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Strategies of the Repeat Player

The European Commission between Courtroom and Legislature

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Für meine Eltern

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Preface

One of the startling empirical insights from the growing body of research on the workings of the EU judicial system is that the European Commission almost always wins. This finding is remarkably robust – every empirical study I am aware of that deals with success and failure in proceedings before the European Court of Justice has so far replicated this result. Whether the Commission litigates itself or lodges an 'observation' (a legal brief outlining its position) in a case brought by a different party, the Court follows the Commission's opinion in the vast majority of cases. Since empirical data on judicial behaviour at the Court of Justice is sparse – judges do not publish votes or record dissents – the source of this 'special rapport' is difficult to establish. But whatever the reason may be, it seemed to me that this crucial 'asset' would have to have some bearing on the Commission's overall stance in the EU's policy-making process. Since the Court has been the author of so many 'history-making' decisions shaping the content of EU policies, being a frequent and frequently successful litigator should provide the Commission with an alternative means of achieving policy objectives, at least when all else fails. Hence, this book looks at how the Commission makes use of its 'special rapport' with the Court of Justice and what factors influence its use of court proceedings vis-à-vis its alternatives in shaping EU policy. In pursuing these questions, I am hoping not only to learn more about the interaction of different modes of EU policy-making, but also to contribute to a body of research that takes a less 'court-centric' approach to 'law and politics' in the EU. Like all courts, the European Court of Justice needs to be 'activated' by litigants pursuing their interests couched in legal terms. Learning more about the motives of litigants, their alternatives to litigation, and their reasons for choosing

this course of action should contribute to a better understanding of the political relevance of the legal system.

Looking back at the long process of which this publication is a preliminary culmination, I realise that I am indebted to many sources of inspiration and support, only some of which I can actually name. First of all I would like to thank my thesis supervisor, Professor Wolfgang Wessels, who both supported my fixation on the Commission and the Court and urged me to maintain a broader interest in EU politics. I would further like to thank Professor André Kaiser, whose seminar on constitutional courts in established democracies provided the nucleus of my idea for this study, and Professor Ingo Rohlfing for making me much more self-conscious about methodology. Between 2010 and 2011, I had the good fortune to be able to spend some time as visiting graduate student at the University of Chicago, where I learned a great deal about the state of research on 'law and politics'. I am greatly indebted to Professor Gerald Rosenberg, first for giving me this opportunity, and second for making me think much more broadly about the role of courts in society. I would also like to thank Professor Susanne Schmidt for her support of my work, which borrows many insights from hers. Anette Fasang patiently answered my many questions about the appropriate use of statistics, and I am very grateful for her help. Naturally, she bears no responsibility for the remaining defects.

My deepest gratitude goes to Franzi Bedorf, who not only read the entire manuscript, but endured my increasingly erratic schedule and supported me at every step. Thank you *so much* for being part of my life.

Finally, I dedicate this book to my parents, Gabriele and Joachim Hofmann, whose unconditional support made all this possible.

Chapter 1

Introduction

When Duke Wilhelm IV of Bavaria decreed a purity law for beer on April 23, 1516, he had in mind a late medieval equivalent of consumer protection. Knowledge about the biological details of the fermentation process was not widely available, and many contemporary beers must have tasted quite foul, particularly during the summer, when high temperatures frequently caused brews to go off. Since beer was still preferable to unsanitary fresh water, and its production lucrative business, brewers frequently made use of all sorts of questionable and not rarely toxic additives to cover up the off-tastes of their products. The more fanciful of these included fly agaric mushrooms, ivy, chalk, soot, snake juice and oxen bile (cf. Thomas 2006: 32; Dornbusch 2011: 104-105). To reign in such creativity, Wilhelm IV's decree restricted the ingredients allowed in the brewing process to barley, hops and water.[1]

Originally only a Bavarian statute, it was not until four centuries later that the German Reichstag established the purity law as a nation-wide rule, in 1906, much to the detriment of some northern German brewing traditions that had included various herbs and spices to vary the flavour of their product (cf. Thomas 2006: 32). The term 'Reinheitsgebot', as the law is known today, was coined shortly thereafter, in the wake of the foundation of the first German republic in 1919. Bavarian delegates used the term in their insistence that the Bavarian law remain the law of all of Germany, in which they suc-

[1] Yeast was not included in the original list since its properties were unknown at the time. The use of malted wheat for wheat beers was reserved for families of the nobility, and subsequently became a very lucrative niche (Dornbusch and Oliver 2011: 829).

ceeded – the newly assembled Reichstag retained the prior 'Biersteuergesetz' codifying the purity law. By the time it celebrated its 450 year anniversary, the purity law was considered the world's oldest continuously existing food quality standard (cf. Dornbusch and Heyse 2011: 692).

Sometime in late 1981, a German distributor announced to the French brewery Brasserie du Pêcheur, based in Schiltigheim in Alsace, that it would cease to carry its products. German authorities had repeatedly removed Brasserie du Pêcheur beers from retail shelves, on the grounds that the Brasserie's use of additives in the brewing process ran afoul of Germany's most recent codification of the purity law, the revised Biersteuergesetz of 1952, which allowed for bottom fermenting beers such as the Brasserie's only the use of malted barley, hops, yeast and water. Products that contained other ingredients could not be sold in Germany as 'beer'. Excluded from the lucrative German beer market, the Brasserie du Pêcheur complained to the European Commission. In restricting its market to beers brewed according to the purity laws, it argued, Germany was infringing the European Community's free market principles, in particular Article 30 of the EEC Treaty, which forbade quantitative restrictions to trade, and all measures having equivalent effect (cf. Clark 1988: 769-770).

The removal of such barriers to trade had been a priority of the Commission for quite some time. Its principal approach to this issue throughout the 1960s and 1970s had been to propose legislation introducing common product standards that would preclude member states from applying their own rules to imported products. This process was cumbersome, due on one hand to the complicated nature of detailed standards and the constant need to update rules to technological progress, and on the other to decision-making rules that gave every member state a veto over individual pieces of legisla-

tion. Product standards can serve ambiguous purposes; they are obviously necessary to protect consumers and the environment, but they can also be a subtle form of protectionism, especially where a certain standard is basically a codification of prevalent practices in one country, drawn up by the leading domestic producers. It is not entirely surprising that member state governments were reluctant to relinquish such standards, especially where they affected important domestic industries.

Among the pieces of legislation proposed by the Commission in the field of product standards had been one concerning the characteristics of beer produced within the Community (OJ 1972, No. C 105/17). It suggested that European standards on the content of beers follow the example of French laws, which allowed the use of up to 30 percent of raw materials other than malted barley or wheat for the production of fermentable wort.[2] That piece of legislation, and subsequent amendments, went nowhere in the Council, owing mainly to resistance by the German government (cf. Schweitzer and Streinz 1984: 42).

By the time the Brasserie du Pêcheur lodged its complaint, the Commission had announced a change of strategy. Rather than introduce more legislation, the Commission would rely on existing laws on the free movement of goods, as it itself interpreted them, and bring enforcement actions before the Court of Justice where such laws were infringed by member states. The Court of Justice's recent case law had proven favourable to this approach, with a long series of cases, most notably *Dassonville* (Case 8/74, ECR 1974: 838) and *Cassis de Dijon* (Case 120/78, ECR 1979: 650),[3] restricting member state discretion to autonomously regulate trade. Prior to the

[2] Cf. "Eurobrew", The Economist, 29 December 1973, Survey, p. 10.

[3] Cf. chapter 5.

beer purity law case, the Commission had taken the Italian government to court for restricting the designation 'aceto' (vinegar) to products derived from wine (Case 2193/80, ECR 1981: 3019). The Court supported the Commission's position that this was an illegal restriction to trade, as products made from other raw materials, like apple must or malt, could freely be marketed as 'vinegar' in other member states. The analogy to beer is obvious, but the German beer case was special, as it affected both the largest member state and one of its most coveted products, protected by a rule that dated back almost half a millennium. The German beer market in the 1980s was second only to the US in both production and revenue, and Germans consumed an annual average of about 150 litres per head (240 litres in Bavaria), by far the highest rate of consumption in the EEC (cf. Schweitzer and Streinz 1984: 47).[4] In fact, the German government claimed that beer was the single most consumed foodstuff in Germany, and its protection warranted particular measures (Case 178/84, ECR 1987: 1236-1237, German edition). The German laws, which effectively functioned as an import ban on non-Reinheitsgebot beers, helped secure domestic producers a market share of about 99 percent (cf. Kohler 1987: 13; Paltrow 1987).

Following its revised strategy, the Commission took no heed of German protestations and initiated an infringement procedure against Germany with a formal letter to the German government in February 1982. Since no agreement could be reached in the early stages of the procedure, the Commission referred the case to the Court of Justice in July 1984. (Incidentally, the Commission opened parallel proceedings against Greece, the only other European country with a purity law for beer, the Greek king Otto, who decreed it during

[4] Cf. also "Bier - hierzulande mehr als ein Getränk", Frankfurter Allgemeine Zeitung, 2 February 1986, p. B5.

his reign from 1832-1862, having been of Bavarian origin.)[5] The Commission argued that the German laws distorted trade in two ways. First, by banning the import of non-Reinheitsgebot beers, it protected its domestic market from foreign competition. Second, by exempting from the Reinheitsgebot beers brewed in Germany exclusively for export, it simultaneously allowed German brewers to compete on the world market. By virtue of this ostensibly protectionist regulation, German exports of beer exceeded imports by a factor of four to one (Case 178/84, ECR 1987: 1234, German edition). Moreover, the Commission argued that the import ban on non-Reinheitsgebot beers could not be justified on grounds of consumer protection. Even where the prohibited raw materials and additives commonly used in foreign beers may constitute health risks, these same substances could legally be used in the production of other foodstuffs in Germany, most notably in wine (Case 178/84, ECR 1987: 1236, German edition).[6] In the Commission's view, there was therefore no reason that beer that could be legally be in other member states should not also be sold in Germany.

In its reply, the German government argued that in the absence of harmonizing legislation, member states retain the right to autonomously regulate their domestic markets. As long as this was so, different national regulations of necessity lead to trade barriers, but these could only be addressed by Community legislation (Case 178/84, ECR 1987: 1235, German edition). Following the Commission's opinion would moreover lead to a dangerous increase in the consumption of additives, as every state would have to adapt its legislation to

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[5] Greek beers not being known for their excellence, some observers view this as evidence falsifying the assumption that a purity law is a sufficient condition for high quality beers. A trip to Belgium may also convince that neither is it a necessary one.

[6] The German Association of Consumer Organizations quipped that "The only ingredient in domestic and foreign beer that has so far been proven to be potentially damaging is alcohol" (Quoted in Markham 1987: A7).

the position of the most lenient member state (Case 178/84, ECR 1987: 1240, German edition). Finally, it argued that the concept of 'beer' was "inseparably linked" to the Reinheitsgebot in the mind of he German consumer, so that for the sake of consumer protection any product differently produced should not carry that designation (Case 178/84, ECR 1987: 1270).

The Court did not accept the German government's arguments. To the latter, it replied that consumer concepts of products evolve over time and that such an evolution must not be precluded by marketing regulations. Quoting an earlier judgement, the judges stated that "the legislation of a Member State must not 'crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'" (Case 178/84, ECR 1987: 1270-1271). Rather than a ban on imports, a simple labeling requirement would sufficiently serve the purpose of consumer protection in this regard. Moreover, the Court did not follow the German government's interpretation of the discretion available to national governments in regulating domestic markets where there was no common Community legislation. While it agreed that, in the absence of harmonization, member states retained some regulatory powers, these, it said, may not be used to pursue unjustified goals, or, where goals such as public health and consumer protection are justified, result in measures that go beyond what is necessary to attain these goals. Consequently, it concluded that "in so far as the German rules on additives in beer entail a general ban on additives, their application to beers imported from other Member States is contrary to the requirements of Community law as laid down in the case-law of the Court, since that prohibition is contrary to the principle of proportionality" (Case 178/84, ECR 1987: 1276).

Another precedence was set, and the Commission could claim an essential vindication of its new, judicial, strategy to remove barriers to trade within the Community, following the principle that a product lawfully produced and marketed in one member state should equally be marketable in all other member states. After its initial legislative strategy had failed, the Commission initiated judicial proceedings, seizing upon legal innovations, and succeeded in establishing a principle that allowed it forthwith to minimize its legislative activity to cover only minimum standards that member states could more easily agree on.

This Commission strategy, this interplay between legislative politics and the judicial sphere is what this book is about. What I attempt is to provide a more inclusive picture of how the European Commission acts within the policy process, a picture that spans various modes of producing policy and indicates which factors account for the choice of strategy. In short, I want to systematically explore a connection between judicial and legislative politics that has as yet not been extensively addressed (cf. Schmidt 2011a: 43; Schmidt 2011b: 37).

1.1 Judicial politics in the European Union

The proximity of law and politics in the European Union, as demonstrated by the Reinheitsgebot case, has certainly not escaped the attention of observers from the social sciences, although they have been late in catching on to the connection. The central legal principles had all been long established when political scientists began debating the role of the European Court of Justice in EU politics. Early debates centred around the question if the Court independently set policies, or whether it was influenced significantly by the preferences of the largest member states (cf. Burley 1993; Burley and Mattli 1993; Garrett 1995; Mattli and Slaughter 1995; Alter 1998; Garrett, Kelemen et al. 1998; Mattli and Slaugh-

ter 1998; Stone Sweet and Brunell 1998). A satisfying empirical answer to this question proved elusive, not least because data on judicial decision-making in the Court of Justice was lacking (cf. Scharpf 2011: 229). The judges do not publish their 'votes', and there are no dissents or concurring opinions. Although for this reason the question was never conclusively settled, some central insights emerged. For one, the Court appears to act strategically. The more member states argue for a specific norm, the less likely the Court is to strike it down, although the Court shows no preference for the position of large over small states (cf. Conant 2007: 51). On the other hand, the most successful litigant before the Court is not a member state, but the European Commission; it wins the overwhelming majority of the cases it argues (cf. Conant 2007: 53).

The new found attention to the judicial sphere of European Union politics spawned a whole range of research questions that went beyond the sole issue of the Court's independence, and sought to locate the legal system in the broader political context. Gradually, the focus shifted away from the Court of Justice as the focal institution to the wider legal environment, including the role of national courts in the evolution of EU politics (cf. Slaughter, Stone Sweet et al. 1998), and the position of individual litigants and the goals they wish to pursue through litigation. A significant part of the latter literature looks at the way the European legal system empowers individuals to challenge the domestic status quo (cf. Alter and Vargas 2000; Cichowski 2006; Kelemen 2006). Daniel Kelemen's recent book-length study of the evolving legal infrastructure in the European Union points to an increasingly adversarial system of confrontation between regulators and the regulated claiming rights derived from the EU legal system, a process that he considers akin to American forms of regulatory politics and dispute resolution, away from more inclusive corporatist structures formerly prevalent through-

out Europe (Kelemen 2011: 4-7). Many such studies are keenly aware that this empowerment does not affect all actors equally, but favours strong organised interests over individuals who either cannot muster the resources to initiate the legal process or are unaware of their rights (cf. Alter and Vargas 2000; Börzel 2006). In particular, actors who frequently engage in litigation, so called 'repeat players' (cf. Galanter 1974), enjoy specific advantages in the long run, being able to 'play for the rules': they can discount the costs of individual judgements against future rewards where they succeed in establishing legal principles that enhance their overall position. The European Commission is surely the single most frequent litigator before the Court of Justice, and the prototypical repeat player on the European legal stage.

Comparatively few works have sought to combine a focus on judicial politics with policies pursued in other spheres. An early example of such an approach is Karen Alter and Sophie Meunier Aitsahalia's article on the impact of the Court's important ruling in the *Cassis de Dijon* case, which laid out the groundwork for the principle of 'mutual recognition' (Alter and Meunier Aitsahalia 1994). They investigate how the Court's judgement, by altering the status quo with regard to permissible trade barriers, provided novel opportunities for various individual and institutional actors to pursue their preferences in national and European fora. In particular, they demonstrate how the Commission seized upon the newly formulated doctrine and used it as a basis for a new approach to remove intra-European trade barriers. While Alter and Meunier bridge the gap between the judicial branch and other spheres of action, theirs is foremost a study of how organisations such as the Commission react to Court rulings they can use to their advantage. Judicial processes, however, can be strategically induced. Individuals can challenge national norms in national courts, and the Commission

can litigate against member states before the Court of Justice, all in order to influence policy.

The Commission's use of the infringement procedure has been closely scrutinised in studies focussing on the national implementation of EU legislative acts (cf. Mendrinou 1996; Börzel 2001; Panke 2009; Börzel, Hofmann et al. 2012). As a result, there is a rich body of insights about what factors influence the distribution of infringement proceedings across member states. Prominent among these are national governments' administrative capacity and political clout (cf. Börzel, Hofmann et al. 2010: 1381). However, these studies rarely address the policy consequences that judicial proceedings entail. In focussing on national compliance, they deemphasise the conflicts over policy content that are fought out before the Court of Justice and their implications for future policy-making.

The way the Commission can employ its enforcement powers to influence legislative processes has been explored in the works of Susanne Schmidt. She demonstrates the interconnectedness between litigation and legislation by focussing on the Commission's ability to strategically alter the status quo of legislative procedures through enforcement actions before the Court of Justice. In particular, she outlines two courses of action the Commission takes in order to apply pressure on Council positions. One targets the status quo of legislation as a whole, by threatening judicial procedures with an outcome potentially disliked by all Council members. The other strategy consists of targeting individual member states, particularly those pivotal in majority voting. Based on these insights, Fritz Scharpf feels confident to declare that "the Commission is able to use infringement and annulment proceedings in order to place specific issues on the Court's agenda, and there is no question that it is able to use its power strategically in order to influence the outcome of legislative processes in the Council" (Scharpf 2011: 229-230).

My study takes these insights as a starting point to systematically assess how the Commission makes use of its access to legislation and litigation in order to advance its policy interests. My contribution is twofold. On the one hand, I aim to analyse what variables influence the Commission's decision to resort to infringement proceedings when pursuing policy. I start from the assumption that the Commission is more likely to pursue a judicial strategy when the obstacles to successful legislation are high. I test this proposition with the help of a dataset that combines information on legislative processes, infringement proceedings and the political positions of the actors involved. On the other hand, I expand this approach beyond the focus on infringement proceedings to the Commission's use of litigation in general in two longitudinal case studies. While Susanne Schmidt argues that infringement proceedings are "the most decisive means for the interaction of judicial and legislative politics" (cf. Schmidt 2011a: 50), I aim to show that other forms of litigation, in particular the Commission's intervention in preliminary reference procedures, also present viable channels of combining the two modes of policy-making. In essence, I incorporate a judicial politics approach in an overall analysis of policy-making in an attempt to achieve a more comprehensive picture of how the Commission influences policy development in the European Union.

1.2 The structure of my study

I structure my study in the following way. Chapter 2 provides an overview of theoretical approaches to the Commission's position in the policy-making process of the European Union. The question of how much the Commission matters has traditionally formed one of the focal points of theorising the dynamics of European integration. I trace the ebb and flow of scientific attention to this topic, which has been closely linked to actual successes and failures of the European politi-

cal system, and outline the central tenets of the opposing camps. I describe how in more recent time the focus of theoretical approaches has moved away from dynamic accounts of the integration process to a more cross-sectional, comparative outlook on the constraints of policy-making. Rather than aligning squarely with the traditional factions of neofunctionalism and intergovernmentalism, these newer approaches analyse the factors and circumstances that allow the Commission to influence policy content in some instances, and prevent it from doing so in others. I highlight two approaches, the 'agenda-setting' literature and the 'principal-agent' approach, as particularly conducive to a more detailed understanding of the Commission's position in European politics. Chapter 2 moreover reviews theoretical assumptions and empirical findings concerning the Commission's 'actorness'. I start by outlining the 'traditional' academic assumptions on the type of preferences the Commission pursues. Until quite recently, the Commission was regularly treated as a preference outlier, usually with an 'extreme' disposition towards 'more integration', however defined. Some explanatory approaches draw on 'bureaucratic politics', positing that the Commission's preferences are a consequence of organisational self-interest. I contrast these assumption with more recent empirical data on internal preference distributions and decision-making dynamics. These newer accounts challenge the assumptions that the Commission necessarily pursues 'more extreme' preferences than the member states, and that it can be treated as a unitary actor. Rather, such studies demonstrate distinct clusters of preferences across services, and point to procedural structures that systematically favour certain internal departments, in particular the respective lead Directorate General (DG) and the Secretariat General. I conclude by outlining which of these insights can fruitfully inform my approach to Commission strategy choice.

Chapter 3 outlines the Commission's position in the inter-institutional policy-making process. I distinguish between three different modes of policy-making that share the production of legal norms as output (cf. Scharpf 2006): an intergovernmental mode, characterised by bargaining between member state governments, a 'joint-decision' mode, characterised by the Commission's monopoly of initiative in legislation, and a 'supranational-hierarchical mode', characterised by the Commission's ability to influence policy without the involvement of the legislative institutions, by executive action and initiating court proceedings. Each of these modes affords the Commission different degrees of influence over policy production, and I discuss the various constraints on Commission policy-making strategies in some detail. On one end of the scale, the Commission's ability to influence outcomes is weakest in situations of intergovernmental bargaining. On the other end, its policy-making ability is greatest in those areas where it has been delegated extensive executive authority. This is primarily so in the field of competition policy, including the contentious areas of state-aid and public utilities. While the Commission has the ability to act unilaterally, its authority is at the same time closely circumscribed to a limited policy field. The Commission's ability to influence the policy process is broadest in legislation and litigation – the content of legislative initiatives and court cases being barely limited in scope. I conclude the chapter by justifying my choice to concentrate on the latter strategies for the remainder of my study.

The following three chapters constitute the empirical part of this study. I proceed by developing a series of propositions which I first test statistically (chapter 4), and then follow up with two longitudinal case studies (chapters 5 and 6). This mixed method design is akin to a "nested analysis" (cf. Lieberman 2005; Rohlfing 2008), although I do not claim to follow the model rigorously. My strategy is to start with strict

assumptions derived from previous works, and then, based on the results of the statistical test, use case studies to add complexity and derive additional insights. The case studies therefore have both a hypothesis-testing and a hypothesis-generating aspect. They provide additional empirical material to test prior assumptions against observed reality, and their results serve to further refine the theory (cf. Levy 2008: 5).

Chapter 4 concentrates on the Commission's use of infringement proceedings as a policy tool. I develop assumptions about the Commission's default strategy in policy-making and formulate a series of hypotheses about the factors that are likely to influence the Commission's subsequent strategy choice. In particular, I propose that the Commission is more likely to resort to infringement proceedings when the likelihood of initiating successful legislation is low. This is the case where voting rules in the Council stipulate unanimity, and where the European Parliament has veto powers. Obstacles to legislation should also rise, the larger the ideological difference between the Commission and the Council and the Commission and the EP, respectively, and in situations where there is considerable disagreement within the Council. I also include a control variable that measures the degree of 'market orientation' of a policy area. This allows me, to some degree, to respond to the frequently voiced proposition that judicial politics in the EU has a distinctly market-making bias (cf. Scharpf 2006: 854). It moreover enables me to draw some, albeit limited, conclusions about possible internal differences in strategy choice between Commission portfolios generally held to pursue a form of interventionist 'regulatory capitalism' and more market oriented portfolios (cf. Hartlapp and Lorenz 2012: 11). I then proceed to test these propositions employing a dataset I have constructed from data based on three different sources. One is a dataset on legislative procedures, compiled by Thomas König, Brooke Luetgert and Tanja Dannwolf (König, Luetgert

et al. 2006). I combine this dataset with information on infringement proceedings referred to the Court by the Commission, based on data compiled by Alec Stone Sweet and Thomas Brunell (Stone Sweet and Brunell 2007). Additionally, I use data on the ideological positions of the Commission, the Council and the European Parliament, as compiled by Andreas Warntjen, Simon Hix and Christophe Crombez (Warntjen, Hix et al. 2008). I designed my dataset so that the dependent variable is the ratio of litigation to legislation in a particular policy area across time. The dearth of available data over longer time spans caused me to restrict this analysis to the time period from 1984 to 1998.

Chapters 5 and 6 take up the results of the statistical test in two longitudinal qualitative case studies, concentrating on the Commission's efforts to remove barriers to trade in goods within the Community (chapter 5) and the Commission's support of the free movement of persons (chapter 6). These case studies expand the scope of the analysis to include the Commission's intervention in preliminary reference procedures. Covering a broad time period, I trace the process (cf. George and Bennett 2005: 205) of Commission policy initiatives in the two fields from the early 1960s to (roughly) the present day. From this series of "causal process observations" (Collier, Brady et al. 2010: 184) – as a form of "theoretically oriented narrative" (cf. George and Bennett 2005: 205) – I attempt to uncover 'causal mechanisms' that link legislative barriers to the Commission's preferred policies to an increased involvement of the Commission in judicial procedures. In this manner, I am able to "examine empirically the alternative causal mechanisms associated with observed patterns of covariation" (Levy 2008: 11).

I chose the two 'cases' (free movement of goods and free movement of persons) with a number of objectives in mind. First, it is never particularly easy to define what constitutes a distinct 'case' in policy studies. Isolating particular events from their context in the policy cycle necessarily increases

the possibility of selection bias. Focusing on single legislative or judicial events, such as a particular piece of legislation or court case, usually provides incentives to select those that stand out in some way or the other, as most such events (legislation or litigation) are uneventful. The primary reason why some events stand out is the presence of conflict, and focusing on those cases alone allows for no variance on one of my central explanatory variables. Primarily for this reason I chose a long time span for my studies, as this would enable me to observe a whole sequence of events and introduce large within-case variance on the side of the independent variables I identified in chapter 4 (cf. Levy 2008: 10). Legislative procedures change over time, and so does the ideological distance between the actors involved, of which conflict is usually the result. Also, observing long time periods, particularly from an early point in the development of Community policies, allows me to identify potential learning effects. Conversely, the long time span prohibits a greater attention to detail. Second, I chose to conduct two case studies, covering two distinct policy fields in order to add cross-case variation to the longitudinal comparison (cf. Levy 2008: 10). Both cases differ with regard to Commission's mandate and the degree of conflict. After the Single European Act, moreover, the policy fields are governed by different legislative procedures – trade in goods being subject to majority voting in the Council, whereas unanimity remained in place for many pieces of legislation concerning the free movement of persons. Both cases also show a different affinity to market integration. Whereas the removal of barriers to trade in goods is a distinctly market-making enterprise, the Commission's efforts concerning the free movement of persons follows a different trajectory. While, certainly, motivated initially by a better allocation of the factors of production, establishing a right to free movement for all member state nationals was informed by the objective of giving effect to the emerging principle of Union citizenship, a principle that is not congru-

ent with market-making activity and the logics of market integration alone. In this way, I will be able to test the causal linkage between judicial activity and the degree of market-orientation of a policy field, adding onto the results of the statistical test. Finally, both cases represent the core of the Commission's activity. The free movement of goods and the free movement of persons form part of the fundamental 'market freedoms' which the internal market is based on. As such, they are 'crucial cases', constituting a sizable portion of the Commission's everyday activities for the period observed. If I want to test my assumptions about how I typically expect the Commission to behave, these are the subject areas I should look to.

Chapter 7, the final chapter, discusses the results of the case studies with regard to the hypotheses developed in chapter 4. It outlines some general considerations regarding the role of the preliminary reference procedure for the Commission's choice of strategy and argues for an amendment to the original propositions. I conclude with some thoughts about the relevance of the wider legal environment for the results of my study.

Chapter 2

Studying the European Commission

This chapter has two objectives. The first part (2.1) outlines theoretical approaches to the study of the Commission. I sketch the positions of the original opposing camps of neofunctionalism and intergovernmentalism and trace their varying prominence over time. I also include a summary of the main characteristics of the 'institutionalist' turn in the study of European Union politics, and conclude by locating my own position among the various approaches. The second part (2.2) looks more closely at theoretical assumptions about what motivates Commission action, and describes more recent empirical studies about internal preference distributions and decision-making dynamics within the Commission. These new approaches cast some doubt on the previously rarely questioned assumption that the Commission constitutes a unitary actor. I summarise the main findings of this research and conclude by outlining my own assumptions about the 'actorness' of the Commission and the types of preferences it pursues.

2.1 The European Commission in the study of European Union politics

The plethora of names and attributes that have been assigned to the Commission – 'honest broker', 'engine of integration', or 'guardian of the treaties', to name some of the most frequently used – indicates the difficulty of neatly identifying its central function in the political system of the European Union. Simultaneously its executive as well as its public administration, the Commission engages in all phases of the EU policy cycle – from initiation via negotiation and implementa-

tion to monitoring (cf. Lindberg 1963: 71). As Neill Nugent puts it: "The Commission is centrally involved in EU decision-making at all levels and on all fronts" (Nugent 2010: 105), or, to use the title of one of his books on the subject, the Commission finds itself "at the heart of the Union" (Nugent 1997b).

At the same time, its actual means of autonomously asserting influence are rather limited. Its central decision-making body, the College of Commissioners, is appointed by member state governments, who at least theoretically have every incentive to nominate candidates they believe will not stray too far from their interests. Its actions, particularly in the process of implementing EU policies, are subject to close oversight procedures on the part of national governments. Most implementation, moreover, is not done in Brussels, but carried out by member state administrations, who have fairly wide leeway to shirk from their duties. They are able to do this not least because the Commission does not have the resources to monitor implementation 'on the ground', but relies instead on member state sources for information and manpower. Always in danger of being stretched thin by its multitude of obligations, "if the Commission is to play a role it must make creative use of the resources it has for influencing behavior of the governments" (Lindberg and Scheingold 1970: 93). What, then, is the impact of Commission actions on European Union policy?

The European Commission's ability to influence policy outcomes in the European Union has traditionally formed one of the central points of contention in theories of European Union politics. How much does the Commission matter? Does it have an independent effect on policy outcomes (cf. Pollack 2003: 4)? The classical 'grand theories' of European integration reached opposite answers to this question. On the one hand, 'neo-functionalism', as promulgated by Ernst Haas,

Leon Lindberg and others, centrally underscored the role of 'supranational' institutions, such as the Commission, in advancing the process of European integration. Integration, Haas argued, could be measured by reference to the prevalence of certain types of compromise in international negotiations, of which he identified three. The first of these constitutes an agreement on the basis of a 'minimum common denominator', where the degree of integration never proceeds past the reservations of the least cooperative bargaining partner (Haas 1961: 367). Second, agreements by "splitting the difference" allow for an outcome that lies somewhere between the final bargaining positions of the partners, aided by the "mediatory services of a Secretariat-General or an *ad hoc* international expert study group" (Haas 1961: 367, original emphasis). The third type of compromise, finally, where agreement would "upgrade the common interest" of the parties, "takes us closest to the peaceful change procedures typical of a political community with its full legislative and judicial jurisdictions, lacking in international relations" (Haas 1961: 368). Parties would succeed in "redefining their conflict", maximising the 'spill-over' effect of international decisions. This solution, however, would only be achieved through the competent arbitration by an "institutionalized mediator" (Haas 1961: 368) such as the Commission (cf. also Tranholm-Mikkelsen 1991: 6). Leon Lindberg took up this line of thought, arguing that such a solution "depends on the participation of institutions or individuals with an autonomous role that permits them to participate in actually defining the terms of the agreement" (Lindberg 1963: 12). He further suggested that "the central institutions of the EEC, by isolating issues and identifying common interests, may play a crucial role here in 'precipitating unity'" (Lindberg 1963: 8). As an arbiter of the 'common interest', as opposed to narrow national interests, he saw the Commission in a central position to facilitate compromise and encourage further integration: "The Commission enjoys some unique advantages by

virtue of its ability to embody the authority of a Community consensus" (Lindberg 1963: 284). "Moreover, it has proved far easier for Member States to give in to the Commission than it would have been for the Germans to give in to the French or vice versa; in other words, in justifying their actions, both to themselves and to their respective governments, Ministers have been able to defend major concessions on the ground that they were made in the interest of the Community" (Lindberg 1963: 286). Precisely because the member states relied on the Commission to enable consensus was it so difficult for them to resist the proposals made by the Commission, the argument went. The Commission's independent influence on the outcome of policy-bargains was therefore seen as an essential condition for political integration per se.

While the original neo-functionalists saw the European Commission essentially as an "honest broker" (Lindberg and Scheingold 1970: 94), they nonetheless acknowledged that it would simultaneously strive to expand its own position of authority. More than just facilitating agreements, the Commission was expected to become a central agent of spill-over[7]: "the initial task and grant of power to the central institutions creates a situation or series of situations that can be dealt with only by further expanding the task and the grant of power" (Lindberg 1963: 10). The Commission "has vigorously defended its own role as spokesman for Community interests, and has sought to expand this role in its specific proposals" (Lindberg 1963: 284). Although he was skeptical about the High Authority's ambition to lead the process of integration in the 1950's, Haas nonetheless asserted that "spill-over *can* be accelerated in the face of divisions of opinion among the governments and in the absence of an articulate consensus toward unity as an end in itself. All that is

[7] Jeppe Tranholm-Mikkelsen later introduced the term 'cultivated spill-over' to describe Commission involvement in the process of European integration (Tranholm-Mikkelsen 1991: 6).

needed is the effective demonstration by a resourceful supranational executive that the ends already agreed upon cannot be attained without further united steps" (Haas 1958: 483-484, original emphasis).

Stanley Hoffmann's 'Intergovernmentalism' on the other hand denied an independent causal role of supranational institutions and emphasised the dominance of national government preferences in determining the outcomes of European politics. His "logic of diversity [...] sets limits to the degree to which the 'spill-over' process can limit the freedom of action of the governments" (Hoffmann 1966: 882). European integration would be restricted to areas of 'low politics', such as economic and social policies (the "area of welfare", Hoffmann 1966: 882), but political integration (in the sense of the 'high politics' of foreign affairs and defense) would remain elusive due to the fundamental differences in member state interests with regard to the global situation – the Cold War, American influence in Europe and the threat of Soviet invasion: "In areas of key importance to the national interest, nations prefer the certainty, or the self-controlled uncertainty, of national self reliance" (Hoffmann 1966: 882). While economic and social integration also bears the potential to limit government's leeway in conducting foreign policy, Hoffmann predicted that member states would resist such tendencies even if this produced short term costs for certain parts of their constituencies (Hoffmann 1966: 884). The European Commission, in this view, is powerless in the face of national government opposition: Facing the governments of France and Germany, "the supranational civil servants, for all their skill and legal powers, are a bit like Jonases trying to turn whales into jellyfish" (Hoffmann 1966: 884). Summing up his position, Hoffmann stated that "If we look at the institutions of the Common Market as an incipient political system for Europe, we find that its authority re-

mains limited, its structure weak, its popular base restricted and distant" (Hoffmann 1966: 885).

Both of these approaches have over the years been significantly refined and expanded, but the central disagreement as to the influence of European institutions remained (cf. Eilstrup Sangiovanni 2006: 3). The period following the publication of Hoffmann's article, however, seemed to vindicate his viewpoint. Academic interest in the development of the European Communities and the actions of its institutions waned in the 1970s and early 1980s, a period that despite some institutional and policy innovation was generally characterised as a European "dark ages", or time of "Eurosclerosis" (Keohane and Hoffmann 1991a: 8). The region's economic and political stagnation and its failure to adequately respond to the oil crisis of 1973 led Ernst Haas to speculate about the apparent obsolescence of regional integration theory, admitting that "Regional integration in Western Europe has disappointed everybody: there is no federation, the nation-state behaves as if it were both obstinate and obsolete, and what once appeared to be a distinctive 'supranational' style now looks more like a huge international bureaucratic appendage to an intergovernmental conference in permanent session" (Haas 1975: 6). As late as 1982, political developments gave Stanley Hoffmann cause to repeat and reinforce his argument about the ineffectiveness of EU institutions and the prevalence of nation states as the decisive (if embattled) units in the international system, asserting that the EEC's "'Federal' institutions have weak powers, and their main organs often paralyze one another; these troubles, in turn, have depressing effects on the other components of the emerging or expected 'central' political system – community-wide interest groups or party alignments" (Hoffmann 1982: 31). They are weak, he says, "because they lack autonomy (from the member states) and because their capacity to act is small" (Hoffmann 1982: 32). One year later, Paul Taylor

wrote of the limits of European integration, underscoring that the "member states have not been absorbed into a new Euro-federation, nor have they become the vassals of a supranational Commission" (Taylor 1983: 60). He argued that in the course of the 1970s, the establishment of the Council presidency and the European Council as central institutions of the Community had significantly reduced the powers of the Commission to exert an independent influence on European policy. Moreover, "As the level of tension between governments in the Council and their committees increased and the expectations of governments of getting what they wanted declined, so it became increasingly difficult and, indeed, futile for the Commission to spell out detailed European solutions" (Taylor 1983: 82). He concluded that "There seemed little prospect in the early Eighties of any strengthening of the Communities' institutions, and if anything, it seemed likely that they would be further weakened: the Communities were in a period of entrenched intergovernmentalism" (Taylor 1983: 83). Finally, writing in 1984, Stephen George, while shying away from broader predictions, asserted that "the prospects for the creation of more common policies are not good" (George 1985: vii). He, too, doubted the ability of the Commission to assume a strong leadership role, pointing to its declining room for maneuver through the establishment of the Committee of Permanent Representatives (COREPER), the Management Committee procedure (what was to develop into the system of 'Comitology'), the inception of the European Council, and an increasing 'bureaucratization' of the Commission, reducing its sense of identity and commitment (George 1985: 12-14).

The in some ways unexpected signing of the Single European Act (SEA), however, challenged these assumptions and precipitated a profoundly renewed interest in European institutions. Academically, the apparent success of the SEA and the Single European Market programme led to a spate of publi-

cations about the dynamism of the "new" Community (cf. Taylor 1989; Keohane and Hoffmann 1991b; Tranholm-Mikkelsen 1991; Sbragia 1992) and heralded a revival of attention to 'supranationalism' and central tenets of neofunctionalism. By contrast, the fact that no scientific theory had predicted this institutional change led some observers to look for other theoretical approaches to explain this development: "In view of our failure to predict developments using older theories, perhaps a new interpretation of joint European decisonmaking should be invented, discarding loaded terms such as 'supranationalism' and 'spillover', and drawing instead on contemporary theories of strategic choice in collective situations, or recent attempts to understand institutional innovation" (Keohane and Hoffmann 1991a: 9).

The new proponents of a revived neofunctionalism engaged in detailed studies of the progress of the Single European Market programme and frequently concluded that the Commission must be seen as a driving factor bringing about profound policy change that could not be explained by reference to intergovernmental bargaining alone (cf. Tallberg 2006: 196). This line of work has produced a wealth of case studies outlining the influence of Commission 'policy entrepreneurship' on developments in individual policy areas. In one of the first studies of this kind, Wayne Sandholtz and John Zysman concluded that the leadership of the Commission was decisive in bringing about the Single European Market programme. In their words, "the renewed drive for market unification can be explained only if theory takes into account the policy leadership of the Commission" (Sandholtz and Zysman 1989: 96). In a similar vein, Laura Cram described the Commission as a "purposeful opportunist" in bringing about social policy legislation (Cram 1993: 143), while Sonia Mazey highlighted the entrepreneurial role of the Commission in fostering policy networks in support of equality of opportunity for men and women at a time of strong govern-

ment opposition (Mazey 1995). Other studies reached similar conclusions about the efficacy of Commission action in regional policy (Hooghe and Keating 1994: 387-388) and IT policy (Cram 1994: 201-207).
The renewed interest in the Commission also brought with it a number of studies focusing on the internal functioning of the Commission and its Directorates General, attitudes of its staff and administrative culture (cf. Ludlow 1991; Cram 1994; Cini 1996; Nugent 1997a). Often without direct reference to neofunctionalism, their optimistic view of the Commission's position in the policy-making process leads Jonas Tallberg to characterise them as "closet neofunctionalists" (Tallberg 2006: 197).

At the same time, the renewed importance of European politics attracted a range of scholars with a background in comparative politics. While these approaches have not gone entirely beyond the classical supranationalist-intergovernmentalist divide, their origin in the study of 'traditional' political systems led them to focus on the European Union as a *polity*, producing a distinct "allocation of values" (Easton 1953: 129), rather than as a *process* of political integration (cf. Rosamond 2006: 14). This focus allowed research to concentrate on the factors influencing policy output, and less on factors influencing the design of the European institutional framework. Prominent among these approaches have been those that adopt a theoretical framework drawn from rational choice institutionalist accounts of legislative, executive and judicial politics. Originating mainly from the study of congressional politics in the United States, rational choice institutionalism posited that the institutional framework of political action has a distinct effect on political outcomes. The *rational choice* part of rational choice institutionalism connotes a set of prior assumptions: that a) collective outcomes can be explained by references to the actions of individuals ('methodological individualism'); and that b)

individuals are self-interested and seek to maximise their preference for certain states of the world ('utility maximisiation') (cf. Pollack 2006: 32). The *institutionalism* part posits that individual actors face constraints in their attempts to achieve outcomes – not only due to multiple actors trying to achieve conflicting ends, but also by the need to adhere to certain formal or informal norms – and that taking account of these constraints (the "rules of the game", North 1990: 3) would be necessary to explain outcomes (cf. Pollack 2006:32-33). In a nutshell, rational choice institutionalism not only postulated that 'institutions matter', but provided a set of hypotheses about how these institutions would matter in relation to policy outcomes. Similar accounts of the effects of, say, the European Commission's exclusive right of initiative on the outcome of bargaining between member state governments have certainly existed previously, but rational choice institutionalism provided a coherent theoretical framework for the analysis of the institutional interplay. Specifically, these efforts allowed to specify the conditions under which different institutions wield different forms of influence.

For the case of the Commission, research within the rational choice institutionalist framework has primarily introduced two approaches to the question of how much influence the Commission has over policy production in the European Union. The first, originating in the literature on legislative politics, highlights the function of the Commission as an 'agenda-setter' (cf. Romer and Rosenthal 1978): by virtue of its monopoly on legislative initiatives the Commission has the opportunity to 'set' the legislative agenda (cf. Pollack 2006: 38). In theory, this position would allow the Commission to emphasise certain policy fields while withholding legislation from others – in practice, this process is much more cooperative and the Commission is sensitive to requests from the European Council, the Council and the European Parlia-

ment. More importantly, when formulating an initiative, the Commission can take account of possible 'minimum winning coalitions' within the Council and the European Parliament and move the outcome close to its own policy preferences within the 'solution space'. Its power to do so depends primarily on the legislative procedure determining majority requirements and possible 'veto players' (cf. Tsebelis 2002). I will give a more detailed account of the Commission's agenda setting powers in chapter 3.

The second prominent approach to the study of the Commission within the rational choice institutionalist framework is the so called 'principal-agent' model. Largely derived from organisational theory and the theory of the firm (cf. Coase 1937), it posits that when exchanges between actors under market conditions are no longer economical due to high transaction costs, actors will prefer forms of hierarchical integration (cf. Williamson 2000: 602-604). Within the hierarchy, the 'principal' (the owner, shareholder, or sovereign) assigns competences to an 'agent' who will conduct tasks on her or his behalf. This 'delegation contract' delimits the boundaries of agent competences and defines certain mechanisms of oversight. The principal-agent model derives its explanatory value from its analysis of possible conflict. Since all actors have potentially divergent preferences ('utility functions'), it is likely that principal and agent do not share goals. The agent has incentives to use his discretion to 'shirk' from his assigned duties and pursue his own preferences instead. He is able to do this on account of his informational advantage vis-à-vis the principal: While the principal will want to exercise narrow oversight, the act of delegation ceases to be functional if the agent can no longer pursue his or her tasks independent of the principal. If the act of delegation is based on concerns about 'credible commitment', commitment to an agreement among the principals would no longer be credible if the agent cannot independently police implementation. If delegation is a result of concerns about

efficiency, the costs of policing may rise above costs saved by the act of delegation in the first place, in which case the principal might as well exercise the tasks her or himself (cf. Tallberg 2002: 25-29). Delegation contracts therefore bear the possibility of 'agency drift', where agents succeed in pursuing preferences that differ from that of the principal. In essence, this term encapsulates the notion of 'supranational entrepreneurship' that is central to most neo-functionalists notions of a "cultivated spillover" (Tranholm-Mikkelsen 1991: 6). Agents such as the Commission can use their delegated powers to pursue their own policy preferences or achieve an even greater accumulation of competences at the European Union level (cf. Tallberg 2002: 34-35). Since member state governments as the 'high contracting parties' are usually treated as a collective principal, intergovernmentalists on the other hand point to the diverse oversight mechanisms at their disposal which may effectively prohibit such agency drift (cf. Garrett 1992: 552). Principal-agent analysis is therefore not predisposed to any particular answer to the question of who ultimately controls outcomes (cf. Tallberg 2002: 34). Such studies of European politics typically analyse the amount of discretion for, e.g., independent Commission action contained in the delegation contract – the European Treaties and relevant acts of secondary legislation – and predict which institutional constellation is more conducive to agency drift than others (cf. Pollack 2006: 39-40).

While rational choice institutionalism is commonly regarded as the dominant institutionalist approach in the study of the Commission as the European executive (cf. Tallberg 2006: 198), some authors prefer to base such research on a more 'sociological' account of institutional constraints on human behaviour. As an alternative institutionalist approach, sociological institutionalism (most closely associated with James G. March and Johan P. Olsen) shares with rational choice institutionalism the assumption that 'institutions matter' in

shaping human interaction. Where it deviates from rational choice institutionalism is in its underlying assumptions about what motivates human behaviour. In particular, it favours the concept of a 'logic of appropriateness' as the motivating factor for human action rather than the 'logic of consequentiality', which describes the goal seeking (or utility maximising) behaviour assumed by rational choice institutionalism. According to March and Olsen, "the processes of reasoning are not primarily connected to the anticipation of future consequences as they are in most contemporary conceptions of rationality" (March and Olsen 2006: 690). The logic of appropriateness stresses that humans adhere to rules not because they see them strategically as a means to an end, but rather because they hold them to be 'good' or 'right' in a normative sense: "Rules are followed because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices, and expectations of its institutions. Embedded in a social collectivity, they do what they see as appropriate for themselves in a specific type of situation" (March and Olsen 2006: 689).

For the most part, this conception has been interpreted as a challenge to rational choice institutionalism (cf. Tallberg 2006: 200). As outlined above, sociological institutionalists do reject the rationalist assumption of goal seeking as the exclusive motivation for human behaviour. However, neither do they claim that the logic of appropriateness is the only logic of human action (cf. March and Olsen 2006: 702), but stress that it is a dimension of human motivation that is simultaneously important and scientifically overlooked. Two approaches are conceivable to reconcile the two positions. One useful solution would be to understand considerations of appropriateness as constraints on human action, while maintaining the assumption that human behaviour is essentially goal driven. This is to assume a hierarchy between dif-

ferent logics of action, where the logic of consequentiality operates at a more basic level of human motivation than the logic of appropriateness (cf. March and Olsen 2006: 703). In other words, goal seeking is constrained by norms that may include internalised, 'culturally learned', ideas about appropriate behaviour. March and Olsen suggest a more 'egalitarian' approach. They differentiate logics of action according to their "*prescriptive clarity*", where "a clear logic will dominate a less clear logic" (March and Olsen 2006: 703, original emphasis). Codes of appropriate behaviour, as well as individual preferences and strategic alternatives may be more or less apparent and therefore constitute more or less stringent behavioural motivations. The expectation is that when individual preferences for outcomes are weak or the alternative courses of action not well understood, rule following is likely more prevalent. Conversely, where rules of appropriate behaviour are not clearly defined or widely shared, goal seeking may become the dominant behavioural logic. The observable implications of both solutions should be quite similar. In this fashion, strict assumptions of goal-seeking rationality can be relaxed without jettisoning their analytical merits.

I locate my study in the institutionalist tradition. In chapter 3 I will draw more heavily on an 'agenda-setting' approach, and my analysis is broadly compatible with the principal agent vocabulary, although I do not explicitly use the concept. I start with no preconceived disposition toward 'supranationalism' or 'intergovernmentalism' – although their fundamental imprint on the study of European politics makes it close to impossible to steer clear of this debate. Also, my choice of topic predisposes me to assume that the Commission is worthwhile investigating; I start from the assumption that the Commission is not entirely irrelevant. The task is less to prove who is right or wrong about the role of the European Commission in European integration, but rather to determine the conditions under which the Commission can

wield influence over policy outcomes, and the factors which determine its strategy to do so (cf. Schmidt 1998: 23).

2.2 Who is 'the Commission' and what does it want?

The Commission is a large institution employing about 33,000 staff, mainly based in Brussels, headed by 27 Commissioners who are supported by Cabinets comprising six or seven close aides, and lead an administration subdivided into more than 40 Directorates General (DGs) and across-the board services. Each Commissioner holds a distinct policy portfolio, but these portfolios do not necessarily match up neatly with the corresponding DGs (cf. Chalmers, Davies et al. 2010: 57). Speaking of actions by 'the Commission' therefore constitutes a crude simplification. Such a reference can mean anything from the organisation as a whole (as in 'the Commission is based in Brussels'), to a decision by the College of Commissioners, the Commission's central decision-making body (as in 'the Commission decided to initiate infringement proceedings against Germany for its insistence on beer purity laws'), or an action by a single Directorate General (as in, 'the Commission is investigating the merger between Honeywell and General Electric') (cf. Cram 1994: 198; Cini 1996: 101; Nugent 1997a: 1). This linguistic problem is exacerbated by the 'principle of collegiality' (cf. Chalmers, Davies et al. 2010: 55), which holds the Commission collectively responsible for all decisions and requires all Commission members to publicly support decisions even where they have been outvoted.

The described linguistic simplification harbours the danger of glossing over significant variables explaining Commission action. In particular, in treating the Commission as a single, coherent actor, it directs attention away from possible conflict within the Commission. Until quite recently, very little empirical material was available about decision-making

processes within the Commission hierarchy.[8] For a long time, literature on the European Commission has held, somewhat unquestioningly, that the Commission as a single entity pursues objectives that are distinctly different from those of the member states. More recently, a new body of research has put this long standing assumption into question and invested considerable effort in unveiling internal preference distributions and decision-making dynamics. In the following overview of the literature on Commission preferences, I will start at a general level of abstraction, and then proceed to cover newer insights into where such preferences come from and how they are aggregated.

The traditional view: What motivates the Commission?

If I start from the assumption that the Commission possesses 'actorness', what does this actor strive for? There are two reference points to answering this question: one is based on the literature on European integration, which has always held very specific assumptions about the preferences of the Commission in the integration process; the other starts from the observation that the Commission could be fruitfully conceptualised as a form of government bureaucracy and therefore looks to general theories of bureaucratic politics to derive assumptions about its preferences.

To start with the latter, public choice models of bureaucracy typically assume public officials to be self-interested utility-maximisers (cf. Hix 2005: 28). While there are multiple conceptions about what exactly bureaucrats maximise, a number of such objectives are frequently invoked. Broadly speaking, such approaches assume that bureaucracies are "constantly seeking to increase their size, staffs, financing, or scope of operations" (Dunleavy 1991: 147). Among these objectives, William Niskanen has prominently proposed 'budget maxi-

[8] An early exception is Laura Cram's account of the Commission as a "Multi-Organization" (Cram 1994).

mising' to be prevalent (Niskanen 1971). In this view, larger budgets are key in allowing bureaus to secure their survival, expand staff numbers, increase salaries, or generally gain prestige (cf. Dunleavy 1991: 155; Hix and Høyland 2010: 24). Competition for limited available resources lead public officials to overstate their institution's budgetary needs and oversupply agency output (by spending beyond immediate necessity) to underscore the inadequacy of their budget and secure future payment (cf. Hix and Høyland 2010: 24; Peters 2010: 13-14). Other accounts of bureaucratic behaviour deemphasise the centrality of budget maximising and instead highlight bureaucrats' interest in policy influence and the absence of direct supervision, especially among more senior officials: "Rather than maximizing budgets, then, senior bureaucrats (particularly in regulatory agencies) will seek to maximise their independence from control and their opportunities to determine policy outcomes" (Hix 2005: 28). Even when the strict assumptions of utility maximisation are relaxed it is commonly accepted that bureaucrats pursue policy oriented interests, "having both expert knowledge and some interest in the expansion of their agencies" (Peters 2010: 199). The extent to which a bureaucracy engages in policy advocacy is thought to be a function of its relative independence from government control (cf. Peters 2010: 199). Expressed in the terminology of the principal-agent approach, all these views share the assumption that bureaucracies as agents face incentives to pursue aims that do not correspond to that of the principal(s).

Looking at the European integration literature, the Commission has traditionally –almost unquestioningly – been held to favour policies that represent a 'European' perspective and increase the competences of EU institutions (cf. Tallberg 2002: 44-45; Hooghe 2012b: 87-88). This view may be informed by the Treaty mandate, which stipulates that "The Commission shall promote the general interest of the Union

and take appropriate initiatives to that end" (article 17(1) TEU). Variants of this view range from the comparatively tame characterisation as the "conscience of the Community" (Cini 1996: 16), safeguarding collective EU interests against self-interested national governments, to the more forceful proclamation that "The members of the Commission are firm advocates of a maximum economic and political integration, as well as of the principle of delegating national powers to the Community institutions" (Lindberg 1963: 67). In the manner of the latter, Wayne Sandholtz and John Zysman, in their 1989 article that revived a neofunctionalist line of argumentation, plainly summarise that "The Commission itself is an entrenched, self-interested advocate of further integration [...]" (Sandholtz and Zysman 1989: 108).

These accounts of 'integrationist' preferences of the Commission do not conflict with the assumptions proposed by the public choice literature on bureaucratic politics. To support an ongoing transfer of competences to European institutions in most circumstances means increased Commission competences, greater policy autonomy and less supervision. Although a view of Commission officials as single-minded budget maximisers will hardly find corroborating empirical evidence, increasing the workload of the Commission could in turn form the basis for demands for greater staff numbers and greater financial resources.

A more nuanced picture: recent empirical research

Since the 'second wave' of interest in the European Commission there has been a growing number of empirical studies about the preferences of individual Commission officials that provide a much more nuanced picture of what 'the Commission' as a whole may strive for (cf. e.g. Hooghe 2000; Hooghe 2005; Egeberg 2006; Wonka 2008; Kassim, Peterson et al. 2013). In particular, these studies demonstrate an internal

heterogeneity of motivations that underscore the difficulty of assigning distinct actorness to a complex organisation. The most recent and most ambitious of these efforts to date, "Commission in Question (EUCIQ)", undertakes a large scale attitudinal survey of Commission officials (n=1901) (Kassim, Peterson et al. 2013). The project finds that while the commonly assumed 'supranationalist' preference (embracing the policy advocacy of the Commission) is indeed prevalent, large minorities of the respondents adhere to role conceptions closer to 'intergovernmentalist' attitudes (downplaying the policy advocacy of the Commission and promoting deference to the Council) and something that Liesbet Hooghe terms an "institutional pragmatism", presenting a 'third way' "which conceives the Commission and Member States as interlocking and complementary institutions" (Hooghe 2012b: 91).

The distribution of these preferences is not random across Commission officials. The EUCIQ project identifies a number of patterns. For example, 'supranationalist' preferences are more prevalent among senior officials and those coming from 'older' member states (although the two often overlap), in particular from states that are either smaller, catholic, federally organised, or inefficiently governed (cf. Hooghe 2012a: 9-10). Preferences also cluster across DGs, but less pronouncedly so. Liesbet Hooghe reports that 'institutional pragmatists' are more prevalent in DGs "with technical content" (Hooghe 2012a: 11), although her distinction between 'technical' and 'political' DGs may be questionable.[9] Moreover, personal characteristics such as prior experience in national administrations (which favours 'intergovernmentalist' attitudes), the stated motivation for joining the Commission (commitment to 'Europe' unsurprisingly favouring a 'supranationalist' attitude), and gender (women being less likely to

[9] Hooghe classifies Environment, Development and Fisheries as technical policy areas without justifying this choice.

express 'supranationalist' attitudes) have a statistically significant impact on preferences (cf. Hooghe 2012a: 11-12).
Apart from the supranational-intergovernmental dimension, EUCIQ also includes questions about Commission officials' political positions on a left-right scale. Here, nationality seems to have a significant impact. Officials from the 'new' member states in particular tend to be more 'pro-market' in an economic sense and 'conservative' in a socio-cultural dimension (cf. Hooghe 2012a: 15). Hooghe also finds clusters across DGs, with officials with more 'interventionist' portfolios expressing less market-friendly attitudes than officials in market-oriented DGs: "On economic ideology, DG location is a surer predictor than nationality" (Hooghe 2012a: 18). Whether this is due to self-selection or socialisation is impossible to tell from the data (cf. Hooghe 2012a: 15).
Finally, the two preference dimensions (supranational-intergovernmental and left-right) combined accurately predict Commission officials' preferred allocation of competences between the EU and the member states, differentiated by policy area. This finding, to some extend, casts doubt on accounts of the Commission as a 'bureau-maximiser': "Commission officials' attitudes on policy scope in general, and on the kind of policies that should be centralized are guided by ideology and EU governance views rather than by career interests" (Hooghe 2012a: 21).

While EUCIQ provides a very detailed snapshot of the Commission at the time of the survey in 2008, Mariam Hartlapp and Yann Lorenz have compiled a longitudinal dataset comprising information on nationality, party-political and professional background on all Commissioners and Directors General from the first EEC Commission to the Barroso Commission that completed its term in 2010 (Hartlapp and Lorenz 2012). In a first descriptive overview of the data, Hartlapp and Lorenz discern patterns of nationality and party-political affiliation in relation to particular policy port-

folios that corroborate some of EUCIQ's findings. In particular, they, too, find portfolios relating to more 'interventionist' policies to be dominated by officials with social-democratic party backgrounds, while liberal and conservative officials tend to cluster in market-related portfolios. They also indicate that individual member states at times express preferences for certain portfolios, although such preferences have no basis in the relevance of these portfolios at the national level (cf. Hartlapp and Lorenz 2012: 32). However, Hartlapp and Lorenz do not offer propositions as to how these patterns may be connected to Commission action. Overall, they find no periods of party-political dominance that could be linked to particular policy initiatives (cf. Hartlapp and Lorenz 2012: 31). Moreover, a longitudinal analysis of the varying influence of individual portfolios on Commission action is hindered by the fact that both content and number of these portfolios have significantly changed over time (cf. Hartlapp and Lorenz 2012: 17).

Apart from these empirical analyses of preference distributions, there is now also a growing body of empirical work on internal dynamics in Commission decision-making, focusing on potential conflict among the top tier of Commission officials. Arndt Wonka, for example, focuses on political dynamics within the College of Commissioners as the Commission's central decision-making body. He proposes four possible rationales for individual Commissioners' behaviour: a "national party" scenario, where the Commissioner acts according to the preferences of her or his national party, which can in turn be influenced by considerations of domestic party competition; a "transnational party" scenario, where the Commissioner is informed by broader ideological positions reflected in the preferences of trans-national party families; a "national agent" scenario, where the Commissioner acts according to cross-party domestic interests of his home country; and finally a "portfolio" scenario, in which the Commissioner

seeks to advance the policies delegated to him (cf. Wonka 2008: 1148-1151). Although Wonka admits that some of the proposed scenarios might be difficult to distinguish empirically, the evidence he finds in two case studies concerning the "REACH" and "Takeover" directives points to a dominance of the "national agent" and the "portfolio" scenarios (cf. Wonka 2008: 1158). He finds no evidence for partisan dynamics. This insight is consistent with the results of Morton Egeberg's 2006 study of Commissioners' decision behaviour in a range of policy types, as reported by officials located in the Commission's Secretariat General, who sat in on debates in the College. Egeberg finds that in both sectoral policies and budgetary matters the "portfolio role" is the most frequently reported behavioural pattern. The "country role", his equivalent to Wonka's "national agent" scenario, is also reported, but less frequently so, while partisan affiliation is very rarely invoked (cf. Egeberg 2006: 11).

Robert Thomson conducts a further test on the importance of officials' personal characteristics in Commission decision-making. His 2008 study connects Commissioners' nationality and party affiliation with their legislative behaviour, investigating more closely the "the conditions under which the commission's positions on legislative proposals agree with those of different member states" (Thomson 2008: 170). He finds that the average distance between the policy position of a member state and that of the Commission is smaller if the Commissioner responsible for the legislative proposal is a national of that member state – but only if the voting rule in the Council allows for a qualitative majority. Under unanimity, no such effect is evident. This finding remains robust regardless of the Commissioner's party political affiliation – the responsible Commissioner being a member of the home state's governing party does not affect the proximity of that member state's position to that of the Commission. The results of Thomson's study dovetail with previous insights insofar as they emphasise that nationality has an influence on

decision-making in the Commission, and that party affiliation is marginal (cf. Thomson 2008: 188). They also underscore that voting rules in the Council have an effect on the content of the Commission's legislative proposal. This is valuable evidence suggesting that the Commission is a strategic actor, taking account of the preferences of other actors involved in the inter-institutional decision-making process and the institutional rules of the game.

A central problem in analysing decision-making dynamics in the College, much like the obstacles to the study of judicial behaviour in the Court of Justice, is the dearth of empirical material about the positions taken by individual Commissioners, as neither debates or votes are recorded (cf. Wonka 2008: 1152). Egeberg speculates that with the growing size of the College, there appears to be a greater proclivity towards non-interference with other Commissioners' projects, and that "bilateral relations between the President and the particularly affected commissioner(s) might come to partly replace collective decision-making" (Egeberg 2012: 945). This in turn lends credence to the implications of Thomson's study, in that the position of the responsible Commissioner has an important influence on the Commission's overall position.

Miriam Hartlapp, Julia Metz and Christian Rauh provide some further support for this supposition. Their analysis of the administrative set-up of the Commission indicates that procedural structures systematically privilege the lead department in the formulation of a legislative proposal (cf. Hartlapp, Metz et al. 2010: 13). They also point to the increasingly important role of the Secretariat General (under the political leadership of the Commission president) in designating the lead department and coordinating legislative proposals: "the SG [Secretariat General] is in a distinguished position in setting policy priorities on the internal agenda and influencing how much say a policy portfolio has in a cer-

tain legislative drafting" (Hartlapp, Metz et al. 2010: 14). Based on these insights, they propose that "the overall legislative output of the Commission may be skewed towards those DGs that act more frequently as the lead department than others" (Hartlapp, Metz et al. 2010: 17). Hartlapp, Metz and Rauh moreover find evidence that there is significant sectoral variance as to which proposals are subject to negotiations in the College. The assumption is that proposals that are negotiated in College meetings are less likely to represent the lead department's position than those decided at a previous stage (cf. Hartlapp, Metz et al. 2010: 22). However, they do not test the implications of their findings against actual legislative proposals.

All in all, this new research agenda has produced a rich body of material on the factors influencing Commission policy positions. I would sum up the central points as follows:
Judging from EUCIQ's extensive survey of Commission officials, it seems reasonable to assume a predominant tendency within the Commission to support policy advocacy. 36.6% of the respondents embraced a 'supranationalist' attitude that largely conforms to a 'traditional' understanding of Commission priorities. Another 28.9% were labeled as "institutional pragmatists" (Hooghe 2012b: 92). While this attitude is more respectful of the interlocking authority of both Commission and Council, it is nonetheless clearly in favour of policy implementation over management. In fact, its prime distinction is a clear rejection of sharing powers of initiative with the European Parliament – a position that most 'supranationalists' support (Hooghe 2012b: 93-97). This indicates that about two out of three Commission officials support Commission policy advocacy. Coupled with the lack of evidence for an across-the-board bureau-maximising attitude, it seems reasonable to assume on this basis that Commission officials on average pursue distinct policies. Policy preferences on an economic left-right scale moreover cluster with

portfolios. 'Interventionist' DGs lean towards the social-democratic spectrum, whereas market-oriented DGs lean towards the liberal/conservative side. Nationality seems to have an influence on policy positions, too. Internal procedures for policy formulation and decision-making, moreover, appear to favour the positions of the lead department, as long as proposals are not subject to intense negotiation in the College. Finally, there is evidence that the Commission acts as a strategic goal seeker in inter-institutional processes, as Thomson's study has shown the Commission's position to vary with voting rules in the Council.

These insights inform my own conception of the Commission to a large degree. In chapter 4 I will develop a proposition about the effects of portfolio characteristics on strategy choice, which I will also test in my case studies (chapter 5 and 6). However, the described lack of readily available empirical data on internal positions within the Commission precludes me from pursuing this question in greater detail. For the most part, I will therefore maintain the simplifying assumption of the Commission as a largely unitary actor, insofar as I assume that once a position has been internally agreed upon, the Commission will pursue it employing the most promising strategy available. Formally, whenever I speak of Commission action as an aggregate, as the appropriate unit of analysis I am actually referring to the majority of Commissioners taking a decision in the College.

The following chapter describes the Commission's position in inter-institutional policy-making processes and compares the relative merits of its strategic options.

Chapter 3

The European Commission in the policy-making process

In the previous chapter I outlined the theoretical approach to my study of the Commission and my assumptions about its 'actorness' and preferences. In this chapter, I will look more concretely at the position of the Commission in the political system of the European Union. I will outline the central characteristics of Commission policy-making strategies in three policy modes. I argue that the outcome of these strategies is functionally equivalent, but they place varying constraints on the Commission's influence over outcomes. I will conclude with a comparison of the Commission's position in various modes of policy-making and argue that the Commission's ability to influence the policy-making process is broadest in legislation and litigation. The detailed comparison between the two strategies will allow me to formulate a series of hypotheses about the factors influencing the Commission's choice of strategy in the following chapter.

3.1 Modes of policy-making

Assuming that the Commission pursues distinct policy preferences strategically, its ability to assert an influence on policy outcomes is dependent on the institutional constraints of policy-making in the EU. These constraints in turn depend on the other actors present in the policy-making process, and the legally prescribed decision-making procedures. In the social science literature on EU politics, such distinct bundles of procedures are described as 'policy modes' or 'modes of

policy-making'.[10] Research has identified a number of such modes at the European level, each of which offers the Commission varying degrees of influence over policy output, but there is generally no agreement on any particular typology. Helen Wallace, for example, proposes a typology consisting of five policy modes. The first three, the "classical Community method" (as employed in the original Common Agricultural Policy), the "EU regulatory mode" (as employed for most internal market regulation) and the "EU distributional mode" (as employed in distributive policies such as cohesion, structural funds, and research and development) all entail a significant amount of delegation of policy-making competences to the Commission, but vary according to the depth of these competences and the involvement of other actors, in particular member state governments and the European Parliament, but also sub-national (or "infranational") regional actors in the case of cohesion policy. The other two policy modes in this typology, "policy coordination" and "intensive transgovernmentalism", assign only a minor role to the Commission, either in setting benchmarks and facilitating dialogue and policy learning among national governments in the coordinating mode, or as a relative bystander in "transgovernmental" bargaining in foreign policy and earlier forms of cooperation in monetary policy and justice and home affairs (cf. Wallace 2010: 92-93).

Fritz Scharpf has suggested an alternative typology. Revisiting his influential article about the European 'joint decision trap', Scharpf calls to attention three different modes of policy-making that he sees as central to European Union politics (Scharpf 2006).

1. The "intergovernmental mode" of policy-making lies at the heart of Scharpf's 'joint decision trap'. This mode is prevalent in all those circumstances where decision-making

[10] Jonas Tallberg also uses the term 'process of rule-creation' (Tallberg 2000: 848). The term 'mode of governance' has largely been used in relation to the so-called 'new modes of governance'.

takes place between constituent governments deciding unanimously on outcomes. (In this regard it is akin to Wallace's "intensive transgovernmentalism".) The European Commission's role in facilitating consensus in this mode is strictly limited, as it lacks resources to "design and pursue bargaining strategies" (Scharpf 1988: 255), primarily against the European Council, but also against the Council in areas like Justice and Home Affairs before the Treaty of Lisbon or the Common Foreign and Security Policy. Scharpf's 'trap' describes the situation where the continuation of existing common policies under changed conditions leads to sub-obtimal outcomes, while the institutional framework forecloses exit and the decision mode precludes policy change as long as a single member prefers the status quo (Scharpf 1988: 257). Lacking powerful mechanisms of consensus formation, Scharpf predicts a "systematic deterioration of the 'goodness of fit' between public policy and the relevant policy environment" (Scharpf 1988: 257).

2. The "joint decision-mode" of policy-making, according to this typology, is employed in most legislative acts at the EU level. It provides a central position for the Commission in facilitating policy solutions through its monopoly on legislative initiatives (Scharpf 2006: 849). This mode best corresponds to the first three modes described by Wallace, in particular to the form of co-decision that is now enshrined as the 'Ordinary Legislative Procedure'. The fact that the Commission has the sole authority to introduce a legislative proposal (in other words, 'set an agenda') greatly reduces the complexity of bargaining between 27 constituent governments and the European Parliament. Provided there is a potential overlap of preferences among the veto players, the Commission wields extensive power over the eventual outcome as it can choose among the possible solutions that which is closest to its own preferences.

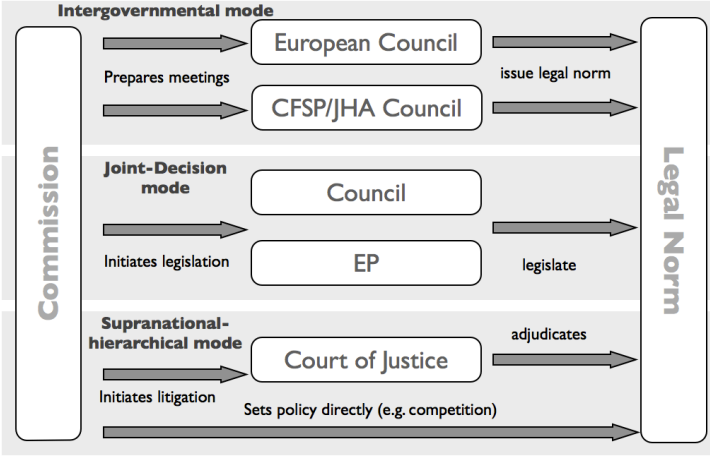
3. The "supranational-hierarchical mode" of policy-making, absent in Wallace's typology, describes all those acts "in which the Commission, the European Court of Justice or the European Central Bank are able to exercise policy-making functions without any involvement of politically accountable actors in the Council or the European Parliament" (Scharpf 2006: 851). With regard to the Commission, this mode involves those areas of competition policy where the Commission has been delegated competences to issue autonomous legal acts, or situations in which the Commission makes use of its function as 'guardian of the treaties' to take a member state to court for an alleged infringement of European law. This policy mode permits an exit from the 'joint-decision trap' as a single actor (or a small number of actors) can produce policy change without becoming involved in complex bargaining procedures. At the same time, policies produced in this mode are extremely difficult to alter (becoming 'locked in'), as legislative override is exceedingly difficult to negotiate (cf. Scharpf 2006: 852-3).

Commonality: legal norm as output

All in all, these different policy modes offer the Commission different channels of influence over policy outcomes. Figure 3.1 outlines the various strategies through which the Commission can influence the production of legal norms. This overview is certainly not exhaustive of all modes of policy-making the Commission is involved in. In particular, I do not cover Commission involvement in so called 'new modes of governance', essentially captured by Wallace's "policy coordination" mode, emphasising soft-law mechanisms of 'naming and shaming', information exchange and common learning (cf. Bartolini 2011: 5), often epitomised by the 'Open Method of Coordination' as introduced by the 'Lisbon Strategy' in 2000 and subject to a whole separate body of litera-

ture. I essentially focus on such modes of policy-making that result in legally enforceable norms. I find this focus justified, as "Law is one of the central products of politics and the prize over which many political struggles are waged" (Whittington, Kelemen et al. 2008: 3). Law, moreover, is the principal output of the European Union: "Law has always been a basic instrument and a central symbol of European integration" (Snyder 1993: 19).[11]

Figure 3.1 Commission strategies in three modes of policy-making



The following section demonstrates in more detail that the outcome of each of the depicted strategies is indeed a legal norm. I will also defend the argument that no matter the

[11] It might be more accurate to refer to "law production" (cf. Tsebelis 1999), rather than "policy-making", but the term is not very widely used. Moreover, "law-production" would include constitutional law-making, i.e. the process of treaty revision, which I do not cover. I choose to focus solely on policy-making, that is, that part of "law production" that has a distinct policy content.

concrete strategy, the outcome is functionally equivalent. This is easier to demonstrate for legislative and executive policy-making, but holds for judicial policy-making as well.

There is no need to explain that law is the central outcome of legislation (which, after all, is Latin for 'law-making'). But legislation is only a subset of all possible acts resulting in legal norms, and, in a formal sense, does not even constitute the majority of all legal acts issued by Union institutions.[12] The Treaty of Lisbon attempts to clarify the nature of different legal acts by introducing a novel typology, intended as a hierarchy of norms (cf. Craig and de Búrca 2011: 108). Art, 289(3) TFEU now defines legislation, or a 'legislative act', in formal terms as a legal act adopted by a 'legislative procedure' (be it the ordinary legislative procedure or a special legislative procedure). All other acts are by definition 'non-legislative'. Secondary legal acts based on legislation will now be termed either 'delegated acts' or 'implementing acts', subject to an ill-defined distinction that will be difficult to implement in practice (cf. Craig and de Búrca 2011: 117). Such secondary legal acts will be executive acts carried out by the Commission (art. 290 and 291 TFEU).

Other EU agencies and bodies with executive tasks also issue legal norms, but theses are not explicitly captured by the new typology. The revised article 263 TFEU on judicial review of EU acts explicitly includes acts of "bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties" as amenable to legal challenge before the Court of Justice. The fourth paragraph of this article moreover introduces the category of "regulatory acts" in regard to which the rules of standing have been relaxed for natural and legal persons. It is unclear what constitutes a regulatory act and what its relation is to legislative, delegated and implementing acts (cf. Craig and de Búrca 2011: 508). Other legal acts, such as

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[12] Autonomous legal acts by the Commission, which will no longer be formally referred to as legislation, consistently outnumber legislative acts by a factor higher than 2:1 (cf. König, Dannwolf et al. 2012: 25).

those issued by the European Central Bank, or by the Council in the context of foreign policy, also do not fit the new typology, leading Paul Craig and Gráinne de Búrca to conclude that "the hierarchy of legal acts composed of theses categories does not capture the totality of the ways in which legal norms are made in the post-Lisbon world" (Craig and de Búrca 2011: 118).

The legal nature of decisions taken by the European Council is something of a grey area (cf. Werts 2008: 28-29). The Lisbon Treaty's caveat that the European Council "shall not exercise legislative functions" (art. 15(1) TEU) does not preclude it from issuing acts of legal relevance, or even legal acts (since Treaty defines legislative acts as those legal acts "adopted by a legislative procedure"). Many procedures with legal effect require a European Council decision even where the formal legal act is carried out by a different institution (see for example the procedure to suspend the membership of a member state in "serious and persistent breach" of Union values, art. 7 TEU). Its position as final arbiter of conflict in the Treaties' 'emergency brake' procedures moreover directly infuses the European Council into the legislative process, even though it does not take a final decision on the draft (cf. Chalmers, Davies et al. 2010: 78). A direct legal effect of European Council acts is most visible in the area of 'constitutional' politics, in particular the simplified procedure for Treaty revision (cf. Chalmers, Davies et al. 2010: 76). While European Council decisions "amending all or part of the provisions of Part Three [internal policies] of the Treaty on the Functioning of the European Union" are still subject to national ratification (art. 48(6) TEU), the so-called 'passerelle' clause allows the European Council to unilaterally amend voting procedures from unanimity to qualitative majority, and legislative procedures from special to ordinary, as long as no national parliament objects (art. 48(7) TEU).

The inclusion of the European Council in the list of Union institutions (art. 13 TEU) entails the possibility of a judicial review of European Council acts, and article 263(1) TFEU quite explicitly grants powers of review to the European Court of Justice where European Council acts are "intended to produce legal effects vis-à-vis third parties". In principle, this could empower individuals to challenge parts of Presidency Conclusions (cf. Chalmers, Davies et al. 2010: 414). The same applies to a failure of the European Council to act where such an obligation exists (art. 265 TFEU). While this certainly constitutes an innovation, it is reasonable to assume that the innovation lies not in the admission of the legal nature of European Council acts, but the existence of legal remedies.

While the outcome of litigation is obviously of legal nature, arguing that judicial processes are functionally akin to legislation is not as straightforward and may require more persuasion. Traditionally, the spheres of legislation and adjudication have been treated as analytically distinct. Lawyers in particular have been reluctant to concede that judges 'make law' rather than merely apply it. To the contrary, I argue that the production of binding norms is central to both processes. Research on 'judicial politics' in many contexts has highlighted the wider policy impact of court decisions, even as they are seemingly addressed to the parties in court only (cf. Chayes 1976: 1281). Much of the literature on 'law and politics' implicitly assumes the two to be more or less the same, or similar processes to a common end. In this vein, Stuart Scheingold proposes that there is "no bright line" between law and politics – the two being inextricably linked to one another (Scheingold 2008: 740). I will not have to go so far as to speak of the law-politics distinction as "a kind of historical curiosity", as Scheingold does (Scheingold 2008: 740), or as Harold Spaeth, who describes the insistence on a conceptual distinction between judging and policy-making as

a "morass of legalistic doublespeak" (Spaeth 2008: 753). But, disregarding this rhetorical barrage, I find the underlying argument essentially sound and use it as important starting point for my study. As Spaeth agues, "the assertion that judging is different from the free choices of congresspersons or administrators is simply false" (Spaeth 2008: 753). All political actors act under constraints imposed by law and concepts of legality (Shapiro 2008: 770-771). What constitutes the boundaries of this legality is frequently contested and is itself decided through legally prescribed means. In this argument, judges are in fact the least constrained actors as it is their prerogative to define what is legal and what is not. Judges, according to Spaeth, "cloak the reality of choice with the rhetoric of analogical legal phraseology. [...] The ultimate choice, then, becomes no more than the choice of words" (Spaeth 2008: 753-754). While this again is strong rhetoric, Martin Shapiro formulates a similar idea somewhat less harshly: "[Courts] implement a lot of law, and in the course of doing so, they make a lot of law" (Shapiro 2008: 769). Or, in the more nuanced words of Stuart Scheingold, "The application of rules is difficult to distinguish in practice from the making of rules. Each exception can be viewed either as an application or a deviation depending on one's perspective" (Scheingold 1974: 31). Judges face weak constraints on decision-making by the requirement to reach jurisprudentially defensible decisions (legal reasoning can support a variety of different outcomes – after all both sides to the court case at hand couch their conflicting arguments in legal terms). However, judges have been empirically shown to be constrained by strategic concerns for the wider institutional environment (cf. i.a. Epstein and Knight 1998) and the particular characteristics of the parties before them (cf. i.a. Galanter 1974). Without launching unnecessarily deep into the question of judicial behaviour, the main argument here is that the actions of judges are conceptually difficult to differentiate from policy-making. In more technical terms, I argue

that the interpretation of a legal norm in court is in most cases equivalent to a (quasi-legislative) recasting of said norm with universal impact and future relevance as precedent (cf. Dehousse and Weiler 1990: 246; Dehousse 1998: 72; Shapiro and Stone Sweet 2002: 90; Vanberg 2005: 184).

Having established the commonality of the described modes of policy-making, I will proceed by providing a detailed overview of the variation in the Commission's influence over outcomes in the three modes. I exclude from this overview budgetary procedures and the management of EU finances, as well as the negotiation of international agreements. By and large, these procedures are special cases of the joint-decision mode that, while surely essential to the day-to-day operations of the EU and highly policy-relevant, would somewhat complicate a concise overview.

3.2 The Commission and the intergovernmental mode

The intergovernmental mode of policy-making is prevalent in those areas outside the internal market that have been gradually added to the list of Union competences over time. This has been most prominently so in foreign policy and justice and home affairs, although the latter has been increasingly subject to the 'Community method' since the entry into force of the Treaty of Amsterdam. Cooperation in these areas had developed outside the formal Treaty framework – or, as in the case of the Schengen agreements, outside the EU context altogether – with initially very little formal Commission involvement. It moreover applies to bargaining in the European Council, which is not confined to any particular policy area.

Although formally without any legislative authority, the European Council has successively assumed a central "pre-

legislative function" (Wessels 2008: 165) in the policy-making process, essentially acting as an important informal agenda setter and the Union's primary forum for crisis response. Now included formally in the list of Union institutions (art. 13 TEU), the Treaty assigns the European Council the tasks of providing the Union "with the necessary impetus for its development" and defining its "general political direction and priorities" (art. 15 TEU). Beyond the mere wording of the legal text, the European Council represents the Union's "focus of authority at the highest political level" (Craig and de Búrca 2011: 48), and access to this institution is therefore a valuable political asset. The Commission is the only EU institution that is formally involved in European Council negotiations, the president of the Commission being a (non-voting, art. 235(1) TFEU) member. Apart from such participation in negotiations, however, the Commission has very limited ability to influence European Council decisions. Without formal veto-power, the other European Council members have little incentive to accommodate its views. Its action in this regard is primarily preparatory and rhetorical. European Council meetings are formally prepared by the General Affairs Council, "in liaison with the President of the European Council and the Commission" (art. 16(6) TEU). More precisely, article 3 of the European Council's rules of procedure stipulate that the president of the European Council, in cooperation with the rotating Council presidency and the Commission president, present a draft agenda to the General Affairs Council four weeks before the scheduled European Council meeting. This same group of persons prepare draft guidelines for European Council conclusions, draft conclusions and draft decisions of the European Council, "which shall be discussed in the General Affairs Council" (OJ 2009, No. L 315/52). However, the provisional agenda, to be adopted by the European Council itself at the beginning of its meeting, is drawn up by the president of the European Council alone (OJ 2009, No. L 315/53). In any formal sense, the Commission

therefore holds very limited agenda setting powers over European Council decisions. Nonetheless, Paul Craig and Gráinne de Búrca hold that "The European Council has been the institutional mechanism whereby the Commission can secure broad agreement from Member States for major initiatives [...], and many European Council initiatives are the result of Commission suggestions fed into the agenda prepared by the GAC [General Affairs Council]" (Craig and de Búrca 2011: 49).[13] Given that the Commission is responsible for the Union's multi-annual legislative programming, it faces strong incentives to match its priorities to those of the European Council: "Winning the European Council's approval for the general direction of policy in a particular area facilitates the Commission's task when fashioning more specific legislation to put that policy into effect" (Craig 2010: 107).

There is as yet preciously little research about the Commission's ability to 'enlist' the European Council and to use the support of the heads of state or government as a lever in subsequent legislative negotiations with the Council. Isolated accounts of such a link dot the literature on policy-making, particularly with regard to the development of the single market programme during the 1980s (cf. Armstrong and Bulmer 1997: 18-19; Craig 2002: 37), but there are so far no systematic studies on the factors influencing the success of such a strategy.[14] This question could present an interesting framework for a test of competing rational choice and sociological institutionalist approaches – the former proposing congruence of preference or pressure from other venues as explanatory variables for Commission success, the latter the

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[13] Similarly, Paul Craig asserts elsewhere that "The Commission has frequently fed policy initiatives that it wishes to advance to the European Council, and gained its imprimatur" (Craig 2011b: 222).

[14] The situation is somewhat different with regard to the Commission's influence on Treaty change, although this discussion is still largely mired in a dichotomous, either-or type of argument between intergovernmentalists and supranationalists.

dynamics of negotiation, issue framing and rhetorical entrapment. It will also be interesting to see if the establishment of the permanent president of the European Council has an effect on the Commission's ability to 'upload' policy initiatives onto the European Council's agenda. The fact that he or she is appointed for a period of up to five years allows for a greater planning perspective than previous presidents of this institution and may serve to undermine the institutional advantages previously held only by the Commission (cf. Craig 2010: 105).

The Commission's position in those areas of foreign policy and justice and home affairs that still retain some of their former (second and third) 'pillar' features is somewhat akin to its relation vis-á-vis the European Council. The Treaty of Lisbon has incorporated most parts of justice and home affairs into the joint-decision mode of policy-making (with slight exceptions in the case of criminal law and policy cooperation), but little has changed from the pre-Lisbon era with regard to Commission competence in the policy-making features of foreign and security policy. Both policy areas are characterised by a plethora of preparatory committees, semi-autonomous agencies and intergovernmental fora in- and outside of the Treaty structure (cf. Giegerich and Wallace 2010: 441-444; Lavenex 2010: 466-468). While the Treaty of Lisbon has formally abolished the former pillar structure, article 24(1) TEU states that the Union's Common Foreign and Security Policy is governed by "specific rules and procedures" that differ from other policy areas. The Commission's role in this area "is defined by the Treaties", i.e. it has no across-the-board competences and remains marginally involved in decision-making procedures (cf. Craig and de Búrca 2011: 327). The main decision-making bodies in this field are the European Council and the Council, the former determining objectives and general guidelines, while the latter defines and implements concrete decisions (art. 26 TEU).

The Commission, through the Union's High Representative for Foreign Affairs and Security Policy, who is a vice president of the Commission and replaces the former external relations Commissioner, shares formal agenda setting powers with the member states (art. 31 TEU). Its main avenues of influence, however, are through its access to the European Council and through cross-issue linkages that tie foreign policy to policy areas such as trade and development policy, in which the Commission has greater policy-making abilities (cf. Giegerich and Wallace 2010: 442).
Prior to the Lisbon Treaty, this situation was similar in the field of police and judicial cooperation in criminal matters, that part of justice and home affairs that constituted the Union's 'third pillar'. Since December 2009, little remains of the intergovernmental mode in this policy field, with the exception of the right of initiative in police and judicial cooperation in criminal matters, where the Commission shares its usual monopoly with "a quarter of the member states" (art. 76 TFEU). Apart from this deviation, however, the ordinary legislative procedure (with 'emergency brakes') now applies to much of this field as well.

Summary

The preceding overview has demonstrated the limited means for the Commission to influence the content of policy set in the intergovernmental mode. Although the relevant literature does indicate some instances of the Commission's success in using this policy mode to its advantage, there is little to suggest that this is systematically so. Its formal agenda setting power is weak and frequently shared with other actors, and little is known about its ability to use informal means of influence.

3.3 The Commission and the joint-decision mode

One of the central functions of the Commission in the political system of the EU is initiating legislation. In the majority of policy areas within EU competences (and all those relevant to this study), the Commission has a monopoly on legislative proposals (cf. Diedrichs and Wessels 2006: 222). Formally, a refusal of the Commission to issue a legislative proposal would preclude the EU's legislative bodies from becoming active. In practice, the Commission typically responds to other institutions' requests for legislative proposals (cf. Diedrichs and Wessels 2006: 221). Barring unexpected events or crises, the Commission follows a medium term legislative programme that it publishes at the beginning of its term of office. Whereas these programmes are formulated at a highly general level of abstraction, outlining broad policy priorities, it issues more concrete Annual Policy Strategies specifying the legislative agenda for the following year. This serves as a basis for inter-institutional debate, as the result of which the Commission publishes a detailed annual Work Programme, listing specific decisions and legislative proposals the Commission intends to pursue (cf. Craig and de Búrca 2011: 145). The concrete origins of policy priorities and initiatives are not always easy to identify. At all stages throughout the preparation and formulation of policy initiatives the Commission closely cooperates with other actors in the political system of the EU, including both formal institutions like the Parliament, the Council and the European Council, and economic and social interest groups providing expertise and seeking influence over the policy agenda. In many instances, detailed requests for policy initiatives are formulated by the European Council in its Presidency Conclusions, especially when responding to unexpected events and crises. The Council operates numerous expert groups exercising exploratory functions in parallel to similar groups under Commission supervision (cf. Diedrichs and Wessels 2006: 223). The Treaty of Lisbon introduces the possibility of a citizen's ini-

tiative (art. 11(4) TEU), albeit with significant constraints. Part of the legislative agenda is moreover made up by mandatory revisions of existing legislation. In effect, Commission data suggests that less than 10 percent of all legislative proposals emanate from genuine Commission initiative (cf. Diedrichs and Wessels 2006: 223). The reliability of such data is unclear, as the Commission has strategic incentives to downplay its entrepreneurial role in order to safeguard its perception as an 'honest broker'. Nonetheless, it is obvious that policy initiatives originate in multiple fora and take account of a multitude of interests. However, despite this multitude of channels, the concrete formulation of specific legislative proposals leaves plenty of space for inter-institutional contestation.

The formulation of an individual legislative proposal is typically assigned to the sectoral DG that is most closely aligned with the matter at hand. The DG in turn designates a 'rapporteur' as lead author who formulates a draft, consulting, where applicable, with other DGs if cross-cutting issues are involved (and they often are). Whereas this horizontal coordination of legislative proposals has long been practiced in a rather haphazard fashion, recent reforms of the process within the Commission have introduced mandatory cross-sectional coordination in many areas, with the Secretariat General in the enforcing position (cf. Hartlapp 2011: 187). Other DGs then have the opportunity to demand changes to the draft or to express their opposition to the proposal. All proposals moreover have to pass the muster of the Commission's Legal Service, which assesses each draft's vulnerability to legal challenge. Following this technical stage, the proposal is passed upwards to the political level of the Commissioners and their cabinets, where it proceeds through the weekly meetings of the responsible members of the Cabinets, the Heads of Cabinet, and, finally, the College of Commissioners, which ultimately decides by a majority of its mem-

bers. In practice, most decisions in the College are reached by consensus. While the College has to formally endorse all legislative proposals, agreement is in most cases reached at an earlier stage in the process. Since 1994, only between 13 and 18 percent of proposals were discussed in the College (cf. Hartlapp 2011: 187).
Besides mandating increased horizontal coordination between DGs, recent reforms have introduced a number of measures to this process to increase the quality of Commission proposals as part of its 'better regulation' approach. An important innovation has been the introduction of mandatory 'impact assessment', which outlines the likely impact of the proposed piece of legislation with regard to environmental, economic and social matters. As these procedures are coordinated by the Secretariat General, the reforms have reinforced its position as an important actor in the formulation of legislative initiatives (cf. Hartlapp, Metz et al. 2010: 13-14).

Literature analyzing the Commission's position in legislative processes has focused on its power to set the agenda. While, as I have shown above, many of the EU's policy priorities originate from other sources, the legislative process grants the Commission significant room for maneuver in formulating the precise content of legislation. The Commission's monopoly on legislative initiatives is crucial: "When the setter has monopoly power, voters are forced to choose between the setter's proposal and the status quo or fall-back position" (Romer and Rosenthal 1978: 27-28). The extent of the Commission's ability to influence legislative outcomes is dependent on two factors in particular: the distribution of preferences (vis-à-vis the status quo) among the actors involved, and the legislative procedures prescribed by the Treaties. The impact of these factors on the Commission's agenda setting position is best demonstrated by a starkly simplified model of the legislative process (figure 3.2; cf. Tsebelis and Garrett

2000: 15; Hix and Høyland 2010: 70). Consider a policy area located on an economic left-right dimension (say, regulation of chemicals, or the access of migrant workers to social security benefits). The points on the scale represent the ideal points for new legislation (assumed to be exogenously given) of each of the actors involved. This model assumes an environment of perfect information, meaning that all actors know the preferences of the other actors involved as well as the location of the status quo (cf. Romer and Rosenthal 1978: 28).[15] The position of the Council is disaggregated into the individual positions of its members (for ease of presentation, reduced to seven members with equal voting rights: M1-M7). SQ represents the status quo. All actors prefer new legislation to the status quo, but differ as to the extent of desired reform.[16] It is the sole prerogative of the Commission to introduce a piece of legislation. It is in its interest to place it strategically so that the outcome will be as close to its ideal point as possible. Given the depicted constellation of preferences, its ability to do so depends on the legislative procedure specifying veto players and voting thresholds.

In its earliest form, legislation was passed without substantial involvement of the European Parliament. Procedural rules merely required *consultation*, giving the EP nothing but the power to delay legislation (and only so after the European Court of Justice decided that legislation would be invalid unless the EP had given its opinion, Case 179/80, ECR

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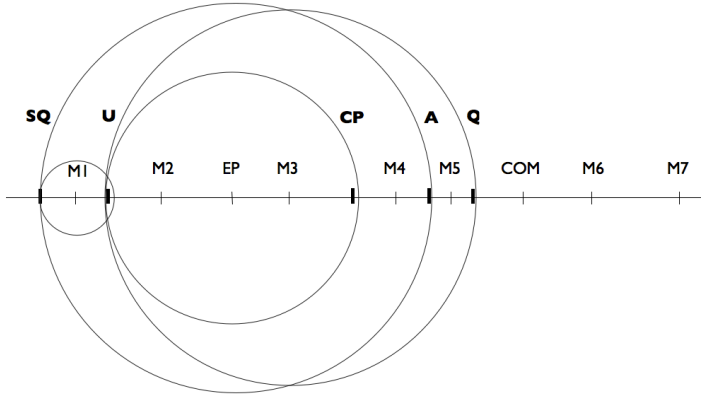
[15] This of course is a very unrealistic assumption. Under perfect information, all actors would anticipate the other actors' actions – legislative proposals would always represent the single possible outcome of the process and would be adopted at first reading.

[16] Other demonstrations often represent the Commission and the European Parliament as preference outliers, typically because the dominant policy dimension is assumed to be 'more integration' or less. When looking at day-to-day politics, however, more traditional left-right dimensions appear more relevant and it is reasonable to assume that Commission and EP pursue more centrist and potentially conflicting goals (cf. the 'regulation scenario' in Tsebelis and Garrett 2000: 30-31).

1982: 3623). If Treaty rules stipulate the Council to decide unanimously, the Commission could expect the passage of a proposal at point U, the most 'progressive' point (in relation to the status quo) that the most 'conservative' veto player, M1, would accept vis-à-vis the status quo (cf. Hix and Høyland 2010: 70).[17]

Figure 3.2 Agenda setting in EU legislation



If Treaty rules stipulate a vote by qualitative majority (here simply defined as 5 out of 7), the Council still has the possibility to alter the Commission proposal, but only unanimously so. In this case the Commission could expect the passage of a proposal at point Q, given that the pivotal member of the Council for a qualitative majority vote, M3, would ac-

[17] Such spatial models of policy-making typically assume 'circular' ('Euclidean') preferences, meaning that M1 is indifferent to which direction the status quo deviates from its ideal point, as long as policy change does not move it further away. This, also, is not always a realistic assumption.

cept any point between Q and U, which would be the outcome of a unanimous vote (cf. Tsebelis and Garrett 2000: 18).

Things again change when the EP becomes more than just a bystander in legislative proceedings. The first procedure to allow for more EP involvement was the so-called *cooperation* procedure which was introduced with the Single European Act and used for most legislation relating to the Single Market programme. Here, the Parliament still did not constitute a veto player in the process, but could impose costs on the Council when ignoring its opposition (George Tsebelis therefore talks of the EP as a "conditional agenda setter" under cooperation, cf. Tsebelis 1994). Most importantly, if the EP disagreed with the Commission proposal, the Council could only override this opposition by a unanimous vote, depriving the Commission of much of its agenda setting power. In order not to trigger such EP opposition, the Commission could then introduce a proposal at point CP, as this is the most 'progressive' point the EP (or rather, the median voter in the EP) would accept over U, the default outcome of a unanimous vote.

The Single European Act also introduced the assent (now referred to as consent) procedure, which was less frequently used but elevated the Parliament to a veto player position. The procedure is similar to the cooperation procedure except that the EP now has the power to reject the Commission proposal without the possibility of a Council override.[18] Moreover, the Council cannot alter the proposal once adopted by the Parliament (cf. Hix 2010: 70-71). Here, the Commission could expect the passage of a proposal at point A, as this is the most 'progressive' point the EP will accept over the status quo that will also be supported by a qualitative majority in the Council.

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[18] In many instances, predominantly in areas outside the internal market, the assent procedure does not give the Commission a monopoly of legislative initiative, in which case the present model is not applicable.

The European Parliament moved towards becoming an equal legislator with the introduction of the co-decision procedure in the Treaty of Maastricht. Here, if disagreement between the Council and the EP about a Commission proposal persisted beyond the second reading, a conciliation committee consisting of an equal number of members of the Council and the Parliament would convene to reach a solution. Under the Maastricht rules, in the event of no agreement in conciliation, the Council could still unilaterally present, by qualitative majority, a final proposal that the EP could either adopt or reject by an absolute majority (which, due to high absenteeism in the Parliament, amounts to a significant supermajority, cf. Tsebelis and Garrett 2000: 29). In effect, at this stage of the procedure the initial Commission proposal had become irrelevant and the 'endgame' consisted of the Council acting as agenda setter and the EP acting as veto player (cf. Tsebelis and Garrett 2000: 23; Hix and Høyland 2010: 72). Stripped of its agenda setting power, a rational, strategic and omniscient Commission could therefore only expect a proposal to be accepted in the vicinity of M3, which is the point that the Council as agenda setter, voting by qualitative majority, and the EP would agree on without Commission involvement.

The Treaty of Amsterdam revised the co-decision procedure to eliminate the final stage, partly due to the fact that the EP had adopted a strategy of systematically refusing all subsequent Council proposals if the conciliation committee had not reached a common position, regardless of policy content (cf. Tsebelis and Garrett 2000: 24). Both Council and EP now vote on the text produced by the conciliation committee. If the committee fails to produce a text, the legislation fails. The Treaty of Lisbon has codified this procedure as the Union's 'Ordinary Legislative Procedure' (art. 294 TFEU).[19] Un-

[19] The Lisbon Treaty slightly but not insignificantly changed this procedure by lowering the voting threshold in the Parliament for adopting the outcome of the conciliation committee from an absolute to a simple majority.

der this procedure, the Commission can expect a proposal to pass at a point somewhere between the pivotal member of the Council (M3) and the EP, depending on the bargaining dynamics between the EP and Council delegations. Since the Commission is present as an arbitrator in the conciliation process, it is reasonable to expect an outcome somewhere in the centre (cf. Diedrichs and Wessels 2006: 227). While the EP has now emerged as a truly co-equal legislator, and the Conciliation Committee as the final agenda setter, the Commission's ability to influence policy content remains significantly curtailed (cf. Tsebelis and Garrett 2000: 23-24).

The model obviously excludes large chunks of the empirical reality of EU legislative decision-making in general, and by choice does not capture the full complexity of agenda setting in particular. Beyond formal powers to introduce a specific piece of legislation, 'political entrepreneurship' involves a much more informal rallying of support behind a particular initiative – including questions of issue framing, focal points and advocacy coalitions – that can be exercised by actors not formally present in the decision-making process (cf. Pollack 2003: 50-51). When it comes to the Commission, the model omits informal processes of consensus building that take place outside the legally mandated procedure, such as the trilogues between the Commission, the Council and the Parliament to secure an early adoption of legislative proposals (cf. Diedrichs and Wessels 2006: 227; Chalmers, Davies et al. 2010: 108-109; Hix and Høyland 2010: 73), or the protracted power-games and inter-institutional conflicts surrounding the choice of legal basis for a legislative act (where, again, the Commission enjoys certain agenda setting powers) (cf. Bradley 2011). However, reducing empirical complexity is the principal advantage of the agenda setter model, assuming that all other factors do not vary systematically with the final outcome. As such, it is able to demonstrate the systematic constraints on the Commission's influence on policy out-

comes in legislative procedures. The simplified model predicts substantial variation in the Commission's ability to exert such influence. In the constellation depicted above, the outcome ranges from close to the status quo (U) to close to the Commission's 'progressive' preferences (Q). Naturally, all of these predicted outcomes depend on the accuracy of the constellation of actor preferences, which has to be empirically established.

Empirical applications have at least corroborated the underlying assumptions about the individual actors' ability to influence the outcomes. Thus, the move from consultation to cooperation and codecision has indeed led to a growing importance of EP positions in EU legislation (cf. Steunenberg and Selck 2006: 81). Simultaneously, studies have pointed to a gradual weakening of the Commission's influence (cf. Shackleton 2000: 336; Tsebelis and Garrett 2000: 34; Pollack 2003: 228; Young 2010: 60).

Summary

To summarise, it is important to keep in mind that "the proximate causes of agreement and disagreement are specific constellations of actor preferences" (Scharpf 2011: 223). If there is no 'win-set' among the veto-players, the Commission will not be able to propose successful legislation at all. If it prefers the status quo to the possible outcomes of legislation, it might attempt to stall the process even when it is asked to produce a proposal. But while the potential outcome of legislation changes with the distribution of ideal points among the central actors, the degree of influence of the Commission over the outcome remains constant within the respective decision-making procedures. This capacity is, all else equal, greatest in policy areas where majority voting applies, since it is more costly for the Council to amend a Commission proposal than to adopt it (cf. Lindberg 1963: 32; Schmidt 2000: 38). Rather than having to account for the preferences of the

most status quo oriented members in the Council, the Commission merely has to respect the preferences of the pivotal members (cf. Tsebelis and Garrett 2001: 374). While the expansion of qualified majority voting thus increased the leeway for the Commission in initiating potentially successful legislation, the concomitant expansion of the involvement of the European Parliament in legislation has rendered this procedure more complicated and curtailed its agenda setting powers to some degree (cf. Tsebelis and Garrett 2001: 374). The introduction of co-decision further amplified this trend (Tsebelis, Jensen et al. 2001).

3.4 The Commission and the supranational-hierarchical mode

The defining characteristic of the supranational-hierarchical mode is the fact that policy can be made without the involvement of the EU's legislative bodies – the Council and the European Parliament (cf. Scharpf 2006: 851). The Commission has access to several strategies within this mode which can be described as judicial and executive in character. Among the judicial strategies, the Commission can initiate infringement proceedings against a member state for failing to conform with legal obligations, or initiate action for annulment or failure to act against other Union institutions where they have acted outside their competences, neglected procedural obligations or failed to act where they would have been legally obliged to.[20] Moreover, the Commission has the ability to intervene in judicial proceedings that have been referred from national courts to the Court of Justice by lodging an 'observation' – a brief outlining its position on the case at hand. While such observations can prove important tools to influence legal developments, the Commission has no control over the timing of such cases or their occurrence

[20] Actions for annulment and failure to act can also be brought against the Commission, but this is not of interest in this context.

in the first place. Finally, the Commission has executive policy-making authority in the field of competition policy, and in areas where Council and EP confer such powers via secondary legislation.

Infringement proceedings

The traditional view of the Commission as the 'guardian of the Treaties' sees the Commission watching over policy implementation in the member states, intervening where it sees deficiencies or outright defects and initiating judicial proceedings where the defendant member state does not take action to remove the aberration (cf. Chalmers, Davies et al. 2010: 318). The relevant rules for this 'infringement procedure', as laid down in article 258 TFEU, stipulate close interaction in multiple formal and informal stages between the Commission and the member state accused of the infringement, with the ruling by the Court as a form of 'last resort' (cf. Craig and de Búrca 2011: 414).

There are two central channels through which the Commission can become aware of alleged infringements: proceedings are either initiated on account of monitoring activities by the Commission itself, or on account of complaints by citizens, MEPs or the European Ombudsman, through either a specialised complaint procedure (cf. COM 2002/141) or relayed from the European Parliament's Petitions Committee. In light of the Commission's limited resources, the latter procedure is an invaluable tool for the detection of possible cases for litigation (cf. Smith 2010: 97; Craig and de Búrca 2011: 410). Although the proportion of complaints as a basis for infringement procedures varies (Harlow and Rawlings 2006: 465; cf. Smith 2010: 8), when disregarding the numerous cases that are routinely initiated purely on account of a failure by a member state to notify the transposition of a direc-

tive[21], the importance of individual complaints in non-trivial cases cannot be overstated (cf. Chalmers, Davies et al. 2010: 333). Until quite recently, the Commission did not systematically differentiate between cases pursued on its own initiative or following a third party complaint. This changed with the Commission Communication "A Europe of Results – Applying Community Law" (COM 2007/502), which introduced a reform of its enforcement strategy following complaints from both the European Ombudsman and the European Parliament about its inconsistent handling of individual complaints (cf. Prete and Smulders 2010: 57). According to this new procedure, currently tested as a pilot scheme in eighteen member states (COM 2011/588: 8), individual complaints are subject to a mechanism of mediation between the complainant and the alleged perpetrator, under the supervision of the Commission.[22] Only if no solution is reached in this form of dispute resolution will the Commission initiate the infringement procedure proper.

Formally, the subject of an infringement procedure is the failure of a "member state" to fulfill an obligation under the Treaties (art. 258-260 TFEU). In practice, the Commission brings such actions against the central government, even where the infringement originates in a law or administrative practice carried out by a public institution that is formally

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[21] The Commission supervises a notification database as a monitoring tool and has routinely pursued infringement proceedings in cases of non-notification since 1989 (cf. Craig and de Búrca 2011: 418). In 2010, non-notification cases accounted for 22% of all open infringement procedures (COM 2011/588: 3).

[22] In its first evaluation of the pilot scheme (Cf. COM 2010/70), as well as the most recent Annual Report on Monitoring the Application of EU Law (COM 2011/588), the Commission indicated that it plans to use this system more generally for the informal stage of investigations before the issue of the letter of formal notice, even where the origin is its own initiative. It has in part commenced to to do so, with the unfortunate side effect that statistics on infringement cases are no longer comparable to previous years (cf. Smith 2010: 154).

independent of that government, such as sub-national units or the legal system (cf. Chalmers, Davies et al. 2010: 327). In general, the Commission can only prosecute an infringement if a national law conflicts with EU law or an administrative practice constitutes a general and consistent breach of obligations. That is, specific cases of individual infringements are generally not subject to enforcement actions, but there are significant exceptions to this rule, specifically where there are civil liberties at issue (as for example in the case of deportations) or significant economic resources (as in the case of public tenders) (cf. Chalmers, Davies et al. 2010: 319). The Commission can bring cases even where the defendant member state has remedied the infringement after the expiration of the deadline set by the Commission (cf. Craig and de Búrca 2011: 422), or where the practical impact of the infringement is negligible (cf. Prete and Smulders 2010: 17).

The first (exploratory) stage in the infringement procedure is an informal letter from the Commission to the member state in question, stating the details of the alleged infringement. The member state then has the opportunity to respond. Around 70% of all proceedings are concluded at this early stage (cf. Chalmers, Davies et al. 2010: 333). The remainder of unresolved disputes then progresses to the formal 'administrative' stage, where the Commission issues a 'letter of formal notice', containing all legal complaints relevant to the member states's breach of obligation (cf. Chalmers, Davies et al. 2010: 335). Another exchange of observations between the Commission and the member state government ensues and the procedure may again be terminated upon agreement. About 85% of infringement proceedings do not progress beyond this stage (COM 2007/502: 5). If the dispute still exists, the Commission then issues a 'reasoned opinion', essentially a more detailed version of the previous letter (cf. Chalmers, Davies et al. 2010: 336). Should the member state – in the Commission's judgement – still not comply with the de-

mands specified in the reasoned opinion, the Commission can take the case before the Court of Justice. Less than 10% of all proceedings reach this stage (COM 2007/502: 5). Chalmers, Davies et al. therefore describe the infringement procedure as essentially "an administrative process, with judicial proceedings predominantly acting as a backdrop to structure the negotiations between the Commission and the Member States" (cf. Chalmers, Davies et al. 2010: 339). The 'shadow of the law' is thus a significant lever in Commission bargaining strategies, without posing a significant constraint on its discretion (cf. Rawlings 2000: 10). In case the Court of Justice holds against the member state, the state is "required to take the necessary measures to comply with the judgement of the Court" (art. 260(1) TFEU). Until the Treaty of Maastricht, a failure of a member state to do so would have triggered another infringement procedure, potentially drawing the process ad infinitum. In a significant step to reinforce the enforcement of legal obligations, the member states at Maastricht decided to introduce potential sanctions for the failure to comply with a Court judgement, allowing the Court (based on a Commission recommendation) to impose a lump sum and/or penalty payment to be paid by the member state should the Court, by way of a second infringement procedure, find that the member state has failed to comply with the initial judgement. The Treaty of Lisbon in turn has significantly truncated this double infringement procedure, reducing the amount of stages in the second proceedings (art. 260(2) TFEU) and enabling the Commission to specify a lump sum and/or penalty payment the first time around when the infringement in question is a failure by a member state to notify the transposition of a directive (art. 260(3) TFEU) (cf. Chalmers, Davies et al. 2010: 344).

As can be gleaned from this overview, the completion of the infringement procedure in its entirety usually constitutes a time-consuming process, the average procedure taking about four years from the first informal letter to the referral to the

Court, should the procedure go this far (COM 2007/502: 5).[23] This is substantial, especially when compared with the average length of the legislative process, which Thomas König reports to have been about 140 days in the late 1990s (cf. König 2007: 427). The Commission's addition of measures towards alternative dispute resolution in the case of individual complaints will do nothing to speed it up and has been extensively criticised as potentially inducing "complaint fatigue" (cf. Smith 2010: 156), giving member states the opportunity to draw out the process and causing individual complainants to simply give up.[24] While the Commission justifies the pilot scheme as introducing a framework "operating at the point closest to the citizen" (COM 2007/502: 8), there may be another reason for the introduction of this measure. The new procedure essentially retains the advantages of the complaint procedure for the Commission (i.e., information about infringements it might wish to pursue) while reducing pressure to litigate where it does not prefer to do so (cf. Rawlings 2000: 5; Smith 2010: 157). This in effect expands the Commission's already extensive leeway in deciding which cases to pursue. The Commission has successfully defended this discretion in the face of various legal challenges.[25] The Court of Justice has repeatedly supported the Commission's

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[23] Since many cases are concluded before this stage, the Commission states the average duration of an infringement procedure as 26 months (COM 2007/502: 5). Note that this does not include the duration of the potential Court case.

[24] Melanie Smith's book on the centralised enforcement of EU law is fiercely critical of the Commission's use of discretion in infringement proceedings following individual complaints, holding the Commission to account on its own standards of 'good governance' that, in her argument, are hardly met in practice (cf. Smith 2010: 115).

[25] As a response to criticism by the European Ombudsman about its handling of individual complaints, the Commission has issued a number of administrative guidelines (cf. COM 2002/141). These do not impinge on its discretion, but allow for somewhat greater transparency and mandate a response to the individual complainant, including a notification when the Commission decides not to pursue a complaint (cf. Harlow and Rawlings 2006: 466-468).

position that it is under no obligation to pursue an infringement, even where a member state's breach of obligations may be obvious, and retains the right to terminate the procedure at any point regardless of the member state's compliance with its demands (cf. Chalmers, Davies et al. 2010: 341-342; Craig and de Búrca 2011: 415). There are therefore no legal administrative boundaries to the Commission's ability to employ the infringement procedure strategically (cf. Snyder 1993: 30; Smith 2010: 47; Craig and de Búrca 2011: 415). Unbound by legal constraints, it is free to take into account all kinds of considerations when enforcing the implementation of Union law: "In the context of the balance of powers between the institutions laid down in the Treaty, it is not for the Court to consider what objectives are pursued in an action brought under Article 169 of the Treaty [now art. 258 TFEU]" (Case 416/85, ECR 1988: 3151). This includes a selective focus on particular policy areas or political priorities (cf. Smith 2010: 115).

In parallel to the defense of its discretion which cases to pursue, the Commission is equally reluctant to reveal much information about its internal procedures regarding infringement cases. Internal handbooks and codes of conduct are not publicly available, not even, apparently, to the European Parliament (cf. Smith 2010: 147). Both the Secretariat General and the Legal Service have units dedicated to the application of EU law and infringements. Otherwise, there appears to be considerable variation across DGs in the handling of infringement cases. Judging from organisational charts and directories, some DGs have specialised units dedicated to this purpose (DGs Agriculture, Competition, Enterprise, Transport, Environment, Taxation, Budget, and Education and Culture) while others spread this task across units (DG Internal Market for example has several infringement coordinators).

From the point of initiation, the progress of individual cases was until quite recently subject to quarterly reports compiled by the Secretariat General, which in turn formed the basis of quarterly discussions by the College in specialised infringement meetings, with significant influence of the Commission's Legal Service, who retained a coherent picture of all cases under review (cf. Smith 2010: 99). The only notable exception to this procedure were state aid cases, which were fast-tracked through the regular meetings of the Commissioners (cf. Smith 2010: 100). A decision by the College is necessary in all stages of the procedure, deciding by the usual majority of its members. Since the late 1990s the Commission has streamlined internal procedures regarding infringements, reducing considerably the time lag in internal coordination and between Commission decisions and their communication to member states, and consequently the length of the procedure in its entirety. In 2008, the Commission moreover increased the frequency of College meetings devoted to infringement cases. These now take place on a monthly basis (cf. Smith 2010: 100-104). In addition, the Commission now holds biannual "coherence review meetings" which, chaired by the Legal Service, provide an overview about the progress of all pending cases (cf. Prete and Smulders 2010: 58). Once a case reaches the Court of Justice, the Commission's position is represented by the Legal Service.

While only a small minority of all infringement proceedings actually reach the Court of Justice, the number of cases decided by the Court under this procedure is nonetheless not trivial, and their substance is not restricted to technical questions of policy implementation. Where infringements concern undisputed aspects of EU policies, or implementation problems of an uncontroversial nature, procedures will be settled at an early stage. The fact that a case progresses to the judicial stage indicates a substantial amount of conflict (cf.

Rawlings 2000: 10). Far from merely technical, infringement cases can therefore constitute "a power struggle between the Commission and a powerful Member State over Treaty competences or other disagreement over interpretation that effectively demands a judicial resolution" (Harlow and Rawlings 2006: 453). Many of the substantive questions decided by the Court are in fact about the proper interpretation of policy as set in either secondary law as legislation or the primary Treaty basis, and they can yield wide-ranging implications: "In this context, it should not come as a surprise that the Commission has, at times, used infringement proceedings as one of the means to encourage and stimulate a progressive evolution of Community laws and policies in certain areas" (cf. Prete and Smulders 2010: 14). The Commission itself has not been shy about admitting this strategy: "Article 169 of the EEC Treaty [governing enforcement action] is now an instrument for the achievement of a policy, and not solely an essential legal instrument" (OJ 1988, No. C 310/6).

Action for annulment and failure to act

The corollary to infringement proceedings, where the Commission prosecutes member states for failure to meet legal obligations, are proceedings aimed at reviewing the legality of acts (or non-action) of EU institutions. The corresponding procedures are described in articles 263 TFEU and 265 TFEU, and referred to as 'actions for annulment' and 'actions for failure to act' respectively. The Commission is listed as a privileged applicant in both procedures, meaning that it can bring cases against other EU institutions even where its own privileges are not at issue (cf. Chalmers, Davies et al. 2010: 413-414; Craig and de Búrca 2011: 490). Reviewable in annulment proceedings are all legal acts of the Council, the Commission, and the European Central Bank as well as those acts of the European Council, the European Parliament and other EU bodies, offices or agencies "intended to produce

legal effects vis-à-vis third parties" (art. 263(1) TFEU).[26] In a similar fashion, actions for failure to act review the legality of the non-action of EU institutions where such action had been legally mandated. Annulment cases can be lodged with the Court immediately, whereas an action for failure to act requires the applicant to call upon the defendant to act. Only if the defendant fails to do so within a two month period can the matter be referred to the Court (art. 265(2) TFEU).
While procedures for annulment and failure to act constitute a significant part of the Court of Justice's overall caseload, only a fraction of these are initiated by the Commission. The most common of such cases are conflicts about the proper legal basis for acts of secondary law. Where there is room for discretion, the Commission frequently chooses as legal basis for its own acts, or pieces of legislation it initiates, those permitting for the greatest Commission influence over the outcome. In most cases the conflict is with the Council, where the Commission proposes a procedure requiring qualitative majority voting, whereas the Council prefers unanimity. The Commission also brings actions for annulment where it finds that its legislative proposals have been amended contrary to its preferences, or where its prerogatives in policy-making procedures have otherwise been impinged upon. Annulment procedures initiated by the Commission regularly make up less than 2 percent of the Court's caseload, and are therefore negligible as a general policy tool.

Preliminary references

Infringement procedures and actions for annulment or failure to act together regularly make up more than half of the Court of Justice's caseload at any given time. The other part, evidently a significant number, are preliminary references

[26] Judicial review of legal acts of the European Council, as well as the explicit mention of other EU bodies, offices and agencies, are an innovation introduced with the Treaty of Lisbon.

from national courts, asking the Court of Justice for an interpretation of a piece of EU law that it deems relevant to the case at hand. The Commission invariably intervenes in such cases following a procedure I will describe below. Preliminary references originate where an individual questions the legality of an act of a member state institution in a national court on the grounds of a possible conflict with EU law, primary or secondary. Whereas the Court of Justice's interpretation is authoritative, national courts are responsible for the final judgement. In practice, the ruling of the Court of Justice is often so closely addressed to the case at hand that the referring court will have little discretion (cf. Craig and de Búrca 2011: 474). Nonetheless, the fact that it is the national court which issues the final ruling greatly enhances its impact, as institutions of the national political system tend to be far more reluctant to ignore a ruling by a national court than a European one.

The system of judicial procedures provided for by the Treaties seems to suggest that infringement proceedings brought by the Commission are designed to address general and systematic breaches of EU law, whereas the preliminary ruling procedure opens a path for localised and specific grievances to be addressed by the Court of Justice in order to achieve individual justice. As has been shown above, however, the Commission does not refrain from addressing individual cases of non-compliance, and with regard to preliminary rulings Paul Craig and Gráinne de Búrca argue that: "Despite the attempts to maintain a clear distinction between the outcome of a preliminary ruling and an enforcement action [i.e. an infringement procedure], however, it is abundantly evident that the ECJ in the context of its preliminary rulings interpretative jurisdiction often effectively declares that a Member State is in breach of EU law, leaving little scope for a different conclusion on the part of the referring domestic court" (Craig and de Búrca 2011: 414). In principle, preliminary rulings can also challenge the legality of an EU legal act

upon which a national implementing act is based. This in effect presents an opportunity for judicial review that is otherwise precluded by the restrictive rules of standing for natural and legal persons in annulment actions (cf. Chalmers, Davies et al. 2010: 159). The majority of preliminary references, however, concern the legality of acts at the member state level.

Judgements of the Court of Justice in preliminary reference procedures have authoritative effect in all member state legal orders, regardless of the origin of the reference – indeed one of the rationales behind the procedure is the uniform application of EU law in national courts (cf. Chalmers, Davies et al. 2010: 160). Moreover, the ostensibly arcane subject matter of a particular case does not preclude the Court from propounding far reaching legal principles. Thus, a dispute about a Dutch tariff classification for urea-formaldehyde in *Van Gend en Loos* (Case 26/62, ECR 19963: 1) led to the Court's establishment of the direct effect of EU law. Many of the Court of Justice's seminal rulings sprang from preliminary references, first and foremost *Van Gend en Loos* and *Costa v ENEL* (Case 6/64, ECR 1964: 587), establishing the supremacy of EU law over national law (cf. Craig and de Búrca 2011: 442).

The Commission's role in preliminary reference procedures is more limited than in direct actions (infringements, annulments and actions for failure to act). It would however be a mistake to conclude that since it is not an official party to the proceedings, it cannot have an impact. As in other proceedings it is not formally a part of, article 23 of the Statute of the Court of Justice allows the Commission to lodge 'observations' in preliminary reference procedures. The Commission is the only EU institution that regularly makes use of this possibility. In fact, it lodges observations in *all* preliminary reference procedures. Member states have the same prerogative, but only intermittently do so, and mostly when refer-

ences originate within their own legal system. Where they do, such proceedings take on the character of a dispute centered on an interpretation of policy that goes far beyond the individual case at hand (cf. de la Mare and Donnelly 2011: 380). Well argued observations can thus have an impact on the judgement, and since rulings have universal effect and often contain far reaching principles, can exert a valuable influence on policy development. In this vein, both the development of direct effect and supremacy of EU law had been suggested to the Court by Commission lawyers in the respective landmark cases (cf. Stein 1981: 24-26). Because of these characteristics, such observations can fruitfully be compared to 'amicus curiae' briefs in the US-American judicial system (cf. Spriggs and Wahlbeck 1997; Nicholson and Collins 2007; Collins 2008).

Very little public information is available as to the internal workings of the Commission with regard to the observations lodged in preliminary reference procedures. From what I could learn from an interview with a Legal Service official[27], the formulation of an intervention takes place at a low level within the Commission hierarchy, with mainly the responsible Directorate General (DG) and the Legal Service involved. The Legal Service acts as gatekeeper in this context. The Court forwards all new cases to the Legal Service, who in turn distributes them to the concerned DGs. The DG then formulates a legal opinion to be lodged before the Court by the Legal Service. This opinion is usually drafted at a low level by the responsible official assigned to the case, in some cases in consultation with the respective Head of Unit. The political level within the Commission (Cabinets and Commissioners) is not formally involved in this process. The opinion is returned to the Legal Service, who exclusively handles all interaction with the Court. While this process mostly in-

[27] Interview with Legal Service official, Brussels, 16.4.2008.

volves little friction, it is the Legal Service who has the final say on legal interpretations, being able to override DG opinions. This is particularly relevant in politically sensitive cases, bearing in mind that the Legal Service is formally under the leadership of the Commission president.

Commission success before the Court

The ability of the Commission to influence policy-production through the judicial system of course hinges on its ability to influence the outcomes of Court rulings. Empirical studies on the outcome of proceedings before the Court of Justice have repeatedly demonstrated a high rate of success for the Commission (cf. Conant 2007: 53). For the case of infringement proceedings, Schepel and Blankenburg comment that "its success rate is so high as to make the ECJ look like a kangaroo court – being the baby in the pouch of the mother, it has to follow wherever the Commission goes" (Schepel and Blankenburg 2001: 18). Corroborating this bold statement, Tanja Börzel finds that between 1978 and 1999, the Commission won 95% of the infringement cases that reached a ruling by the Court (Börzel 2006: 133). This is certainly due to the Commission's discretion which cases to pursue, where unpromising cases are settled before they reach the Court (cf. Ehlermann 1981: 139).[28] A similar success rate, however, appears to hold for the outcomes of rulings on preliminary references (cf. Stone Sweet 2010: 21; Stone Sweet and Brunell 2012: 212). The Court has been found to follow the Commission's legal opinion in a similarly large majority of such cases in constitutional politics (cf. Stein 1981: 25) and the policy fields of environmental protection (cf. Cichowski 1998: 397) and gender equality (cf. Cichowski 2004: 499).

[28] "Die Kommission greift im übrigen nur Fälle auf, in denen ihr das Risiko des Unterliegens vor dem Gerichtshof gering erscheint" (Ehlermann 1981: 139).

This success is not all that easy to explain. Most observers point to an assumed congruity of preferences (ostensibly for 'more integration') between the Commission and the Court. There have been very few empirical tests of this assumption. Unlike in the judicial system of the United States, where an extensive literature on judicial preferences exist, judges at the Court of Justice, as I have mentioned, do not publish their 'votes', and there are no 'dissenting opinions' to a judgement, making it very hard to gauge individual judges' policy preferences (cf. Stone Sweet 2010: 25; Kelemen and Schmidt 2012: 2). Michael Malecki's promising attempt to disaggregate the Court of Justice's preferences by looking at individual chamber decisions goes some ways towards solving this problem, but the dimension of preferences he analyses is not independent of the Commission. Rather, his point of reference is the 'pro-Commission' orientation of the judges, used as a proxy for 'pro-integration'. He, too, finds evidence that the Commission is much more successful than other actors before the Court, but the success rate differs with chamber composition: "In the data at hand, the most 'anti-Commission' judge signed his name to pro-Commission judgements 72 per cent of the time" (Malecki 2012: 60). While this yields somewhat more nuanced results as to the preferences of individual judges, it still does not tell us if deciding for the Commission is evidence of shared preferences.

Some explanations for the Commission's success point to processes of socialisation, particularly in the early years of European integration, where the personnel of European institutions had been recruited from a small elite pool of individuals with many common characteristics. As Antonin Cohen's study of the social background of European judges and High Authority officials demonstrates, "the members of the early ECJ had a lot in common with the members of the High Authority of the ECSC or the Commission of the EEC" (Cohen 2008: 6). Antonio Trabucchi for example, Italian judge from 1962-1972, had previously been director of the High

Authority's legal service (cf. Cohen 2008: 7). Karen Alter, moreover, points to the establishment of 'Euro-law' associations in the 1950s and 1960s that promoted a unified view of how European legal integration should proceed, centered on the "commitment to the larger objective to European integration" (Alter 2009: 66). These associations constituted a "largely homogenous 'policy community'" of legal experts that were active both in the Commission and at the Court of Justice (Alter 2009: 67-68).

While these findings are certainly intriguing for the early period of European integration, this state of affairs has seen considerable change over time. The increasing prominence of EU law in legal training has elevated EU lawyers from the margins of the legal profession; it is consequently no longer accurate to talk of an isolated and like-minded group. Also, Cohen's study indicates a countervailing tendency in the recruitment of judges and Commission officials in recent times. Whereas Commissioners increasingly come from a background in high profile politics, appointments to the Court have increasingly gone to members of academia (cf. Cohen 2008: 12). Moreover, the argument of ideological congruity becomes even less straightforward when looking at issues that do not fit neatly in the 'more or less integration' spectrum. Much internal market regulation cannot easily be subsumed by this dichotomy. The bias of many related Court rulings is towards facilitating internal market transactions (as in the case of the expanding logic of 'mutual recognition'), not necessarily towards enhancing the powers of supranational institutions. Finally, many issues of recent salience do not immediately touch upon market integration per se, but involve much more nuanced issues of non-discrimination and individual rights, such as the cases concerning EU citizenship, gender equality and age discrimination (cf. Scharpf 2012: 131-133).

Another approach at explaining Commission success is to assume strategic behaviour on the part of the Court. In aligning itself with the Commission position, the Court may expect a greater acceptance and impact on the actual implementation of its rulings on behalf of member state governments (cf. Stein 1981: 24). The reach of the Commission in this regard, however, is limited, and its enforcement powers in turn hinge on its ability to resort to Court proceedings. This of course leads to a somewhat circular argument.

With the limited means available to test the assumption of congruous preferences, the most promising explanation rests on insights derived from the study of judicial politics in the United States that do not take account of the concrete preferences of actors involved (cf. Conant 2007: 53). This explanation focuses on the Commission's position as the single most frequent litigator before the Court of Justice, and the consequent body of expertise the Commission has amassed over time, coupled with the resources the Commission has at its disposal in pursuing legal action. The 'Legal Service' as the Commission's 'law firm' employs roughly 350 staff, many of them legal experts covering all policy areas within the Commission's competences. Even where governments dispose of a specialised legal branch (such as the Austrian 'Verfassungsdienst'), the Commission outnumbers (in terms of personnel) the resources at the disposal of member states. Both expertise (as a function of the frequency of litigation) and resources have been shown to be the prime predictors of success in court proceedings (cf. McGuire 1998: 522-523).
Being a frequent and resourceful litigator with comparatively little vested interest in the immediate outcome of each individual case bears another advantage. Marc Galanter has described such entities as "repeat players" (cf. Galanter 1974: 97) who enjoy considerable advantages over those actors that rarely interact with the court system (so called "one-shotters"). Repeat players can pursue decidedly different le-

gal strategies than one-shotters: "Because his stakes in the immediate outcome are high and because by definition OS [one-shotter] is unconcerned with the outcome of similar litigation in the future, OS will have little interest in that element of the outcome which might influence the disposition of the decision-maker next time around. For the RP [repeat player], on the other hand, anything that will favorably influence the outcomes of future cases is a worthwhile result" (Galanter 1974: 100). Repeat players can invest their resources in long term strategies that "play for the rules" (Galanter 1974: 103). Lawyers in particular have been alert to the Commission's potential to pursue such 'rule gain': "By virtue of its position and expertise it is the ultimate 'repeat player' in Community litigation. Consequently, the Commission can use litigation as an element in developing longer-term strategies. Instead of simply winning individual cases, it is able to concentrate on establishing basic principles or playing for the rules" (Snyder 1993: 30-31). Richard Rawlings pursues a similar line of argumentation: "the Commission can seek, via 'test-casing', to establish basic principles and 'play for the rules' " (Rawlings 2000: 10). Conversely, the Commission has the ability to stay clear of sensitive areas where it sees little chance of achieving its goals (cf. Rawlings 2000: 10). In the absence of empirical evidence on preference congruity between the judges and the Commission, this explanation appears as the more parsimonious approach that allows me to treat decision-making among judges as a 'black-box'.

Summary

Given that the Commission enjoys a very high success rate no matter the form of the procedure, judicial proceedings present a viable channel for the Commission to influence policy. Since actions for annulment or failure to act are only rarely pursued by the Commission, its main judicial strategies consist of initiating infringement proceedings and lodging ob-

servations in preliminary references. The obvious disadvantage of preliminary rulings as a policy tool for the Commission is its lack of control over the process. The Commission has considerable discretion which cases to pursue in infringement proceedings and when, whereas it has no formal means of influencing the timing and the content of preliminary references. The occurrence of such proceedings is substantially affected by several factors: individual rights of standing for individuals before national courts, which vary between member states and subject matters, the interests pursued by individual litigants, and the willingness of national judges to refer questions to the Court of Justice. All of these factors lie largely outside the control of the Commission.

Executive policy-making powers

As opposed to judicial strategies, the Commission's executive policy-making powers allow it to autonomously set policies in certain areas, without other institutions as intermediaries. Member state governments, both as High Contracting Parties in intergovernmental conferences and as members of the Council have delegated a number of direct and sometimes unilateral policy-making powers to the Commission in several closely circumscribed but significant policy areas.
The Treaty text itself allows for some but very few primary law-making powers. For instance, the Commission directly regulates the conditions under which migrant workers enjoy the right "to remain in the territory of a member state after having been employed in that state" (art. 45(3)(d) TFEU). The most extensive of these competences have been delegated in the area of competition policy, where the Commission is centrally responsible for prosecuting anti-competitive behaviour of cartels and monopolies (including the special case of public utilities, or services of general economic interest), authorising mergers and acquisitions of private compa-

nies and regulating state subsidies ('aid') to industry. While the Treaty explicitly prescribes a strong role for the Commission in the competition policy regime (cf. Maher 2011: 724), its powers are mostly assigned through acts of secondary law (with only marginal involvement of the European Parliament through the consultation procedure), the earliest of which dates back to the early 1960s.

As is the case with all Commission legal acts, decisions in the realm of competition are taken by the College of Commissioners, allowing for a certain degree of political contestation (cf. Maher 2011: 728). The central actors within the Commission hierarchy, however, are officials within the directorate general responsible for competition, although there is frequent demand for horizontal coordination with other DGs, in particular those responsible for the internal market and industry (cf. Wilks 2010: 149). Commission action in the competition field is based on either its own investigations or third party intervention, such as complaints by individual competitors or 'confessions' by transgressors seeking to evade large penalties (cf. Chalmers, Davies et al. 2010: 924). The Commission enjoys wide discretion as to which cases it pursues. Once a decision for action has been reached, the individual case is mostly in the hands of the rapporteur in the competition DG (cf. Wilk 2002: 148).

Somewhat paradoxically, the Commission's capacity for autonomous action is greatest in an area that is of central concern for member state governments: the regulation of anti-competitive behaviour of public utilities, or services of general economic interest. These are typically either publicly owned monopolies, or privately held undertakings that have been officially granted monopolies, or near monopolies, in large 'network' industries such as telecommunication, postal services, energy or public transport. Here, article 106(3) TFEU stipulates that the Commission "shall, where necessary, address appropriate directives or decisions to Member

States" to prevent or rectify unjustified distortions of market competition, granting it direct and unilateral law-making powers (cf. Usher 2006: 114; Chalmers, Davies et al. 2010: 1022). The Commission has only rarely made use of this provision, relying instead on the initiation of legislation under the internal market clause (now employing the ordinary legislative procedure, art. 114 TFEU), although its ability to take recourse to unilateral action has increased its bargaining position vis-à-vis its interlocutors (Schmidt 1998: 301-332; cf. Chalmers, Davies et al. 2010: 1039; Maher 2011: 718-719).
At the same time, its capacity for autonomous action is comparatively weak in relation to the regulation of state aid. The procedure of finding state aid incompatible with Treaty objectives is somewhat akin to an abrogated infringement procedure. If the Commission finds that subsidies granted to industry by a member state distort competition and are not justifiable by one of the exemptions listed in the Treaty, it issues a decision stating the course of action to be taken by the member state. Should the member state not comply, the Commission can refer the matter to the European Court of Justice directly, bypassing the procedures otherwise required for prosecuting Treaty infringements (art. 108(2) TFEU). The Court will not engage in a substantive review of the Commission's decision (i.e. judge whether the state aid in question indeed runs counter to Treaty obligations), but rather concentrate on procedural issues of how the decision was reached and what information was taken into account (cf. Craig and de Búrca 2011: 1085). However, the Council can unanimously decide to find any given measure compatible with the Treaty, in effect overriding the Commission's authority to decide which measures comply. Moreover, the Council can decide to add exemptions to those listed in article 107 TFEU – by qualitative majority when acting on a proposal of the Commission, unanimously when altering that proposal. Up until 1999 all Commission action in state aid cases was based on the primary Treaty articles. After that

point the procedure was based on secondary law, mainly in an effort to codify existing case-law (cf. Grespan 2008: 553). The most prominent of the Commission's executive powers in competition policy is with regard to the anti-competitive behaviour of private parties. Here, the Commission has been delegated – by acts of secondary law – extensive investigative authority, including so called 'dawn raids' – in situ inspections seeking to reveal information about alleged market-distorting cartels or abuses of dominant market positions. Once sufficient evidence of an infringement has been obtained, the Commission stages a hearing with the accused party in front of a Hearing Officer, who is himself a Commission official reporting directly to the Commissioner responsible for competition policy (cf. Chalmers, Davies et al. 2010: 931). Should the Commission decide to pursue the infringement, the College will issue a decision at this point outlining the action to be taken by the private party to end the anti-competitive practice in question and, where appropriate, a penalty in the form of fines, or, more drastically, in the form of 'structural remedies', including the break-up of companies into smaller sub-units (cf. Chalmers, Davies et al. 2010: 932-933).[29] This decision is subject to a special form of the 'advisory procedure' in the EU's system of comitology (more on that below), where the draft decision is reviewed by an advisory committee consisting of members of national competition authorities. The College is required to take the 'utmost account' of this review but is not legally bound to follow its recommendations (cf. Chalmers, Davies et al. 2010: 931).

As with many aspects of the single market agenda, the Commission's formulation and enforcement of competition policy has been subject to significant change over time, despite relatively little change in the Treaty text (cf. Maher 2011: 725). The Commission only started to intervene in state regulation

[29] This 'nuclear option' has in fact never been employed (cf. (cf. Wilks 2010: 141).

of the market (either in form of monopolies granted to public utilities or direct aid to industry) in the course of the Single European Market programme, when the general economic preferences of most actors where predisposed towards less state intervention – although conflict doubtlessly ensued. Merger control moreover was only introduced in 1989 by way of legislation, whereas the Commission's powers to regulate cartels and monopolies at that stage had been in operation for almost three decades. More recent reform, however, curtails the Commission's autonomy by delegating more decision-making powers to national competition agencies (cf. Hix and Høyland 2010: 198).

In addition to the competition regime, EU legislation may confer upon the Commission the "power to adopt non-legislative acts to supplement or amend certain non-essential elements of the legislative act" (art. 290(1) TFEU). While the Treaty calls these acts "non-legislative", they are of a clearly legal nature. The delegation of decision-making powers to the Commission by way of secondary law is widespread throughout all policy areas, particularly those involving the distribution of funds (such as cohesion and research), as well as agriculture and fisheries (cf. Chalmers, Davies et al. 2010: 59-60). In this regard, the Commission regularly issues agricultural quotas, dispenses money to regions through structural funds and grants research funding to public and private institutions without formal legislative involvement of the Council and the Parliament. As the Treaty outlines, these delegated acts are confined to "non-essential" issues, although of course this is hard to define in practice.
All of these delegated powers however come "with strings attached" (Pedler and Bradley 2006: 240). The Commission's discretion, and hence its capacity for independent action, is significantly curbed by the procedures foreseen in the EU's protracted system of oversight committees, referred to as 'comitology', and its successor regime since the entry into

force of the Treaty of Lisbon. Comitology committees consist of delegates of all member states (usually government officials with relevant technical expertise), voting by qualified majority. They are chaired by a member of the Commission, usually from the unit most closely involved with the relevant act. Developed outside the primary Treaty basis, the comitology system had long been exceedingly complex, with new procedures introduced on an ad hoc basis (cf. Pedler and Bradley 2006: 241). Subsequent reforms had by 2006 brought the number of alternative procedures down to four – with a major revision in progress since the entry into force of the Treaty of Lisbon. Each procedure afforded the Commission a varying degree of discretion in adopting implementing decisions.

The advisory procedure granted the Commission the widest autonomy in adopting implementing decisions. While the Commission had to consult the committee in question (and give 'utmost account' to its opinion), its advice was not binding and could in effect be ignored (cf. Pedler and Bradley 2006: 243). In the management procedure, the committee retained a form of veto over the measures proposed by the Commission, in so far as it could decide to refer the matter to the Council, which may, by qualitative majority, "take a different decision" (Decision 1999/468, art. 4(4)). This form of oversight was heightened in the regulatory procedure, where the committee had to agree to a proposed measure before the measure could take effect. In case such agreement was not reached, the matter was again referred to the Council, which could reach a different decision by qualitative majority. (The Parliament also had an opportunity to voice its opposition to the draft to the Council.) If the Council failed to reach a decision, however, the proposed measure took effect – this provision in effect rendered the regulatory somewhat akin to the management procedure (cf. Chalmers, Davies et al. 2010: 119). The European Parliament gained veto power over Commission measures in the infrequently used 'regulatory

procedure with scrutiny', where both Parliament and the Council (by qualitative majority) could oppose a measure even where the committee had voiced its support.
In practice, very few Commission proposals were vetoed by the committees, regardless of the procedure, suggesting that the formal rules did not greatly influence the day-to-day working of the system, which has been characterised as highly deliberative and consensual (cf. Joerges and Neyer 1997: 620). Nonetheless, and despite the fact that guidelines existed as to which comitology procedure was to be used in which policy context, Commission, Council and Parliament frequently disagreed about the procedure to be used, each with a clear bias towards the procedure affording it the greatest formal powers. This indicates that formal rules are not irrelevant.

As described above, the Treaty on the Functioning of the European Union introduces a novel hierarchy of legal acts, distinguishing between primary "legislative acts" and secondary so-called "delegated" and "implementing" acts. These secondary acts are subject to novel oversight procedures, the contours of which are only beginning to take shape. In the case of delegated acts, article 290(2) TFEU stipulates that the European Parliament (alongside, but independent of the Council) will have general powers of veto over Commission measures, including the possibility to revoke the act of delegation altogether. Implementing acts on the other hand will continue to be subject to "mechanisms for *control by Member States* of the Commission's exercise of implementing powers" (art. 291(3) TFEU, my emphasis). This suggests that an adapted form of comitology will remain in effect for implementing acts, but it is unclear how far it will apply to delegated acts (cf. Chalmers, Davies et al. 2010: 121-122; Craig and de Búrca 2011: 136). The absence of specialised oversight committees for delegated acts would likely strain both the Council's and the Parliament's ability to effectively exercise

scrutiny, whereas the installation of such committees would somewhat defeat the purpose of reform (cf. Craig 2011a: 675; Craig and de Búrca 2011: 138-139). Moreover, while the Treaty requires the nature of the act to be stated in its heading, the authors refrain from defining what differentiates the one from the other. Since the applicable comitology procedure is already a subject of contestation between the institutions involved, it is reasonable to expect this distinction to become another source of conflict (cf. Chalmers, Davies et al. 2010: 100-101; Craig and de Búrca 2011: 117). The outlines of the new comitology system pursuant to article 291(3) have recently been laid down in regulation 182/2011. The most important innovation is the elimination of referral to the Council. While the advisory procedure becomes the default procedure, committees operating under the only other procedure, the examination procedure, will in future have final veto power over Commission proposals, subject to appeal to a newly installed appeal committee. While this ostensibly simplifies the protracted comitology system, the existence of various qualifications and derogations leads some commentators to question whether, apart from changing procedures, the new system in fact offers much in the way of novelty (cf. Craig 2011a: 684).

Summary

Member state governments, through both primary and secondary law, have delegated to the Commission wide ranging executive authority in some select policy areas. Most prominent among these is competition policy, where the Commission can unilaterally regulate the exercise of monopoly power by public utilities, intervene in cases concerning state subsidies to industry, and authorise or prevent mergers and acquisitions of private companies. The Council and the European Parliament can also delegate implementing powers to the Commission by means of legislation in a wide range of

policy fields. The exercise of such powers by the Commission, however, is usually confined to 'non-essential' aspects of legislation and is subject to various oversight procedures on the part of the Council and member state governments.

3.5 Comparing the Commission's position in the three policy modes

The literature focussing on the Commission's position in European Union politics has created, with varying emphasis, a wealth of information about the workings of each of the described policy modes. What is lacking to some degree is a more circumspect perspective that encompasses the whole policy cycle, from the identification of salient issue areas and the formulation of action plans and the like, through to legislation, adjudication and executive action. Methodologically, this would naturally be a very ambitious undertaking. The factors influencing the outcome along the way are myriad, and the process is often circular. What I attempt to do is isolate an aspect of the policy cycle without regressing to an analysis of single policy modes. I focus on the interaction between two policy modes that I find to be most universally applicable for the widest range of policies – legislation and litigation.

While there is a lot to learn about the intergovernmental mode, the Commission ability to influence outcomes is strictly limited. Conversely, the Commission's capacity to autonomously set policy is certainly greatest in the areas where it has been delegated extensive executive authority, but these areas are closely circumscribed. Susanne Schmidt and Lisa Conant both describe how the Commission has been able to use its executive authority as competition 'watchdog' to work towards a liberalisation of the European telecommunications and electricity markets (Schmidt 1998; Conant 2002). Throughout the 1980s and 1990s, the Commission

gradually asserted its ability to issue directives abolishing state-owned or publicly supported monopolies in these sectors. Susanne Schmidt in particular argued that the Commission was able to exert pressure on the Council to pass liberalising legislation by threatening unilateral action that would adversely alter the status quo of legislation (Schmidt 1998: 323-329). Challenges to its authority did not find the support of the European Court of Justice (cf. Conant 2002: 103). The wider policy impact of this mode of policy-making is essentially restricted to opening up markets to competition that had so far been dominated by state-run or quasi state-owned public utilities. Large as the impact of that policy may be, particularly in the energy and telecommunications sector, there is little the Commission can do in this fashion if the market in question is not dominated by a single actor (or a small conglomeration of actors). Other executive powers derive from secondary law and usually deal with implementing measures that leave little leeway in developing policy more generally.

In pursuing legislation and litigation on the other hand, the Commission does not face these constraints. The content of legislative initiatives are limited only by the principle of conferral (art. 5(2) TEU) and the principle of subsidiarity (art. 5(3) TEU), but these checks are modest. The European Treaties contain various far reaching 'flexibility clauses', in particular article 352 TFEU, which allows for legislation necessary "to attain one of the objectives set out in the Treaties". This very generous phrasing sets few constraints on Union legislative competences (cf. Craig and de Búrca 2011: 90). Moreover, article 114 TFEU allows for a broad scope in harmonizing member state laws where the subject matter pertains to the internal market. Similarly, the Commission can only litigate where there is an existing piece or principle of European law that it can base its claims on, but both Treaties and secondary law provide a wealth of possible grounds for

litigation, and the Court has certainly not shied away from endorsing novel principles that had theretofore nowhere been codified.

In this vein, I can formulate a scope condition for the subject of my study. Specifically, I focus on actions by the European Commission that a) have a policy content, b) result in norms that are enforceable within the legal system of the EU and c) are either a legislative act within the meaning of article 289(3) TFEU or a procedure before the European Court of Justice.

Based on these considerations, I will present arguments as to the Commission's default strategy, and propose a number of specific hypotheses about the factors influencing the Commission's subsequent choice of strategy in the following chapter. Chapter 4, moreover, includes a statistical test of these propositions, while chapters 5 and 6 provide further empirical material in the form of two longitudinal case studies.

Chapter 4

Predicting strategy choice

The following chapter proceeds in four steps. The first section presents arguments as to the Commission's likely default strategy (4.1). Based on these assumptions, I develop a series of hypotheses about the factors influencing the Commission's choice of strategy between legislative initiatives and infringement proceedings (4.2). I then present the data I use to statistically test these hypotheses and outline the central characteristics of the dataset (4.3). The final section (4.4) discusses the results of the statistical test and their implications for the case studies presented in chapters 5 and 6.

4.1 A default strategy

Legislation and litigation are near universal tools for producing EU policy. It is not surprising that the Commission jealously guards both its monopoly on legislative initiatives and its discretion in prosecuting infringements (for the latter: Smith 2008: 42-43). As I have shown, the Commission's position in legislation varies with legislative procedure, in particular with the applicable voting rule in the Council and the European Parliament's variable veto powers. Within the judicial sphere, its ability to influence policy development does not significantly differ between the various procedures. However, the Commission has no control over the occurrence of preliminary references and can only dock onto subject matters arising from domestic disputes. In comparison, its position in infringement proceedings is independent of

other actors.[30] Much like its monopoly of initiative, the Commission has extensive control over timing and content of cases it wishes to refer to the Court.

Should we expect a relationship between the Commission's use of legislative initiatives and infringement proceedings? Given its substantial success rate before the Court of Justice, might it not be reasonable to expect the Commission to take resort to infringement proceedings wherever it can, irrespective and independent of its legislative activity? I argue that three considerations suggest that this is not so. They touch on issues of legal certainty, the possibility for policy innovation, and standards of legitimacy.

First, while the result of court cases may be far reaching, and while the Commission has a good track record of convincing the Court of its position, the process is nonetheless subject to some uncertainty. Judicial formalism allows for no bargaining between the parties, and the result is a tableau of 'take it or leave it' measures with no room for compromise. The risk of an unfavourable outcome can therefore not be minimised. Moreover, case law for the most part constitutes an incremental piecemeal process that "clearly gives actors limited guidance on existing regulatory requirements" (Schmidt 2011b: 43). "Case-law is fragmentary, incomplete and ultimately unstable" (Schmidt 2011a: 46). Court cases, moreover, are time-consuming. It can take years between the Commission's referral of a case to the Court of Justice and the final ruling. Finally, the impact of a court ruling can be 'contained' by member state governments by ignoring wider ramifications and restricting the implications to the case at hand (cf. Conant 2002: 32).

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[30] The same holds true for actions for annulment and failure to act, but these procedures only make up a very small subset of judicial proceedings in the European Union. I will therefore not pursue them further.

It can also be argued that legislation is a more flexible tool for policy innovation than litigation. After all, litigation has to have a basis in existing law, whereas legislation can create laws in areas that had priorly not been regulated. This argument should however not be overstated. The principle of conferral restricts the EU institution's ability to legislate beyond the competences delineated in primary treaty law. At the same time, the Court has frequently developed principles of EU law that had previously not been codified. (The prohibition against age discrimination is a recent prominent example, as are of course the principles of supremacy and direct effect of EU law in the first place.)
Finally, considerations of legitimacy also restrict a unilateral resort to court proceedings to influence policy. Strategic goal-seeking behaviour on the part of the Commission is at least partially constrained by norms of appropriate behaviour, including respect for member state autonomy, subsidiarity and the legitimacy of decision-making.[31] Relying on court rulings alone would inevitably lead to conflict with the legislative institutions. In the medium term, the Commission has an incentive to maintain a "good working relationship" (Nugent 2010: 132-133) with national governments in the Council and the European Parliament, since all cooperation in the EU is reiterative.

Concluding from these considerations, it seems a reasonable premise to assume that legislation is the default choice of strategy for the Commission. This notion of infringement proceedings as an ancillary to the legislative process has first been explored by Susanne Schmidt. In a series of articles, Schmidt looked at the wider consequences of the interplay between legislative and judicial politics, drawing on a wide range of empirical data from internal market policies. She

[31] Such considerations are voiced, e.g., by Claus-Dieter Ehlermann, Director General of the Commission's Legal Service from 1977-1987, and Director General of DG Competition from 1990-1995 (cf. Ehlermann 1981: 137-138).

identified two essential patterns of the Commission's resort to its delegated powers and infringement proceedings in order to apply pressure on Council positions vis-à-vis legislation. Central to this approach is the location of the status quo as a default condition of not passing legislation (cf. Schmidt 2011a: 48). In both scenarios, the Commission introduces a piece of legislation that goes beyond the preferences of the pivotal member of the Council. The first is a strategy she termed "lesser evil", where the Commission threatens litigation that would move the status quo to a position that would make a majority of Council members worse off than the Commission's proposed piece of legislation. She finds instances of this pattern in the areas of energy markets, merger control, road haulage and air transport (cf. Schmidt 2011a: 50-51).
The second pattern, termed "divide and conquer", describes situations in which the Commission, making use of its delegated powers in competition policy or threatening infringement proceedings, targets individual member states (those pivotal in majority voting), altering the default condition for non-action of individual member states rather than the Union as a whole. She identifies this strategy in the liberalisation of ground-handling in airports, gambling and sports betting, and electricity and gas markets (cf. Schmidt 2011a: 52-53).

The question arises whether these patterns form part of a systematic strategy, or represent isolated exceptions. Building on the arguments developed by Schmidt, the remainder of this chapter develops a set of hypotheses about the Commission's use of the infringement procedure and tests these against data on legislation and litigation in the EU. This analysis does not take into account the Commission's use of observations in preliminary references. Although the preliminary reference procedure may constitute a viable channel for policy production, the procedure does not present a 'stra-

tegic' alternative to legislative initiatives – the Commission has no control over their occurrence. While the Commission can intervene in such procedures, it does so unconditionally (it intervenes in all cases before the Court). The Commission's use of observations in preliminary references as a dependent variable therefore does not lend itself to statistical testing.

4.2 Factors influencing the Commission's choice of strategy

I assume that legislation is likely to be the default choice of strategy for the Commission. Initiating infringement proceedings to influence policy should therefore constitute an alternative strategy that it employs when the preferred course of action is unpromising. The Commission's resort to Court proceedings can therefore be seen as a function of its ability to successfully set the agenda in legislation. I assume that the higher the obstacles to successful legislation, the more likely the Commission is to take resort to litigation in form of infringement proceedings. As the literature on agenda setting has demonstrated, the extent of these obstacles are primarily determined by the voting rule in the Council and the involvement of the European Parliament in the legislative process. I can therefore formulate two specific hypotheses:

H1: Increasing obstacles to a successful Council vote (a move from QMV to unanimity) favour the choice of litigation over legislation.

H2: Adding the European Parliament as a veto player in legislation favours the choice of litigation over legislation.

The principal additional factor influencing the likelihood of successful legislation is of course the distribution of prefer-

ences of the actors involved vis-à-vis the status quo. I have included in my data information about the difference in political positions between the Commission on the one hand and the European Parliament and the Council on the other. An adverse distribution of preferences should hinder the adoption of legislation. The following two hypotheses reflect this assumption.

H3: Greater political distance between the Commission and the Council favours the choice of litigation over legislation.

H4: Greater political distance between the Commission and the European Parliament favours the choice of litigation over legislation.

Another good indicator of an adverse distribution of preferences (at least for the members of the Council) is the presence of conflict in Council negotiations. Such conflict prolongs the legislative process and renders its outcome more uncertain. I therefore propose a fifth hypothesis:

H5: A greater degree of conflict in the Council favours the choice of litigation over legislation.

Another proposition concerns the characteristics of the subject matter pursued by the Commission. A number of contributions about the trajectory of legal developments in the EU stress an underlying asymmetry that favours 'market-making' over 'market-correcting' measures (cf. Scharpf 2006: 854). This is not primarily ascribed to the policy preferences of the actors involved in legal proceedings, but rather to an inherent 'pro-market' bias of European law. Following this reasoning, judicial proceedings should promise greater success (and should consequently be favoured by the Commission) if the issue in questions concerns a market-oriented policy rather than an interventionist policy, which is held to

be disadvantaged by European law. The following hypothesis provides a control for this assumption.

H6: The Commission is more likely to favour litigation over legislation if the subject matter pertains to a market-oriented policy field.

Some specific characteristics of the infringement procedure that I have discussed above point to certain patterns in their occurrence that I will need to include controls for. The most important of these is the observation that not all legislative instruments are equally likely to be the subject of an infringement proceeding – directives are clearly overrepresented. This has to do with the necessity for national transposition. Directives formulate policy goals but largely leave it up to member state governments to chose the appropriate mechanism to achieve these goals. Since the late 1970s, the Commission has consistently targeted cases of non-transposition. Moreover, since such transpositions require national implementing laws, the Commission can more easily find fault with such laws than in the case of regulations, which are directly applicable and require no transposition. For this reason I include a controlling hypothesis:

H7: The ratio of litigation to legislation should be higher if the subject matter is dominated by directives as a legislative instrument, regardless of Commission policy intent.

4.3 Data

In order to test these hypotheses I draw on existing data collected for different purposes and aggregate them in a new dataset. The three datasets I draw upon include information on EU legislation (König, Luetgert et al. 2006), litigation (Stone Sweet and Brunell 2007), and the political positions of the actors involved in these processes (Warntjen, Hix et al.

2008). In the following section, I will justify my choice of data source, describe the data in some detail and discuss some of the problems that arose in the construction of my combined dataset.

Legislation

The complexity of legal instruments and decision-making procedures in the EU seems to translate into a problem in record keeping. In fact, no two descriptions of the legislative output of the EU present the same figures, despite the fact that most recur to the same databases (cf. Stone Sweet 2004: 58; König, Luetgert et al. 2006: 555). There are two central explanations for such discrepancies. The first of these involves the definition of what actually constitutes 'legislative' output. Up until the recent Treaty of Lisbon, there had been no legally defined hierarchy of legal norms. As I have described above, legislation, or a 'legislative act', is now defined in formal terms as a legal act adopted by a legislative procedure (art. 289(3) TFEU). All other acts are by definition 'non-legislative' and mainly refer to executive acts carried out by the Commission (art. 290 and 291 TFEU). Some confusion remains as to nomenclature: both legislative and non-legislative acts can take the form of directives, regulations and decisions (as the principal legally binding output of the EU), alongside multiple other instruments of diverse legal character. Conflicting accounts of the EU's legislative output therefore often differ as to what kind of output they actually cover.

The second difficulty in capturing the EU's legislative output lies in the differing purposes of its central databases and the information they record. This information is not always uniform across different entries. Whereas "EUR-Lex"[32], the go-to database for all EU activity, encompasses an exhaustive

[32] eurlex.europa.eu

range of individual documents produced by all EU institutions, both the Commission's "PreLex"[33] and the European Parliament's "Legislative Observatory"[34] database document processes between the Commission, the Council and the European Parliament, resulting for the most part in what is now formally defined as a "legislative act". All databases overlap significantly, but they individually record different characteristics of legal acts and sometimes contain conflicting information.

While the Commission regularly publishes aggregate data on legal output in its annual "General Reports on the Activities of the European Union" (presumably based on either EUR-Lex or PreLex data), there are a number of publicly available datasets that take individual legal acts or processes as their units of analysis (cf. König, Luetgert et al. 2006; Kovats 2010; Häge 2011). Predictably, the information contained in these sets overlaps, but they are not identical. Frank Häge's 2011 European Union Policy-Making (EUPOL) dataset encompasses a vast amount of decision-making procedures that are not captured in the other sets, but he concedes that if research is primarily interested in 'standard' inter-institutional processes such as legislation – as my study is – his dataset might not be useful (Häge 2011: 460). Both Laszlo Kovats' and Tomas König, Brook Luetgert and Tanja Dannwolf's datasets restrict their data collection to inter-institutional procedures that are relevant for my purposes. Figure 4.1 provides an overview of the total amount of Commission legislative initiatives reported in these datasets and compares them to the aggregate data reported by the Commission.

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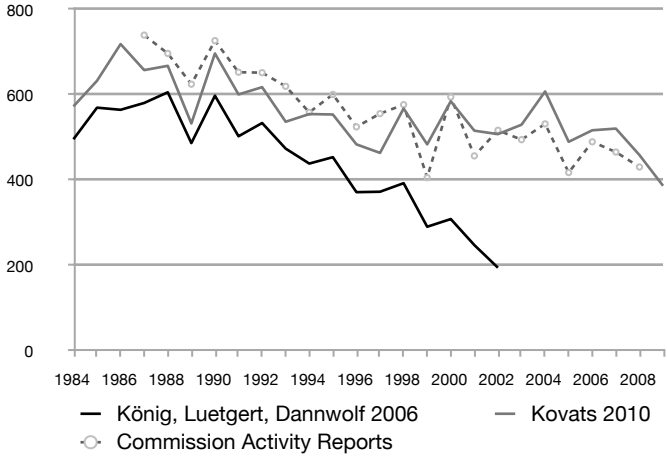
[33] ec.europa.eu/prelex/apcnet.cfm?CL=en

[34] www.europarl.europa.eu/oeil/home/home.do

Figure 4.1 Commission legislative initiatives

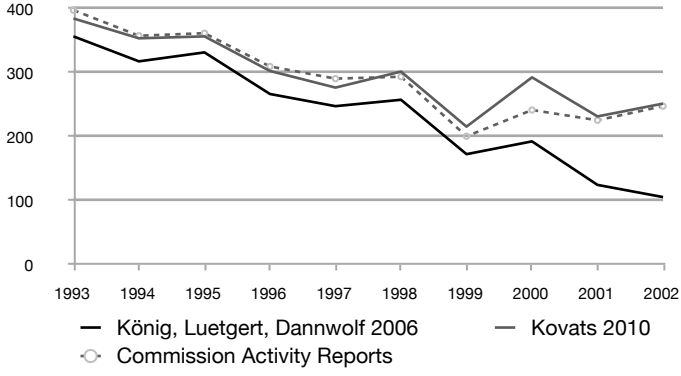


While the trends are similar (a general decline in legislative initiatives), the sources report divergent aggregate numbers. The Kovats dataset, based solely on data derived from the PreLex database, appears to underestimate the total amount of legislative initiatives relative to the Commission reports until about 1998, from which point it appears to slightly overestimate them. The König, Luetgert and Dannwolf dataset consistently underestimates the number of legislative initiatives relative to the other two. The reported trends are consistent with the other data sources, albeit with a slightly widening gap, until about 1999, from which point the reported numbers for Commission initiatives drop off steeply.

The consistently lower reported aggregate figures have several reasons. First, König, Luetgert and Dannwolf combine data from both the PreLex and the EurLex (or rather CELEX, its predecessor) databases. Their last reported data is from February 2003. Only initiatives that can be identified in both databases are retained. Apparently, this merging process excludes a significant amount of pending legislation, explaining the deviation in reported initiatives for the last years of the

dataset. Second, König, Luetgert and Dannwolf employ a restrictive definition of legislative initiatives, reporting only those which are based on a reference to primary treaty law or secondary legislation. This excludes all those initiatives based on other sources, such as accession treaties or international agreements, that are included in the other figures.
A more detailed look at the data reveals that the differences in reported Commission activity mainly pertains to decisions (figure 4.2).[35] The König, Luetgert and Dannwolf dataset only slightly underestimates the amount of legislative initiatives for regulations and directives relative to the other sources – again until about 1999, from which point the reported data deviates for the stated reasons.

Figure 4.2 Commission initiatives for regulations and directives



For the purposes of my study, the dataset published by König, Luetgert and Dannwolf has a number of central advantages over the Kovats dataset that lead me to select theirs for my test. In particular, the detailed coding of the data lends itself more closely to the purposes of testing my hy-

[35] The Commission's General Reports unfortunately do not differentiate between different types of legislation before 1993.

potheses than the data compiled by Kovats. König, Luetgert and Dannwolf have comprehensively coded legislative acts closely corresponding to the current definition of the term (i.e. those acts decided according to a legislative procedure). Since their data are based on a cross-reference of two databases, EUR-Lex (the former CELEX) and PreLex, they contain more detailed information about the date of initiation, type of legislative procedure (outlining the involvement of the European Parliament), voting rule in the Council (based both on the available information in the PreLex database and an additional coding of the treaty basis as indicated in EUR-Lex), policy area, and type of item on the Council agenda (A or B point, indicating the degree of contentiousness of the issue). The other dataset contains a vast amount of missing values for the crucial variables "EP involvement" and "Council voting rule", which would make an empirical test of my hypotheses tenuous at best. This decision, however, has several drawbacks. Most importantly, their data ranges from January 1984 to February 2003, whereas Kovats includes more recent data. As I have shown above, the merging process between the two sources moreover leads them to significantly underestimate legislative initiatives from about 1999. I have therefore decided to further truncate their dataset to end with 1998, which is close to the entry into force of the Treaty of Amsterdam. This of course means that I have no information about the past decade and a half. This disadvantage is made up, in my opinion, by the outlined advantages in the richness of their codings.

Litigation

Finding data on judicial proceedings is somewhat less fraught with difficulty, although for infringement proceedings in particular there are again several sources to choose from. Detailed information on individual cases is again contained in EUR-Lex, which covers documents relating to

judgements, orders and opinions of the courts (the Court of Justice, the General Court and the Civil Service Tribunal) as well as opinions of the advocates general. Similar information can be obtained from the database provided by the Court of Justice itself.[36] The principal other source of information on infringement proceedings is the Commission itself, which annually publishes aggregate data on its use of the infringement procedure in its "Annual Reports on Monitoring the Application of EU Law".[37] Alec Stone Sweet and Thomas Brunell have moreover compiled a publicly available dataset containing all individual infringement proceedings lodged by the Commission before the European Court of Justice from 1958 to 2005, based on data from the Court of Justice (Stone Sweet and Brunell 2007). This latter dataset is particularly useful, since it contains information on individual cases, such as date of referral, defendant, and subject matter. Comparing this dataset with the aggregate data published by the Commission indicates close correspondence, with the slight deviations most likely due to the handling of cases that where withdrawn or joined (figure 4.3).

Note that compared to the declining trend in legislative initiatives, there is a distinct increase in infringement proceedings referred to the Court of Justice after about 1993 – the number of court referrals increases nearly five-fold between 1993 and 2003. This demonstrates that the amount of infringement proceedings brought to the Court of Justice is not just a function of the level of legislative activity, or the total amount of legislative acts in force, which rises continuously over time (cf. Stone Sweet and Brunell 1998: 59).

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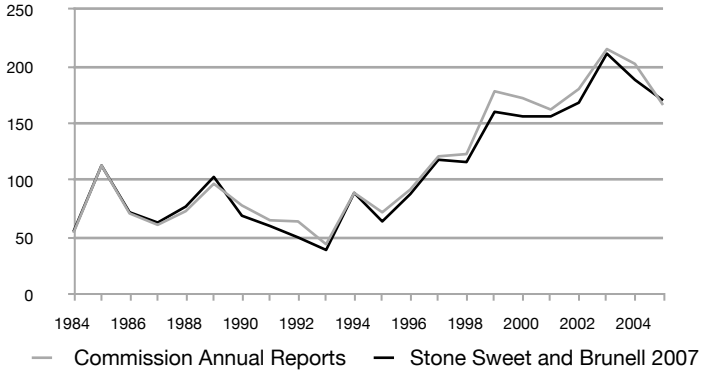
[36] Available at curia.europa.eu.

[37] The Commission also grants selective access to its internal database on infringement proceedings, which is not usually open to the public (cf. Börzel, Hofmann et al. 2012: 456).

Figure 4.3 Infringement proceedings referred to the Court

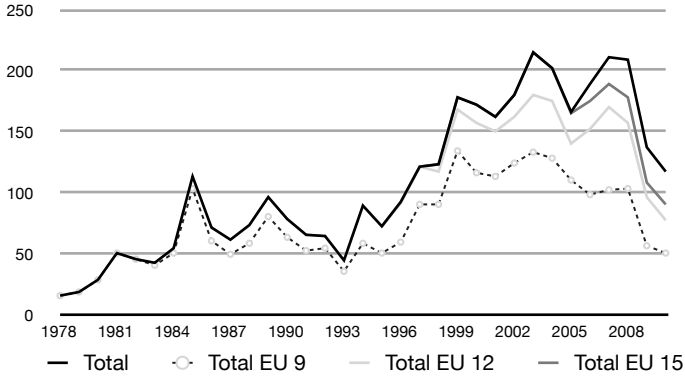


The increase also cannot be explained by reference to enlargement alone. While the increase in member states potentially infringing their legal obligations certainly amplifies the observed trend, the trend also holds when looking solely at the initial nine member states for the period observed (figure 4.4). The variance in court referrals over time must therefore be explained with reference to Commission strategy (cf. Börzel 2001: 820). Note also that the trend reverses dramatically after 2008. This is due to a major revision of the Commission's approach to infringement proceedings (cf. COM 2011/588: 3).

One of the central strategies of the Commission since the late 1970s has been to place particular emphasis on the timely transposition of directives (cf. COM 84/181: 5). Infringement proceedings are routinely initiated when member states fail to notify the transposition of a directive within the prescribed period and are referred to the Court when the member state in questions continues to fail to do so. Figure 4.5 depicts this strategy. From initially (1983, the earliest available datapoint) less than 20 percent of all infringements referred to the Court, non-transposition cases continually increased as a subset of all referrals to reach a ratio of about 80 percent in

1995, to later recede to more or less half of all referred cases between 1998 and now.

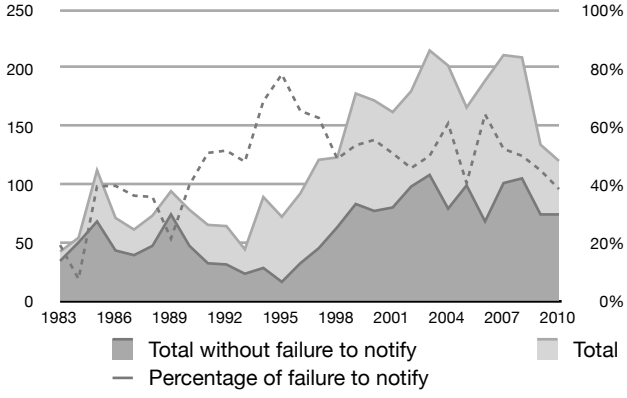
Figure 4.4 Infringement proceedings referred to the Court – by accession round



Source: European Commission "Annual Reports on Monitoring the Application of EU Law".

Non-transposition cases are routine technical cases that do not constitute policy-tools – after all, the policy content of a legal norm is not at issue. Even when discounting these cases, however, the general trend remains robust: a slight decrease in infringement referrals from the early 1980s to 1995 (with two spikes in 1985 and 1989), a continuous increase between 1995 and 2007 (with a brief drop in 2005), and a sharp drop after 2008. This finding underscores the need to take into account the varying prevalence of directives when analysing the relationship between legislation and infringement proceedings. Unfortunately the Stone Sweet and Brunell dataset does not allow me to discriminate between non-transposition cases and those that concern a dispute about policy content. Nonetheless, for the purposes of this study, they offer the most comprehensively coded dataset available.

Figure 4.5 Infringement proceedings referred to the Court – by subject matter



Source: European Commission "Annual Reports on Monitoring the Application of EU Law".

Legislation and litigation combined

In order to test my hypotheses, I have combined data from the König, Luetgert and Dannwolf dataset on legislative initiatives with data from the Stone Sweet and Brunell set on infringement proceedings. The subsequent dataset initially consisted of individual (disaggregated) Commission actions in both modes of policy-making in a period from 1984 to 1998. Observations can either be legislative initiatives or referrals of alleged infringements to the Court of Justice. I coded this variance in type of Commission action as 0 in the case of legislation (or rather, a proposal for legislation), and 1 in the case of litigation (or, more correctly, referring an existing infringement procedure to the European Court of Justice).

In order to investigate a possible systematic relationship between the two modes of policy-making, I needed to establish

common characteristics for both legislation and litigation. Since my hypothesis is that the Commission is more inclined to use litigation when legislation is unlikely to be successful, I needed to find a measure that gauges the legislative obstacles *had the Commission initiated legislation instead of litigation*. If my unit of analysis were to remain the individual Commission choice of action, I would have needed to define values for hypothetical legislative procedural rules corresponding to each case of litigation. However, the information available in the current dataset was not detailed enough to connect an individual infringement procedure to a treaty article that unambiguously mandates a certain legislative voting rule or procedure. In its stead, I defined common characteristics for legislation and litigation at the *level of the wider subject matter*. The assumption is that both legislation and litigation can be grouped into policy fields that broadly share certain characteristics, such as voting rules in the Council and EP veto powers, and that these characteristics have a meaningful impact on the *ratio of litigation to legislation* in these policy fields. My unit of analysis is hence not an individual instance of Commission action, but a policy field over time (i.e. 'policyfield-years').

As with many categorisations based on empirical data, defining which act pertains to what policy field is not as straightforward as one might think. Just take for example standards for motor vehicle emissions: a legislative act or infringement proceeding pertaining to this subject matter touches upon environmental matters, transport, industry, and the internal market. Some coding rule was necessary to decide which policy field is dominant. My combined dataset would have allowed for three such rules. The first is based on so called directory codes used by the Commission to categorise legal acts contained in the EU's "Directory of Legal Acts in Force"[38].

[38] Available at eur-lex.europa.eu/en/legis/latest/index.htm.

The second is based on the Treaty chapter on which the legal act is based. The third is based on the primarily responsible Directorate General (DG) within the Commission. While the latter would have been of particular interest, König, Luetgert and Dannwolf only code the eight DGs responsible for the bulk of legislative initiatives, combining all other DGs under the heading "Others". This unfortunately omits too much information to be truly useful as a coding rule for applicable policy field. The dataset on litigation, moreover, does not contain information on responsible DGs. The other two coding options provide for a more detailed classification of legislative initiatives, but yield somewhat different results. I have opted for a coding rule based on directory codes, because the resulting list of policy areas is more meaningful than that of Treaty chapters. In particular, the directory codes allow me to differentiate between the free movement of workers, services and capital respectively, whereas coding along Treaty chapters would have lumped theses fields together. The same applies to competition, taxation and the approximation of laws, which would have been counted as one policy field according to Treaty chapter.

The resulting list of policy fields contained a number of categories that were of only peripheral interest to my study. Since I am primarily interested in questions of policy-making, I subsequently excluded all areas that do not directly pertain to the policy-making process. These include institutional issues or financial provisions (although these undoubtedly have a secondary policy impact). Also, in order to present a choice of policy-modes to the Commission, policy areas will have to be (in theory) amenable to both legislation and litigation. Matters pertaining to Justice and Home Affairs do not fall in that category for the period observed, and external relations are traditionally not subject to judicial review. In effect, I restricted my analysis to policy areas that are in some way related to the internal market.

A cross-tabulation of the frequency of legislative initiatives by policy fields according to directory code and responsible DG highlights the difficulty of finding a classification of policy fields that would allow for an unambiguous coding of legislative initiatives (table 4.1). Evidently, multiple overlapping competencies among DGs, and the subsequent joint responsibility for legislative proposals make for difficult classification (cf. König, Luetgert et al. 2006: 568). For twelve out of the 14 policy fields, however, the classification by directory code correctly predicts the intuitively corresponding DG as primarily responsible more than half the time.
The notable exception is transport policy – the cases classified as transport policy according to the directory codes appear to have largely been handled by DG Agriculture. DG Industry also turns out to be responsible for just under half of all initiatives coded as "industrial policy and internal market" according to the directory code reported in CELEX. This is due to the fact that this directory code includes all legislation concerning the harmonization of member state product standards, spanning many different subject areas.

On the basis of this tabulation I have coded policy areas according to the categories 'market-oriented' or 'interventionist' to create a variable corresponding to H6 (cf. Hartlapp and Lorenz 2012: 11). I have created a dummy variable that takes on the value 1 if the policy area is market-oriented (customs union & free movement of goods, establishment & services, transport, competition, taxation, free movement of capital, energy, industrial policy & internal market, and undertakings). The variable takes on a value of 0 if the policy area can be classified as 'interventionist' (agriculture, free movement of workers & social policy, regional policy, environment, consumers & health, and science, education and culture). The rationale for this classification is based on categories proposed by Liesbet Hooghe and Fabio Franchino.

Table 4.1: Cross-tabulation of policy field and responsible DG

	Primarily Responsible DG, reduced to largest ones (PreLex)								
Directory Code	DG 01 Trade	DG 03 industry	DG 05 employment	DG 06 agriculture	DG 11 environment	DG 15 market	DG 21 taxation	Others	Total
customs union & free movement of goods	26	21	1	104	0	1	779	299	1,231
agriculture & fisheries	21	28	3	2,195	3	1	12	860	3,123
free movement of workers & social policy	0	4	114	4	3	2	0	50	177
establishment & freedom to provide services	4	15	0	11	2	57	0	11	100
transport	2	15	0	167	2	0	2	22	210
competition	1	0	0	0	0	0	0	21	22
taxation	0	0	0	1	0	10	147	2	160
Economic and monetary union & free movement of capital	3	0	0	0	0	1	0	41	45
energy	2	0	0	36	2	0	0	65	105
industrial policy & internal market	2	172	0	66	18	15	0	106	379
regional policy & coordination of structural instruments	0	0	2	1	0	0	0	24	27
environment, consumers & health protection	2	20	17	12	124	1	3	23	202
science, information, education & culture	0	1	2	14	0	2	1	32	52
law relating to undertaking	0	8	0	1	0	13	0	3	25
Total	63	284	139	2,612	154	103	944	1,559	5,858

Hooghe suggests classifying portfolios within the Commission by their affinity to "European regulated capitalism" (cf. Hooghe 2001: 124-131, 224). Franchino bases his typology on the "substantive dimensions that underlie each policy portfolio" as well as their ideological profiles on a left-right scale, using policy categories suggested by the Comparative Manifesto Project (CMP) (cf. Budge, Klingemann et al. 2001; Franchino 2009: 17). Both of their categorisations of portfolio characteristics conform to my coding.

Table 4.2 tabulates the list of policy fields and the frequency of Commission action in the two policy modes.

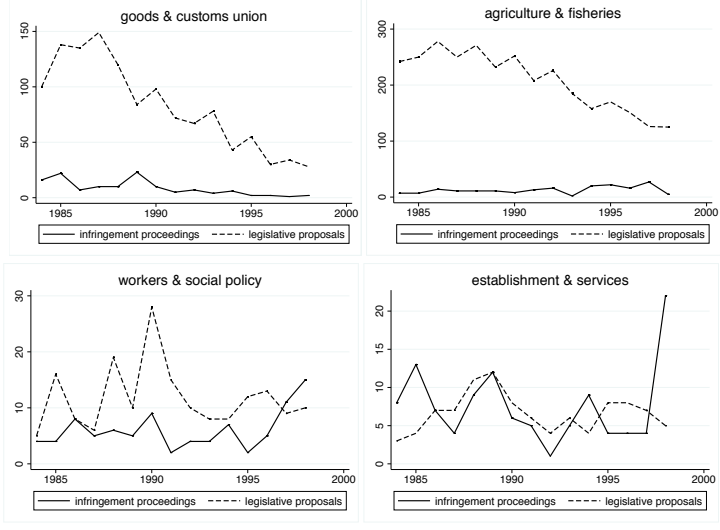
Table 4.2 Type of Commission action by policy field

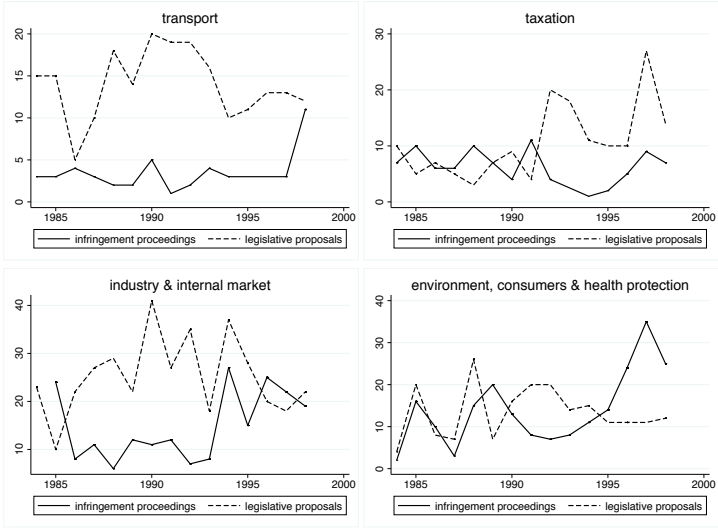
Directory Code	Type of Commission action: legislative proposal	infringement proceeding	Total
Customs union & free movement of goods	1,231	127	1,358
Agriculture & fisheries	3,124	190	3,314
Freedom of movement for workers & social policy	177	91	268
Right of establishment & freedom to provide services	100	113	213
Transport	210	46	256
Competition	22	32	54
Taxation	160	89	249
Economic and monetary union & free movement of capital	45	7	52
Energy	105	1	106
Industrial policy & internal market	379	207	586
Regional policy & coordination of structural instruments	27	0	27
Environment, consumers & health protection	202	211	413
Science, information, education & culture	52	0	52
Law relating to undertakings	25	0	25
Total	5,859	1,114	6,973

Source: Combined datasets (König, Luetgert et al. 2006; Stone Sweet and Brunell 2007).

Some patterns emerge from this simple tabulation. In the period of observation, customs union & free movement of goods and agriculture & fisheries make up the bulk (roughly three quarters) of all legislation, but produce only about a quarter of all infringement proceedings. The ratio of infringement proceedings to legislative initiatives is highest in the areas of competition, environment, consumers & health protection and right of establishment & freedom to provide services, whereas the areas of regional policy, science & education and the law relating to undertakings have produced no infringement proceedings at all. As this tabulation presents the whole of the dataset, it is not sensitive to temporal variation. Figure 4.6 depicts the annual frequency of legislative initiatives and referral of infringement proceedings to the Court of Justice by policy field over time. I restrict this overview to the eight policy fields responsible for the largest share of Commission action.

Figure 4.6 Infringement proceedings referred to the Court and legislative proposals





Source: Combined datasets (König, Luetgert et al. 2006; Stone Sweet and Brunell 2007).

The first two figures show that the amount of legislative initiatives in the fields of free movement of goods & customs union and agriculture & fisheries have declined significantly over the period of observation. As these fields make up the bulk of all legislative initiatives, this trend alone should account for most of the general decline of EU legislation over all. In the case of free movement of goods & customs union, the overall decline coincides with the envisaged completion of the internal market by the early 1990s. The only notable incline in legislative initiatives occurred in the field of taxation, albeit at a comparatively low annual level of initiatives.
Concurrent with the decline in legislative initiatives, the amount of infringement proceedings referred to the court declined in the field of free movement of goods & customs union, whereas all other policy fields show a general increase in referrals towards the end of the period of observation. This uptick in referrals is most notable in the areas of industrial

policy & internal market and environment, consumer & health protection, where the annual frequency has doubled since 1995. A similar increase is notable in the area of freedom of movement for workers & social policy, whereas the significant increases in referrals in the areas of the right of establishment & freedom to provide services and transport policy appear to be outliers.

From the original dataset at the level of individual Commission actions I have generated a 'collapsed' dataset where the individual observations represent policy fields by year. The dataset includes 14 distinct policy areas over 15 years of observation, yielding a possible 14*15=210 observations. Since seven policy field-years contain no Commission action, the total numbers of observations in my dataset is 203. From this information, I have computed a dependent variable equal to the annual ratio of litigation (court referrals) to legislative initiatives for each policy area. This ratio is consequently 0 for years in which no infringement proceedings where referred to the court, 1 where no legislative initiatives where forwarded to Council and Parliament, and between 0 and 1 where both modes of policy-making occurred.

Depicting the annual mean of the dependent variable (across policy areas) on a temporal axis, it becomes apparent that the data contain strong trends. Concurrent to the trends identified above, all else equal, the ratio of litigation to legislation decreases between 1984 and 1992 (with two distinct peaks in 1985 and 1989), and increases steadily thereafter (figure 4.7).

In order to explain the observed variance in the ratio of court referrals to legislative initiatives, I have created a number of independent variables that capture certain characteristics of the individual policy areas according to my hypotheses.

Figure 4.7 Mean of dependent variable over time

Source: Combined datasets (König, Luetgert et al. 2006; Stone Sweet and Brunell 2007).

As stated in hypothesis H1 and H2, I primarily assume that the ratio can be explained by the obstacles to legislation in a certain policy area: the higher the obstacles to successful legislation (from the Commission's point of view), the higher the ratio of court referrals to legislative initiatives. I take these obstacles to be primarily determined by the applicable voting rule in the Council and the participation of the European Parliament in the legislative process. It is impossible to assign, a priori, certain procedural rules to a certain subject matter. Each policy field is governed by multiple procedures, with varying voting rules in the Council and varying involvement of the European Parliament. I have consequently decided to base my variables on the actual use of certain procedures, in effect creating an 'average legislative procedure' for each policy field.

Information on Council voting rules and EP involvement was available in the König, Luetgert and Dannwolf dataset on EU legislative activity. In fact, they use two different sources to code these variables. The first of these is information available in PreLex which directly indicates the voting rule in the

Council and the involvement of the European Parliament. Presumably, this is the most accurate indication of what procedures where actually used in legislation, since they were officially recorded. Unfortunately, this variable contains a large amount of missing values (cf. König, Luetgert et al. 2006: 565). For about half of all legislative initiatives in the dataset, the form of EP participation was not recorded in PreLex. The number of missing values is even higher for the applicable voting rule in the Council – this rule was only recorded in a quarter of all cases. It is not immediately clear whether the cases in which this information was recorded constitute a representative sample of all legislation or whether there is a systematic bias inherent in the recording practice. There is also a clear time trend: the amount of missing values decreases over time. Whereas the Council voting rule was only recorded in 10 percent of all cases for the first four years of the period of observation, this ratio increases to about 40 percent for the final four years. The trend is similar for EP involvement. This indicates that the information recorded in PreLex may be more biased in the early part of the period of observation. König, Luetgert and Dannwolf provide another source of information for the applicable legislative procedure. They individually coded all Treaty articles that served as legal bases for a legislative proposal (as recorded in EUR-Lex) and used the legally prescribed procedure as a proxy. The resulting scores have very few missing values. However, anyone familiar with coding Treaty articles will know that this practice necessarily involves a certain amount of inaccuracy, as the reference to a legal base does not always indicate which procedural variation is referred to. Treaty articles often contain multiple options or various exemptions from a general rule. König, Luetgert and Dannwolf have opted for a 'conservative' coding of the respective variables, where an unclear procedural rule was coded as the highest possible obstacle (unanimity rather than qualitative majority voting, codecision rather than consultation). A cross-

tabulation of the information provided in PreLex and the separate coding effort based on the legal basis shows a number of discrepancies (Table 4.3 and 4.4).

Table 4.3 Information on Council voting rule

PreLex	legal basis (CELEX) missing	QMV	unanimity	Total
missing	385	2,967	1,073	4,425
QMV	41	524 (39%)[39]	132 (10%)	697
unanimity	49	409 (30%)	279 (21%)	737
Total	475	3,900	1,484	5,859

Source: Calculations based on (Stone Sweet and Brunell 2007).

Table 4.4 Information on EP participation

PreLex	legal basis (CELEX) missing	no Veto[40]	Veto	Total
missing	394	2,713	14	3,121
no Veto	79	2,260 (85%)	159 (6%)	2,498
Veto	2	134 (5%)	104 (4%)	240
Total	475	5,107	277	5,859

Source: Calculations based on (Stone Sweet and Brunell 2007).

Where information was available from both sources, the codings agree in 60 percent of cases with regard to the Council voting rule, and 89 percent with regard to EP veto. It appears that the manual coding of the legal basis underestimates the

[39] The percentage in brackets refers to the total amount of cases in the cells where information was available from both sources (QMV-QMV, QMV-unanimity, unanimity-QMV, unanimity-unanimity).

[40] I have coded the cooperation procedure to count as an instance of no EP veto (see below).

use of unanimity in the Council (despite the 'conservative' coding), but for the most part correctly predicts the (lack of) veto powers of the European Parliament. As König, Luetgert and Dannwolf point out: "This suggests that scholars should pay careful attention to the drawbacks of procedural indicators" (König, Luetgert et al. 2006: 565). About 40 percent of the codings for Council voting rule and 11 percent of the codings for EP participation did not match. While the coding of legal bases is more complete, it may at the same time be less reliable, at least when it comes to applicable voting rule in the Council (cf. König, Luetgert et al. 2006: 566-567). In order to escape the ensuing dilemma of having to choose one option over the other, I opted to run my analysis with both options and interpret the results accordingly. I have moreover included a third option, which combines the two available sources, giving precedence to PreLex information and substituting the coded legal basis where the former was missing. This third option may in fact be the most reliable measure available.

Some further recoding was necessary. The variable for Council voting rule in the König, Luetgert and Dannwolf dataset was already dichotomous (qualitative majority voting (QMV) vs. unanimity), but I recoded this variable to take the value 1 when unanimity was required, and 0 when QMV was required. For the participation of the European Parliament in legislative procedures, I created a dummy variable that takes on a value of 1 if the European Parliament has veto powers, and 0 if it does not. I have defined veto powers narrowly to exclude the EP's suspensive veto in the cooperation procedure, in which the Parliament's opinion can ultimately be overruled by a unanimous Council vote. The reasoning is that the EP can only impose costs on the Council in the cooperation procedure if the voting rule stipulates QMV, which is not

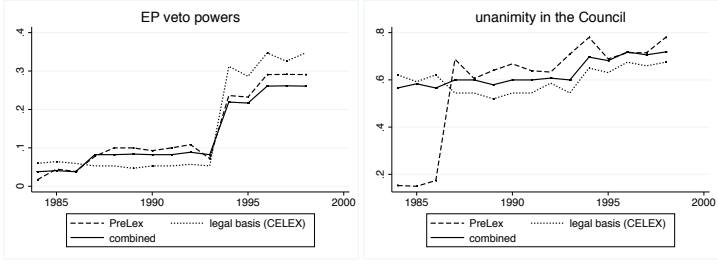
always the case.[41] In effect, both variables take on a value of 1 when the number of veto players rises and procedural hurdles for legislation are consequently high.

In order to calculate an 'average legislative procedure' for each policy field, I used the mean of the actual legislative behaviour of Council and Parliament in individual policy areas. Since I expect this behaviour to vary with the changes in Treaty basis, I calculated this separately for the three time periods governed by different treaties in my period of observation (Treaty of Rome, Single European Act and Treaty of Maastricht). For example, according to the data recorded in PreLex, out of all legislative acts in the area of agriculture under the Maastricht rules, the EP had veto powers in only 3.5% of cases (or 8.8% according to the coding of the legal basis, and 2.7% according to the combined coding). Council voting rules on the other hand stipulated unanimity (as opposed to QMV) in 50.8% of legislative acts (or 23% according to the coding of the legal basis, and 41.9% according to the combined coding). I would subsequently code the corresponding variables as 0.035 and 0.508 respectively for both legislation and litigation in that policy area (or 0.088 and 0.23 for the coding of the legal basis and 0.027 and 0.419 for the combined codes). In this fashion I created (three sets of) two independent variables for average Council voting rules and average EP participation corresponding to the percentage of actual legislative acts employing unanimity in the Council and allowing for EP veto *by policy area and applicable treaty rules*.

[41] Apart from this substantial consideration, there are also large coding discrepancies for the cooperation procedure between the different sources. The manual coding of the legal basis for legislation appears to greatly underestimate the use of the cooperation procedure, coding many cases as "consultation/no EP involvement".

The figures below depict the mean of the two variables *across policy areas* over time – representing an 'average annual legislative procedure'.[42] It is apparent that these variables, too, contain strong time trends.

Figure 4.8 Mean of variables EP veto and Council voting rule over time



Source: calculations based on (König, Luetgert et al. 2006).

As would be expected, both the Single European Act and the Treaty of Maastricht extended the European Parliament's ability to exert veto powers. Since I coded the cooperation procedure, introduced by the Single European Act, as no EP veto, the increase in EP veto powers after 1987 is slight (due, presumably, to a greater prevalence of the assent procedure), whereas the introduction of codecision in Maastricht clearly had a significant impact. Compared to the data recorded in PreLex, the coding of the legal basis appears to slightly underestimate the EP's veto powers before the entry into force of the Treaty of Maastricht and to slightly overestimate it afterwards. This observation is consistent with the cross-

[42] Note that the figures technically depict the mean (across policy fields) of the mean legislative procedure in each policy field, as if each policy field produced the same amount of legislation. This is of course not true – the 'mean procedure' of all actual legislative acts would be greatly skewed towards the procedures applicable in the fields of customs union & free movement of goods and agriculture & fisheries, since they make up three quarters of all legislation.

tabulation of the two codings above, which had shown slight discrepancies.
A different scenario emerges in the data on the use of unanimity in the Council. It appears that for the period before the Single European Act, the data recorded in PreLex shows a clear bias towards QMV. This would indicate that, early on, PreLex tended to record procedures that were extraordinary – in this case qualitative majority voting in the Council. This consideration would suggest that the combined code is likely a better estimate. Note that the importance of the Luxembourg compromise does not show in the data. While PreLex appears to primarily record the few instances of QMV where they did occur before the entry into force of the Single European Act (cf. Hayes-Renshaw and Wallace 1997: 49), the coding of the legal base does not seem to take account of the compromise. Curiously, even when ignoring the pre-SEA period, the data show a slight but constant rise in the use of legislative procedures mandating unanimity in the Council. This is certainly counterintuitive, since both the Single European Act and the Treaty of Maastricht specifically set out to expand majority voting to more policy areas. The information recorded in PreLeX data for the actual use of the opportunity structures provided by the treaty indicates that this did not come about in practice. The trend is still puzzling, since it conflicts with the information presented by Fiona Hayes-Renshaw and Helen Wallace for the period immediately following the one covered above, based on data provided by the Council Secretariat (Hayes-Renshaw and Wallace 2006: 262). From 1999 to 2004, they show legislative acts decided by QMV to outweigh unanimous decisions by a factor of 2:1. I cannot resolve this conflict, but only point to the vagaries of data availability, coding rules and the definition of legislative acts.

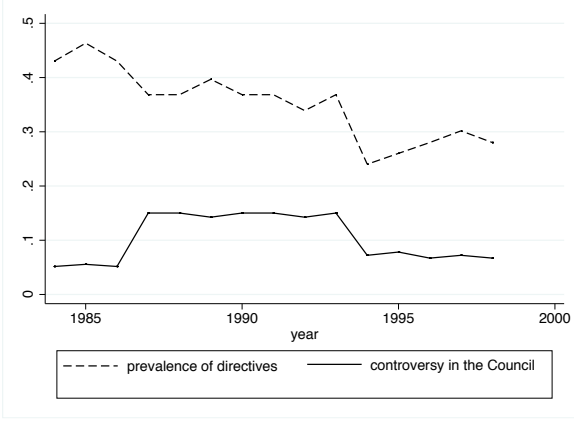
I employed a similar procedure, using policy field averages, to create two further independent variables. The first of these

is an indicator for the degree of conflict in the Council. The König, Luetgert and Dannwolf dataset contains information about the type of agenda item each proposal ends up as in Council meetings, as documented in the Official Journal (cf. König, Luetgert et al. 2006: 561). The agenda for each Council meeting is made up of so-called A points and B points. A points are issues that have been resolved at the level of working groups or the Permanent Representatives and require no further discussion at ministerial level. B points on the contrary designate items that are still contentious where conflict will have to be resolved at the Council meeting itself. The prevalence of B points on the Council agenda is therefore a useful indicator for the degree of conflict within the Council *in a certain policy field*. I created a dummy variable that takes on the value of 1 if a proposal ended up as a B point, and 0 in all other cases (provided the information was not missing). From this information, I created a variable equal to the mean of B points by policy field and applicable treaty rules. Similarly, I created a variable indicating the prevalence of directives as a legislative instrument in a particular policy field. The König, Luetgert and Dannwolf dataset captures Commission initiatives for regulations, directives and decisions. I subsequently created a dummy variable that takes on a value of 1 if the legislative instrument is a directive, and 0 if otherwise. From this, I created a variable equal to the mean of directives by policy area and applicable treaty rules.

Figure 4.9 depicts the mean of these variables across policy areas and over time. The two variables show distinct time trends. Over time, the prevalence of directives as a policy instrument declines across policy fields, whereas the amount

of B points in the Council rises after 1986 and recedes after 1993.[43]

Figure 4.9 Mean of variables controversy and prevalence of directives over time



Source: Calculations based on (König, Luetgert et al. 2006).

Political positions

I used data from a third dataset to create a variable measuring the ideological distance between the Commission, the Council and the European Parliament. Andreas Warntjen, Simon Hix and Christophe Crombez (Warntjen, Hix et al. 2008) have compiled information on the party-political composition of the EU's legislative bodies from 1979 to 2006 and combined this with information on the parties' ideological position based on data from the Comparative Manifesto Project (Budge, Klingemann et al. 2001). This project is a

[43] Again, the figure technically depicts the mean (across policy fields) of the mean use of directives in each policy field, as if each policy field produced the same amount of legislation.The mean prevalence of directives of all actual legislative acts would be greatly skewed towards the procedures applicable in the fields of customs union & free movement of goods and agriculture & fisheries, since they make up three quarters of all legislation.

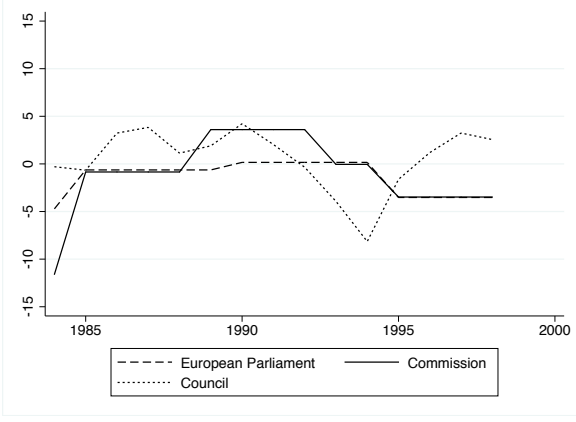
large scale attempt to position political parties in a multi-dimensional political space based on a coding, as the name implies, of party manifestos.
Warntjen, Hix and Crombez' dataset offers two dimensions of ideological positions. One is the 'traditional' left-right dimension, the other a measure of pro- or anti-European leanings. I have chosen to concentrate solely on the left-right dimension for several reasons. First, I find most conflicts over policy at the European level to be better captured by the left-right spectrum than pro- or anti-integration. Second, governments tend to agree that some sort of European solution is preferable to the persistence of national rules. This is reflected in the data that show very little variance on the pro-/anti-European dimension in the period of observation. All three legislative bodies are consistently scored as mildly pro-European, with very little volatility. Third, the CMP data on this dimension appears to be less reliable when compared to other methods of estimating the ideological positions of parties, expert surveys in particular. Scores for positions on the left-right dimension on the other hand correlate highly between the CMP data and data derived from expert surveys (cf. Warntjen, Hix et al. 2008: 1250).

In order to position each of the three legislative bodies on a left-right ideological dimension, Warntjen, Hix and Crombez used the party political background of their constituent members. In the case of the Commission, they used scores for the party each Commissioner belonged to at the national level before his or her nomination, and subsequently calculated an annual mean of all Commissioner's scores.[44] For the Council, they used scores for the party-political composition of national governments. In the case of coalition governments, the scores where weighted by the number of ministerial positions each party holds in government. Since there is

[44] Non party-affiliated Commissioners have been left out of the coding (Warntjen, Hix et al. 2008: 1247).

greater fluctuation in the party-political make-up of the Council (due to frequent national elections), Warntjen, Hix and Crombez calculated a half-yearly mean for the ideological position of the Council (cf. Warntjen, Hix et al. 2008: 1249). Finally, the European Parliament's position was determined by weighting the constituent (national) parties' score by their allocated seats and calculating an annual mean. Figure 4.10 shows the resulting positions of the three legislative bodies over time. A positive score indicates 'rightward' leanings, negative scores the opposite.

Figure 4.10: EU legislative institutions' mean party political position on a left-right scale

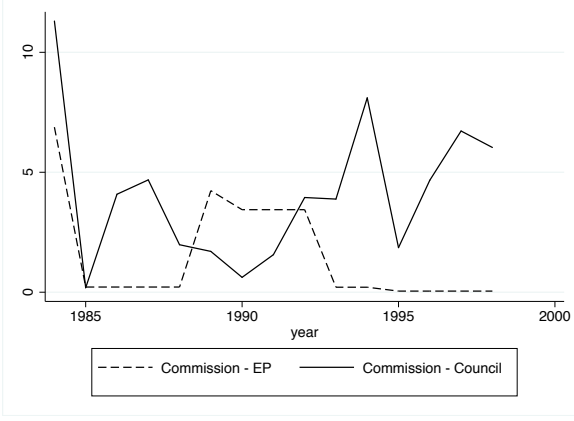


Source: Data based on (Warntjen, Hix et al. 2008).

With the exception of 1984, both the Commission and the European Parliament show very little volatility. The first and third Delors Commissions leant slightly to the left, the second Delors Commission somewhat more pronouncedly to the right, and the Santer Commission about equally pronouncedly to the left. Of the three election periods covered after 1985, the mean score of the European Parliament was largely centrist for two periods, with a more pronounced move to the left after the 1994 elections. Predictably, the scores for the

Council show more volatility. I calculated a yearly mean of the half-yearly scores provided by Warntjen, Hix and Crombez, which slightly understates the magnitude of the oscillation.[45] Overall, I can identify three tentative periods of Council positions: an initial right-leaning period from 1986 to 1991, a generally left-leaning period from 1992 to 1995, and a final right-leaning one from 1996. I subsequently calculated the absolute annual ideological distance between the Commission and the EP, and the Commission and the Council (figure 4.11).

Figure 4.11: Annual absolute ideological distance between EU legislative institutions



Source: Data based on (Warntjen, Hix et al. 2008).

Except for 1984 and the period between 1989 and 1993, the ideological positions of the Commission and the European Parliament largely coincide. The distance between Commission and Council however varies significantly, with the greatest agreement in 1985, between 1988 and 1992 and again in

[45] In particular, this affects a distinct 'rightward' spike in the second half of 1986, and a pronounced right-left-right oscillation from 1988 and 1990. For all other dates, the trends and amplitude of the scores match quite well.

1995. With the exception of 1993, these periods cover the respective years of appointment (1985, 1988, 1995).

Naturally, a number of caveats apply. Taken for granted that the Comparative Manifesto Project provides meaningful scores, it may still be doubtful whether the ideological scoring of an individual's national party-political background is truly a useful indicator of that person's ideological position on the European level, be they Commissioners, members of the European Parliament or government representatives in the Council. It may be assumed that such an indicator correctly reflects general personal inclinations towards policy content, but it may only weakly account for personal positions on specific issues. There is evidence for Commissioners and Parliamentarians in particular that nationality is a better predictor of political positions as party affiliation (for the Commission, cf. Wonka 2008: 1158).[46] Nor does it reflect the process of socialisation and adaptation that comes with a position at the European level – this being applicable mainly to Commissioners and MEPs, but also to situations of collective bargaining in the Council. Moreover, the calculation of a mean for a specific institution may be a crude procedure to locate an aggregate institutional position.

Nonetheless, I find the advantages of this procedure to outweigh its drawbacks. Using means of constituent individuals' positions as an indicator for institutional positions is a relatively straightforward measure compared to more elaborate procedures. Using the pivotal member's position, for example, as is widely employed in spatial analysis, is difficult to apply across the board, since the pivotal member of an institution changes with applicable decision-making rules (e.g. simple or absolute majority in the European Parliament, qualitative majority or unanimity in the Council). Mean-based indicators on the contrary can be generally employed,

[46] It should be noted that since the CMP codes are based on national party manifestos, nationality is at least partially captured.

are reasonably parsimonious and have been shown to produce meaningful results empirically (cf. Warntjen, Hix et al. 2008: 1247). Using manifesto data to position individual actors in political space is also reasonably straightforward and generally replicable. The efforts of the Comparative Manifesto Project have made such data widely available, and there are often very few alternatives. Using individual voting records to establish ideological positions is only possible for roll-call votes in the European Parliament and for a limited amount of Council decisions where such votes have been recorded. Where expert survey data is available, this has been shown to correlate with the CMP data to a large degree (cf. Warntjen, Hix et al. 2008: 1246).

In general I would summarise that the CMP data represents a useful measure to locate an institution's basic ideological leanings – not least for lack of a viable alternative. The described procedure in my opinion produces a generally unbiased if somewhat rough indicator of the potential for inter-institutional conflict over policy content, all else equal. Results will naturally have to be interpreted accordingly.

Table 4.5 Descriptive statistics on all variables in the analysis

Variable	Obs	Mean	Std. Dev.	Min	Max
ratio lit/leg	203	.2245109	.2541377	0	1
Council unanimity (PreLex)	132	.6183941	.2783613	0	1
EP veto (PreLex)	193	.1415545	.2088385	0	1
Council unanimity (legal basis)	203	.5963491	.3176333	0	1
EP veto (legal basis)	203	.1429146	.1977036	0	.8
Council unanimity (combined)	203	.6272621	.2733097	0	1
EP veto (combined)	203	.1267653	.1875563	0	.8
Distance Commission - EP	203	1.538479	2.115594	.0463006	6.8805
Distance Commission - Council	203	4.109474	2.93762	.1862149	11.30278
Controversy in the Council	203	.103824	.083692	0	.25
Prevalence of directives	203	.3519254	.3016992	0	1
market-oriented policy	203	.6502463	.478071	0	1

For an overview, table 4.5 provides descriptive statistics on all variables used in the analysis.

4.4 Results and discussion

My hypotheses predict that the ratio of litigation to legislation should be higher in policy areas characterised by higher obstacles to successful legislation (i.e. where legislation is less likely to pass). I therefore expect the regression coefficients for the variables Council voting rule and EP veto powers to be positive and significant. I moreover expect the coefficient for the variables indicating the absolute distance between the Commission and the Council and the Commission and the EP respectively, as well as the coefficient for the prevalence of B points on the Council agenda (as a proxy for conflict within the Council) to be positive and significant. I also expect the effect for the variable indicating the prevalence of directives to be positive. Since I expect market-oriented policies to produce more litigation, the effect for the dummy variable for market-oriented policies should be positive, too. To test the hypotheses, I ran an OLS regression including dummy variables for the years of the period of observation. These dummy variables act as controls for time trends (they function as time fixed effects). I ran three separate models, each with a different coding base of the two independent variables "Council unanimity" and "EP veto". As described above, these codings were based on the information recorded in PreLex (PreLex), the legal base as manually coded by König, Luetgert and Dannwolf (EUR-Lex), and a combined coding (combined) respectively.

Table 4.6: Results of OLS regression (with time fixed effects)

Variable	PreLex	EUR-Lex	combined
Council unanimity (PreLex)	-0.040		
EP veto (PreLex)	-0.153		
Council unanimity (legal basis)		-0.038	
EP veto (legal basis)		-0.395***	
Council unanimity (combined)			-0.017
EP veto (combined)			-0.343***
Distance Commission - EP	-0.024	-0.032*	-0.025
Distance Commission - Council	-0.003	0.004	-0.001
Controversy in the Council	0.093	0.435*	0.421
Prevalence of directives	0.526***	0.582***	0.592***
market-oriented policy	-0.093*	-0.075*	-0.056
_Iyear_1985	-0.067	-0.074	-0.078
_Iyear_1986	-0.186	-0.163	-0.148
_Iyear_1987	-0.094	-0.180*	-0.139
_Iyear_1988	-0.202	-0.175*	-0.146
_Iyear_1989	(omitted)	(omitted)	(omitted)
_Iyear_1990	-0.102	-0.119	-0.121
_Iyear_1991	-0.133	-0.079	-0.077
_Iyear_1992	-0.155	-0.184**	-0.170*
_Iyear_1993	-0.131	-0.236**	-0.198*
_Iyear_1994	(omitted)	(omitted)	(omitted)
_Iyear_1995	-0.087	-0.034	-0.053
_Iyear_1996	-0.036	0.018	0.002
_Iyear_1997	-0.007	-0.008	-0.007
_Iyear_1998	0.034	0.083	0.074
_cons	0.263	0.213*	0.176
N	131	203	203
r2	.392	.435	.425

legend: * p<0.05; ** p<0.01; *** p<0.001

The results do not confirm my central hypotheses (table 4.6). Council voting rules have no statistically significant effect on the Commission's use of litigation (measured as the ratio of litigation to legislation), regardless of coding. A surprising effect is evident for the involvement of the European Parliament. When this variable is coded according to the legal basis or a combination of information in PreLex and the legal basis, the analysis suggests the opposite of the expected effect. Increased involvement of the European Parliament coincides with lesser use of the infringement procedure by the Commission. It is unlikely that this is a causal effect. The results essentially indicate that policy areas characterised by greater EP involvement also have a lower ratio of litigation to legisla-

tion, all else equal. Likewise, one of the models (m2) indicates that an increasing political distance between the Commission and the EP (as measured by CMP scores) decreases the use of litigation, contrary to what I predicted. Again, I can think of no sensible causal mechanism. This finding indicates that, all else equal, at times of greater ideological distance, the Commission's use of litigation was lower than at times of greater agreement. A comparison of figures 4.7 and 4.11 above suggests that this is so. The major period of ideological distance between the Commission and the EP (from 1989 to 1993) coincides with the lowest ratio of litigation to legislation. The distance between political positions of the Commission and the Council have no effect on the dependent variable.

The effect of the dummy variable indicating market-oriented policies is statistically significant in two of the models (m1 and m2), but again the effect is opposite to what could be expected based on some assumptions in the literature. All else equal, market-oriented policy areas see slightly less litigation (relative to legislation) than interventionist policy areas do, but the effect is not strong. A possible explanation could be James Caporaso and Sidney Tarrow's more recent argument that legal developments have in fact bolstered interventionist social policy and a form of "embedded liberalism" at the European Union level (Caporaso and Tarrow 2009: 615). A competing explanation could be related to Martin Höpner and Armin Schäfer's counterargument that legal developments in the EU have in fact three dimensions, which they describe as "market-shaping", "market-enhancing", and the creation of a "European area of nondiscrimination" (Höpner and Schäfer 2012: 431). They argue that the latter category, in particular, has given rise to judicial proceedings that pit individual rights against collective solidarity. While they agree that this development cannot be characterised as market-enhancing, they demonstrate that neither can it be called interventionist or market-restricting

in a conventional sense (Höpner and Schäfer 2012: 446). In any case, this finding disagrees with the assumption of a singular pro-market bias in EU law.
My control variable for the prevalence of directives has the strongest and most robust effect of the analysed variables, suggesting that infringement proceedings cluster predominantly around the transposition of directives. This does not necessarily mean that infringement proceedings predominantly target technical issues of non-transpositions. Cases concerning allegedly incorrect transpositions of directives can equally contain controversy about the content of policy.
Finally, there is limited evidence supporting my initial proposition that the Commission uses infringement proceedings where legislative obstacles are high. In one of the models (m2), the variable indicating controversy within the Council has a strong and significant effect. Moreover, the coefficient only narrowly misses statistical significance in m3 ($p=0.06$). Since the effect is quite strong (almost equal to the effect of my control variable concerning directives), this leaves some room for my original proposition.

A number of conclusions can be drawn from this result. First, as a general insight, it has become apparent that the coding of legislative procedures is a complicated process – the different coding rules I employed have a significant impact on the results of the statistical test. König, Luetgert and Dannwolf's observation that more attention should be paid to the quality of procedural indicators is strongly corroborated by this study (cf. König, Luetgert et al. 2006: 565).
Some other insights should carry over into my case studies. There is some, albeit weak, evidence that the prevalence of controversy in the Council has an effect on the Commission's choice of strategy. It would be valuable to find evidence of a causal link for this effect. The substantive dimension or ideological profile of a policy area does not seem to have a strong effect on the Commission's use of infringement proceedings.

If anything, it tends to engage in more litigation (relative to legislation) where the subject matter does *not* relate to a market-making policy area in the classical sense. My case studies concern both a market-oriented and an interventionist policy area, so the following chapters should allow for more insights. Finally, my analysis has so far not incorporated other judicial strategies open to the Commission, in particular the lodging of observations in cases arising out of preliminary references. I have stated my reasons for doing so above, but it is quite possible that the Commission's use of the infringement procedure is not independent of its interventions in preliminary reference procedures. The case studies will allow me to include such proceedings in my analysis and I should be able to say more about the interrelationship between different judicial procedures in my concluding chapter.

Chapter 5

Removing barriers to trade

This chapter and the next cover two case studies of the Commission's use of legislation and litigation in two policy areas over time. The first of these case studies (this chapter) concerns the free movement of goods within the EU, in particular the prohibition of barriers to trade arising from national product standards. The second (chapter 6) traces Commission action aiming to expand the right to free movement for member state nationals from an initial economic right to a fundamental freedom of all Union citizens regardless of their economic activity.

The aim of this procedure is to provide a further empirical test of the propositions developed in the preceding chapter, while taking account of the results of the statistical analysis as described in the conclusion to that chapter. The case studies cover a longer time period than the statistical analysis, tracing Commission action in the two policy areas from the early years of the European Economic Community to close to the present day. This allows me to take into account long-term dynamics and learning effects that have informed the Commission's choice of strategy over time. They also cover a wider range of Commission action, including the Commission's use of legislative initiatives, infringement proceedings, observations in preliminary references proceedings and other forms of presenting its policy positions to the political environment (annual reports, action plans, responses to parliamentary questions, etc.). A closer attention to the stated motivations underlying Commission action, as revealed in such documents, provides the potential to causally link the proposed explanatory factors to actual strategy choices.

The rationale for case selection has been laid out in detail in chapter 1. While covering essential fields of Commission policy-making efforts, both cases differ with regard to the substantive dimension and ideological profile of the policy areas concerned, legislative procedures (after the Single European Act), and the degree of contentiousness over time.

This chapter proceeds as follows. I will start with a brief overview of central characteristics of the policy area. The second part (5.2) focuses on the contested interpretation of which national measures were illegal by virtue of the Treaty provisions on the free movement of goods. The third part (5.3) then takes up the Commission's legislative efforts at harmonizing member state laws in the areas where member state action had not been precluded by primary law. The fourth part (5.4) combines the strands, focusing on the Commission's efforts following the Court's ruling in the *Cassis de Dijon* case to establish the principle of mutual recognition. The remainder of the case study traces the use of mutual recognition as a contested policy tool to the current day (5.5), while a final section concludes (5.6).

5.1 Overview

Following the objective of gradually building a common market, the governments of the member states had set themselves the aim to abolish barriers to trade in goods, targeting those national rules that put imports at a disadvantage compared to domestic products. First and foremost this concerned custom duties and quantitative restrictions on imports, classical hallmarks of protectionist economic policies. But many non-discriminatory rules of trade also adversely affect imports, or generally impede trade, while at the same time serving important purposes, such as public health and consumer protection (like rules prohibiting additives for certain foodstuffs). The original means of dealing with this

problem was common legislation that would harmonize the divergent national product norms and standards, allowing for possible economies of scale in the production of goods for a European market. The central question that emerged was how much leeway member states would have in organising their domestic markets in the absence of harmonization.

The central legal provisions in this domain were listed in part three, title I, chapter 2 of the EEC Treaty under the heading "elimination of quantitative restrictions between member states". These articles state the general prohibitions and applicable exceptions. The original wording has remained largely unchanged since. The Treaty of Amsterdam replaced the word "elimination" with "prohibition", reordered some of the articles and deleted those that had become obsolete since the end of the original transitory period after the Treaty of Rome. The remaining provision are now articles 34-37 TFEU following the Treaty of Lisbon. While these provisions state general prohibitions, the corresponding procedures for legislative harmonization were codified in article 100 EEC, which stipulated that "the Council, acting unanimously on a proposal from the Commission, shall issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market". Additionally, the EP was to be consulted in cases where national implementation would "involve the amendment of legislation". The Single European Act added article 100A, which introduced both qualitative majority voting and the cooperation procedure for harmonization measures in the context of the single market programme. The Treaty of Maastricht changed the procedure for this article to codecision. This framework essentially remains in place today. Article 114 TFEU covers harmonization measures that apply to " the achievement of the objectives" of the internal market (as outlined in article 26 TFEU), and mandates the ordinary legisla-

tive procedure, subject to a number of exceptions and safeguard measures. In particular, fiscal provisions, measures relating to the free movement of persons, or those related to the rights and interests of employed persons are exempted from its range of application (art. 114(2) TFEU). Such measures require the application of article 115 TFEU, which remains essentially the old article 100 EEC, stipulating unanimity and the consultation procedure, and allowing only for the passage of directives.

5.2 Quantitative restrictions and measures having equal effect

Article 30 EEC prohibited quantitative restrictions to trade and all measures having equivalent effect.[47] As with many such general prohibitions, the Treaty went on to state a series of exemptions, enumerated in article 36 EEC, listing a series of justifications for national trade barriers. These were "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of natural treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property". These justifications, in turn, were subject to the stipulation that they must not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

While the concept of 'quantitative restrictions to trade' was easy enough to define, the Treaty did not provide a definition of what would constitute a 'measure having equivalent effect'. There was also no precedent in international law (cf.

[47] While this prohibition applied to all national rules adopted after the entry into force of the Treaty of Rome, the High Contracting Parties authorized the Commission in article 33(7) to issue directives addressing national measures that had previously been in effect.

Deringer 1981: 95).[48] While this definition may have seemed like a technical detail, it in fact bore substantial consequences. The core of the conflict was (and continues to be) about the balance between the basic concept of the 'free movement of goods' (the absence of barriers to trade) and the national regulatory autonomy of the member states (cf. Deringer 1981: 96). Both aims are inherently conflictive. National trade regulations may hinder cross-border trade (say, by imposing marketing standards that are more costly to meet for foreign producers than domestic ones), but at the same time serve legitimate goals of public policy, such as consumer protection, public health or environmental protection.

An expansive interpretation of the treaty's prohibition of measures having an equivalent effect would have included all national trade regulations that potentially hindered cross-border trade, even where they indiscriminately applied to foreign and domestic products alike.[49] The official Commission position consisted of a somewhat more cautious approach. The question about the interpretation of what national measures might constitute (illegal) measures having an equivalent effect to quantitative restrictions was first publicly posed by the chairman of the Legal Affairs Committee of the European Parliament, German MEP Arved Deringer. While the Court of Justice had already provided an interpretation of 'charges having equivalent effect to customs duties', prohibited under article 12 EEC, its equivalent for quantitative restrictions had so far not been subject to Court proceedings. In a series of written questions to the European Com-

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[48] While the GATT also aimed to remove import quotas, it did not include measures having equivalent effect.

[49] Such an interpretation was in fact proposed as early as 1967 by Pieter VerLoren van Themaat, who had just retired from his position as Director General of the influential DG IV (competition), which he had held from 1958-1967, and who would later become Advocate General at the Court of Justice from 1981 to 1986 (cf. Ehlermann 1977: 583; Veelken 1977: 319).

mission, Deringer asked how many related cases had occurred and whether the Commission had arrived at a working definition of the concept (OJ 1967, No. 9/122, German edition). The Commission responded that it had indeed encountered a number of such cases and was addressing them on a case by case basis (OJ 1967, No. 59/901, German edition). As a result of this practice, most national measures that preclude or raise the costs of imports relative to domestic products would be considered a measure having equivalent effect to a quantitative restriction. Such 'measures' would be interpreted widely to include an extensive range of government actions. Also, it would be sufficient for measures to be potentially harmful to trade, making it unnecessary to demonstrate that such measures actually hindered imports. So far, the Commission followed an expansive interpretation of measures having and equivalent effect. However, it pointed out that national measures that applied indiscriminately to domestic and imported goods alike would as general rule not be captured by the restrictions. It also pointed out that its interpretation might be subject to change with further experience and that a final answer to this problem would lie with the Court of Justice (OJ 1967, No. 169/12, German edition).

Three years later, the Commission adopted an official interpretation in Commission Directive 70/50. Based on article 33(7) EEC, which empowered the Commission to issue directives abolishing measures of equivalent effect which had been in place before the entry into force of the Treaty of Rome, this directive was technically legally binding only until the end of the transitional period on 1 January 1970 (cf. Craig and de Búrca 2011: 639). It nonetheless served as an important guideline in the interpretation of what constitutes a measure having equivalent effect beyond that date (cf. Oliver 1982: 56). This directive paid closer attention to the distinction between national measures that discriminate between

domestic and imported goods and those that do not (so called 'indistinctly applicable rules'). The basic rationale was to generally prohibit discriminatory barriers, except in such cases where such a rule could be justified by one of the objectives listed in article 36 EEC. For indistinctly applicable rules, i.e. such rules that imposed certain marketing standards on all products within a state,[50] imports and domestic goods alike, the Commission foresaw greater national discretion, recognising that restrictive effects on trade "are normally inherent in the disparity between rules applied by Member States" (recital 9, Directive 70/50). In principle, such rules should be upheld where they serve a legitimate policy goal (including objectives not listed in article 36 EEC) and simultaneously meet strict proportionality criteria (Craig and de Búrca 2011: 647) – they would be legal as long as they were appropriate for the achievement of the stated goal and there were no alternative measures to achieving this goal that are less restrictive to trade.[51] The Commission's aim in this twofold approach was to prevent an expansive interpretation of the exemptions listed in article 36 EEC without unduly restricting member state regulatory autonomy (cf. Ehlermann 1973: 11).[52]

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[50] The directive speaks of "measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up" (article 3, Directive 70/50).

[51] The directive would uphold such measures unless their restrictive effect exceeds their "intrinsic effect", in particular where "the restrictive effects on the free movement of goods are out of proportion to their purpose", or "the same objective can be attained by other means which are less of a hindrance to trade" (article 3, Directive 70/50).

[52] Ehlermann, later Director of the Commisison's Legal Service (1977-1987) moreover states: "Denn nach der von der Kommission erarbeiteten Theorie ist es zur Rechtfertigung einer unterschiedslos anwendbaren Maßnahme nicht notwendig, auf Artikel 36 zurückzugreifen; insbesondere ist es nicht erforderlich, daß einer der in diesem Artikel genannten Gründe vorliegt. Es genügt vielmehr irgendein Ziel, das unter Berücksichtigung der handelsbeschränkenden Wirkung des zu seiner Erreichung erforderlichen Mittels legitim erscheint: ob sich dieses Ziel mit den in Artikel 36 aufgeführten Gründen deckt, ist nicht entscheidend." (Ehlermann 1973: 7).

This interpretation was the outcome of a long series of cases the Commission had dealt with throughout the 1960s (cf. Oliver 1988: 83). The Commission had initiated a number of infringement proceedings since the early 1960s against several member state measures (cf. European Commission 1968: 42), including such diverse subjects as an (indistinctly applicable) Belgian rule regulating the nitrate content of fertiliser, a French rule regulating the marketing of woolen blankets, a Dutch rule regulating ingredients in meat products, and a German rule regulating the lead content in petrol (cf. Ehlermann 1973: 9-10). All of these disputes were settled at the administrative stage of the procedure, and none of them were referred to the Court of Justice.

The Commission first tested its definition of a measure having equivalent effect before the Court in its observations in *International Fruit Company* (joined cases 51 to 54/71)[53]. Here, the Commission defined such measures as those whose effect on trade is indirect and "arises from the fact that imports or exports are rendered more difficult or costly in comparison with the marketing of the domestic product. The difficulties created for imports or exports may be absolute or relative but it is in any event the potential effect of the measure in question which must be taken into consideration" (joined cases 51 to 54/71, ECR 1971: 1113). This view conflicted with that of the Dutch government, which had also intervened in the proceedings. It considered that the "prohibition on quantitative restrictions and measures having equivalent effect must be interpreted as meaning that infringement of the articles referred to in the question asked

[53] A note on my citation of court cases: ECR is short for 'European Court Reports', which is an annual publication by the Court of Justice, containing all available documentation of a case. The volume's year of publication also indicates the year of the judgement. The name in italics indicates the name of the central party. Infringement proceedings carry the title 'Commission v [member state]'. All other cited cases arise from preliminary references.

can only follow from an *actual application* of measures contrary to this prohibition" (joined cases 51 to 54/71, ECR 1971: 1112, original italics).
Despite these differences, the Commission repeated its conciliatory stance on the regulatory autonomy of member states: "Of course it must not be concluded from this that all measures having a restrictive effect on imports or exports are to be considered as measures having an effect equivalent to quantitative restrictions: [...] there are other measures which, although they have an inherently restrictive effect on trade, are compatible with the Treaty. These are measures falling within the framework of the powers or options explicitly or by implication left to the Member States (for example provisions on commerce and on customs clearance). Naturally those measures are also prohibited if the restrictive effect which they involve exceeds the extent necessary to attain the objective sought" (joined cases 51 to 54/71, ECR 1971: 1114).

While the case shows the divergent views of the Commission and some member states, the Court did not solve the conflict or address this interpretation in its ruling. Later judgements also refrained from doing so, although the Court started referring intermittently to the Commission's definition in Commission Directive 70/50, lending it a certain degree of legal authority (cf. Veelken 1977: 338). This situation changed in the central Court case in this early conflict about national regulatory autonomy, *Dassonville (*Case 8/74, ECR 1974: 837), which is still part of all introductory courses on internal market law. Like several later landmark judgements, curiously, *Dassonville* related to the import of alcoholic beverages, in this instance Scotch whisky. Gustave and Benoit Dassonville, Franco-Belgian wholesalers of spirits, had imported to Belgium from France a batch of 'Johnnie Walker' and 'Vat 69' Scotch whisky, contravening a Belgian law that mandated a certificate of origin for such products, issued by

government authorities of the exporting country. Having bought the whisky in France, the Dassonvilles merely affixed to their bottles a reference to the documents held by the original French importer, which the Dasonvilles themselves did not possess. For this practice, they were taken to court both by the Belgian government and by two private Belgian companies, who had been the exclusive importers of these Scotch whiskies for Belgium. The case came before a Belgian appellate court, where the Dassonvilles argued that the Belgian requirement for a certificate of origin constituted a measure having equivalent effect to a quantitative restriction. The Belgian court in turn referred the question to the European Court of Justice.

In its observation in *Dassonville*, the Commission repeated its assertion that "any measure, whatever its nature or content may, by reason of its effect on the free movement of goods, constitute a measure having equivalent effect" (Case 8/74, ECR 1974: 846). This was disputed by the British government, which, echoing the earlier assertion by the Dutch government in *International Fruit Company*, stated that "the concept of 'measure having equivalent effect' does not cover measures which are only potentially liable to have such an effect" (Case 8/74, ECR 1974: 844). The Court's judgement in return provided an authoritative interpretation, which has subsequently become the standard textbook definition: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (Case 8/74, ECR 1974: 852). To this degree, the Court followed the wider approach favoured by the Commission. However, in all appearance, the Court seemed to go beyond the Commission's position. In its observations, the Commission had reiterated its conciliatory approach to member state regulatory autonomy: "Trading rules which apply equally to

national products and imported products do not in principle constitute measures having equivalent effect within the meaning of Articles 30 et seq of the EEC Treaty", subject to the qualification that "the right of Member States to regulate trade by means of provisions applying equally to imported products is not unlimited. This right can be exercised only to attain the objectives of the rules concerned and must be suited to those objectives" (Case 8/74, ECR 1974: 846-847). The Court made no mention of this distinction. In fact, its use of the phrase "*all* trading rules enacted by Member States" (my emphasis) seemed to indicate that it disagreed that a distinction should be made between discriminatory and indistinctly applicable rules. Moreover, the judges seemed to introduce a 'rule of reason' approach to all restrictive measures (cf. Craig and de Búrca 2011: 640). In the absence of common rules, member states would be allowed to take measures to prevent "unfair practices". Such potentially justifiable measures however, would be subject to the condition "that these measures should be reasonable" (Case 8/74, ECR 1974: 852). This seemed to indicate that the Court agreed to the proportionality test proposed by the Commission, but extended it to all possible justifications, even those expressly listed in article 36 EEC.
This broad interpretation threatened to severely curtail member states' ability to regulate trade, going well beyond the Commission's conciliatory stance on indistinctly applicable measures. However, all relevant court cases to this date had concerned rules relating specifically to imports – no genuine indistinctly applicable rule had yet been disputed (cf. Ehlermann 1977: 589; Oliver 1980: 110-111).

Such rules first became subject of court proceedings in a series of cases concerning mandatory minimum pricing. In its observations in *van Tiggele* (Case 82/77), yet another case about alcoholic beverages (Genever, this time), the Commission specifically repeated its assertion that "there is no doubt

that even rules fixing price and profit margins which apply *without distinction* to domestic products and imported products may also constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30", in particular (quoting Directive 70/50), "'where the restrictive effects on the free movement of goods are out of proportion to their purpose' and where 'the same objective can be attained by other means which are less of a hindrance to trade'" (Case 82/77, ECR 1978: 33, my emphasis). This view was specifically contested by the Dutch government (Case 82/77, ECR 1978: 31-32). While the Court clearly followed the Commission's position, it did not seem to take account of the stated qualifications to this view. Ruling that "Article 30 of the EEC Treaty must be interpreted to mean that the establishment by a national authority of a minimum retail price fixed at a specific amount and applicable without distinction to domestic products and imported products constitutes [...] a measure having an effect equivalent to a quantitative restriction on imports which is prohibited under the said Article 30" (Case 82/77, ECR 1978: 40), the Court did not address the question if such an indistinctly applicable measure might be justified, as was the Commission's position, and whether such justification might be subject to a proportionality test.

This question was the subject of yet another landmark case concerning national regulations of the market for alcoholic beverages. In *Cassis de Dijon* (Case 120/78), the German retail company Rewe complained against a decision of a German regulatory authority (the 'Bundesmonopolverwaltung für Branntwein') barring the marketing in Germany of the French black currant liqueur Cassis de Dijon, on account of the fact that its alcohol content was lower than that mandated for the sale of liqueurs in Germany. The Commission had in fact some years earlier initiated infringement proceedings against the German government in a very similar case

concerning an import ban for aniseed liqueur, based on the same reasoning, but this case had been concluded before reaching the Court. The German government had granted an exception for the product in question, without abolishing the general rule (cf. Alter and Meunier Aitsahalia 1994: 538).

The Court's judgement in *Cassis de Dijon* had two important implications. It is primarily known for the introduction of the principle of 'mutual recognition' into Community law concerning the free movement of goods, of which more later. It also, for the first time, explicitly addressed possible justifications for a national measure that was formally non-discriminatory (or 'indistinctly applicable'). It is interesting to note that by the time of the judgement in *Cassis de Dijon*, one of the outspoken critics of the Court's expansive approach to measures having equivalent effect, Claus-Dieter Ehlermann, had advanced to the post of Director of the Commission's Legal Service and was in effect in charge of the Commission's legal position presented to the Court in the proceedings. Ehlermann had previously defended the Commission's more cautious stance that indistinctly applicable measures (as opposed to discriminatory measures) should be exempted from the Treaty prohibition, as long as they were justified by defensible policy goals, were appropriate for the achievement of such goals and constituted the least restrictive alternative (cf. Ehlermann 1973: 10-11; Ehlermann 1977: 584). In fact, the careful reasoning in his 1977 paper somewhat presages the *Cassis de Dijon* ruling (cf. Ehlermann 1977: 589-591).

The Commission's observations in *Cassis de Dijon* repeated its prior argument that restrictions on trade that apply equally to imported and domestic goods may be justified on several grounds, but that such a justified restriction must be proportionate to the intended goal: "In the final analysis, the essential question is whether rules which are applicable

without distinction [...] must be considered to be 'out of proportion'" (Case 120/78, ECR 1979: 659). In its judgement, the Court chose wording which did not immediately conform to the Commission's position, but presented an approximation: "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer" (Case 120/78, ECR 1979: 662).

The Court effectively acknowledged that the catalogue of justifiable measures was larger than those enumerated in article 36 EEC and established a set of "mandatory requirements" that member states could invoke if they wished to maintain non-discriminatory regulations of trade. These mandatory requirements largely coincided with the justifications enumerated by the Commission in its observation: protection of health, protection of the consumer (consumer information and protection against fraud) and fair competition between producers (Case 120/78, ECR 1979: 658-659).[54] Contrary to the position of the Commission, it reversed the burden of proof: a restrictive national trade rule would constitute a measure having equivalent effect (and be illegal) unless the member state could demonstrate that this rule served a mandatory requirement (cf. Oliver 1980: 112). The Court concluded that the German measures in question did not serve to achieve any of the enumerated aims: the unilateral fixing of minimum alcohol levels for fruit liqueurs could not be justified on public health grounds, "since the consumer

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[54] The Court's inclusion of the "effectiveness of fiscal supervision" is a nod to a previous case, INNO, where it had held that fiscal concerns where a justifiable restriction to trade (Case 13/77, ECR 1978: 2142) (see also Oliver 1980: 112).

can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form", and in order "to protect the consumer against unfair practices on the part of producers and distributors", less restrictive measures could be employed, "since it is a simple matter to ensure that suitable information is conveyed to the purchaser" by means of labeling (Case 120/78, ECR 1979: 663-664). Without using the terminology, the Court had applied a proportionality test: certain justifications for national restriction to trade existed, but the German measures in question, where they may have been justified in terms of consumer protection, were not proportionate to their goal, since less restrictive means were available.

While the Court in *Cassis de Dijon* unquestionably dealt with an indistinctly applicable measure, its judgement did not specifically address the distinction between discriminatory and indistinctly applicable measures as such. A chance to clarify the relevance of this distinction came up shortly after in *Peureux* (Case 119/78), again a case concerning alcoholic drinks (fruit brandies). More specifically, this case concerned a French rule prohibiting the distillation of imported raw materials other than fresh fruit. Since this prohibition only related to imported and not domestic raw materials, the measure in question concerned a clearly discriminatory measure. In fact, the Commission had already initiated an infringement proceeding against the French government for its failure to abolish this rule, holding it to be a measure of equivalent effect, but this proceeding had not yet been referred to the Court of Justice (Case 119/78, ECR 1979: 980). While the Commission's observation did not mention the distinction between discriminatory and indistinctly applicable measures, the Court's judgement repeated it's *Cassis de Dijon* provision, albeit with an important specification: "Ob-

stacles to intra-Community trade resulting from differences between the provisions of national laws which have not yet been harmonized in relation to the marketing and use of certain products constitute, in principle, measures having an effect equivalent to quantitative restrictions unless those provisions apply without discrimination to products imported from other Member States and to those produced or manufactured in the national territory" (Case 119/78, ECR 1979: 985). This wording suggested that the Court would follow the Commission's initial distinction (cf. Oliver 1980: 112-113): discriminatory measures would always be illegal unless they could be saved by one of the justifications contained in article 36 EEC, interpreted narrowly. Indistinctly applicable rules, on the other hand, could be saved by reference to broader "mandatory requirements", as long as they are proportionate.

The Court of Justice specified this position shortly thereafter in *Gilli and Andres* (Case 788/79). This case concerned (for a change) an Italian rule that prohibited the sale of vinegar that was not made from wine. Again, the Commission had already initiated infringement proceedings against this rule, holding it to be an unjustifiable restriction to trade. This proceeding had not yet reached the court when the same rule was disputed in a preliminary reference. In its observation, the Commission considered whether the Italian prohibition could be justified as a mandatory requirement in the line of the *Cassis de Dijon* ruling, concluding that this was not so. In its judgement, the Court specified its previous assertions in *Peureux*: "In the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade. It is only where national

rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30" (Case 788/79, ECR 1980: 2078). This interpretation seemed to make clear that the mandatory (or "imperative") requirement justification would only be available to indistinctly applicable rules.

Still, some confusion remained. The Commission seemed to be unsure about the possible derogations from discriminatory rules in its submission in *Commission v Ireland*, one of the few infringement proceedings at the time that actually reached the Court. Since the disputed rule (a particular labeling requirement) pertained only to goods (souvenirs) that were not produced in Ireland, the subject was clearly a discriminatory measure. The Irish government had submitted that the labeling requirement was justified with respect to consumer protection and to combat fraud, referring to the *Cassis de Dijon* ruling. The Commission in return argued that none of the exceptions listed in article 36 EEC applied to the rule in question, and added that "although the Court held in its judgment [in *Cassis de Dijon*] that consumer protection may justify restrictive measures, the restrictions at issue are not justified under Community law because they are not necessary to protect the consumer" (case 113/80, ECR 1981: 1630). The Commission submission in this case was co-authored by Peter Oliver, member of the Legal Service, who had previously commented on *Cassis de Dijon* and *Peureux* in Common Market Law Review. In this comment, he had expressly posed the questions "does the distinction between discriminatory and 'indistinctly applicable' measures subsist?" and "what is the role of Article 36?" (Oliver 1980: 112). He offered two solutions: "according to one the distinction

between discriminatory and 'indistinctly applicable' measures has been rejected, in which case Article 36 merely serves as a guideline as to what purposes justify restrictions on imports. According to the other solution, the distinction lives on, Article 36 applying only to discriminatory measures, while the REWE-Zentral [*Cassis de Dijon*] test applies to 'indistinctly applicable' measures" (Oliver 1980: 112). Oliver went on to cite another member of the Legal Service, René-Christian Béraud, who had presented the Commission position to the Court in *Dassonville*, and who had supported the latter interpretation, indicating that this view most likely had support within the Legal Service. Oliver then interpreted the Court's ruling in *Peureux* as indicating that the Court shares this view, and concluded by posing the question: "Is the reference to discrimination in Peureux due to a deliberate decision to retain the distinction between discriminatory and non-discriminatory measures or simply to a failure by the judges of the Court to coordinate their judgments?" (Oliver 1980: 113). Although the Commission (and Oliver himself) did not explicitly pose this question in *Commission v Ireland*, the Court seemed to respond directly to Oliver's prior questions, pointing out that "in view of the fact that neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in Article 36, those grounds cannot be relied upon as such in connexion with that article. [...] The orders concerned in the present case are not measures which are applicable to domestic products and to imported products without distinction but rather a set of rules which apply only to imported products and are therefore discriminatory in nature, with the result that the measures in issue are not covered by the decisions [like *Cassis de Dijon*, allowing for a consumer protection justification] which relate exclusively to provisions that regulate in a uniform manner the marketing of domestic products and imported products" (Case 113/80, ECR 1981: 1639).

The Commission followed this up in an answer to a parliamentary question: "if (and only if) the measure in question applies equally to domestic and imported goods, it may be permissible in Community law if it is the 'essential guarantee' of the observance of some 'mandatory requirement' of national interest; this means not only those interests referred to in Article 36 EEC, but also certain others — the Court gave consumer protection and prevention of tax evasion as examples" (OJ 1981, No. C 295/30). The Commission early on proposed that the list of justifications for non-discriminatory barriers to trade (the mandatory requirements) may be longer than that offered by the Court in *Cassis de Dijon*. Reacting to the *Cassis de Dijon* judgement, Commission president Gaston Thorn remarked in reply to a question from an MEP that "The list of such requirements is not exhaustive. It will be the responsibility of the Commission, when examining individual cases and under the supervision of the Court of Justice, to determine which other 'mandatory requirements' may be taken into consideration. The protection of the environment may, for example, be considered to be a case of this nature" (OJ 1981, No. C 309/8).

Summary

The preceding section describes the early conflict about the meaning of an essential Treaty provision. The question centred on the degree of member states' autonomy in regulating their domestic markets in goods. What national measures resulting in barriers to intra-Community trade would be illegal by virtue of primary law, without the necessity of secondary legislation? The Commission enjoyed certain agenda setting prerogatives, as it could autonomously issue legal guidelines, which it did in Commission Directive 70/50. This initial interpretation, which expressed a strict stance on discriminatory measures but a conciliatory stance on non-

discriminatory ones, informed the legal position of the Commission for the following decade and a half, and was partially endorsed by the Court. The member states reacted selectively, and for the most part only when their domestic rules were challenged in Court. Their expressed legal positions argued for a limited effect of the relevant Treaty rules. National measures should be legal as long as they did not actually affect trade, and the catalogue of available justifications should be interpreted extensively. These positions could not be upheld in the face of multiple Court judgements. Since the conflict centred on primary law, member state governments were significantly constrained in the range of possible responses. Treaty change being almost impossible to achieve as long as a single member state favoured the Court's position, their preferred reaction seemed to consist of a selective application of single rulings, a "contained compliance" in Lisa Conant's words (cf. Conant 2002: 32). They yielded to individual judgements, but did not adapt their overall policy stance. This would explain the fact that many Court cases addressed very similar issues, and often almost identical product classes. Consequently, the Commission's ability to remove barriers to trade was confined to one barrier at a time, a cumbersome and time-consuming effort that yielded more limited results than potential harmonizing legislation, which is the subject of the following section.

Another feature of the described legal process is the dearth of infringement proceedings that reached the Court of Justice. In several instances, the Commission had initiated such proceedings, but there were parallel cases brought before national courts that were referred to the Court of Justice more quickly than the Commission's own efforts. This could be indicative of the fact that the Commission did, up to this stage, not pursue infringement proceedings as a policy strategy, but rather as a tool for negotiation with individual member states.

5.3 Mutual recognition and the harmonization of laws regulating trade

The aspect for which the *Cassis de Dijon* judgement is perhaps better known today is the way it established a link between the Community's legislative efforts at harmonizing national trade rules according to article 100 EEC and the removal of barriers to trade according to article 30 EEC, which has been the subject of the previous section. While this connection was not explicitly raised by the plaintiff, it was extensively covered in the observations of the German government: "The scope of the questions of interpretation referred to the Court goes well beyond the subject-matter of the main action: in most Member States there exist provisions, very diverse in nature, relating to the minimum wine-spirit content of potable spirits and those provisions constitute merely a small pan of the complex problem raised by the existence of a considerable number of divergent national "technical standards" for numerous goods. [...] The resulting obstacles to trade must be reduced by recourse to the procedure for the approximation of such provisions [...]. Until such time as the national rules relating to manufacture and marketing have been harmonized, Article 30 of the EEC Treaty is to be applied only in so far as those provisions lead to discrimination against imported goods in relation to domestic goods" (Case 120/78, ECR 1979: 655). The argument of the German government therefore rested on the assertion that the appropriate method of dealing with barriers to trade resulting from differing production or marketing norms was to adopt harmonizing legislation. It specifically warned against the effects of following a different approach: "In view of the fundamental importance to an assessment of the technical specifications of all other sectors of production [if non-discriminatory rules should be declared illegal], it should be noted that its consequence would be that the minimum alcohol content of a given product in the Federal Republic of Germany would no longer be governed by German law but by French law; [...] in

an extreme case, a single Member State could enact legislation for the whole Community, without the collaboration or even the knowledge of the other Member States. The result would be to lower minimal requirements to the lowest level set in any given national rules, in the absence of the authorization required by Article 100 of the Treaty, which presupposes the consent of the Member States" (Case 120/78, ECR 1979: 656). In effect, this observation conjured up the possible effect of a doctrine of mutual recognition. Needless to say, the German government was vehemently opposed: "The Member States must continue to be able effectively to exercise those [regulatory] powers, until the achievement of harmonization transfers their freedom of action to the Community" (Case 120/78, ECR 1979: 656-657).
The Danish government seemed to agree with the German government's view in principle. In its observation it argued, in a roundabout fashion, that "rules relating to the quality of products" and "a technical obstacle to trade which may be eliminated by the adoption of harmonization directives pursuant to Article 100 of the Treaty" should not be considered measures having equivalent effect to a quantitative restriction (Case 120/78, ECR 1979: 659). However, pointing out that Danish cherry wine also fell foul of the German regulation, it held that the German rules in question did not fall under this category.

The Commission, possibly wishing to avoid taking a stance on a controversial issue, did not take up the German government's elaborations, and confined its arguments to a strict proportionality test. The judges themselves also did not react to the scenario outlined in the German observation, although they restated the German governments argument: "Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of

imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States" (Case 120/78, ECR 1979: 663). While they had addressed – and refuted – every other argument the German government had offered in defense of its rules, they curiously left this one unanswered (Craig and de Búrca 2011: 649). To the contrary, the Court ended up proclaiming exactly what the German government had warned against. Its formulation again is now a mandatory element of all EU law textbooks: "There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State" (Case 120/78, ECR 1979: 664). This was the nucleus of the concept of mutual recognition as it was subsequently taken up and pursued by the Commission.

The origins of the concept and its relation to legislative harmonization, however, date back somewhat further. The *Cassis de Dijon* ruling, and others quoted above, implicitly established a link between the Community's legislative efforts at harmonizing laws and the Treaty's more general prohibition of barriers to trade. These judgements particularly referred to the "absence of common rules relating to the production and marketing"[55] of goods as leading to an application of article 30 and the consequent prohibitions. In the *Cassis de Dijon* ruling, the Court specifically recalled that a Commission proposal for a harmonization of national provisions for the production and marketing of certain spirits had been be-

[55] This is the wording from *Cassis de Dijon* (Case 120/89, ECR 1979: 662), repeated in *Gilli and Andres* (Case 788/79, ECR 1980: 2078) and *Commission v Ireland* (Case 113/80, ECR 1981: 1639), among many others. The Court had already used similar wording in *Dassonville* (Case 8/74, ECR 1974: 852).

fore the Council for three years, but not been decided upon (Case 120/89, ECR 1979: 662). This passage can be read as an implicit comment about the slow progress of the legislature's programme of harmonizing production and marketing rules. In effect, the Court went on to propose a different strategy. How does this relate to the Commission's earlier legislative and judicial efforts? Did *Cassis de Dijon* present entirely new options?

The corollary to the removal of trade barriers was the simultaneous harmonization of trade rules across the Community. The corresponding procedure was laid out in article 100 EEC, which, as described above, mandated a unanimous Council vote. The Treaty also provided the option of qualitative majority voting in such cases where the Commission finds a member state rule to be "distorting the conditions of competition" (article 101 EEC)[56], and authorised the Commission to issue recommendations where a member state planned to introduce or amend a provision that could cause such distortion (article 102 EEC) .

The Commission's view on the Community's harmonization agenda is indirectly discernible from its approach to the barriers to trade that has been discussed above. Recall the Commission's initial position on the treatment of non-discriminatory member state rules: such rules were generally justified, since restrictions on trade "are normally inherent in the disparities between rules applied by Member States in this respect" (recital 9, Directive 70/50). Conversely, the removal of trade barriers arising from these disparities would be achieved by harmonizing national laws. Pieter VerLoren van Themaat, Director General of the Commission's DG Competition, early on identified the approximation of laws as a central part of the Commission's effort to establish a com-

[56] The resolution on the use of majority voting at the extraordinary Council session in Luxemburg on 17-18 January 1966 (the "Luxemburg compromise") significantly curtailed the advantages of this provision.

mon market, targeting among others "technical and administrative obstacles to trade, including veterinary regulations, foodstuffs control, pharmaceutical rules; and regulations for industrial health and safety" (Verloren van Themaat 1960: 17).

During the 1960s, however, the Commission's efforts at initiating the harmonization of member state laws concerning trade in goods were limited in number and scope.[57] Member state opposition was entrenched, not only at the political level, but also at the level of member state administrations, particularly during the transitional period before the full effectiveness of the rules concerning the common market (cf. Seidl-Hohenverldern 1981: 175-176). The Commission even largely refrained from issuing the recommendations provided for in article 102 EEC (where a member state introduced new regulations), despite the fact that it could do so on its own initiative without involvement of the Council (cf. Seidl-Hohenverldern 1981: 188). This may be due to the fact the Commission adopted a cautious stance, granting the member states considerable leeway: "Approximation of legislation involves work in so vast a field, with subject-matter which has so many ramifications, that progress cannot and should not be other than cautious and gradual" (European Economic Community Commission 1965: 101); but it is also a reflection of the Commission's limited capacities to monitor new legislation in the member states. Up to this point, there was no legal requirement for the member states to inform the Commission of their legislative proposals for new trade rules, and repeated attempts by the Commission to introduce such a requirement found no support in the Council (e.g. OJ 1965,

[57] "Progress in eliminating other obstacles to trade due to differences in regulation has been very meagre" (European Economic Community Commission 1966: 16).

No. 160/2611; cf. also Houin 1971: 790).[58] Despite these obstacles, the Commission started to pursue, in the mid to late 1960s, a growing number of directives regulating potential barriers to trade. These proposals targeted disparate national requirements concerning quality, composition and packaging as well as mandatory border inspections (cf. COM 62/300: 14). The latter in particular were the subject of early efforts by the Commission to achieve a mutual recognition of requirements and controls: "For effective elimination of obstacles to trade, harmonization must be carried out at two different levels: not only technical rules, but the inspection and supervision procedures which ensure their enforcement, must be brought into line. Approximation of the various procedures is intended to ensure *reciprocal recognition* of inspections by the competent authorities of the Member States" (European Economic Community Commission 1965: 102, my emphasis; cf. also Verloren van Themaat 1965: 248). While the concept of mutual (or reciprocal) recognition in the field of goods was evidently discussed as early as the mid 1960s, the scope of this approach was more limited than the approach suggested by the *Cassis de Dijon* ruling. The aim was primarily to establish "common approval and inspection procedures" that would serve to eliminate duplicate and costly border controls for imported goods (cf. European Economic Community Commission 1965: 102). The Commission formulated this idea in a proposal for a "Council resolution on the mutual recognition on inspections" that formed part of its "General Programme for the elimination of technical barriers to trade" (OJ 1968, No. C 48/30). It proposed that if

[58] In this vein, while the Commission had foreseen in its proposal for a first directive approximating the law of undertakings that member states should provide information on all new legislative proposals in this domain early enough for the Commission to react before their adoption (OJ 1966, No. 96/1520-1524), the Council struck the respective recital and limited member state obligations to ensuring "that they communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive" (article 13, Directive 68/151).

the technical requirements of a given product are "rendered equivalent by Community action or are considered to be already equivalent, the Directive relating to that product should provide for mutual recognition of inspections carried out before it is put on the market" (OJ 1968, No. C 48/30).[59] This is a very indirect form of mutual recognition, requiring the adoption of secondary law relating to individual product classes. In the absence of harmonizing directives, the Commission suggested in an annex to the General Programme, a more general "mutual recognition of inspections" as part of five possible approaches to harmonization.[60] This approach proposed that inspections conducted in one member state should automatically be recognised in the other member states.[61] It would be applicable in economic sectors where there is very far reaching correspondence between member state technical and administrative regulations[62] (cf. also Falke and Joerges 2010: 253). The reference to the mutual recognition of *inspections* might be somewhat misleading, since inspections also entail adherence to nation standards. As the Commission pointed out in an information memo

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[59] While the Council adopted the proposal shortly after, it did not take up a recital from the Commission's proposal stating that the multiplicity of inspections constituted a distortion of competition between domestic and foreign producers in member state markets (cf. OJ 1969, No. C 76/31).

[60] These proposed approaches were not included in the proposal as published in the Official Journal. They can be inferred from European Parliament Documents 15 1968/1969 and 114 1968/1969.

[61] "Danach wird zugestanden, daß die in einem Mitgliedstaat durchgeführten Kontrollen, die eine Voraussetzung für das Inverkehrbringen eines Erzeugnisses sind, von allen übrigen Mitgliedstaaten automatisch als gültig anerkannt werden. Dies führt zu einer Beseitigung der Hindernisse, die sich aus der Wiederholung der systematisch in jedem Mitgliedstaat vorgenommenen Kontrollen ergeben" (European Parliament Document 114 1968/1969: 18).

[62] "Diese Lösung kann jedesmal dann in Betracht gezogen werden, wenn in einem Wirtschaftszweig eine sehr weitgehende Übereinstimmung der geltenden technischen und Verwaltungsvorschriften festgestellt wird oder wenn diese Vorschriften auf Gemeinschaftsebene oder in größeren internationalen Gremien harmonisiert worden sind. Im letztgenannten Fall kann sie zum Zug kommen, bevor die laufenden Arbeiten ganz abgeschlossen sind" (European Parliament Document 114 1968/1969: 18).

three years later, such a recognition of inspections is equivalent to a recognition of product norms: "la solution dite de 'reconnaissance réciproque des contrôles' consiste à admettre purement et simplement, sur une base de réciprocité, les produits conformes aux normes des autres Etats membres et contrôlés par ceux-ci suivant leurs critères" (European Commission 1972: 2; cf. also Slot 1975: 81). In this wording, the proposed approach, albeit only one of several, seemed fairly close to the one the Commission adopted in the wake of the *Cassis de Dijon* ruling – with the caveat that it would only apply to sectors where there was prior correspondence of norms. Nonetheless, the Commission seemed skeptical as to the merits of mutual recognition, giving priority to the harmonization of member state laws: "Toutefois, ces deux solutions ['reconnaissance réciproque des contrôles' et 'reconnaissance conditionnelle des contrôles'] sont difficile à mettre en oeuvre sur la plan pratique, et comme elles ne conduisent pas à unifier les législations, elles ne donnent pas tous les avantages d'une réglementation harmonisée" (European Commission 1972: 2). Should *Cassis de Dijon* therefore be seen as a watershed that took even the Commission by surprise (cf. Alter and Meunier Aitsahalia 1994: 540)?

While mutual recognition had been employed or intensively discussed in the areas of company law and degrees and diplomas (cf. European Commission 1969: 67-69, 81), member state opposition to mutual recognition in trade was evident early on. Martin Seidel, Director General ('Regierungsdirektor') in the German Federal Ministry of Economics, who on occasion represented the German government before the Court of Justice,[63] voiced such opposition at a conference of European law professionals in 1969, arguing that a system of mutual recognition would entice producers to choose the least onerous standards, leading to harmonization at the

[63] See for example Case 152/73, discussed in the following chapter.

lowest common denominator (cf. Seidel 1971: 736)[64] – this line of argumentation presaged the content of the German government's observation in Cassis de Dijon.[65]

In the aftermath of the General Programme, the Commission did not pursue any explicit measures with regard to mutual recognition. Only minor pieces of evidence suggest that the Commission may have been debating the uses of mutual recognition more generally. Somewhat cryptically, the Commission, in its General Report on the Activities of the Communities for the year of the adoption of the General Programme (1968), interpreted this programme to imply "a basic political choice in that it lays down that the final objective of all measures to eliminate technical obstacles is the mutual recognition of the national decisions on the subject so as to enable producers in the Community to manufacture on the scale of the common market, and consumers to make a better choice among the products thus made available" (European Commission 1969: 55). While this phrasing seemed to hint at a more expansive reading, it was subsequently not repeated. The root of the problem with mutual recognition, from the Commission's point of view, may be inferred from a speech by Internal Market Commissioner Finn Olav Gundelach before the European Parliament in February 1974. He pointed out that the Commission's programme for abolishing barriers

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[64] "Die wechselseitige Anerkennung der nationalen Rechts- und Verwaltungsvorschriften durch die Mitgliedstaaten stellt ebenfalls kein Verfahren dar, das sich zum Abbau der technischen Handelshemmnisse eignet. Die Einführung eines solchen Systems [...] kann allenfalls für die Fälle erwogen werden, in denen die nationalen Rechtsvorschriften gleichwertig sind [...]. Bei mangelnder Äquivalenz der Vorschriften führt die gegenseitige Anerkennung zu einer Entwertung der strengeren Regelungen" (Seidel 1971: 735).

[65] Cf. also the opinion of Pieter Slot, writing in 1975: "As the matter stands today, there is no chance of [mutual recognition] being accepted anywhere in the near future by the national governments, the main reason being that the national authorities are unwilling to give up their exclusive exercise of approval and inspection" (Slot 1975: 88).

to trade included other measures than a "total" harmonization of member state laws. Among the methods the Commission employed "in order to develop a free market" would be such where "the Member states accept goods which comply with other Member states' regulations; in this case, no Community considerations demand approximation of the national legislation but the method may be combined with certain minimum standards. Unfortunately, the mutual trust among the authorities of the Member states does not appear to be sufficient to allow the use of this method as often as the Commission would like to" (European Commission 1974: 3). This suggests that the Commission saw member state opposition as the decisive obstacle to a strategy of mutual recognition – even where it was accompanied by harmonized minimum standards. By all other indications, it appears that the Commission by this stage had given up on mutual recognition as an effective tool in the removal of national barriers to trade.

Nonetheless, the measures foreseen in the 1968 General Programme suggested an inclusive approach. While the programme, in particular its timetable of harmonizing directives to be pursued by the Commission and the Council, appeared "very ambitious but utterly unrealistic" (Falke and Joerges 2010: 248), it is unlikely a coincidence that the General Programme was formulated concurrently to the Commission's Directive 70/50 on the treatment of measures having equivalent effect to quantitative restrictions. From this point on, the Commission started to use a two-pronged approach to the removal of technical and administrative barriers to trade: "Obstacles to trade resulting from such trading rules normally have to be removed by harmonization under Article 100. To the extent, however, that such provisions constitute measures with effect equivalent to quantitative restrictions, Articles 30 et seq. are applicable. On this point, the Commission's experience and thinking lead it, in the present circum-

stances, to class among such measures any provisions that are applicable without distinction to both domestic and imported products and whose restrictive effects on the free movement of goods exceed those proper to rules on trade. It is from this angle that the Commission intends to examine the cases currently referred to it" (European Commission 1969: 30). As a general principle, the Commission stated it would pursue harmonizing legislation. This however would not mean that member states are free to regulate trade where there are no Community rules. Rather, the Commission would seek judicial action to remove those national rules that appear unjustified or disproportionate. Underlining this approach, the Commission started listing its efforts in the field of measures having equivalent effect to quantitative restrictions and the harmonization of technical obstacles to trade back to back in its General Reports on the Activities of the Communities.

This specific link between the Commission's legislative efforts at harmonizing national laws and judicial interventions to remove existent trade barriers was taken up by the Court in *Dassonville*: "*In the absence of a Community system* guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals" (Case 8/74, ECR 1974: 852, my emphasis). This phrasing, similar to the one the Court later used in *Cassis de Dijon*, implied a trade-off between harmonization at the Community level, and the residual competences left to the member states, lending judicial support to the Commission strategy. Where there were no common rules, member states retained the ability to regulate trade, but only within very strict pa-

rameters. Harmonization, it could be imputed, would thus represent for the safer approach for member states than relying on their residual autonomy.

While the Commission's efforts to remove barriers to trade in court offered – as I have shown above – some success, the legislative element in this strategy lagged behind considerably, despite the implicit threat of judicial action in the case of non-harmonization. On the one hand, this was due to the nature of the task of harmonization as it was then understood, in particular in the field of technical barriers to trade, where the drafting of legislative proposals required minute attention to details that in themselves proved a moving target: not only would common standards have to be agreed upon, they would also continually have to be adapted to technological progress (cf. Falke and Joerges 2010: 254; Craig and de Búrca 2011: 583). On the other hand, the Commission frequently expressed frustration with the handling of its proposals by the Council[66] and the European Parliament[67]. This no doubt was also a reflection of the difficult economic situation faced by the member states in the 1970s. The Commission acknowledged this but remained committed to its programme of trade liberalization: "In the desire to preserve what has already been achieved in the free movement of goods and the opening-up of the Community market, the Commission's main effort this year was directed towards

[66] "The Council has been unable to meet all its commitments this year, having adopted only 13 directives. The Council will therefore have to intensify its efforts if it wishes to achieve the objective it has set itself" (European Commission 1975: 60). "The rate of adoption of directives by the Council has remained as slow as before and the number of proposals still pending remains about the same as for last year – 65 compared with 59" (European Commission 1976: 62).

[67] "The long time taken by Parliament to give its views on a number of directives has considerably delayed the programme for adoption of Commission proposals. In the case of the proposal for a directive on the lead content of petrol this delay has exceeded 22 months" (European Commission 1976: 62).

containing and halting the protectionist trend which has been one of the most preoccupying effects of the very difficult economic situation affecting certain industries in the Member States" (European Commission 1978: 77).[68] In the face of the 'deteriorating' situation, including the increased resort to such 'protectionist' measures by the member states, the Commission had been in the process of adapting its strategy to the obstacles it faced even before the *Cassis de Dijon* ruling: "Realizing that much firmer measures must be taken to reverse this [protectionist] trend and ensure strict compliance with the rules of the Treaty, the Commission has concentrated greater efforts and resources on resolving cases of infringements and following up complaints submitted to it" (European Commission 1977: 76). The extent of the problem was reflected in the growing number of complaints the Commission reported.[69] While no comprehensive statistics on the earlier (pre-court) stages of the infringement procedure exist for this period, the trend is evident in the successive General Reports on the Activities of the Communities: "At the end of 1978 the Commission was investigating over four hundred cases of barriers to the free movement of goods, mostly under Articles 30 to 36 of the EEC Treaty. And even this figure, which is more than four times as many as four years ago, represents only the tip of the iceberg" (European Commission 1979: 82). In reaction to this trend, and, in its own words, "conscious of the imperative need to sound the alarm in face of the repeated attacks by the Member States on the free movement of goods within the Community" (European Commission 1979: 81), the Commission sent

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[68] Cf. also: "The difficult economic situation which prevailed during the year drew the Commission's attention more closely to the need to safeguard and preserve achievements gained in freeing the movement of goods in the Community and opening up the market to trade" (European Commission 1977: 76).

[69] The Commission's language is unambiguous: "The restrictive measures complained of constituted a veritable arsenal of covert measures in an exceedingly broad range of regulations" (European Commission 1978: 77).

a letter to Member State governments, outlining the central elements of its revised strategy for the "safeguarding of freedom of trade within the Community" (COM 78/337 final: 1). The letter again repeated the close connection between legislative efforts at harmonizing member state trade rules and the Commission's legal action to remove barriers to trade. While non-discriminatory rules regulating goods sold in a member state may serve legitimate aims,[70] "such rules may, however, be directed towards preventing or discouraging imports of products coming from other Member States. The same applies to national technical standards drawn up by the professions which are often based on manufacturing criteria employed by national industry. When these are made obligatory by Member States and thus are equally imposed on imported products, the consequence is that they bear more heavily, if not exclusively, on the latter than on indigenous products. The restrictive effects of these rules and technical standards are doubly harmful to free trade: on the one hand they partition markets within the Community; on the other, they paralyse the enactment of Community rules in the matter" (COM 78/337 final: 2). In order to address this, and other, problems more effectively, the Commission announced that it would focus more rigorously on enforcement: "Thus being conscious of the need to maintain this element which is essential for the functioning and development of the internal market, freedom of trade, the Commission has decided to act firmly and promptly and has placed this action among its priority tasks" (COM 78/337 final: 3). To this aim, it had revised its internal procedures regarding infringements, "allowing it to initiate a very significant number of infringement procedures [...] and to prosecute them in half the time required previously. [...] About two hundred and

[70] Here the Commission lists such exemptions as had been brought up in recent case-law: "the protection of life and health of humans, protection of, and information for, the consumer, improvement of products' quality" (COM 78/337 final: 2).

eighty-five dossiers are therefore involved; during 1974-1975 less than a hundred dossiers were the subject of such decisions" (COM 78/337 final: 3-4). The considerable uptick in infringement proceedings for the field of goods that has been interpreted to be a result of the Court's ruling in *Cassis de Dijon* (cf. Stone Sweet 2004: 136-137) is therefore not solely a reaction to the judgement, but also a reflection of the previous adaptation of the Commission's strategy.[71] This observation is supported by Claus-Dieter Ehlermann, then Director General of the Commission's Legal Service (from 1977 to 1987), who described the Commission's changes to its handling of the infringement procedure in more detail. According to this account, the Commission started out with a cautious stance on enforcement actions (cf. Ehlermann 1981: 139). The reevaluation originated with the appointment of the new Commission under president Roy Jenkins, who from 1977 on elevated the importance of infringement proceedings to rank equally with legislative initiatives, following the aim of safeguarding market freedoms in face of increasing member state opposition (cf. Ehlermann 1981: 141). The Commission in effect declared its legislative strategy to have failed in the face of increasing member state opposition, and that it would concentrate on a judicial strategy instead.

It is nonetheless important to note that despite the confrontational wording of the 1978 letter and the General Reports, the Commission did not raise the idea of a mutual recognition of trade rules. Rather, its strategy seemed to address each barrier to trade one at a time, although this approach was constrained by staffing problems (cf. COM 78/337 final:

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[71] The Commission summarises this approach as follows: "Finally, the Commission proposes to explore, in accordance with the new guidelines set out by recent interpretative decisions of the Court of Justice, all the possibilities which will enable it to ensure that the rules of the EEC Treaty on the free movement of goods, especially Articles 30-36, are strictly applied and thus to achieve a greater and more effective liberalization of intracommunity trade" (COM 78/337 final: 4).

4). Although it has been asserted that the Commission was not involved in bringing about the *Cassis de Dijon* case (cf. Alter and Meunier Aitsahalia 1994: 538), the judgement, which mentioned the idea of mutual recognition almost as a byline, therefore came at an opportune moment. Specific parts of the ruling, like earlier in *Dassonville*, even read like a direct admonition of the member state's failure to harmonize trade laws: "In the absence of common rules relating to the production and marketing of alcohol — a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309, p. 2) not yet having received the Council's approval — it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory", as long as those national rules are "necessary in order to satisfy mandatory requirements" (Case 120/78, ECR 1979: 661), which the German rules in question were judged not to be (cf. Craig and de Búrca 2011: 684).

The Commission reacted by adjusting its already revised strategy in the light of the ruling, further de-emphasising its legislative harmonization efforts for the benefit of infringement proceedings as an alternative means. It outlined its new strategy first in a communication to the European Parliament (COM 80/30) and later in a letter to the member states (OJ 1980, No. C 256/2). It becomes clear from these documents that the Commission would employ a very wide interpretation of the Court's pronouncements, and that it would use it offensively against member state trade regulations. While the Court had formulated its interpretation of mutual recognition specifically with regard to alcoholic beverages, the Commission extended this principle to all product classes: "Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State" (OJ 1980, No. C 256/2). Any exemptions from this principle would be interpreted very

strictly: “Even if [member state] rules apply indiscriminately to home-produced and imported products, they can only create barriers if these are necessary in order to satisfy mandatory requirements, are in the general interest, are the main guarantee of that general interest and if that general good is more important than the requirement of free movement of goods which is one of the basic rules of the Community” (COM 80/30: 3). Note that the Commission is suggesting, next to the proportionality requirement, a universal trade-off between a general interest, however defined, and the basic market freedom; the Commission mentions no a priori exemptions. The consequences would be far ranging: “As a result of the court's decisions, and the judgement referred to above in particular, Member States may control marketing conditions as regards their own products while the same is not the case for products imported from other Member States. An approach based on the guidelines described would make it possible henceforth to put stop to the application of a large number of national regulations insofar as these hinder trade between the Member States” (COM 80/30: 4). On the basis of these observations, the Commission outlined a general rationale for its future strategy, which would be flexibly based on several elements: “The aim is not to accumulate directives, but to remove hindrances to trade (COM 80/30: 6)”. New strategies would be necessary not least with respect to the Commission’s overall capacity: “the method adopted hitherto for the removal of technical barriers to trade poses yet another fundamental problem: it results in a growing burden of responsibility for the Commission and a constantly increasing workload for its staff. Whereas a few years ago the task of Commission officials in this field was to draw up new proposals and justify them to the other Community institutions, today much of their work is taken up with the management of directives already adopted, i.e. controlling their implementation in the member states (nearly 250 actions for infringement are pending) and adapting them to technical

progress. These last-mentioned tasks are bound to grow with the Community patrimony, i.e. with the number of directives adopted by the Council, and will entail a steady expansion of the Commission's staff" (COM 80/30: 8-9). The limits of harmonization would therefore be obvious: "Bearing in mind that under Article 100 of the Treaty a binding provision must generally already exist in one Member State at least, it is not hard to see how cumbersome is a procedure that requires Community consensus to solve a problem that could be created by one national civil servant working with two or three experts. The Commission must therefore review the whole of its activities in connection with the removal of barriers to trade in the light of the policies it intends to pursue (COM 80/30: 9-10).[72] As a result, the Commission announced it would limit its legislative efforts to those limited areas of national trade regulation that would, according to its narrow interpretation of the *Cassis de Dijon* ruling, continue to be justified (cf. OJ 1980, No. C 256/3; Craig and de Búrca 2011: 638). Without explicitly saying so, the Commission implied that all other (presumably inadmissible) obstacles to trade would primarily be addressed by means of infringement procedures (cf. also European Commission 1981: 84).

In subsequent court proceedings, the Commission started employing variations of the *Cassis de Dijon* formula concerning barriers to the trade of a wide array of product classes: vinegar (Case 799/79, ECR 1980: 2076), bread (Case 130/80, ECR 1981: 533), margarine (Case 261/81, ECR 1982, 3967), vitamin additives (Case 174/82, ECR 1983: 2456), poultry meat (joined cases 47 and 48/83, ECR 1984: 1732), milk

[72] Cf. also a passage later in the document: "For the Commission to sponsor a flood of directives that it would have the utmost difficulty in managing would be pointless: the aim is the free movement of goods within the Community, and in order to achieve that aim the Commission intends to broaden its present activities by placing as much emphasis on the prevention of barriers as on the removal of those already created" (COM 80/30:16).

products (Case 97/83: ECR 1983: 2378), video-cassettes (joined cases 60 and 61/84, ECR 1985: 2625) and, repeatedly, beer (Case 94/82, ECR 1983: 955; Case 176/84, ECR 1987: 1208; Case 178/84, ECR 1987: 1246), among others. Many of these proceedings originated from preliminary references and were decided according to the Commission position, but the Commission also referred a growing number of infringement proceedings to the Court. Where member states submitted observations in these cases, they almost uniformly argued that, while the rules in questions may constitute a barrier to trade, they would still be justified by one of the reasons previously accepted in case law. None of them specifically contested the idea of mutual recognition, but at the same time almost none of these observations made specific reference to the concept (for an exception, see the Danish observation in Case 174/82, ECR 1983: 2454). This development was not lost on the Commission. As it pointed out in its General Report for the year 1981 (and continued to do in a similar manner throughout he early 1980s): "In their efforts to contend with the deterioration in the international political climate and the continuing economic and social crisis at home the Member States' governments tended to resort to unilateral, national action which not only makes it harder to impose a common discipline but can also be the gradual undoing of what the Community has achieved so far. There were more and more cases of aids distorting competition and rules and technical standards inhibiting freedom of movement, while the number of infringements of Community legislation increased. [...] Delays in taking decisions which would strengthen the Community hampered the convergence of policies, and the Community's main concern has now be-

come the preservation of the common market" (European Commission 1982: 18).[73]

Summary

The preceding section demonstrates a distinct connection between the Commission's legislative agenda and its actions in the judicial sphere. These findings corroborate some of my earlier assumptions and do not conflict with the findings of the analysis in chapter 4. The Commission expresses a preference for legislative harmonization as a tool for market integration, but alters its strategy as this course of action becomes increasingly difficult to realise. As Commission documents demonstrate, its increased concentration on judicial proceedings can be interpreted as a reaction to the hesitance of the legislative institutions to act on Commission initiatives. The difference in preferences about the scope of market integration between the Commission on the one hand and the Council (and, possibly, the European Parliament) on the other, as well as possible internal conflict within the Council, can be made out as the principal factors influencing the Commission's strategy in bringing about trade liberalization. The section also shows that the Commission had been intensifying its judicial efforts in the face of increasing obstacles to legislation, and started to reform internal procedures for infringement proceedings even before *Cassis de Dijon* provided

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[73] Cf. also the reports of subsequent years: "The Community's difficulties in preventing the fragmentation of the market during this time of recession are greater than ever. Constantly rising unemployment leads every country in the world to seek salvation in falling back on overt or covert protectionism while accusing other parties of taking similar steps unilaterally. [...] In this third year of recession, national tribulations loomed so large that the governments were unable to make any real progress towards reaching a consensus on Community problems" (European Commission 1983: 18, 20); "There was a marked re-emergence of non-tariff barriers to trade, with the result that the Commission had to deal with a large number of complaints based on Article 30 and subsequent articles of the Treaty (European Commission 1984: 82).

the legal tools to engage in a more circumspect litigation strategy. While the Commission cannot be demonstrated to have brought about the case, or even to have suggested the outcome to the Court, its reaction to the Court's judgement indicates an advanced degree of preparedness. The Commission would not have been utterly surprised by the suggestion of mutual recognition as a legal standard, as it itself had considered such a concept only half a decade before – only to abandon it in the face of member state resistance.

5.4 Mutual recognition and the single market programme

The subsequent success of legislation pursued by the Commission with regard to the harmonization of product standards (cf. European Commission 1985: 83) are difficult to ascribe to changes in Commission strategy alone. They coincided with a suitably changed environment for the pursuit of free market policies. The economic recession showed signs of abating, and the growing predominance of neo-classical economical thinking among governments supplied the corresponding ideological disposition towards trade liberalization. As a measurable consequence, the number of pending proposals for harmonizing legislation dropped from an average of 50 in previous years to about 20 in 1985 (European Commission 1986: 104). A first sign of this development was the adoption by the Council of a Commission proposal for a legally binding 'stand-still' directive (OJ 1980, No. C 253/2) which would replace a prior 'gentleman's agreement' that had been part of the 1968 General Programme (cf. Pelkmans 1987: 254), after having been held up in the Council for three years. This proposal required member states to inform the Commission of the preparation of new technical regulations or standards before their adoption, in order to enable it to monitor their compatibility with the free movement of goods. The directive gave the Commission the opportunity to re-

quest the stand-still of a new technical regulation for a period of six months while it investigated their compatibility with free movement rules, if it felt that the new regulation constituted a barrier to trade, or up to twelve months if it intended to propose harmonizing legislation (article 9, Directive 83/189).

Member state governments hence demonstrated a new willingness to cooperate to remove barriers to trade. At a European Council meeting in Brussels in March 1985, governments called on the Commission to propose concrete measures with regard to "action to achieve a single large market by 1992, thereby creating a more favourable environment for stimulating enterprise, competition and trade" (Bull. EC 3-1985: 12). The Commission clearly acknowledged this changed environment in the introduction of its corresponding White Paper on the completion of the single market. After the restrictive measures introduced during the recession of the 1970s and early 1980s, "the mood has begun to change, and the commitment [to market freedoms] to be rediscovered: gradually at first, but now with increasing tempo" (COM 85/310: 5). In light of these developments, the Commission felt confident to assert its approach to the removal of technical barriers to trade: "The general thrust of the Commission's approach in this area will be to move away from the concept of harmonisation towards that of mutual recognition and equivalence. But there will be a continuing role for the approximation of Member States' laws and regulations, as laid down in Article 100 of the Treaty. Clearly, action under this Article would be quicker and more effective if the Council were to agree not to allow the unanimity requirement to obstruct progress where it could otherwise be made" (COM 85/310: 6-7).

The White Paper restated the Commission's opinion that, "if a product is lawfully manufactured and marketed in one

Member State, there is no reason why it should not be sold freely throughout the Community. [...] The Commission is fully aware that this strategy implies a change in habits and in traditional ways of thinking. What is needed is a radical change of attitude which would lead to new and innovative solutions for problems – real or apparent – which may appear when border controls no longer exist" (COM 85/310: 17). In keeping with the earlier formulations, the Commission described its strategy to be twofold. Legislative harmonization, on the one hand, would be "restricted to laying down essential health and safety requirements which will be obligatory in all Member States" (COM 85/310:19). The Commission, moreover, suggested in this regard that the Council "off-load technical matters by making more use of its powers of delegation" to the Commission (COM 85/310: 20). On the other hand, the Commission would determine which remaining national regulations constitute unjustified barriers to trade and prosecute them accordingly (COM 85/310: 19, 22).

At the same time, the Commission repeatedly emphasised the need for simplified decision-making mechanisms in the Council. In its 1984 General Report it asserted that "The Community's inability to take decisions is becoming more and more obvious. The shortcomings of the Community's cumbersome decision-making procedures are blocking dynamic development, and the practice of making one issue dependent on another tends to hamper any fresh moves" (European Commission 1985: 20). A year later, it repeated this observation: "Attainment of the ambitious goal of creating a single market by 1992 is conditional on institutional reform: gradual removal of physical, technical and tax barriers will prove extremely difficult unless existing decision-making procedures are changed" (European Commission 1986: 26).

The member states evidently agreed with this assessment. The Commission proposed to the Intergovernmental Conference on the Single European Act the extension of qualitative majority voting to all legislation affecting the completion of the single market (cf. European Commission 1986: 32). Member state governments subsequently agreed to introduce into the EEC Treaty an article 100A, which foresaw majority voting for the approximation of laws concerning the establishment and operation of the internal market. Taking account of persistent member state concerns, subsequent paragraphs limited the applicability of this rule, excluding fiscal matters, the free movement of persons and employee rights. Moreover, the new article 100A(4) EEC included the possibility to maintain national provisions regulating trade, even in the face of Community harmonization, if they could be justified by one of the exemptions listed in article 36 (cf. Bull. EC 11-1985: 9). Claus-Dieter Ehlermann, then Director General of the Commission's legal service, commented that this last paragraph "was drafted by the Heads of State and Government themselves", with the aim "to protect any Member State in a minority position from being forced to accept the majority line" (Ehlermann 1987: 381, 389). The transfer to majority voting was therefore limited, with specific safeguards firmly in place.[74]

While the Commission's vigorous endorsement of mutual recognition as the cornerstone of a new legislative programme to remove barriers to trade coincided with a new member state interest in free market measures, this did not mean that national governments accepted the concept. The Council, for its part, never specifically endorsed mutual recognition, and in fact avoided any reference to it. While the Commission proposal for the 1983 stand-still directive contained a specific reference to *Cassis de Dijon* ("technical

[74] Member State Governments also rejected wider implementing powers the Commission had demanded for itself (cf. Ehlermann 1987: 403).

regulations relating to products, *where they impede the free movement of goods legally manufactured and sold in a Member State*, are lawful only if they are necessary in order to meet essential requirements and have an objective in the public interest of which they constitute the main guarantee", recital 4, OJ 1980, No. C 253/2, my emphasis), the Council deleted the wording reminiscent of mutual recognition.[75] It is also not mentioned in the Council recommendation for "a new approach to technological harmonization and standards" (OJ 1985, No. C 136/1). The wording used here is "presumption of conformity", which relates to the mutual recognition of the results of tests that had already been discussed in the early 1970s. The member states clearly wanted to avoid mutual recognition as a general concept and place it in strict confines – mutual recognition should be applicable where secondary legislation allows for it, and preferably on the basis of harmonized requirements.

The negotiations about the Single European Act, moreover, demonstrated that member states opposed an incorporation of mutual recognition into primary law. While all parties agreed on the 1992 deadline for the completion of the internal market, disagreements arose as to the consequences of this date. As Claus-Dieter Ehlermann recounts, the Commission initially proposed a "radically progressive solution" (Ehlermann 1987: 370). In a corresponding working paper, the Commission suggested that in the case of a failure on the part of the legislative institutions to successfully harmonize the relevant national provisions in time, national governments should, "by 31 December 1992 at the latest, recognize the equivalence of the rules of the other Member States concerning persons, goods, services and capital" (cited in Eh-

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75 The corresponding recital to the adopted directive read: "barriers to trade resulting from technical regulations relating to products may be allowed only where they are necessary in order to meet essential requirements and have an objective in the public interest of which they constitute the main guarantee" (recital 4, Directive 83/189).

lermann 1987: 405). Not only would all safeguard clauses be rendered nugatory, but also all exemptions arising from article 36 or the mandatory requirements contained in the *Cassis de Dijon* ruling (cf. Ehlermann 1987: 371). In effect, these clauses would have put in place the complete mutual recognition of all member states rules in the event that harmonization should fail to be completed by the deadline – a significant penalty meant to entice the speedy adoption of Commission proposals. Perhaps not surprisingly, the Commission resoundingly failed to convince national governments of this approach. The final text omits all reference to a possible direct effect of single market rules. The new article 100B merely allowed for a Council decision (albeit by majority vote on a Commission initiative) to recognize an unharmonized class of national rules as equivalent. At the conclusion of the intergovernmental conference, moreover, member state governments issued a "Declaration on Article 8A of the EEC Treaty", underlining that "Setting the date of 31 December 1992 does not create an automatic legal effect" (cf. Ehlermann 1987: 371-372).

While the member states continued to oppose mutual recognition understood broadly, it is also not entirely clear what the role of the concept was in the programme pursued by the Commission. The legal concept of mutual recognition as formulated by the Court and endorsed by the Commission is certainly very abstract (cf. Pelkmans 2007: 703). Its effect is essentially negative – mutual recognition will have to be invoked in court (either by the Commission or by affected traders) against a restrictive practice to become effective. It is an extension of the prohibition of measures having an equivalent effect to quantitative restrictions: any national trade rule that prohibits the import of a good lawfully produced in another member state is illegal, unless it can be justified by mandatory requirements, provided the rules are proportionate to their aim. Contrary to the procedure regarding the

drafting of new, potentially obstructive trade regulations as specified in the stand-still directive, the legal concept of mutual recognition gives little concrete guidance to national authorities, who reflexively resort to national regulations (cf. Pelkmans 2007: 711). The Commission implicitly acknowledged that it was very costly to enforce: "As the national courts and the European Court (Article 30 is directly applicable) decide on a case by case basis, the absence of Community legislation thus leaves to the judiciary the responsibility of deciding on questions which normally fall to the responsibility of the legislator. The ensuing uncertainty is highly detrimental to economic operators" (COM 85/19: 5). The Court judgement in *Cassis de Dijon* and the subsequent efforts provided the Commission with a very wide ranging legal norm with very narrow practical applicability – it would have to pursue infringements case by case. The member states, in refusing to endorse the principle, were again able to contain the effects (cf. Conant 2002: 32).

The principal utility of mutual recognition for the Commission was therefore its implied threat to member states: in the absence of European rules, each potentially restrictive national rule could be subject to legal challenge, imposing on national authorities (and traders alike) continuous costs and uncertainty.[76] This threat in return served as an incentive to pursue harmonizing legislation, which would, under the new approach, be confined to specifying regulatory goals, broadly in correspondence with the justifications provided for in article 36 EEC or the mandatory requirements outlined by the Court in *Cassis de Dijon*, while leaving specification to national administrations or common standardization bodies.

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[76] The Commission evidently acknowledged this dual approach: "The removal of non-tariff barriers to intra-Community trade in goods is a cornerstone of the buildings of the single market. The Commission has two basic instruments for this purpose at its disposal, the prohibition on all measures having equivalent effect to quantitative restrictions (Article 30 to 36 of the EEC Treaty) and the harmonization of technical rules" (OJ 1990, No. C 232/10).

Whereas the old approach to harmonization (the pre-*Cassis* approach) was to draft highly specific technical specification that would apply to all European products, the new regulations 'merely' specified the degree of health and safety, environmental and consumer protection requirements that products would have to comply with (cf. Craig and de Búrca 2011: 594).[77]

Summary

The general outlook for Commission policies at the outset of the single market programme was highly favourable. There was less ideological distance to the Council with regard to market integration, voting rules in the Council had changed to include the possibility of majority voting, enhancing the Commission's ability to successfully propose legislation while also speeding up the process: "Decision-making by the institutions has accelerated considerably since the Single European Act entered into force, primarily due to the changes in procedure. The extension of qualified majority voting to most issues connected with the internal market has stepped up the pressure to find a consensus within the Council. [...] It took just 12 months to reach a common position on the key pro-

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[77] The new approach is best summed up in the Commission own words:
"legislative harmonization is limited to the adoption [...] of the essential safety requirements (or other requirements in the general interest) with which products put on the market must conform, and which should therefore enjoy free circulation throughout the Community,
the task of drawing up the technical specifications needed for the production and placing on the market of products conforming to the essential requirements established by the directives, while taking into account the current state of technology, is entrusted to organizations competent in the standardization area,
these technical specifications are not mandatory and maintain their status of voluntary standards,
but at the same time national authorities are obliged to recognize that products manufactured in conformity with harmonized standards (or, provisionally, with national standards) are presumed to conform to the "essential requirements" established by the directive" (COM 85/19: 6-7).

posal concerning machine safety, compared with 70 months to adopt the first Directive to reduce noise from lawnmowers" (COM 89/311: 2).[78] With the legally established principle of mutual recognition as an implied threat to national rules, moreover, the Commission could apply leverage over Council positions. The introduction of the cooperation procedure seems not to have introduced large legislative obstacles: "Parliament has played its part in the cooperation procedure with great efficiency; the current delay in adopting the common position on television is the responsibility of the Council, Parliament having done all in its power to enable a decision to be taken before the European elections" (COM 89/422: 2). Given these conditions, my hypotheses would predict a much less confrontational stance. This is evident to some degree in the rhetoric of Commission documents from that time, which emphasised the willingness of all Community institutions to cooperate. These documents also stress a predominant concern with legislation, in particular with regard to the proposals included in the 1985 White Paper (although these concerned more policy areas than just the free movement of goods).

5.5 Mutual recognition after 1992

By the end of the 1992 deadline for the implementation of the single market programme, most of the initiatives announced in the White Paper had in fact been adopted. The Commission had transferred all 282 envisaged proposals to the Council and the Parliament by mid-1990, and the legislative institutions had adopted 90% of the programme by late 1992 (cf. COM 90/90: 6; COM 92/383 final: 1-2). This

[78] Compare this to a comment a year later: "But no such speeding-up has been seen where unanimity is imposed either by the legal basis (trade mark law, taxation) or the Council's refusal to implement the principles of the Single Act concerning the powers of implementation of the Commission; for this reason the Commission has requested a debate at the General Affairs Council on the subject of 'comitology'" (COM 90/90: 3).

amount of activity stands in contrast to the 177 harmonizing directives adopted by the Council between 1969 and 1985. The amount of legislative proposals for harmonization successively dropped after the 1992 deadline, while the focus of legislation changed to other aspects of the internal market, such as taxation and services, or the liberalisation of transport and electricity markets (cf. Craig 2002: 30).[79] The Commission did, however, introduce a number of proposals over the course of the last two decades with the aim of improving its monitoring and enforcement position vis-à-vis national barriers to trade. These measures were primarily aimed at limiting member states' discretion in applying national regulations to Community products, and pursued two central goals: expanding the application of mutual recognition, and expanding the Commission's authority to prevent member states from autonomously applying existing and creating new domestic rules.

As for the latter, the Commission justified the need for improved procedures by pointing out that "the persistent tendency of some Member States to prescribe detailed technical regulations for products represents a constant threat to the Single Market; on average more than 450 new national technical rules for products are notified to the Commission every year. There is little sign yet that Member States are ready to observe the self-discipline in rule-making that they advocate so vociferously for the Union" (COM 96/520: 20). Restricting this tendency constituted one of the four "strategic targets" formulated by the Commission's "Action Plan for the Single Market" which it presented to the European Council in Amsterdam (COM 97/184: 6). In the conclusions to this meet-

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[79] Cf. also: "Eleven years after the 1985 White Paper programme was agreed, a 'hard core' of its proposals still remains to be adopted, and market liberalisation in sectors which were not covered by that programme has not been completed. [...] The main stumbling blocks are in key areas affecting business management, such as company law and corporate taxation, financial services and the liberalisation of the transport and energy markets" (COM 96/520: 18).

ing, the European Council, in turn, requested the Commission "to examine ways and means of guaranteeing in an effective manner the free movement of goods, including the possibility of imposing sanctions on Member States" (cf. COM 97/619: 3). The Commission subsequently proposed an intervention mechanism which would essentially replicate the procedure for intervention in state aid cases. In the event of a "grave disruption of the free movement of goods" resulting in "serious loss to the individuals affected" (COM 97/619: 3), the Commission would be able to take a decision with binding legal effect on the member state concerned, outlining the course of action to be taken. Should the member state not comply, the Commission would be able to immediately refer the question to the Court of Justice, effectively abridging the infringement procedure by eliminating the requirement for a letter of formal notice and shortening the time limits for a response to the Commission's reasoned opinion to three days. The rationale for these enhanced legal competences was a plain admission that the infringement procedure alone was insufficient for the prevention and removal of trade barriers: "the application for a declaration in infringement proceedings is still unsuitable for reacting efficiently to certain serious breaches of the principle of the free movement of goods which need to be rectified urgently. The litigation process remains lengthy, with a minimum of two years elapsing before the judgment establishing the infringement is delivered. In the intervening period, no legally binding instrument will be available particularly to help economic operators enforce their rights quickly and effectively as part of the means of redress provided by the Member States" (COM 97/619: 3).

While the Council adopted a regulation based on the Commission's proposal just over a year after its submission, the content of that regulation bears little resemblance to the proposal. Instead of the authority to issue legally binding decisions, the Commission was granted strictly declaratory

competences only, including an ability to publish its observations in the Official Journal. Member state governments only set themselves the requirement to respond to Commission allegations, with no legal consequences foreseen. The Council moreover stressed that the regulation "may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike" (article 3, Regulation 2679/98). In all likelihood, this was a reaction to an earlier infringement case where the Commission, supported by the Spanish and British governments, had taken the French government to Court for its failure to adequately respond to a series of public protests.[80] French farmers, in an effort to prevent the import of foreign fruit and vegetables, had repeatedly attacked transport operators and retailers offering such produce, and the Commission accused the French authorities of largely refraining from intervening. This failure to assure the free movement of goods, the Commission argued, constituted a measure having equivalent effect to a quantitative restriction to trade. The Court accepted the Commission's position, holding that "Article 30 therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty [the principle of loyal cooperation], to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory" (Case C-265/95, ECR I 1997: 6999).

While its efforts to achieve greater autonomous legal competences largely failed, the Commission was somewhat more successful in giving effect to the principle of mutual recognition. As I have outlined above, one of the serious drawbacks of this principle was the fact that it had its basis in case-law

[80] In a corresponding resolution, the Council mentioned this case explicitly (OJ 1998, No. L 337/10).

only. The refusal of the member state governments to endorse the principle accounted for its relative invisibility. National authorities, faced with the choice of admitting an unknown foreign product to their domestic markets, had very little guidance as to the operation of the principle, and, more often than not, chose to ignore it (COM 99/299: 5, cf. also Craig 2002: 35-36). One of the aims of the Commission was consequently to impose on member states an obligation to include 'mutual recognition clauses' into national pieces of legislation. A possible channel for this were the extensive notification requirements in place for national rules imposing novel product or marketing standards as part of the 1983 'stand-still' directive (Directive 83/189). The Commission subsequently included a requirement for such clauses in its assessment of the compatibility of new national rules with the Community rules on the free movement of goods. Since the Commission's assessments were not legally binding, member state authorities could refuse to follow them. This was so in the case of a French rule on the content of 'foie gras', which French authorities passed in 1993. The Commission initiated infringement proceedings against the French government for its refusal to include a mutual recognition clause into this rule, arguing that in the absence of such a clause, the rule would constitute an illegal barrier to trade.[81] The Court sided with the Commission (Case 184/96, ECR I 1997: 6226), in effect bolstering its efforts to achieve greater visibility for the principle of mutual recognition (cf. Craig and de Búrca 2011: 687).

Despite this success, the Commission conceded repeatedly over the following years that the application of mutual recognition did not work well in practice. In a communication

[81] The Commission had proposed such a clause to read: "'Preparations with foie gras as a base produced in an unvarying and fair manner in accordance with traditional procedures existing in other Member States of the EEC may be marketed in France" (Case 185/96, ECR I 1997: 6202).

devoted to this issue, the Commission repeated its observation that "there is a need to reinforce the knowledge of economic operators and the competent authorities of the Member States regarding the principle of mutual recognition" and announced greater efforts at providing information and reporting on the problem, initiating infringement proceedings where applicable, and making greater use of the requirement for mutual recognition clauses in national legislation (COM 99/299: 7-8). The Council reacted with the adoption of a resolution, acknowledging the Commission's position (OJ 1999, No. C 141/5). While this resolution contained no specific proposals for further action, its passage was nonetheless contested.[82] Problems continued to persist in the application of mutual recognition for technically complex or potentially hazardous products, leading the Commission to conclude that "in the specific sectors in which national rules provide for such different levels of protection that the principle of mutual recognition cannot properly fulfil its role (as in the field of fortified foodstuffs and construction products), harmonisation will continue to be the most suitable solution, on condition that it covers all the problems for which mutual recognition cannot provide an effective solution" (COM 2002/419: 2). The Commission also reported an increased number of infringement proceedings targeting member states' failure to apply the principle of mutual recognition (COM 2002/419: 33). By 2003, the Commission started to mention the possibility of legislation on the application of the mutual recognition principle, in order to provide "more structure so as to enhance transparency" (COM 2003/238: 7). This would include binding rules "which would make the application of the principle easier and more predictable for business" (COM 2005/11: 22). The Commission transferred the corresponding proposal for a regulation to the Council and the EP in February 2007, stressing again the lack of

[82] Its adoption was listed as a B-Point in Council negotiations according to PreLex.

awareness of the principle and the legal uncertainty surrounding its application, in particular with regard to the range of product classes it applies to and the allocation of the burden of proof (COM 2007/36: 2). The proposal introduced a legally binding procedure for national authorities to follow should they choose not to adhere to the principle of mutual recognition and apply a national standard to an imported product instead. The procedure requires the national authority to fully disclose the reasons underlying the decision, and to indicate the possible legal remedies against it. Such remedies would always include recourse to the national judicial system (COM 2007/36: 15-16). In effect, the proposal firmly allocated the administrative burden to the national authority (cf. Craig and de Búrca 2011: 686). Merely a year later, Council and Parliament agreed on the proposal without substantive alterations, adopting the first piece of legislation that explicitly endorses the concept of mutual recognition (regulation 764/2008).

Summary

This overview of internal market policy over the last two decades stresses the Commission's concern with procedural rules to give effect to mutual recognition as a central principle of market integration, which had until recently been based exclusively on case-law. Member state opposition, or, in any case, refusal to endorse the principle, had rendered it an ineffective tool. The Commission's concerns for legal certainty and its comments about the costliness of the lack of clear legal guidelines echo Susanne Schmidt's propositions about the inherent instability of case-law and the preferability of legislative codification (cf. Schmidt 2011a: 46). In essence, this was the strategy pursued by the Commission during this time. While there was some judicial activity in this regard, which resulted in the Commission successfully imposing on member states an obligation to include mutual

recognition clauses in new domestic legislation, the Commission's attempt to gain larger autonomous regulatory powers through legislation failed, and there is no evidence of it attempting to expand its position in court. The Commission did, however, combine its proposal for the legislative codification of guidelines concerning the application of mutual recognition with the threat of increased resort to infringement proceedings in this matter.

5.6 Conclusion

The findings of the case study certainly add complexity to the analysis of Commission strategies, but they also corroborate some initial assumptions. There is evidence for a link between the Commission's actions in legislation and litigation. Legislative obstacles to harmonizing legislation have influenced the Commission's resort to legal proceedings particularly for the period between the mid 1970s and the early 1990s.

Early Commission action in establishing the common market was essentially non-confrontative. The Commission regarded discriminatory trade rules as incompatible with Treaty stipulations but accepted wider member state discretion in formulating non-discriminatory rules characteristic of all market regulation. The Commission referred almost no infringement proceedings to the Court during this time. It essentially regarded the procedure as a forum for confidential negotiation between member state governments and itself which should generally not result in confrontation. Its primary tool for the abolishment of trade barriers were harmonization measures, which it initiated with increasing frequency following the 1968 General Programme.

This position changed over the course of the 1970s, where several trends overlapped. First, the legislative programme for the harmonization of product standards proved unsuccessful. The Commission ascribed this fact to member state

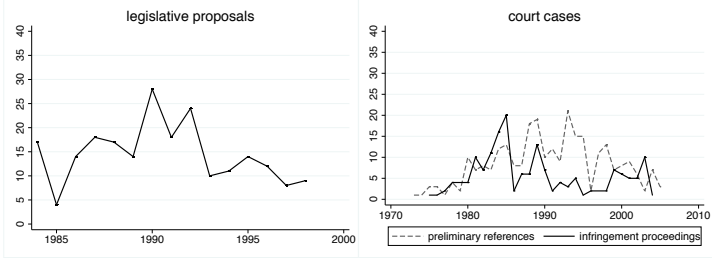
resistance in the face of adverse economic conditions. Second, its interpretation of Treaty obligations turned more weary of member state discretion, and this position was supported by the Court of Justice, which, at least in *Dassonville*, even went beyond the Commission's interpretation. Third, from 1977, the Commission revised its position on the use of the infringement procedure in the face of increasing legislative obstacles, resulting in a more confrontative stance in the enforcement of what the Commission interpreted as obligations arising out of EU law. All three strands combined after the Court's judgement in *Cassis de Dijon*, which provided a legal principle allowing the Commission to apply pressure on member state governments to remove trade barriers.

The emergence of the single market programme, which was promoted both by the Commission and the European Council, caused a change in the Commission's strategy, leading it to focus on legislation while de-emphasising litigation. This may be due to several factors that coincided during this time. First, member state resistance to harmonization measures receded in the face of a changing dominant economic ideology and improved economic conditions. Moreover, the Single European Act introduced majority voting to legislative procedures concerning harmonization. All of these factors reduced the obstacles to successful legislation, and the Commission subsequently de-emphasised its judicial strategy. The period following the completion of the single market programme is characterised less by continuing harmonizing legislation, but more by the Commission's intention to give greater effect to the principle of mutual recognition.

A look at descriptive statistics for Commission action during this time supports this interpretation (figure 5.1). The two figures make for slightly awkward comparison because the timelines are not the same (there are no reliable data on legislative initiatives before 1984). The data on legislative initiatives refer to Commission proposals concerning the ap-

proximation of member state trade laws according to the internal market clause (art. 100 EEC and its successors), whereas the court cases specifically pertain to quantitative restrictions to trade and measures having equivalent effect (art. 30-36 EEC and successors).

Figure 5.1: Legislative initiatives and cases referred to the Court



Source: Calculations based on (Stone Sweet and Brunell 2007) and (König, Luetgert et al. 2006).

The lack of good aggregate data on legislative proposals before 1984 is unfortunate, as it is not possible to compare the Commission's activities before and after the single market programme. Evidence from the Commission's General Reports and other documents quoted above, however, suggests the conclusion that the Commission's legislative activity indeed picked up with the prospect of Council cooperation and the introduction of majority voting, to then gradually taper off after the completion of the programme around 1992. The low point in Commission legislative activity coincides with the reorientation of the Commission's strategy from the 'traditional' approach to the 'new' approach to harmonization in the Commission's 1985 White Paper on the completion of the internal market.

Looking at court cases, what becomes apparent is a sudden and constant rise in infringement proceedings referred to the Court from the late 1970s, the spike of which coincides with the formulation of the 1985 White Paper. This is consistent

with the evidence from Commission documents that had repeatedly highlighted the growing importance of litigation in pursuing its policy of market integration in the face of member state resistance to corresponding legislation. The origin of the Commission's increased resort to infringement proceedings moreover coincides with the reforms of internal procedures concerning enforcement actions described by Claus-Dieter Ehlermann (cf. Ehlermann 1981: 141). It is also indicative of a distinct 'learning curve' – the Commission had priorly not made much use of this procedure across the board.

The post-1985 drop in court referrals can then be seen as a function of the success of the legislative programme. The spike of referrals in 1989 is an outlier in the general post-1985 trend and cannot, by reference to the relevant documents, be comprehensively explained in terms of a Commission strategy. It may have constituted a form of 'warning' in the face of lagging Council activity: "While real progress has been made in all areas covered by qualified majority voting, matters requiring the Council to be unanimous are falling behind schedule" (COM 90/90: 3). More likely, however, is an explanation that points to the predominant plaintiff for this year. Whereas the 20 infringement proceedings lodged before the Court in 1985 spread more or less evenly across member states, half of the 14 proceedings in 1989 concern Italy, which had been admonished in a 1990 report on the implementation of the White Paper as a laggard in implementing harmonizing directives.[83] The slight increase in enforcement actions reaching the Court towards the late 1990s is again consistent with Commission documents describing a concentration on such action to give effect to the principle of mutual recognition (COM 99/299: 7-8), although this link is

[83] "In some countries progress has been much slower, particularly in Italy, which despite its experience with Community law, has become the Member state with the greatest backlog since improvements in Spain and Portugal" (COM 90/90: 6).

not corroborated by other evidence. None of these cases have contributed to a reinterpretation of the legal principle.
Finally, the data also reveal a distinct time dimension to the Commission's activity profile that is due not to changing institutional incentives, but rather the changing policy priorities of the Union (and the Commission) over time. Throughout the 1990s, the Commission's rate of legislative proposals and enforcement actions concerning intra-Community trade in goods remains well below its late 1980s peak. The focus of activity by the Union institutions evidently moved on to different subject areas after 1992, reflecting both the relative success of the single market programme as well as the revised strategy concerning harmonization.

The evidence from this overview of legislation and infringement proceedings largely corroborates my assumption that the Commission increasingly resorts to infringement proceedings where the prospects of successful legislation are low. The reversal in the ratio moreover coincides with the introduction of majority voting, although there is less evidence for a distinct causal link – the overall alignment of preferences regarding market integration may equally explain this phenomenon.

What is the role of preliminary reference procedures? One of the distinct observations in this analysis is that early legal developments stem almost exclusively from preliminary references. This is consistent with the finding that the Commission did not begin to systematically refer cases to the Court before the late 1970s. The Commission used its ability to lodge observations in preliminary reference proceedings and in this way regularly presented its legal positions to the Court, which, with the exception of *Dassonville*, largely supported the Commission's stand-point. A comparison between the amount of infringement proceedings and preliminary references as depicted in figure 5.1 reveals several patterns.

First, the number of court cases in total for this subject matter was low during the 1970s. This is largely in synch with the comparatively low activity profile of the Court at this time. It moreover becomes apparent that from the late 1970s until 1985, court cases in this field were predominantly initiated by the Commission. The situation changes drastically after 1985, when the Commission started referring much less cases to the Court, whereas the number of preliminary references rose until about 1993 and then started receding. This pattern introduces another possible explanation for the reversal of the Commission's judicial strategy after 1985. The rising incidence of preliminary reference procedures before the Court could be interpreted as making it plainly unnecessary for the Commission to pursue infringement proceedings against member states, when it could use its limited resources for legislative initiatives while simultaneously being able to keep up pressure on member states in the judicial sphere. The amount of cases pursued by individual traders before national courts, however, was also regarded with apprehension by some Commission officials, as the subjects of such proceedings appeared increasingly frivolous, potentially threatening revolt from national courts and jeopardising the legislative cooperation between the Commission and the Council (cf. Stone Sweet 2004: 139-140). Perhaps encouraged by the Commission's prior actions, individual litigants started to question the legality of national trading rules that had no apparent connection to cross-border trade, such as rules governing opening times for retail outlets (cf. White 1989: 238-239; Steiner 1992: 750). The Court eventually went on to define limits to this liberalizing drive in *Keck* (joined cases C-267/91 and C-268/91, ECR I 1993: 6097), essentially adopting an interpretation that had previously been proposed by Eric White (White 1989), a member of the Commission's Legal Service (cf. Stone Sweet 2004: 140). This demonstrates that preliminary references can be something of a double-edged sword: they are useful where they fit

into the policy programme pursued by the Commission, but can be counterproductive where they do not.

Chapter 6

From market citizen to European citizen

The subject of this chapter, the free movement of persons, constitutes, next to the free movement of goods covered in the last chapter, and the free movement of services and capital, one of the 'fundamental freedoms' embedded in the original Rome Treaty that are central to the Community's rights-based approach to market building. As such, the policies pursued in accordance to it bear some resemblance to those described in the previous chapter; but they also differ in important ways, which makes for a fruitful comparison. Importantly, the Commission has from the outset regarded policies concerning the free movement of persons, while anchored in the economic realm, as having an essential social policy component (cf. Craig and de Búrca 2011: 715). Whereas the free movement of goods was expected to have positive effects on the economic performance of national economies, and be noticeable to the consumer through lower prices and increased diversity in products, the right for persons to move freely within the Community was regarded as much more symbolic, not just for the establishment of a common market, but for the advancement towards an "ever closer union among the peoples of Europe", as was declared in the first preamble of the EEC Treaty. Consequently, the free movement of persons, independent of economic activity, was one of the central elements in the notion of a 'European citizenship' which the Commission and the member state governments debated since the early 1970s.

This chapter proceeds as follows. As in the previous chapter, I will start with a short overview of the central characteristics of the policy area concerned. The second part (6.2) describes

the initial position of the Commission with regard to the free movement of persons, and outlines early legislation. While this early phase was cooperative, I demonstrate a growing friction between the position of the Commission and that of the member states. The third part (6.3) concerns the emerging debate about the concept of a 'European citizenship' and the concurrent attempts by the Commission to de-couple free movement rights from their economic base. The fourth part (6.4) traces the Commission's proposal for a general right of residence for Community citizens, which it transferred to the Council in 1979 but which was only adopted in 1990. The remainder of the case study (6.5) concentrates on the substantial rights associated with the inclusion of 'Union citizenship' in the Treaty of Maastricht and the Commission's effort to consolidate legislation on the free movement of persons to cover all Union citizens. A final section (6.6) concludes.

6.1 Overview

The obstacles to the free movement of persons, as they existed in the first decades of the European Economic Community, were of a different quality than the tariffs, quotas and measures having equivalent effect hindering trade in goods. National control over the entry of migrants to the territory, the conditions for residence and access to the labour market, even when concerning other Community nationals, touched close to the core of national sovereignty. This was particularly true when it came to rules governing access to social security and social welfare, both of which, as all actors understood, presented barriers to movement. Losing entitlement to social benefits in the home country, or the lack of access to social security in the host country, pose significant economic disincentives to move from one country to the other, even when other factors make migration an attractive option. The more surprising, perhaps, that it did not take much more than a decade for the Community legislators to

put into effect the essential framework for each member state to open up its labour market to other Community nationals. The issue started becoming contentious, however, when the focus of the debate changed to non-economic migrants: family members, students, pensioners, the unemployed, and the 'non-employed'. When notions of a 'European citizenship' were debated in the early 1970s, the Commission seized upon this concept to promote a de-coupling of free movement from its economic base, a position that proved highly conflictive among member state governments.

When formulating the respective articles of the EEC Treaty, member state governments couched the rules governing the free movement of persons in mainly economic terms. While the free movement of goods was treated in a separate Treaty title, the free movement of persons was paired with the free movement of capital and services (article 3(c) and title III EEC), ostensibly indicating that it was mainly barriers to the movement of economic factors that member state governments intended to remove. This is evident moreover in the fact that free movement was tied to an economic activity: chapter 1 of title III covered workers, chapter 2 the self-employed. It is apparent that, as part of an Economic Community, the free movement of persons was understood as an allocation of economic assets, say of unemployed Italian workers to northern industries with high demand for labour (cf. Craig and de Búrca 2011: 715).

The outlines of the free movement of workers were laid out in article 48 EEC, which stipulated "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". Member state governments defined in article 48(3) EEC that the free movement for workers was reserved for the purpose of "accepting offers for employment actually made". They also exempted employment in the public service (article 48(4) EEC)

from free movement rules, reserving the ability to regulate state employees as a national domain. Article 49 EEC in turn spelled out the procedure for the adoption of directives and regulations governing this field: the Council would adopt such measures on a proposal from the Commission and upon consulting the Economic and Social Committee. While not foreseen in this article, the Council subsequently also consulted the European Parliament on a regular basis. Finally, article 51 EEC governed the procedure to coordinate national social security systems with the aim of "aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries" and "payment of benefits to persons resident in the territories of Member States" (article 51 EEC). Such measures would be adopted unanimously on a proposal from the Commission.

Subsequent Treaty changes did not significantly alter the wording of these articles. The Single European Act introduced the cooperation procedure to article 49 EEC and explicitly allowed for qualitative majority voting in the Council, but did not change article 51 EEC covering social security. The Maastricht Treaty exchanged cooperation for codecision in article 49 EEC, but article 51 EEC was left unchanged until the Treaty of Amsterdam, which introduced codecision coupled with unanimity in the Council. Finally, the Lisbon Treaty introduced majority voting in the form of the ordinary legislative procedure for social security matters, but included the option of an 'emergency brake' for national governments, should a legislative act "affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system" (article 48 TFEU). All matters falling outside the scope of articles 49 and 51 EEC (now art. 46 and 48 TFEU) would have to be based on article 100 EEC, the internal market clause, requiring unanimity and the consultation procedure (which remains in place in article 115 TFEU), or the Treaty's

general flexibility clause (the former art. 235 EEC, now article 352 TFEU), which requires unanimity and, since the Treaty of Lisbon, EP consent.

6.2 Cooperation and emerging friction

While the Treaty did not explicitly refer to non-economic objectives in the free movement of persons, the Commission acknowledged its social implications early on: "The free movement of workers is linked with the economic and social policy of the Community, since it aims at a better distribution of manpower throughout the economy of the six Member States and at raising the workers' standard of living by helping to reach full employment" (European Economic Community Commission 1960: 94). In this vein, it established a link to the social policy mandate included in the Treaty, which the Commission summarised as an "equalization of working and living conditions of labour in an upward direction" (European Economic Community Commission 1961: 155). In many ways, this constituted a difficult compromise, as the Treaty included very different economic and social policy mandates. If any inference can be drawn from the ordering of the Treaty, it can be concluded that social policy objectives were at best subsidiary to economic ones.[84] In article 117 EEC, member states agreed "upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems", but also from active harmonization measures. Member state governments conferred upon the Commission, in article 118 EEC "the task of promoting close cooperation between Member States in the social field". This

[84] Social policy is covered last amongst the Community's substantive policies.

field would include employment, labour law, vocational training, social security, occupational health and safety, and collective bargaining rights. While this list of competencies may appear extensive, the Treaty articles on social provisions did not include a concrete legislative mandate, safe a stipulation for the Commission to "act in close contact with Member States by making studies, delivering opinions and arranging consultations" (article 118 EEC), presuming that harmonization measures would have to be adopted in accordance with article 100 EEC, the general internal market clause.

The Commission clearly took this ostensive mandate seriously: "The work of approximating legislative and administrative provisions also extends to the social security field" (European Economic Community Commission 1960: 204). This should be seen, much like in the field of goods, in relation to its efforts to remove barriers to trade as an economic necessity: "To ensure the free movement of labour, the Treaty lays down in Article 51 that any obstacles to such free movement which may stem from social security legislation must be removed in such a way as to guarantee migrant workers and their families the benefits of social security" (European Economic Community Commission 1960: 96). Did this statement of policy goals result in a similar two-pronged approach to harmonization and the removal of barriers?

It does not seem so. Certainly, the harmonization of national social security systems would have been a very ambitious project. While the Commission initially upheld its language in subsequent reports,[85] it gradually toned down its emphasis on harmonization, and its actions remained largely confined to the production of numerous surveys, studies, and com-

[85] Cf. e.g. "The European Commission has continued its efforts to bring about the progressive harmonization of social systems" (European Economic Community Commission 1961: 159); "The Commission's activities in harmonizing social policies are carried on in close contact with the Governments and both sides of industry" (European Economic Community Commission 1965: 251).

parative tables of social security laws. It finally dropped its reference to harmonization measures from the subheadings in the social policy chapter of its General Reports in 1975. Nonetheless, the Commission maintained the dual economic and social objectives it identified for the free movement of persons. In drafting the first related statutory provisions, "the Commission had in view not only the progressive fulfilment of one of the fundamental conditions for the establishment of the Common Market but also the need to fit the proposed liberalization measures into its social policy" (European Economic Community Commission 1961: 157). It is also possible to detect a shift in emphasis towards the social policy spectrum,[86] all the while acknowledging the limited powers in the field.[87] This is reflected in the structuring of the Commission's General Reports. From 1965 onwards, the Commission summarised its activities concerning the "free movement of workers" in the social policy chapter, while maintaining a more general heading on the "free movement of persons" in the internal market section.

The Commission and the Council cooperated during the 1960s to establish the legislative framework for the free movement of economically active Community nationals. The frequency of legislation and the breadth of issue areas are indicative of the fact that initially there was little friction between the actors involved. In this first decade of the Economic Community, the legislative bodies adopted regulation

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[86] "A dynamic social policy, not subordinate to other considerations of the Community policy, is needed, not only to gain the support of all workers in the building of Europe, but also to achieve the main object of that process which, in the terms of the Preamble of the Treaty, is constantly to improve the living and working conditions of the peoples of the six countries" (European Economic Community Commission 1963: 174).

[87] "During the period under review the Commission has continued its work with a view to implementing the few mandatory provisions of the Treaty which relate to social matters and, so far as its limited powers allow, to improving the manner of their application" (European Economic Community Commission 1963: 174).

3 and 4 of 1958, covering the coordination of social security systems for migrant workers, directive 64/221 concerning derogations from the right of free movement, directive 68/360 abolishing certain barriers to movement, regulation 1612/68 on the free movement of workers, and multiple amendments thereto. These early pieces of legislation fleshed out the rights of migrant Community nationals and their families to enter another member state, to remain in that state, to access employment, to be protected from expulsion, and not to be discriminated against with regards to taxes, social advantages, social security benefits, vocational training, housing, and trade union membership (cf. Foster 2006: 245-248).

With this legislative framework successively in place, the Commission did not adapt a confrontative stance in litigation, even where it arose from preliminary references. One of the central early points of contention that were raised in court was the definition of the terms 'worker' and 'wage-earner', which by and large delineated who should be covered by the Community's provisions on free movement for persons who were not self-employed, in particular with regard to the implications for social security benefits. When this question was first referred to the European Court of Justice by a Dutch court in 1963, the Commission advocated member state discretion. Siding with the German government's observation, the Commission held that the definition of 'wage-earner', as it had been used in Community legislation, should be defined by national laws: "the Treaty does not authorize the Community to create a unified social law for all the Member States. Accordingly, it should not be assumed that there is a specifically Community definition of the legal concept of 'wage-earner'" (Case 75/63, *Hoekstra*, ECR 1964: 183). The Court did not follow this position. In direct contradiction to the Commission's observation, it held that "If the definition of this term [wage-earner] were a matter within the competence of national law, it would therefore be possi-

ble for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person. [...] The concept of 'workers' in the said Articles does not therefore relate to national law, but to Community law" (Case 75/63, ECR 1964: 184). The same would hold for the expression 'wage-earner' as used in the respective implementing legislation. The Court favoured a wide interpretation of these terms. It would not be confined to those currently employed, but rather refer "to all those who, as such and under whatever description, are covered by the different national systems of social security" (Case 75/63, ECR 1964: 185).

The Community legislators subsequently included in regulation 1408/71, the first major revision of the coordination regime for social security, a thorough definition of the term 'worker', taking account of the Court's decision (cf. Sindbjerg Martinsen 2006: 220). This term would mean "any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons" (article 1(a), regulation 1408/71, OJ 1971, No. L 149: 418). Although the definition they provided was broad, all elements specifically refer to the exercise, present or past, of an economic activity. The fact that it had taken over four years to adopt this regulation, the original proposal having been sent to the Council in January 1966, points to an increasingly conflictive nature of the subject area. In comparison, the equally important regulation 1612/68 on the freedom of movement for workers within the Community, setting the general framework for entry and the right to reside, was adopted just over a year after the Commission submitted its proposal.

Emerging friction – the public service exception

This increasingly conflictive nature of the subject matter was subsequently reflected in judicial proceedings. Contrary to its initial deferential position in *Hoekstra*, the Commission took the view in the early 1970s that exemptions to the right to free movement should be interpreted narrowly. One of the subject areas the Commission targeted specifically was the public service exception. Member states had, in article 48(4) EEC, exempted "employment in the public service" from the rules regulating the free movement of workers. National governments interpreted this to mean that they retained control over employment relations where they themselves were the employer. In particular, they would retain the ability to reserve certain positions to their nationals, and exclude non-nationals from certain benefits that came with the status as en employee in the public service. This position was contested in another preliminary reference. Giovanni *Sotgiu*, an Italian migrant working for the German postal service (a state operation), who had been denied a raise in a separation allowance paid to workers employed away from their residence, claimed to be a victim of discrimination based on his nationality. The German government responded extensively to this claim. According to its observation, the Community rules prohibiting discrimination on grounds of nationality "do not apply to the employees of the Federal Post Office, since the latter forms part of the public service [...]. In excluding the sector of the public service [from free movement rights] Article 48 (4) of the Treaty has taken account of the fact that the Community is not a unitary state organization but is based upon the state organization of its Member States. The Treaty does not define what is to be understood by 'the public service': the objectives of Article 48 (4) require an interpretation based on the national concept and idea of the public service. This provision is justified by the need to be able to rely upon the special loyalties of the nationals of a

country at the time of the recruitment of employees in the public service" (Case 152/73, ECR 1974: 156-157).
In direct contrast to this position the Commission now argued in its observation that the concept of employment in the public service "is a concept of Community law which has no reference to the law of Member States" (Case 152/73, ECR 1974: 160). The tone of its argument is altogether different from that a decade before. Reminiscent of the Court's argument in *Hoekstra*, the Commission now asserted that: "If it were left to the Member States to define independently the scope of the public service, this would result in giving to the duties which flow from the principle of freedom of movement, that is, from one of the fundamental liberties provided for by the Treaty, a very different scope from one State to another" (Case 152/73, ECR 1974: 158). Employment in the public service would have to be interpreted strictly to be "limited to the functions of the public service which are concerned with the genuine interests of the State" (Case 152/73, ECR 1974: 159). While the Court did not directly address the extensive definition proposed by the Commission, it agreed that employment in the public service would be subject to a definition under Community law (Case 152/73, ECR 1974: 163; cf. also Craig and de Búrca 2011: 735).

The Commission subsequently took efforts to enforce its definition. In a later infringement case against Belgium, the Commission restated its position that the public service exception should be interpreted narrowly and refer only to such posts that implied "actual participation in the exercise of official authority by those occupying them" (Case 149/79, ECR 1980: 3884). Subject of the proceedings were Belgian laws that defined as public servants drivers and signalmen of the national railroad, office cleaners, painter's assistants and canteen staff of the local railways, and architects, night watchmen and garden hands in the employment of the City of Brussels, among others (Case 149/79, ECR 1982: 1847-

1848). The Belgian government, supported by the French, German and British governments, replied that "when the Treaty was drafted the Governments wished conditions of entry to public office to remain their preserve", arguing that a substantive interpretation of the "exercise of public authority" would amount to an "unworkable concept" (Case 149/79, ECR 1980: 3887). The government of the United Kingdom agreed that an attempt to apply the Commission's narrow concept of "participation in the exercise of official authority" to the public service of the United Kingdom "would in practice produce chaotic and arbitrary results". The concept would "impose an extremely heavy burden on Member States which wished to preserve the national integrity of their public service" (Case 149/79, ECR 1980: 3893). The French government submitted that the Commission's interpretation would "have extremely grave consequences throughout the whole of the French system of the public service" (Case 149/79, ECR 1980: 3897), especially with regard to the system of promotion, where a foreign national would be able to advance in the public service but be prohibited from adopting a post that included the exercise of public authority. In effect, the French government argued that the "demarcation of public services remains a prerogative of the Member States". A harmonized concept of the public service would not be for the Commission to define, but rather "a matter for positive Community measures which it is for the Commission to propose and the Council to negotiate, adopt and amend as domestic situations evolve" (Case 149/79, ECR 1980: 3897).

Despite these interventions, the Court followed the Commission's position. It ruled that the concept of employment in the public services "requires uniform interpretation and application throughout the Community" (Case 149/79, ECR 1980: 3901). According to the Court, the concept of employment in the public service must be "connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with

responsibility for safeguarding the general interests of the State" (Case 149/79, ECR 1982: 1831).

Based on this judgement, the Commission subsequently announced that it had "decided to implement a strategy for the elimination of restrictions on grounds of nationality, which in each Member State hinder the access of workers from other Member States to posts in certain particular parts of the public sector", considering that "the functions involved in certain forms of public employment are for the most part sufficiently remote from the specific activities of the public service as defined by the Court of Justice that they would only in very rare cases be covered by the exception in Article 48 (4) of the Treaty" (OJ 1988, No. C 72/2-3, cf. also COM 88/331: 25). The Commission would consequently act to "liberalize the conditions for access to employment in a large number of public sectors (agencies managing commercial services, operational public health services, teaching in public establishments, non-military research)" COM 88/331: 25), if necessary by recourse to infringement proceedings (cf. OJ 1988, No. C 72/3).

Summary

The pattern that becomes evident from the preceding section is somewhat reminiscent of that covered in the previous chapter. For the first decade or so, the Commission did not adopt a confrontative stance, and its legislative programme to flesh out the substance of free movement rights was largely adopted by the Council. In early judicial proceedings such as *Hoekstra*, the Commission advocated member state discretion, but, as in *Dassonville* (although this was a decade later), the Court went beyond the Commission's position in restricting member state regulatory authority. The reversal of the Commission's position over the following decade, however, is quite stark, and cannot be linked to frustrations to its

legislative programme, as was the case with its 1968 General Programme for the elimination of technical barriers to trade. The Commission's legal opinion in the *Sotgiu* case is the direct opposite of its previous position. While it had argued in *Hoekstra* that the term 'worker' should be subject to member state definitions, a decade later it argued that such a procedure with regard to the term 'public service' would be detrimental to free movement rights. Not only was this position highly contentious, but the Commission followed it up with a series of enforcement actions throughout the 1970s and 1980s. Notably absent is any attempt by the Commission to regulate this matter by initiating legislation. What motivated this reversal of positions is not immediately evident from the documents.

6.3 Moving beyond the economic base of free movement

The conflict about the public service exception, which played out over a decade and a half, is not an isolated case in the question of who would be covered by the Community's rules on the free movement of persons, and who could be lawfully excluded. The aspect forms part of a wider debate whether free movement rights should be de-coupled from their economic foundation and apply to all Community nationals, regardless of their economic status.

An early Commission lever to expand the range of persons covered by free movement rights was the notion that such rights could be extended to 'recipients of service'. While the Treaty did not refer to this group of people, the early directives covering rights with regard to establishment and the provision of services specifically stated that "freedom to provide services entails that persons providing and receiving services should have the rights of residence for the time during which services are being provided" (recital 2, directive

64/220). In this vein, article 1 of directive 64/220 stipulated that "Member States shall [...] abolish restrictions on the movement and residence of [...] nationals of Member States wishing to go to another Member State as recipients of services".[88] While this concept was potentially wide ranging, the Commission, in line with its early conciliatory stance, initially adopted a restrictive position on who would be covered by this provision. In particular, the understanding seemed to be that free movement rights for recipients of a service would only come into effect if the provider himself was also a migrant (cf. Evans 1982: 503). Consequently, the Commission stated, in response to a parliamentary question, that tourists, among others, would not be included (OJ 1969, No. C 159/2).

As with the public service exception, this initial stance gave way in the 1970s to a more expansive approach to who could be covered by the provisions on recipients of service. In the case of a refusal by French border officials to admit a group of German delegates of Amnesty International seeking to have lunch in France, the Commission argued that "a decision by a Member State to refuse entry to nationals of another Member State who wish to enter its territory as recipients of services violates the principle of free movement of persons and services within the Community" (OJ 1975, No. C 242/3). The requirement, pronounced earlier, that the provider of the service should also be a migrant, seems to have been dropped. However, the Commission held that the purpose of border crossing would still need to be tied to an economic activity, and would not apply, for example, to German protesters wishing to enter France with the intention of demonstrating against the construction of a nuclear plant: "Free movement of persons and services within the meaning of the EEC Treaty and provisions adopted in implementation of that Treaty relates solely to nationals of Member States

[88] This wording was later repeated in directive 73/149 which replaced the prior directive.

who move and reside within the Community either to pursue an [economic][89] activity or as recipients of services" (OJ 1975, No. C 242/4).[90]
Despite this restriction, the concept of 'recipients of service' as the Commission interpreted it nonetheless had the potential to cover almost any Community national crossing the border from one member state to the next, since almost any traveler is a prospective recipient of a service (cf. Evans 1982: 507). The Commission moreover confirmed that it had changed its position on tourists, arguing in its observations in *Watson*, that tourists would indeed benefit from free movement rights as recipients of services (Case 118/75, ECR 1976: 1193).

Debating citizenship

The Commission started to reorient its position on the discretion member states would have in restricting rights to free movement at around the same time that member state governments themselves began to debate the possibility of a 'European citizenship'. That the Treaty of Rome and subsequent legislation established quite far reaching rights for Community nationals wishing to migrate was clearly intended by its authors. The language of the relevant secondary legislation in particular uses the term 'fundamental right'[91] when referring to the free movement of workers. At the same time, the reasons the legislators provided for establishing such rights were not purely economic, but also of a social character: "mobility of labour within the Community must be

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[89] The English version refers solely to "activity", but this seems to be an error in translation. The German versions reads "Erwerbstätigkeit", the French "activité économique".

[90] The Commission maintained this view with regard to a similar incident in 1979 (OJ 1979, No. C 214/31).

[91] Recital 3 of regulation 1612/68, for example, states: "freedom of movement constitutes a fundamental right of workers and their families".

one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States (recital 3, regulation 1612/68). Both primary and secondary law, moreover, explicitly established a link between the right of free movement and the principle of non-discrimination.[92] Member state governments had thus intended a rights-based approach to the free movement of persons. But the exercise of these rights would have to bear a relation to economic activities (cf. Evans 1982: 501-502).

There is evidence that the Commission had considered the free movement of persons as a nucleus for an incipient European citizenship from very early on (cf. Evans 1982: 409-501). Lionello Levi Sandri, Social Affairs Commissioner and later Vice-President of the Commission, explicitly used the term in a 1961 debate in the European Parliament: "Ich sehe in der Freizügigkeit der Arbeitskräfte nicht nur ein Mittel zur bestmöglichen Kombination der Produktionsfaktoren, sondern ich sehe in ihr vor allem den ersten Aspekt einer europäischen Staatsbürgerschaft" (EP Debates No. 48: 157, 22.11.1961, German edition). He repeated a statement to this effect in 1968: "In dieser Sicht ist die Freizügigkeit der Personen etwas Höheres und Anspruchsvolleres als die bloße Beweglichkeit eines Produktionsfaktors. Sie ist vielmehr ein erster Keim, eine noch unvollkommene Gestalt des Europäischen Bürgerrechts" (EC Bulletin 11-1968: 6, German edition). In the run-up to the 1972 Summit Conference in Paris, Commission president Sicco Mansholt again brought up the term when speaking to the European Parliament: "Eine

[92] Recall that article 49 EEC reads: "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States". Recital 5 of regulation 1612/68 states: "the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality or treatment shall be ensured in fact and in law".

Wirtschaftsgemeinschaft mit Grenzen, an denen die Bürger ihren Paß vorzeigen müssen und Kontrollen unterworfen sind, ist keine Wirtschaftsgemeinschaft. [...] Sie ist erst dann verwirklicht, wenn der normale Bürger, der durch diese Gemeinschaft reist, nicht nur das Gefühl hat, sondern am eigenen Leibe erfährt, daß etwas Wesentliches verwirklicht wurde. Wir fordern daher auch von der Gipfelkonferenz – das wird in unseren Vorschlägen festgelegt werden –, daß das Staatsbürgerrecht geschaffen wird, das europäische Recht, sich in der Gemeinschaft frei und ohne jegliche Hindernisse bewegen zu können" (EP Debates No. 149: 110, 19.4.1972, German edition). He repeated this position at the Summit Conference, proposing that the Community legislature "open the frontiers which still keep its citizens apart from one another. To this end we consider systematic checks at the Community's internal frontiers should be done away with, and nationals of Member States progressively integrated into the social, administrative and political fabric of the host countries, with the aim of gradually conferring upon them 'European civic rights'" (EC Bulletin 11-1972: 59). This notion was supported up by Italian prime minister Giulio Andreotti, who proposed to "establish a European citizenship, which would be in addition to the citizenship which the inhabitants of our countries now possess. It should permit the citizens of the Community countries, after a stay of a certain length in one of our countries, to exercise some political rights, such as that of participating in communal elections" (EC Bulletin 11-1972: 46). The granting of such political rights was also brought up by Belgian prime minister Gaston Eyskens (EC Bulletin 11-1972: 39). While the 1972 Summit Conference did not produce any concrete proposals in this regard, member state governments agreed, somewhat vaguely, at the European Summit in Paris two years later to "study the conditions and the timing under which the citizens of the nine Member States could be given special rights as members of the Community" (point 11 of the Communiqué of the European

Community Summit Meeting in Paris 1974, EC Bulletin 12-1974: 8).

While the member state governments did not officially mention the term citizenship in their communiqué, the Commission responded to this point in a 1975 report entitled "Towards European Citizenship". Here, it referred back to its earlier views on an expansion of the rights of economic migrants to all Community citizens. While it restated that economic activity is the trigger for rights under the Treaty, such activity would not define the outer limits of the ensuing rights: "Although these rights are based on economic activity of the beneficiary, they are not confined to the person exercising the activity nor to the period of the activity" (COM 1975/321, Bulletin EC 7-1975: 26). The report specifically made reference to the concept of 'recipients of service', which the Commission considered as a potential basis for an expansion beyond the purely economic realm. The Commission was clearly aware of the broad implications of its approach: "Since any national of a Member State who goes to another Member State is at least a recipient of services in the latter, one can assume that Community law provides the requisite powers [...] to give each of these Community nationals the economic and social rights which the nationals of the host country possess and the rights to come and go in any of the Member States" (COM 1975/321, Bulletin EC 7-1975: 27).

Summary

The 1975 report demonstrated that the Commission had started thinking of ways it could de-couple free movement rights from its economic base in the 1970s. In particular, it was considering which rights were already implied in the free movement of persons as contained in law in force, and which would have to be additionally granted through Treaty change or secondary legislation. Its interpretation of which persons

would benefit from free movement rights as a 'recipient of service' pointed to an expansive position on the former. This, again, constituted a stark reversal of stand-points within a short period of time.

This development should not have been entirely unforeseen by the member state governments. As is evident from their formulations in primary law and secondary legislation, they clearly intended a rights-based approach to the free movement of persons, and they couched the relevant provision in the strong language of fundamental rights. It is unclear, however, to what extent they expected these rights to be mainly symbolical. The concept of citizenship, moreover, was discussed at the highest political level at the European Summit in 1974, and member state governments gave the Commission a mandate to pursue that matter further.

6.4 Towards a general right of residence

Subsequent efforts towards fleshing out the content of the special rights of Community citizens progressed very slowly. Three years later, the Commission remarked that Council support for the special rights agenda seemed to have stalled: "Discussions on two other topics raised at the Paris Summit — the grant of special rights for the citizens of the nine Member States throughout the Community and the creation of a passport union — did not advance to a point at which further, more precise, political guidelines could have been issued. There is therefore no immediate prospect of a concrete decision on these matters. This is regrettable, because such a decision would probably have beneficial effects for freedom of movement and the growth of a greater awareness of the Community as a political entity" (European Commis-

sion 1977: 85).[93] This lack of progress coincided with the perceived persistence of barriers to the free movement of persons which were increasingly put into question by the affected citizens: "The increasing number of written and oral questions on this subject put to the Commission by Members of Parliament and of complaints by private individuals would suggest that crossing the internal frontiers of the Community is fraught with difficulties" (European Commission 1980: 97).

The European Parliament, in a 1977 resolution, urged the Commission to take further steps with regard to giving effect to "the right of residence for all Community citizens" (OJ 1977, No. C 299/26-27). The Commission responded by preparing a proposal for a directive on the "right of all nationals of a Member State to remain on the territory of other Member States, even without carrying on any economic activity" (European Commission 1979: 91). Existing rights, in the words of the Commission, "should not remain the prerogative solely of those engaged in economic activities" (European Commission 1979: 96). Such residence rights should be granted to migrants "no longer as persons engaged in economic activity but in their capacity as Community citizens" (European Commission 1980: 98).

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[93] The same holds true for later years: "the Council continued considering these two matters raised at the Paris meeting of Heads of Government in December 1974. No decision was taken. The main difficulties concern the question of what languages to use and the cover design for the European passport. The Commission considers it lamentable that the Member States are unable to show enough flexibility on these secondary matters to allow a political decision taken by the Heads of Government more than three years ago to be put into effect. It would emphasize the beneficial effects of the decision that is awaited for the free movement of persons and for the development of a sharper awareness of the Community as a political entity" (European Commission 1978: 83-84); "Efforts by the Council and the Commission to solve the difficulties involved in the creation of a uniform passport did not meet with success in 1978" (European Commission 1979: 90).

The original proposal submitted to the Council on 31 July 1979 contained in article 4 three basic stipulations that set the boundaries for the exercise of free movement rights: "Member States shall grant the right of permanent residence to citizens of another Member State [...] who reside or wish to reside in their territory. Nevertheless, the Member States may require those citizens to provide proof of sufficient resources to provide for their own needs and the dependent members of their family. [...] Member States may not require such resources to be greater than the minimum subsistence level defined under their law" (COM 79/212, OJ 1979, No. C 217/15).

The European Parliament supported the Commission's initiative, noting that "the proposal for a Directive introduces a new dimension to previous legislation on freedom of movement and the right of establishment since it extends these rights to all citizens of the Community, independently of the pursuit of an economic activity", and welcoming "the fact that this will represent the first step towards the creation of a 'European citizenship'" (OJ 1980, No. C 117/48). Its position on the possible constraints on citizen rights, however, went even further, to the extent that "the proposal should not grant Member States the power to make the exercise of the right of residence subject to proof that the applicant has sufficient resources", since "such a condition would make the granting of the right of residence dependent upon socially discriminatory procedures, which would be contrary to the aims of the Treaties" (OJ 1980, No. C 117/48). Despite the fact that the Commission did not adopt this position and retained the requirement for sufficient resources (OJ 1980, No. C 188/10), the details of this requirement proved contentious in the Council. The general fear among member state governments was that a general right of residence would lead to unsustainable burdens on social security and social welfare

systems, if the rule of non-discrimination was strictly applied in this area (cf. Craig and de Búrca 2011: 721).

Subsequently, there was no progress on this proposal. By 1984, the Commission had even ceased to report on its status in its General Report. This situation changed with the member states' revived efforts towards the establishment of the single market, in connection with the European Council at Fontainebleau in June 1984. In the conclusions to this summit, under the heading of "A people's Europe", the member state governments acknowledged that the "Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world", and called for an ad-hoc committee to prepare and coordinate this action, made up of member state representatives (Conclusions of the Presidency, EC Bulletin 6-1984: 11). Despite the fact that the member states did not refer to movement and residence rights, the subsequent report, in March 1985, of the ad hoc committee recommended taking up the residence directive that had stalled in the Council, mentioning specifically the problematic question of sufficient resources: "The Committee is convinced that the right of a citizen of a Member State of the Community to reside in any other Member State of his free choice is an essential element of the right to freedom of movement. Discussions within the European institutions since 1979 did not lead to final agreement, because in particular debate on evidence of sufficient resources to live on as a condition for unhindered residence failed to produce a solution. Such evidence seems indispensable to avoid migration motivated only by economic considerations, because in particular the European social security systems have not been harmonized. Citizens wanting to reside in a country other than their own should not become an unreasonable burden on the public purse in the host country". The committee nonetheless urged the European Council

to take "a political decision of principle on a general right of residence for all citizens of the Community [...] linking admission to exercise the right of residence with the precondition that evidence of adequate resources at the level of social assistance in the host country and of adequate provisions in case of illness is provided" (report from the ad hoc committee on "A People's Europe", EC Bulletin 7-1985: 14).

In June of the same year, the Commission amended its initial proposal to exclude from the residence directive the difficult question of the rights of students. Despite this move, the renewed interest in developing a 'People's Europe', and the concrete proposals of the ad hoc committee, the Commission, in a November 1985 communication to the Council, expressed dissatisfaction about the progress on this issue: "eight months after the [ad hoc committee's] first report and five months after the second, achievements are lagging behind the objectives. [...] The Commission therefore feels that follow-up to the work of the ad hoc Committee has been unsatisfactory. The situation reveals once again the divide between major political decisions and their implementation" (COM 85/640: 1). The Commission went on to ask the Council to approve "proposals embodying some progress towards a Europe which is closer to its inhabitants", including the proposal on a "generalized right of residence, which has been discussed several times at Council level" (COM 85/640: 1, 3). Summarising the present state of negotiations, the Commission stated that "In approving the first report [of the ad hoc committee] the European Council took a political decision of principle on generalized rights of residence for all Community citizens. It was to pave the way for a legal decision which has still not materialized. Discussions are running into difficulties; one delegation is opposed to a directive being used to extend the right of residence to non-active persons" (COM 85/640: 3).

A year later, in the context of the discussion about voting rights for Community nationals in local elections, the Commission again underlined its assertion that "The Treaty of Rome and legislation derived from it have created a unique legal framework which allows citizens to plan their professional lives without regard to national frontiers. This is quite new in that the fact of being a citizen of one Member State confers rights in the other Member States too. Citizenship is thus disassociated from the national limits on rights attached to a given nationality. [...] European citizens therefore enjoy considerable freedom to establish themselves in the Member State of their choice. The Commission, in presenting a proposal for a directive on generalized right of residence, for nationals of Member States in the territory of another Member State, hoped to take this to its logical conclusion so that these freedoms are no longer viewed in economic terms but are generally available to all citizens" (COM 86/487; EC Bulletin Supplement 7/86: 8). Despite these urgings, again nothing happened for a period of years. The Commission protested the lack of progress, but, until the late 1980s, to no avail: "Since 1979 a Commission proposal has been on the table to extend the right of residence to all Community nationals who do not yet have it (in particular, students and pensioners). Despite the Commission's endeavours, the Council has not yet reached agreement on this proposal, which is of major importance to the man in the street" (COM 88/331: 26).

In the absence of legislation, litigation? The question of 'welfare tourism'

In the absence of agreement on the residence directive, the Commission continued to apply an expansive interpretation of who should be covered by the Community's free movement rights in judicial proceedings. This included cases where there may have been legitimate reasons to believe that

a migrant's connection to economic activity was tenuous at best. Such a case concerned a British citizen (Ms D. *Levin*) living in the Netherlands who was employed in a part-time position that paid less than the Dutch minimum wage. The Dutch authorities had denied her application for a residence permit on the grounds that her minimal employment did not qualify her as a 'worker' in the Community sense. Rather, it was alleged that the real objective of her move to the Netherlands was not employment, but, by taking advantage of the rights she would enjoy as a migrant worker, to enable her husband, a third country national, to live with her on Community territory.

The Dutch and the Danish governments submitted observations supporting member states' rights to refuse residence permits to Community migrants who appeared to abuse an economic right for ulterior motives. The Dutch government argued that the definition of 'worker' should only apply to a person who takes employment "at least to provide himself with means of support". The migrant's intention to move should therefore primarily be of an economic nature. As a consequence, the right to free movement should be denied where "a national of a Member State moves to another Member State in order to pursue an activity devoid of economic interest with the sole aim of thus being able to enjoy the advantages conferred upon persons to whom the provisions on freedom of movement for workers apply" (Case 53/81, ECR 1982: 1040). The Danish government agreed: "The term migrant worker covers persons who acquire the means to provide for their own needs and those of their family [...]. The term also implies that the persons concerned work a normal number of hours, which in Denmark is a minimum of 30 hours per week" (Case 53/81, ECR 1982: 1041).

The Commission, supported by the French government[94], retorted that Community law did not prescribe a minimum amount of income or work hours for Community citizens who make use of their right to free movement: "an EEC citizen is just as free as Netherlands nationals to have recourse to part-time work as long as he is actually employed." The restrictive Dutch stipulation would run counter to the fact that the term 'worker' must be defined under Community law and could not be altered by national regulations (Case 53/81, ECR 1982: 1044). Regarding the migrant's intentions, the Commission argued that "the fact that a reduced amount of work is performed is not necessarily of itself an indication that there is no intention to pursue an occupation." Rather, as long as employment of whatever kind is actually taken up, the motives for doing so become irrelevant. All national rules to the contrary would deprive the migrant of the "fundamental right which the free movement of workers entails" (Case 53/81, ECR 1982: 1044-1045).

The Court accepted this argument and repeated the reference to fundamental rights the Commission had used (cf. Craig and de Búrca 2011: 721). The term 'worker' and 'employed persons', the Court argued, were concepts that "define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively". Community law did not subject the right of free movement "to any condition relating to the kind of employment or to the amount of income derived from it" (Case 53/81, ECR 1982: 1049). Ms Levin would therefore have to be treated as a worker. However, the Court acknowledged, somewhat ambiguously, that the rules governing the free movement of workers "cover only the pursuit of effective and

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94 This constellation is rare. Member states, when neither they nor one of their citizens are directly concerned, usually only intervene in support of other member state positions. The French government had no apparent connection to the case at hand, but nonetheless argued against the Dutch and Danish opinion. This constellation of interests might reflect the stances of the delegations in the negotiations on the residence directive.

genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary" (Case 53/81, ECR 1982: 1050). The Court provided no definition of what the threshold to such marginal activity might be, safe that it was not identical to part-time work or work below the minimum wage. It concluded that "Once this condition [non-marginal activity] is satisfied, the motives which may have prompted the worker to seek employment in the Member State concerned are of no account and must not be taken into consideration" (Case 53/81, ECR 1982: 1052).

This case (and others like it)[95] highlighted the problematic question to what degree member states could protect themselves against ostensive abuse of free movement rights in order to obtain advantages, be they related to residence permits or access to social benefits. The latter question came up a few years after *Levin* in *Kempf*, where a German music teacher employed in the Netherlands applied for an income supplement on account of the fact that his music lessons earned him less than the Dutch minimum income. The parameters, and the arguments exchanged (the Commission supporting the applicant's position and the Dutch and Danish governments arguing against), were broadly similar to *Levin*, and again the Court sided with the Commission, finding that the fact that the meagre income from part-time work necessitated a subsidy did not of itself make that work "marginal or ancillary" (Case 139/85, ECR 1986: 1748-1750). A similar question was also raised repeatedly with regard to maintenance grants for students. While all parties (except for the student claimants) agreed that such a grant, which is normally paid to nationals as financial support based on personal financial circumstances, would not be available to Community nationals migrating solely for the purpose of

[95] Cf. i.a. Case 66/85, ECR 1986: 2121; case 197/86, ECR 1988: 3205; case 196/87, ECR 1988: 6159; case 344/87, ECR 1989: 1621; all arising out of preliminary references.

studying, there was considerable disagreement when it came to educational courses in connection to prior employment in the host country. The Commission, in keeping with its overall stance, argued that a previously employed migrant worker would retain that status (and the inherent protection against discrimination) when taking up studies, either in direct relation to previous employment, or as a consequence of unemployment due to the general situation in the labour market.[96] The spectre frequently raised in the context of these cases was the potential for 'welfare tourism' arising from a right to free movement, and the prohibition on discrimination that it entailed, when the purpose of migration lost its connection to employment. Member states sought to safeguard themselves against possible expenses arising from Community nationals moving to countries that offered more generous benefits than their home country only for the purpose of obtaining those benefits (cf. Craig and de Búrca 2011: 721). The Commission frequently took the position in judicial proceedings that such safeguards should be kept to a minimum.

Legislative breakthrough: the 1990 residence directives

Although there is no concrete evidence to support this view, it appears that the Commission's confrontative stance in judicial proceedings has been motivated by the objective to apply pressure on the Council to adopt the residence directive granting movement rights to non-economically active persons. While the Court cases all dealt with migrants that had at least some connection to economic activity, however tenuous, the Commission's position at the same time reduced

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[96] This position is evident from the Commission's observation in *Lair*: "the three Member States which have submitted observations [Germany, Denmark and the United Kingdom] argue that a person loses the status of worker, on which the social advantages depend, when, in the host State, he gives up either his previous occupational activity or, if unemployed, his search for employment in order to pursue full-time studies. The Commission disagrees with that view" (Case 39/86, ECR 1988: 3198).

that link to the point of presenting a credible threat that a general (non-economic) right to residence might be established by judicial rulings. If so, the member states remained largely unimpressed. By the end of the 1980s, discussion in the residence directives was still going nowhere.

In 1989, the Commission noted that "after ten years of discussions, the Member States are still unable to reach unanimity on the proposal for a directive. Indeed, at the Council meeting on the internal market on 13 April 1989, the Ministers came to the conclusion that, failing any new contributions, any further discussion would be doomed to failure" (COM 89/275 explanatory memorandum: 1). In the face of this resistance, the Commission withdrew its initial proposal and introduced three separate proposals differentiated by the class of persons covered (COM 89/275), in the hope that by disentangling the individual issues it would be possible to find a more advantageous legal basis than article 235 EEC, the general flexibility clause requiring unanimity, on which the initial proposal had been based. The Commission based the first of the new proposals, covering the rights of residence for students, on article 7 EEC, which concerned the principle of non-discrimination, and which, following the Single European Act, stipulated greater involvement of the European Parliament through the cooperation procedure, and, more importantly perhaps, majority voting in the Council. The second proposal, relating to pensioners, was based on articles 49 and 54 EEC, relating to the free movement of workers and the self-employed, which also stipulated cooperation and qualitative majority voting. The third proposal then represented the equivalent to the initial proposal on general residence rights, covering all those not covered by other provisions, i.e. persons who were not and had not been economically active and who were not students, as long as they were covered by sickness insurance and could demonstrate sufficient resources to avoid becoming a burden on the social security system of the host. This proposal was based on

article 100 EEC, which governs harmonizations measures for the free movement of persons. While maintaining unanimity in the Council, article 100 EEC stipulated the cooperation procedure.[97]
The Commission's aim was evidently to allow for majority voting as far as possible. Moreover, the Parliament had consistently expressed its position in favour of residence rights. Its inclusion would therefore apply extra pressure on the Council.

The new proposals toned down some of the language of the original, omitting a prior reference to citizenship. Moreover, the Commission explicitly restated member state concern for welfare tourism in the proposal recitals: "it is vital to avoid migration flows resulting solely from financial considerations based on the fact that the social security and social assistance systems have not been harmonized; [...] a European citizen wishing to reside in a country other than his own should not constitute an unreasonable burden on the public finances of the host country; [...] therefore, at the present stage in the development of the Community, conditions should be laid down for the exercise of the right of residence" (recital 4, OJ 1989, No. C 191/5).

This approach was very much in line with the position of the Council, which wished to emphasise the restrictions on the right to free movement by non-economically active persons. The amendments proposed by the Council included a more restrictive stance vis-à-vis the definition of sufficient resources and the definition of family members than the Commission had proposed. The Council also deleted all reference to rights non-economically active persons might enjoy under legislation regulating access to social benefits. With regard to the residence rights for students, the Council introduced a

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97 This clause differs from article 100A, discussed in chapter 5, which allows for majority voting in issues related to the 1992 internal market project.

new article that prevented the directive from establishing a right to maintenance grants (OJ 1990, No. C175/99). This must be seen as a direct response to prior litigation. More importantly, the Council insisted on a change of the proposed legal basis for all three directives back to article 235 EEC, which stipulated unanimity and excluded the European Parliament.

Under these conditions, and, as the Commission put it, "after a tortuous legislative procedure" (COM 93/209 explanatory memorandum: 1) spanning more than a decade, the Council was able to agree on the three separate directives (directive 90/364, directive 90/365, and directive 90/366), which were based on a common template. The resulting text deleted in its recitals a reference to "a guaranteed right of residence throughout the Community for all citizens of the Member States" that had been reinserted by the European Parliament (OJ 1990, No. C 15/71), and retained the Council formulation that "beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State" (OJ 1990, No. C 175/85).

These provisions fell short of what the Commission and the Parliament had originally envisaged. Parliament and Commission moreover disagreed with the change of legal basis depriving the EP of its influence over the final text. In the case of directive 90/366, covering student rights, the European Parliament, supported by the Commission, subsequently initiated an action for annulment before the Court of Justice (Case C-295/90). The two institutions argued that, based on prior case-law, access to vocational training would be governed by the Treaty rules on non-discrimination, as the Commission had originally proposed. The Court agreed, and annulled the directive. The result of this ruling, however, was largely symbolic. As the Commission later stated in its proposal for a replacement directive, "the attached pro-

posal reproduces the version of the Directive as adopted by the Council, and not the substance of the Commission's initial proposal. [...] Parliament, through its appeal, intended simply to secure acknowledgment that the procedure followed had failed to respect its prerogatives" (COM 93/209 explanatory memorandum: 1).

The Council's agreement on these directives must be seen in the context of the negotiations concerning the idea of European Union. During the preparations for the intergovernmental conference that negotiated the new Treaty, the Spanish government proposed to consider including provisions on European citizenship (SEC 93/1021: 6). This suggestion was endorsed by the Rome European Council in December 1990, which instructed the intergovernmental conference to examine possible provisions for a "freedom of movement and residence irrespective of engagement in economic activity" (EC Bulletin 12-1990: 10). Member state governments at the Maastricht European Council in December 1991 subsequently agreed on the inclusion of a 'Citizenship of the Union', and, in particular, in article 8a TEC the right for Union citizens to "move and reside freely with the territory of the Member States". This right, however, would be "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". By referring to existing legislation, member states limited the possibility for these provisions to establish any new rights with regard to movement and residence.

Summary

The preceding section again demonstrates a strong link between legislation and litigation, albeit of a somewhat different kind than the one explored in the previous chapter. In pursuing a de-coupling of movement rights from their economic base, the Commission adopted a two-pronged ap-

proach that broadly resembles its approach to the removal of trade barriers, and originated at around the same time in the late 1970s. On the one hand, the Commission used litigation to advocate an expansive approach to movement rights implied in primary law. It would suffice for a migrant's link to economic activity to be remote for the rules on free movement to apply. Its legal opinion prevailed in court, over the repeated objection of several member state governments – although member states retained the ability to selectively apply the Court's case law. At the same time, the Commission introduced legislation that would formally remove the necessity for an economic base, proposing a general right to move and reside for Community citizens, provided that the exercise of that right would not lead to a burden on member state welfare systems. This, however, is where the analogy ends. First, the Commission did not explicitly state a link between judicial action and legislative progress, as it had done repeatedly and forcefully in the case of trade barriers. In fact, the Commission's annual reports on the application of Community law do not mention the term 'citizenship' at all until 1998. Second, judicial activity in this area was almost exclusively a result of preliminary references. Infringement proceedings initiated by the Commission are almost completely absent, safe for a few cases concerning access to tertiary education. The eventual success of the Commission's legislative initiative came at the cost of coherence (the initial proposal was split in three) and is possibly best explained as a precursor to the inclusion of 'Union citizenship' in primary Treaty law at Maastricht .

6.5 Defining the substance of European citizenship

After the Council had adopted the three residence directives and the heads of state or government agreed on Union citizenship in Maastricht, the Commission undertook efforts to give effect to this new status. Even before the entry into force

of the new Treaty, the Commission proposed to extend the coordination of social security systems, so far confined to employed and self-employed persons, to all insured Community citizens. This plan was nearly as ambitious and controversial as the prior residence directive. The Commission regarded the coordination regime as an essential element in the framework of free movement that would be "indispensable in the context of the social dimension of the internal market and a People's Europe" (COM 91/528 explanatory memorandum: 3). Its proposal was therefore "to extend the Community coordinating rules to all insured persons, in particular to students and non-employed persons" (COM 91/528 explanatory memorandum: 5). In keeping with earlier proposals that aimed at a general right to free movement, this proposal met with equal reluctance in the Council (cf. Sindbjerg Martinsen 2006: 225). Nothing happened for a series of years.

In order to "generate new momentum in this area" (COM 98/394 explanatory memorandum: 4), the Commission set up a so called 'High Level Panel' on the free movement of persons in 1996, which had the aim of "identifying the existing or potential obstacles encountered by European citizens in exercising their right to move freely and to work within the Union" (COM 98/403 Annex: 1). This group subsequently, in March 1997, produced a lengthy report that included a series of proposals addressing "lacunae" of existing legislation. In general, the group's report suggested that "Free movement rights should be brought in line with the new concept of European citizenship. [...] The concept of European citizenship suggests that a piecemeal sectoral approach to residence rights should be replaced by consolidated legislation and in time treating all European citizens as equal" (Veil, Andre et al. 1997: 4). With regard to legislation on social security, the panel remarked that "The current scope of the Regulation as regards the persons covered is inadequate in view of changes

that have taken place since its adoption and, in particular, since the adoption of the three Directives on the right of residence of retired persons, students and other persons with sufficient resources and sickness/maternity insurance. In 1991, the Commission submitted a proposal to the Council on extending the scope of Regulation 1408/71 [on social security coordination] to persons who do not already fall within it [...]. The proposal, however, is still before the Council" (Veil, Andre et al. 1997: 46).

The report of the High Level Panel prompted a series of replies from the Commission outlining its intended course of action. These reactions coincided with member state government's efforts towards another Treaty revision, which included an intensified focus on employment. The European Council at Amsterdam in June 1997 had endorsed an "Action Plan" for the full implementation of the single market, setting out the future steps in this area (cf. chapter 5). As an ancillary to this plan, the Commission, in November 1997, presented an "Action Plan for free movement of workers", which went into greater detail regarding its proposals for an extension of free movement rights. In this plan, the Commission stated its "intention to present in 1998 proposals to simplify and enhance the existing secondary legislation with a view to drawing all consequences in order to give full value to citizenship of the Union" (COM 97/586: 9). The Commission stressed that free movement rights "are becoming an integral part of the legal heritage of every citizen of the European Union, and should be formalised in a common corpus of legislation. For all these reasons, the Commission considers it necessary to harmonise the legal status of all Community citizens in the Member States, irrespective of whether they pursue an economic activity or not" (COM 98/403: 2). The proposed measures therefore aimed at consolidating the

vast array of respective secondary legislation[98] and bringing it in line with existing case law (cf. Nic Shuibhne 2009: 167).

Following up on this statement of intentions, the Commission started drafting proposals covering a generalised right of free movement. A first success in its legislative programme was the Council's agreement on that part of the Commission's 1991 proposal on extending social security coordination which related to students (regulation 307/99; cf. Sindbjerg Martinsen 2006: 226). Of all classes of persons the Commission aimed to include in the coordination scheme this left out only 'non-employed' persons. All others were covered by one provision or the other, albeit in a piece-meal fashion. The Commission's main objective for subsequent proposals was a consolidation of existing rights more than a further expansion of their personal scope. Hence, its 1998 proposal for a generalised coordination of social security would apply "to all persons who are covered by the social security legislation of a Member State" (COM 98/779 explanatory memorandum: 2).[99] Rules governing such coordination should "no longer have the sole aim of ensuring the free movement of workers, but are about protecting the social security entitlements of all persons moving within the European Union. Coordination must therefore be seen from

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[98] Cf. also (COM 98/403: 1-2): "As stated in the High-Level Panel's report, rights of entry and residence were initially linked to the pursuit of an occupation. Since then, mainly as a result of secondary legislation, these rights have gradually been extended to cover all citizens. This step by step extension has meant, however, that beneficiaries have been compartmentalised in a way that is no longer in keeping with modem forms of mobility or with the establishment of citizenship of the Union."

[99] Cf. a little bit further down: ""This is in line with the principle underlying the aim of the legislation, which is to protect the social security rights of people making use of free movement. Since this right is not limited to the active population, it seems appropriate that if a person has an acquired right under a social security scheme in a Member State, the said right should not be lost when that person goes to another Member State" (COM 98/779 explanatory memorandum: 4).

the perspective of European citizenship and the building of a Social Europe" (COM 2004/332: 3). Negotiations in the Council proved difficult, with the largest disagreement clustering around the right of residence and access to benefits of unemployed persons (cf. Council press release PRES/2001/225: 15). The proposal ended up as a B-point on the Council agenda for six meetings over five years, until it was agreed upon in April 2004 (regulation 883/2004).

In 2001, the Commission completed its work on a proposal for a consolidated piece of legislation that would summarise residence rights for all persons covered by Community law. It followed the oft-stated premise that "Union citizens should, mutatis mutandis, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country (COM 2001/257 explanatory memorandum: 2) and would finally bring all disparate sets of rules "together in a single legislative instrument" (COM 2001/257 explanatory memorandum: 3). Negotiations on this proposal were speedier than those on social security coordination. Council and European Parliament adopted the corresponding directive 2004/38 on the same day as the regulation 883/2004, after having been placed twice on the Council agenda as a B-point.

Litigating citizenship

At the same time as the Commission drafted legislation fleshing out the Maastricht Treaty provisions on citizenship as regards the right to free movement and access to social security, it also engaged in court proceedings to define the meaning of these provisions. Recall that the new article 8a TEC provided that "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".

The question in particular was whether this provision added any new substantive rights for citizens to move and reside to the existing corpus of free movement rights, or whether they were a largely symbolic rephrasing of the status quo (cf. Nic Shuibhne 2009: 170-171; Craig and de Búrca 2011: 824). Member state governments, as their opinions in subsequent cases indicated, appeared to argue for the latter.

This subject was first explicitly raised before the Court of Justice in 1996 in a preliminary reference. The case concerned a Spanish national, María *Martínez Sala*, who lived in Germany but had been unemployed for some time. Her right to reside in Germany was not questioned (it had been granted by German authorities on grounds unrelated to EU law), but her request for a child-raising allowance ("Erziehungsgeld") was turned down with the argument that she was not a German national and she did not enjoy protection from discrimination since she did not fall under any provision of EU free movement law. In its observations, the Commission held that the Treaty provisions on citizenship established a novel set of movement rights that were directly effective. It argued that "the right to move and reside freely throughout the Union flows *directly* from the Treaty. The limitations and conditions provided for in Article 8a therefore relate solely to the *exercise* of that right, established by primary law as a freedom of the citizen" (Case 85/96, ECR 1998-I: 2701, original emphasis). The fact that Martínez Sala did not hold a residence permit under EU law therefore would not prevent her from enjoying the rights emanating from her Union citizenship and the fact that she had moved from one member state to another, including protection against discrimination on grounds of nationality. This view was contested by the German, the French and the British governments, who held that the Treaty provision on citizenship merely subsumed existing rights under a new heading: "In their view, that provision simply reiterates the rights of

free movement and residence already accorded to the various individual categories of persons concerned and welds them together in a single provision of primary law — like the fragments of a mosaic, as the French Government put it at the hearing [...]. In other words, Article 8a does not give freedom of movement any new broader substance than earlier legislation did" (Case 85/96, ECR 1998-I: 2701).
The Court largely concurred with the Commission's position. Contrary to the observations of the German, French and British governments it held that "As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship" (Case 85/96, ECR 1998-I: 2725). From this, it would follow that a Union citizen lawfully resident in another member state enjoys protection against discrimination concerning the grant of benefits such as the one Martínez Sala had applied for (Case 85/96, ECR 1998-I: 2726).

Nonetheless, the Commission did not adopt an expansive stance to free movement rights where court cases presented an opportunity to go beyond the position the Commission had adopted in its proposals for the both the residence and the social security directives. In *Baumbast*, the Commission argued that a German national living in the United Kingdom but not pursuing an economic activity there could not rely on rights directly derived from the Treaty provisions on Union citizenship if he could not demonstrate adequate sickness insurance, a precondition – along with sufficient resources – for residence rights for non-economically active persons (Case 413/99, ECR 2002-I: 7126). Similarly, it held in *Grzelczyk* that neither Union citizenship nor the specific residence rights for students entitle student migrants to social benefits (Case 184/99, ECR 2001-I: 6212). And again in *Bidar* the Commission defended the express provision in-

cluded in its proposal that residence rights for students did not entitle migrant students to a maintenance grant (Case 209/2003, ECR 2005-I: 2146).
In all of these cases, the Court rejected the Commission's more restrictive position and significantly extended the reach of Union citizenship regarding free movement rights and the concomitant principle of non-discrimination.

Summary

As I have shown above, the Commission has, since the 1970s, consistently supported an expansive interpretation of the economic basis for the free movement rights of citizens. The Treaty articles on citizenship provided a further resource to draw upon where the association between movement and economic activity was no longer tenable. While the Commission continuously proposed legislation to fill in the ambiguities of the legal status quo, it did not shy away from asserting its position in court, despite the objections raised by member state governments. Subsequent legislative proposals would then take up the results of case law in order to lock in its effects: "The Commission intends to ensure that these proposals succeed in their aim of improving conditions for freedom of movement to reflect the spirit expressed by case-law. The latter is a basic step forward for the European citizen and the Commission will ensure that discussions in the Council do not lead to the loss of the headway made by case-law" (COM 98/394, explanatory memorandum: 6). Recital 10 of the Commission's amended proposal for a new comprehensive directive covering the free movement rights of Union citizens consequently took up the Court's ruling in *Martínez Sala*, stating that "The fundamental and personal right of Union citizens to reside in another Member State is conferred directly on Union citizens by the Treaty" (COM 2003/199: 14).
However, there are clear limits to this strategy. Even where a series of preliminary references provided the opportunity to

further expand rights derived from Union citizenship, the Commission did not go beyond the position it had adopted in its legislative proposals. From present evidence it is impossible to discern whether the Commission's position in these cases reflected a genuinely cautious stance with regard to a possible abuse of rights, or whether it wished to exercise restraint with regard to the pending legislation. Both explanations are consistent with the complete lack of infringement proceedings in this area. While the Commission at times used the opportunities provided by litigation initiated by individuals, it did not itself pursue a discernible judicial strategy.

6.6 Conclusion

Contrary to the findings of the last chapter, this case study finds less corroboration for my hypotheses. While the Commission employed both legislative proposals and judicial proceedings in order to expand the reach of free movement rights for EU citizens, a concrete link between the two modes of policy-making is largely missing.

In parallel to its stance regarding the removal of barriers to trade in goods, the initial position of the Commission was conciliatory. The initial legislative programme was largely successful, with the framework for the rights of economically active migrants in place within a decade after the signing of the Treaty of Rome. Where contentious issues were raised in preliminary references, such as the definition of the term 'worker', the Commission advocated member state discretion. At the same time, the Commission established a concrete link between the economic objectives of the free movement of persons and the Treaties' social policy mandate. Members of the Commission expressed the opinion from the outset that free movement rights for Community nationals could represent the kernel of a more encompassing 'European citizenship' that would not be based on economic activ-

ity. The Commission, however, only started acting on this notion in the early 1970s, when the concept of citizenship was debated at the highest political level of the member states. The concurrent reversal of its position vis-à-vis member state discretion was quite stark. When conflict about the extent of free movement rights reached the Court of Justice, the Commission took a confrontative stance, arguing that exceptions from free movement rights be interpreted narrowly, while the necessity for economic activity as a trigger to those rights should be treated expansively.

At the same time, the Commission took the conclusions of the Paris Summit in 1974 on special rights of Community citizens as a mandate to introduce legislation establishing a general right of movement and residence. The timing of its proposal coincided with a series of communications indicating increased frustration with Council's (lack of) activity in the field of trade barriers. Whereas legislation in both fields – the free movement of goods an the free movement of persons – met with increasing reluctance in the Council, the Commission's response to such legislative barriers was quite different. While it resorted to a strategy of increased judicial action in the form of infringement proceedings following the *Cassis de Dijon* judgement, the Commission undertook no such action with regard to the pending residence directive. It did, however, intervene in preliminary reference procedures, supporting, where the question arose, an expansive interpretation of who should be covered by free movement rights. Legal developments in this field, supported by the Commission, reduced the connection of movement rights to economic activity to a minimum, and it is not unthinkable that the connection could have been removed altogether by judicial means. Nonetheless, the Commission did not itself initiate 'test cases', or apply pressure on Council negations in any other way through the infringement procedure. All the while, Council agreement on the proposed directive seemed elusive. A renewed effort was taken in the context of the single mar-

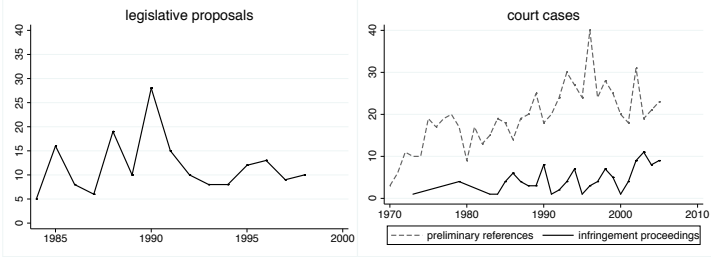
ket programme, but the momentum did not lead to a consensus. The Commission's attempt to take advantage of qualitative majority voting following the Single European Act was equally unsuccessful, as the Council insisted on a restrictive legal basis. Judging from the positions expressed in judicial proceedings, there was considerable disagreement within the Council, with the French government advocating an expansion of movement rights, and the Danish and Dutch governments opposed.

This disagreement was only resolved in the period preceding the Treaty of Maastricht, where member state governments agreed on the inclusion of 'European citizenship' in primary law. The subsequently expressed opinion by governments indicates that this new status of member state nationals was not intended to create novel political rights, but rather to summarise existing rights arising from secondary legislation. The Commission contested this view in court, with some success. The Court accepted the Commission's position that the fundamental right to move and reside emanated directly from the Treaty, but the Commission did not pursue the matter further, forgoing an opportunity to support a further expansion movement rights in court. Instead, it initiated legislation with a view to consolidate (and moderately expand) existing rights to give greater effect to the application of such rights, which was adopted in 2004.

These conclusions are corroborated by descriptive statistics for this policy area (figure 6.1). Like in the previous chapter, certain caveats apply to this overview. The timelines do not match, since there are no reliable data on legislative initiatives before 1984. Both legislative initiatives and court cases refer to the field of 'free movement of workers and social policy' as summarised in the 'directory of European Union legislation in force'. They cover a wider range than the measures discussed above, but should be indicative of general trends that apply to my case at hand.

The pattern with regard to legislative initiatives is broadly similar to its counterpart for the harmonization of trade laws. The bulk of the activity coincides with the single market programme and recedes significantly after its completion. Again, the lack of data for previous periods does not allow me to conclude that the late 1980s and early 1990s account for the majority of initiatives in this area, but the figure certainly shows that this was a period of heightened activity. This is broadly indicative of the fact that the cooperation between the Commission and the legislative institutions worked well, even though this was not the case for the residence directives discussed above.

Figure 6.1: Legislative initiatives and cases referred to the Court



Source: Calculations based on (König, Luetgert et al. 2006) and (Stone Sweet and Brunell 2007)

My observations with regard to the Commission's judicial strategy are consistent with the data for court cases. The overall volume of infringement cases in this policy field is low compared to the previous chapter, and there is an overall increase of the use of this procedure over time, albeit very uneven. There is no clear pattern that would connect judicial and legislative action. In the period from 1984 to 1990, both the number of legislative initiatives and the number of infringement proceedings rise. Whereas legislative initiatives generally recede in number thereafter, the judicial activity profile of the Commission in the 1990s is characterised by

strong swings. The general incline towards the end of the period for which data is available coincides with the Commission's efforts to consolidate existing legislation and closing "certain loopholes" (COM 2002/324: 71), but there is no evidence connecting the two forms of action.

There is generally no concrete evidence that connects the Commission's use of infringement proceedings with the obstacles to legislation. The introduction of majority voting for some issues concerning the free movement of persons with the Single European Act (although not so for the residence directives) coincides with an increase in the Commission's legislative activity, but there is no corollary for its use of enforcement action, which remained at a generally low volume. The evident existence of conflict in the Council also did not lead the Commission to rely on such a judicial strategy. It is speculative to assume that the Commission intended to limit the antagonism between individual rights arising out of EU law and historically negotiated systems of collective solidarity at the member state level. A more fruitful approach at an explanation of the lack of a judicial strategy may be based on the pattern of preliminary references for this policy area, which is altogether different from that identified in the previous chapter. With few exceptions, the number of such proceedings exceeds that of both legislative initiatives and infringement cases referred to the Court of Justice. These high rates of litigation since the early 1970s provided a constant opportunity for the Commission to present its policy preferences (cast as legal opinion) before the Court. As I have indicated before, this can be interpreted as making it unnecessary for the Commission to initiate proceedings itself. However, as in the previous chapter, there is evidence here that the Commission did not agree with the expansive stance taken by individual litigants. In particular with regard to recent legal developments regarding the rights inherent in Union citizenship, the Commission has frequently sided with

the member states arguing for wider national regulatory autonomy.

The relationship of infringement proceedings and preliminary references as options for the Commission to influence policy-making is evidently in need of greater exploration.

Chapter 7

Conclusions

I have set out in this study to systematically assess how the Commission makes use of its access to legislation and litigation in order to advance its policy interests. Based on a detailed overview of the Commission's relative position in three modes of policy-making, I aimed to advance a number of propositions as to which factors account for the Commission's choice of strategy. I started from the assumption that the Commission prefers legislation over litigation to advance its policy interests, for reasons primarily of legitimacy and legal certainty. I then proceeded to propose that the Commission is more likely to resort to infringement proceedings when the likelihood of initiating successful legislation is low. This would be the case where voting rules in the Council stipulate unanimity, and where the European Parliament has veto powers. Obstacles to legislation would also rise, the larger the ideological difference between the Commission and the Council and the Commission and the EP, respectively, and in situations where there is considerable disagreement within the Council. I also included a control variable that measured the degree of 'market orientation' of a policy area. To test these propositions, I proceeded in two steps, corresponding to two forms of empirics. Focusing initially on the Commission's use of infringement proceedings, I tested the relationship between my proposed explanatory variables and the outcome (the ratio of litigation to legislation by policy area over time) statistically. For these purposes, I combined three datasets containing information on legislative processes, infringement proceedings and the political positions of the actors involved for the period from 1984 to 1998. In a second step, I undertook two longitudinal

case studies of Commission policy initiatives and judicial action in two policy areas: the free movement of goods, in particular with regard to the removal of barriers to trade in goods, and the free movement of persons, in particular with regard to the rights of European Union nationals to move and reside within the Union. These case studies expanded the period of observation, starting with early Commission actions in the 1960s and tracing related processes to (close to) the present day. The case studies moreover expanded the focus of my analysis beyond infringement proceedings to the Commission's use of litigation in general.

The purpose of this mixed-method approach was to start with a set of relatively strict assumptions, and then, based on the results of the statistical test, use case studies to add complexity and derive additional "causal process observations" (Collier, Brady et al. 2010: 184). In this way, I hoped to uncover 'causal mechanisms' that link the proposed explanatory factors (legislative obstacles and characteristics of the policy field) to the outcome (the Commission's use of litigation relative to legislation). These combined results would then allow me to propose refinements to the theory.

My conclusions address this latter part of my objectives. I will start by reviewing the hypotheses developed in chapter 4, taking account of the results of the statistical test and the two longitudinal case studies (7.1). I then outline my findings regarding the importance of the preliminary reference procedure for the Commission's judicial strategy (7.2), and conclude with some thoughts on the way ahead (7.3).

7.1 Reviewing my hypotheses

In this following section, I will review my initial hypotheses, developed in chapter 4, in light of the results of both the statistical test and the two case studies.[101]

H1: Increasing obstacles to a successful Council vote (a move from QMV to unanimity) favour the choice of litigation over legislation.

My statistical analysis in chapter 4 has found no (statistically) significant effect of the prevalent voting rule in the Council on the Commission's use of the infringement procedure. Overall, my two cases studies do not support this proposition, either. In the field of goods, member state governments had introduced majority voting for harmonizing legislation regarding internal market objectives in the Single European Act. This coincided with an increase in legislative initiatives proposed by the Commission, and the Commission commented favourably on the effect majority voting had on the speed of adoption of these proposals. At the same time, the number of infringement proceedings the Commission referred to the Court in this sector receded noticeably. While this pattern is consistent with the hypothesis (in reverse), there are competing explanations for the success of the legislative programme and the decrease of court cases, drawing in particular on a general convergence of preferences regarding the removal of barriers to trade.

There is no evidence of a similar pattern in my case study concerning the free movement of persons. The Single European Act allowed for majority voting in some areas regarding the free movement of workers and the self-employed, and the Commission did indeed propose a higher volume of legislation at this time. Again, this coincided with a greater congruence of preferences between the Commission and the Council regarding measure to complete the internal market. Decreased legislative obstacles, however, did not have an effect on the Commission's use of infringement procedures. Court

[100] I will not cover hypothesis H7, as this concerned a control variable.

referrals remained low throughout the 1980s and even rose slightly towards their end.

H2: Adding the European Parliament as a veto player in legislation favours the choice of litigation over legislation.
My statistical analysis has produced puzzling results for this hypothesis. In two of the models (including the combined coding that I regarded as more reliable), the effect of EP veto powers on the Commission's use of infringement procedures was opposite to what I had proposed. The ratio of litigation to legislation decreased in areas where the European Parliament had veto powers. I interpreted this as a spurious relationship. My case studies have revealed no evidence of a causal link between the European Parliament's involvement in legislative procedures and the Commission's use of infringement proceedings. The Commission did not identify the EP as an obstacle to its harmonization programme after the introduction of the cooperation procedure in the Single European Act (although I did not code this as 'veto powers' in my statistical analysis), or at any time thereafter. The EP explicitly supported the Commission's position with regard to residence rights for migrant citizens, and frequently demanded more extensive rights for non-economic migrants than the Commission. In its attempt to find a solution for its pending residence rights proposal in the late 1980s, moreover, the Commission proposed a legal basis for legislation that would have involved the Parliament, even where unanimity for Council voting was stipulated regardless. There is consequently no evidence that the Commission regarded the EP as an obstacle to legislation that needed to be avoided, or circumvented by judicial action.

H3: Greater political distance between the Commission and the Council favours the choice of litigation over legislation.
The statistical analysis has not revealed a systematic relationship between the political distance of the two institutions

and the Commission's resort to infringement proceedings. The CMP scores I used for this analysis may be too blunt to use for individual policy areas. As I have described for hypothesis H1, the convergence of preferences between member state governments and the Commission with regard to the single market programme coincided with the introduction of majority voting, and my case study data does not allow me to discern between the two factors. CMP scores for this time period show a fluctuation that is not consistent with the observed actions. In any case, I could only find evidence for the expected effect of legislative obstacles, which are partially a result of greater ideological distance, with regard to the trade barrier case, where the expected pattern was evident for the period from the mid-1970s to the early 1990s. I could find no such pattern in the field of free movement for persons.

H4: Greater political distance between the Commission and the European Parliament favours the choice of litigation over legislation.

Similar to the results for H2, the statistical analysis suggested (in one model) that greater ideological distance between the Commission and the EP had the opposite of the expected effect. With greater distance in political positions, the Commission's resort to infringement proceedings decreased. I also interpreted this relationship as spurious. The material I used for evidence in my case studies does not allow me comprehensively address this proposition. The only information I presented for the position of the European Parliament was regarding the residence directive, where the Commission and the EP largely agreed, with no discernible effect on the Commission's use of the infringement procedure. It therefore appears that there is no causal link between the positional difference and the Commission's choice of strategy.

H5: A greater degree of conflict in the Council favours the choice of litigation over legislation.
My measure for conflict between member state governments in the Council, the proportion of issues that were discussed as B points in Council meetings, was the only independent variable pertaining to my original proposition that had a statistically significant effect on the outcome in the expected direction. According to one of the models (m2, admittedly based on the coding which I had demonstrated to be less reliable), all else equal, increased conflict in the Council led to an increased use of the infringement procedures. My case studies only provide limited instances allowing me to thoroughly discern between conflict arising out of positional differences between the Commission and the Council on the one hand and differences among member state governments in the Council on the other. Some court cases, in particular, hint at the conflict lines in Council negotiations. These relate to the residence directive, where the French government and the Dutch and Danish governments found themselves on opposing sides of the legal argument about the extent of such rights. As I have pointed out above, the inability of the Council to agree on the Commission's proposal for a residence directive throughout the 1980s did not lead the Commission to refer an increased number of infringement proceedings to the Court of Justice.

H6: The Commission is more likely to favour litigation over legislation if the subject matter pertains to a market-oriented policy field.
A comparison between the statistical test of this hypothesis and the evidence from the case studies again yields inconclusive results. The statistical test indicated that the assumed market-bias of EU law does not translate into a higher ratio of infringement proceedings for policy areas that can be characterised as 'market-making' rather than 'interventionist'. It in fact demonstrated the opposite effect. The case

studies, however, conflict with that finding. I could find evidence for the expected pattern of increased enforcement actions in the face of legislative obstacles in the case of the 'market-making' policy area, but not in the 'interventionist' policy area.

Summary

The question arises if the proper consequence of these inconclusive results would be to reject my propositions. For most of the more specific hypotheses, this is undoubtedly the case. I could not demonstrate Council voting rules and EP veto powers to have a systematic and meaningful impact on the Commission's use of the infringement procedure. The same applies for ideological distance as measured by CMP scores relating to a political left-right dimension. Regarding my more general proposition that the Commission will resort to judicial proceedings in the face of increasing obstacles to legislation, I would plead for a more lenient conclusion. My empirical tests have revealed some evidence to support the proposition, and the Commission's actions in the field of trade barriers, in particular, follow the expected pattern closely from the late 1970s to the early 1990s. Commission documents, moreover, specifically make reference to the connection.

Should this evidence be treated as an isolated pattern that is not characteristic of Commission action as a whole? Evidence from my case studies points to another explanation: In concentrating solely on the Commission's use of the infringement procedure, the statistical test has most likely omitted an important variable. The case studies have demonstrated the central importance of the preliminary reference procedure in bringing about policy change. They have moreover shown that the Commission often successfully intervenes in such proceedings. As a result, I will need to adapt my original proposition. Taking account of the Commission's intervention in preliminary reference procedures turns out to be cru-

cial in understanding the opportunities offered by the legal system and the Commission's subsequent choice of strategy. Concentrating solely on infringement proceedings overlooks this strategic opportunity and might partially explain the inconclusiveness of the previous statistical test. I will outline some related thoughts in the following section.

7.2 Preliminary references and judicial strategy

The preliminary reference procedure provides the Commission with much the same opportunity to present its legal opinion to the Court as infringement proceedings. Its success rate does not differ greatly between the two procedures. The principal difference lies in the Commission's ability to influence the timing and content of court cases – it has wide discretion over which infringement cases to pursue and when, whereas it has no such control (or only to a limited extent, as I will outline below) with regard to preliminary references. This led me to exclude preliminary references from my statistical test. As I have shown in my case studies, court cases can come at inopportune moments or contain positions the Commission does not support, for reasons strategic or sincere. This disadvantage may be alleviated by the fact that the rates of litigation before national courts being referred to the Court of Justice are generally high. The frequency of preliminary references in many policy areas provides the Commission with the constant opportunity to present its legal position to the Court. Rather than invest limited resource in pursuing infringement proceedings, it can use these resources to pursue policies in other venues.

The empirical evidence from the case studies, moreover, demonstrates that a significant part of legal innovation resulted from Court rulings in cases arising out of preliminary references. This is so in virtually all cases concerning the rights of Union citizens to move and reside. It equally applies to major cases regarding national barriers to trade. The ini-

tial legal framework, on which the Commission built its later legislative and judicial strategy, was essentially laid out in the *Dassonville* and *Cassis de Dijon* rulings. Both originated from individuals claiming rights derived from EU law in national courts. This does not mean that the Commission merely reacts to the results of preliminary references. I have shown how the Commission is able to involve itself in such proceedings and that it has successfully done so in many cases. There is therefore every reason to assume that intervention in preliminary references forms an important part of the Commission's judicial strategy. The Commission's own position supports this assumption. In fact, it is quite vocal about the value of the preliminary reference procedure: "The Commission also regards Article 177 of the EEC Treaty [the preliminary reference procedure] as a particularly important means of redress for the citizens and a fundamental means of creating law" (OJ 1988, No. C 310/7).

If preliminary references indeed present a viable option for the Commission to pursue its policy preferences, as the evidence suggest, it should follow that Commission's involvement in such proceedings has a systematic effect on its use of the infringement procedure, and that an analysis of the Commission's use of the infringement procedure as a judicial strategy should take this into account. A future iteration of my statistical analysis should therefore include Commission intervention in preliminary references. The question is how to design such a revised model. The Commission's intervention in preliminary reference procedures is unconditional – it intervenes in all such cases. The frequency of preliminary references (over which the Commission has no control) is equal to the frequency of Commission observations in such cases. A variable measuring such procedures should therefore be included not as part of the outcome, but as a control. Using absolute frequencies of preliminary references seems unsuitable, as those numbers are a result of characteristics of

the subject matter in question, in particular individual access to justice and the distribution of legal resources among private litigants. Rights of standing vary not only from member state to member state, but also from policy area to policy area, and so does the existence of legal infrastructure and organised interests that favour judicial proceedings (cf. Slepcevic 2009: 391). A variable concerning preliminary references should therefore be a relative measure. But relative to what? As an independent variable, it cannot be put in relation to factors that make up the outcome, i.e. legislation or litigation. I assume rates of legislation and litigation to be the outcome of strategic choices on the part of the Commission, which are, according to the revised model, in turn partially a factor of the incidence of private litigation. One possible solution could be to use the ratio of preliminary references to earlier stages of the infringement procedure, such as letters of formal notice or reasoned opinions. These earlier stages are more concerned with implementation than with policy, and are likely a good measure of the degree of legal conflict or obstacles to the exercise of rights in a policy area. Likewise, it could be possible to use the amount of individual complaints received by the Commission, but these may not be independent of the legal remedies available to potential litigants across policy areas.

Taking account of the frequency of preliminary reference procedures also allows for a reevaluation of the effects of a policy area's 'ideological profile' on litigation. Litigation rates on the whole were higher for the field of movement rights than for the removal of barriers to trade. The degree of market-orientation of a policy areas is consequently not a good predictor of judicial strategies. This insight is reflected in some of the more recent discussions of this topic (cf. Caporaso and Tarrow 2009; Höpner and Schäfer 2012; Scharpf 2012). As I have mentioned above, James Caporaso and Sidney Tarrow have argued for a social embeddedness of Euro-

pean economic rights that, in their account, is increasingly recognised by the Court of Justice (Caporaso and Tarrow 2009: 615). Martin Höpner and Armin Schäfer responded that while developments such as the expansion of movement rights for non-economically active citizens could indeed not be classified as market-making, they should not be interpreted as a form of social policy, either, as such measures put pressure on solidaristic communities that continue to be organised nationally (Höpner and Schäfer 2012: 448). In addition, Fritz Scharpf now concurs that EU law principles such as non-discrimination, non-restriction and "inter-personal equality" do not inherently favour a market-making or market-correcting trajectory of legal developments, but they allow for individual rights-based claims against collectively reached decisions (Scharpf 2012: 132-133). The existence of individual rights can therefore be seen as a necessary condition for expansive litigation. The degree to which EU law confers such rights on individuals differs from policy area to policy area, and may therefore constitute a crucial factor in explaining a judicial approach to policy-making.

7.3 Some thoughts on the wider legal environment

It is reasonable to assume that the distribution of rights-based policies has an impact on the Commission's use of the judicial system. Where the existence of individually enforceable rights creates sufficient incentives for individuals to engage the legal system, the Commission can redirect its resources and concentrate on lodging observations and initiating legislation. There is evidence that the Commission actively encourages such an approach. From its earliest report on the application of Community law, it has stressed the importance of the preliminary reference procedure for the Community's legal system, and insisted that this "additional method of control deserves to be made more widely known to the general public" (COM 1984/181: 4). Over the years, it has

encouraged both greater access to legal remedies for citizens and closer cooperation among legal practitioners, and it has initiated various programmes in this regard (cf. OJ 1993, No C 233/9). These have become more systematic since the 'Citizens First' initiative, launched in 1996, which aimed to increase awareness about rights and ways to enforce them (OJ 1997, No C 160/9). At the same time, the Commission's proposal for the 'Robert Schuman Project', a project supporting common training measures for legal professionals, stated as its rationale that: "it seems futile to encourage European citizens to make use of all the rights that they enjoy by virtue of Community law (which, for instance, is the aim of the Commission's recent "Citizens First" initiative) if the parties responsible for ensuring that those rights are enforced and respected in the Member States do not know of their existence or are unfamiliar with their content. [...] Although there are qualified specialists in Community law in the Member States, it is apparent that legal practitioners in general do not have a sufficiently developed Community reflex causing them automatically and systematically to check whether Community solutions apply to the cases they handle on a daily basis" (COM 1996/560, explanatory memorandum: 2-3). Another of the Commission's initiatives included the extension of legal aid to individuals and non-profit organisations, such as consumer associations, who cannot muster the necessary resources to engage in judicial proceedings (COM 2002/13, explanatory memorandum: 8). More recently, in 2011, the Commission launched a new programme with the objective of enabling "half of the legal practitioners in the European Union to participate in European judicial training activities by 2020" (COM 2011/551).

It is obvious that the Commission has actively encouraged the evolution of the legal infrastructure Daniel Kelemen describes as a necessary condition for the expansion of rights-based litigation (cf. Kelemen 2011: 17). This indicates that the Commission may be in the position to actively encourage

private litigation, rather than just react to preliminary references as they are referred to the Court of Justice. Its means of influence in this regard are necessarily very indirect. In this context, it would be worthwhile investigating in what way the Commission can act as a 'signal' for individual litigants by supporting some positions over others. Since the Commission's legal opinion prevails in court most of the time, individual litigants face strong incentives to align themselves with the Commission's stand-point. Conversely, a consistent legal argument against certain claims could serve to discourage private litigation in those areas.

These considerations about the Commission's involvement in private litigation indicate how the actions of the Commission in the judicial sphere of the European Union connect to the wider environment of judicial politics in Europe. One final issue that arises in this context is the question of impact. Despite the wide ranging legal developments concerning mutual recognition, non-discrimination and citizenship rights, the general impression appears to be that these rights do not work all that well in practice. Rates of litigation do not only reflect the varying degrees of access to the legal system, but also the incidence of problems individuals encounter. The Commission seems quite aware of this: "a gap still remains between the applicable legal rules and the reality confronting citizens in their daily lives, particularly in cross-border situations. The large number of complaints and enquiries the Commission receives every year, recent Eurobarometer surveys, discussions with stakeholders, [...] provide ample evidence of the many obstacles standing in the way of citizens' enjoyment of their rights" (COM 2010/603: 3). However, many studies – this one included – focus exclusively on disputes in the courtroom or the legislature, but stop short of evaluating the practical effect of these actions, beyond mere member state implementation. It is almost a reflex to cite Lisa Conant's book on the limited impact of EU law (Conant

2002), but much harder to accept the consequences. It is unreasonable to believe that concerns for efficacy have no impact on strategy choice and I would expect that such considerations inform Commission action. Tying this back to the vagaries of inter-institutional decision-making would provide a much more complete picture of the policy-making process. A more thorough concern for the real world impact of EU policies, legislative or judicial, will go a long way towards determining how important the Commission really is.

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