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POWER, NORMS AND INSTITUTIONAL CHANGE IN THE EUROPEAN UNION: THE PROTECTION OF THE FREE MOVEMENT OF GOODS

Dionyssis G. Dimitrakopoulos

Abstract. How do institutions of the European Union change? Using an institutionalist approach, this article highlights the interplay between power, cognitive limits, and the normative order that underpins institutional settings and assesses their impact upon the process of institutional change. Empirical evidence from recent attempts to reinforce the protection of the free movement of goods in the EU suggests that, under conditions of uncertainty, actors with ambiguous preferences assess attempts at institutional change on the basis of the historically defined normative order which holds a given institutional structure together. Hence, path dependent and incremental change occurs even when more ambitious and functionally superior proposals are on offer.

Introduction

Institutions are major determinants of the outcomes of political processes. Thus, their recent 'rediscovery' (March & Olsen 1989; Steinmo, Thelen & Longstreth 1992; Göhler 1987; 1997; Hall & Taylor 1996; North 1990; Powell & DiMaggio 1991) is more a return to a basic theme than a surprising new development. This 'rediscovery' of institutions has also influenced scholars interested in the process of European integration. Nevertheless, despite their significant value (see esp. Pierson 1996), EU-related institutionalist analyses (Aspinwall & Schneider 2000; Bulmer 1994; 1998; Armstrong & Bulmer 1998; Jupille & Caporaso 1999; Kerremans 1996; Pollack 1996; Sandholtz and Stone Sweet 1998; Schneider & Aspinwall 2001) do not focus explicitly and systematically on the issue of institutional change at the level of the European Union. Rather, they focus either on the manner in which institutional arrangements structure EU policies or on the usefulness of institutionalism for the study of European integration more broadly.

Institutional change is a crucial issue since (a) different institutions produce different outcomes even when they face similar pressures despite performing comparable functions; and (b) major political battles are fought in an attempt to change institutional structures. Although the issue of institutional change is attracting increasing attention in the institutionalist literature, the primary focus remains on national institutions (see, for instance, North 1990; Nedelmann 1995; Alston, Eggertsson, & North 1996; Göhler 1996a; 1996b; Genschel 1997; Knill & Lenschow 2000). In the context of the EU, the politics of integration is, to a very large extent, the politics of institutional change.

This issue was on the agenda already in the 1960s with the crisis that led to the so-called Luxembourg compromise; in the 1970s with the establishment of the European Council; in the 1980s with the politics of the Single European Act—that is the first major Treaty reform—and in the 1990s with the creation, *inter alia*, of the single currency and the independent European Central Bank. Finally, even the current debate, which began prior to the latest intergovernmental conference (IGC) and is likely to dominate at least until the next one scheduled for 2004, focuses on the issue of reform and the broader institutional configuration that the EU must adopt so as to become more effective, democratic and transparent. Nevertheless, institutional change in the EU does not occur only in the context of IGCs, where 'constitutional' arrangements are made, but also in the course of more

mundane day-to-day processes. Paradoxically, neither this dimension nor its interplay with the more 'visible' IGCs has attracted the attention that it deserves.

This article builds on the historical and sociological strands of institutionalism and seeks to analyse a recent case of institutional change in the area of the free movement of goods which, along with the free movement of labour, capital and services, is one of the foundations of economic integration in Europe. This case of institutional change is interesting for a number of reasons. Given the fundamental importance of the free movement of goods for economic integration in Europe and the wider implications of the balance of power between individual national governments and the European Commission—an issue that is at the heart of this case—it represents what Lowi (1972: 310) has termed 'constituent or system maintenance' policy. The empirical discussion will show that although the action of the Commission focused on the technical issues and the policy area immediately concerned, i.e. the free movement of goods, the projected wider ramifications of its proposals have largely determined the final outcome.

This case is interesting for two additional reasons. First, it involves action at two complementary levels: the IGC and the more mundane Brussels-based decision-making process. Indeed, in the run-up to the meeting of the European Council in Amsterdam in 1997, the Commission and the member states were agreed that the procedure of Art. 226 (ex Art. 169) of the Treaty of Rome, whereby the Commission raises issues of alleged violations of EU law by national authorities and has the power to take member states to the European Court of Justice (ECJ), was ineffective in cases where more direct and rapid action was necessary. Such cases had occurred repeatedly during the 1990s, especially—but not exclusively—in France, where lorry drivers, farmers and other groups of citizens protested against public policies by blocking the national road network, including access to the Channel Tunnel, thus hampering the free movement of goods. As procedures under Art. 226 (ex Art. 169) of the Treaty usually last a minimum of two and a half years (Mattera 1999: 9), public (European and national) authorities were agreed that this was not an effective measure in instances of flagrant violations of the free movement of goods which had led to huge losses on the part of hauliers and exporters in a number of member states. This issue therefore came on to the agenda of the Amsterdam summit. The European Council then called on the European Commission to submit to the Council of Ministers a legislative proposal aiming to enhance the protection of this fundamental freedom. When the Commission did so, it discovered that institutional change is a very difficult matter, despite broad support for a solution to this pressing problem.

The member states were agreed both on what was necessary for the effective protection of the free movement of goods and, untypically, on the legal basis of the new arrangement. However, they were unwilling to adopt these measures. The final outcome of this process took the form of an institutional arrangement that differs only marginally from the previous one and is, therefore, likely to remain ineffective. What accounts for this mediocre outcome? This is the issue discussed in this article.

Secondly, this result seems to be at odds with the cardinal importance attached to the free movement of goods within the EU. Indeed, one would expect that the member states would be willing to go farther down the road of institutional change in an attempt to protect the free movement of goods. This would be compatible with the initial establishment of this freedom and the enhancement of this process after the Single European, which has entailed the limitation of their power to impose restrictions unilaterally. It is argued that the traditional emphasis of institutional analysis on institutions as *power structures* obscures their *normative* and *cognitive* aspects. Although the distribution of power remains the dominant aspect of each institutional edifice, attempts to promote change in a context where uncertainty reigns can be hampered by the combined effect of (a) the normative order that underpins an

institutional arrangement and (b) limited knowledge about the potential impact of the proposed changes on future outcomes even when there is consensus among dominant actors with regard to what the problem is and how it can be resolved.

This article essentially discusses the impact of the normative order that underpins the balance of formal power between the individual member states and the European Commission, as guardian of the Treaty, on processes of institutional change. The analysis of the case that concerns the new arrangements for the protection of the free movement of goods is placed in a wider historical context which is marked by key choices made when the Treaty of Rome was drafted, as well as the more subtle but formative impact of day-to-day mundane processes.

The Commission's role of guardian of the Treaty (Art. 226/169) has evolved historically and has relied on a formal tripartite structure whereby the autonomous assessment by the two opposing parties (typically, a national government and the European Commission) of a case of alleged infringement is frequently, though not always, followed by a ruling of the ECJ issued in its capacity of impartial adjudicator. However, the requirements of the protection of the free movement of goods in cases of severe but brief breaches of EU law were such that the role of the Commission would have to be transformed into what Bardach (1977: 31) termed 'fixer'. 'Fixing' entails a clear *corrective* element—'repairing' and 'adjusting' in Bardach's terms—but is crucially underpinned by a certain degree of 'coerciveness' (Bardach 1977: 274). Indeed, fixing is meaningful only to the extent that the fixer has the power to overcome obstacles that inevitably appear in the course of implementation. Such a role was in direct conflict with the norms of relative autonomy that underpin the aforementioned tripartite institutional structure and was therefore deemed to be unacceptable to the member states.

The theoretical framework is outlined in the following section of this article. The first sub-section discusses the interplay between power, norms and cognitive limits and the way in which they shape the pace of institutional change. The second sub-section outlines the factors that shape the direction of institutional change. The emphasis then shifts to the case study. Some preliminary conclusions regarding institutional change in the EU are drawn in the final section of the article.

Institutions, institutional change and the European Union

Power, norms and cognitive limits

Institutionalists use the term 'institution' very broadly to cover phenomena as diverse as the state, the welfare state, property rights, electoral systems, legislatures, and executives. A conception of institutional change must rely on a specific view of what constitutes an 'institution'. Institutions are construed here as sets of 'relatively durable and formal rules that allocate resources of power, constrain the choices of the personnel and the clients, citizens or subjects of the institution and possess internal enforcement mechanisms' (Levi 1990: 405).

This definition treats the distribution of power as the cardinal feature of an institution. No doubt this is the key characteristic of every institution; but it is not the only one since institutions encompass a normative dimension as well. They reflect the relations that they, simultaneously, define but these relations are embedded in a wider 'normative order' (March & Olsen 1989: 107). This order consists of collectively constructed values and principles that must be protected and put into effect. It is a structure of meaning and scheme of interpretation (March & Olsen 1998: 948), a collective *référentiel* (Muller 1995), a collection of pervasive informal norms that underpin and hold institutional contexts together (North

1990: Ch. 5). It is significant in the context of both (a) role fulfilment that occurs in institutional arrangements whereby individuals and groups act in 'appropriate' ways because they are expected to do so (March & Olsen 1989; Finnemore & Sikkink 1998: 891) and (b) processes of institutional change.

This normative order entails what Hauriou (cited in Waschkuhn 1987: 72) terms an '*idée directrice*' (guiding idea) that shapes and justifies most of the activity that occurs in institutional contexts. It affects the direction of institutional change[1] as well as (a) the (re-)interpretation of institutions in a changing context and (b) the choice between conflicting institutions (when such a conflict occurs). It does so by providing a frame for the assessment of alternative options.

The importance of the normative order is essentially rooted in ambiguity, a pervasive characteristic of organisations (March & Olsen 1976). Decision making in organisations is fundamentally an interpretive activity. Decision makers, in particular those that are involved in institutional change, try to match identities with the requirements of a decision situation (March 1994). This entails a minimum of interpretation. The normative order that underpins the institutional context in which decisions are made *guides* this interpretive activity and thus affects the outcome of the decision process. In short, the normative order conditions the activity that takes place within institutional arrangements as well as attempts to change these arrangements (Crozier & Friedberg 1977) by providing a 'compass', a guiding 'device' (Kratochwil 1989: 10) for the exercise of power.

A normative order tends to endure because actors infuse rules with values that hinder subsequent change. The longer a rule exists, the more embedded it becomes in the values of actors (March, Schulz & Zhou 2000: 72-3). To be sure, change at the level of a normative order consists mainly of a new interpretation rather than the complete re-definition of its content. This is particularly conspicuous in the EU where the socialisation effect that is inherent in the process of integration becomes evident after a certain time lag.

What, then, is institutional change? It is defined here as a 'shift in the rules and enforcement procedures so that different behaviors are constrained or encouraged' (Levi 1990: 406). Institutional arrangements typically tend to preserve themselves even in the face of adversity (Skowronek 1982; Krasner 1984) or pressures for change. This is so for a number of reasons that are particularly conspicuous at both the national and the European levels: powerful factors that undermine efforts at change comprise sunk costs, uncertainty and political conflict (Genschel 1997), intentional design and path dependence (Pierson 2000b: 491-2), the legal dimension of formal institutions (Levi 1990: 415), the complexity of joint action in the implementation stage (Pressman & Wildavsky 1973), ambiguity and the problematical allocation of attention (March & Olsen 1976) and competency traps[2] (March & Olsen 1989: 63; March, Schulz & Zhou 2000: 73). These factors promote institutional stability and relate both to the national political *context* and to the characteristics of the *actors* that operate therein.

More importantly, institutions tend to preserve themselves because they need a minimum of stability so as to perform their role (Genschel 1997: 47). However, the social and political context within which they operate is not stable. The multi-tiered EU system, in particular, is rich in potential sources of change, for it is open, affected by fifteen different electoral cycles and competing institutional, political and economic actors. Nevertheless, uncertainty with regard to the impact of institutional change upon future political outcomes is a powerful source of inertia. This applies especially to the role attributed to supranational players such as the ECJ and the European Commission. Since they remain outside the control of individual national governments, they are capable of producing unintended consequences: a typical feature of the process of integration (Pierson 1996). National governments which are

aware of this phenomenon are therefore likely to favour either stability or incremental—that is, slow and marginal—change over radical transformation.

Incremental change is promoted also by the characteristics of the decision makers. Rational choice approaches based on microeconomics tend to over-estimate the capacity of actors to choose among alternatives on the basis of exogenously defined clear preferences in their quest for utility maximisation. By contrast, other strands of social science (Merton 1936; March & Olsen 1976; Crozier & Friedberg 1977; March 1994) that inform historical and sociological institutionalist approaches emphasise the characteristics of decision makers-in particular, the limits to their rationality (Simon 1947)-as sources of incremental action that entails slow, marginal changes[3].

Moreover, institutions are hard to change also because they are 'nested'. Typically, they are parts of a wider complex system of rules (Krasner 1988; Starck 1995; March, Schulz & Zhou 2000). Although boundaries between jurisdictions can mitigate the effects of nesting upon attempts to generate institutional change, individual components cannot be examined in total isolation from the system as a whole. This is so not least because of the *perceived* impact of change in one part (or level) of the system on other parts or the system as a whole.

A distinction can be drawn between systemic and sub-systemic institutions. The latter exemplify and give meaning to the former in specific policy areas. Systemic rules are more abstract and operate as a guideline for the definition and interpretation of sub-systemic (policy-specific) rules. Attempts to change the latter are likely to generate opposition to the extent that they either necessitate or raise the issue of change at the systemic level. This is so not only because change at the systemic level typically requires larger majorities (or even unanimity in the case of the EU[4]) but also because systemic rules operate at similar or comparable levels of abstraction to the normative order that underpins an institutional edifice. The distinction between systemic and sub-systemic rules is particularly pertinent in the EU, where there is a marked difference between primary law (Treaties) and secondary law (Directives, Regulations, Decisions). The ECJ typically refers to the former—as a system of legal rules—for the interpretation of the latter (Louis 1990: 49).

Attempts to change rules at one level are assessed on the basis of their potential impact on that level as well as their implications for the wider institutional system. This is when cognitive limits become particularly relevant. Cognitive limits refer to the notions of ambiguity and uncertainty. Ambiguity refers to the unclear preferences of the actors involved in institutional change. This may result from multiple contradictory identities which lead to diverging conceptions of appropriate action. This is further compounded by uncertainty with regard to the (projected) outcomes that are associated with alternative options. This is when norms become critical.

Although power is a crucial dimension that affects institutional change by means of what Levi (1990: 407) calls 'the withdrawal of contingent consent', norms—and the symbols that are associated with them—reflect the dominant 'criteria of appropriateness' (March & Olsen 1989: 55). These criteria are collective constructs. They develop over time and become part of each institution's identity and standard operating procedures. Thus, although it may well be in the interests of powerful promoters of institutional change to choose a particular course of action, they are not likely to do so in conditions of ambiguity and uncertainty if it goes against the normative order that is mirrored in entrenched conceptions of identity and appropriate action.

The direction of change: The logic of path dependence

Approaching institutions as both power structures and normative orders is useful for discussing the *pace* of institutional change but says little about its *direction*. Institutionalist

analyses place considerable emphasis on the concept of 'path dependence' (Krasner 1988; March & Olsen 1989; Levi 1990; North 1990; March, Schulz & Zhou 2000; Pierson 2000a) whereby past choices affect subsequent events either by increasing the cost of path change or by precluding it altogether (Krasner 1984: 240).

This is so for a number of reasons (Pierson 2000a). First, the short time horizons that are particularly conspicuous in political life tend to undermine the likelihood of radical institutional change because it typically generates high costs that are borne in the short run while their positive effects tend to appear in the medium or long run. Second, power asymmetries mirrored in institutional arrangements tend to reproduce themselves over time (Levi 1990: 406) because powerful actors (e.g. ruling political parties) try to use their power so as to maintain or even improve their position in a political system. Further, given cognitive limits and the problematical allocation of attention, knowledge about the consequences of alternative choices is incomplete. Since political actors are aware of their inability to control institutions continuously (Pierson 2000b: 491), when change occurs it is likely to follow established paths, especially in the EU where unintended consequences are particularly conspicuous.

Moreover, Lowi's (1964) classic assertion that 'policies produce politics' has significant implications for the analysis of the direction of institutional change. Indeed, some types of policies are more conducive to path dependent development than others. Path dependent change is much more likely to occur in what Lowi (1972) has termed 'constituent policies' than other types of policy. Unlike distributive and redistributive policies, where the stake and at least some of the consequences of alternative options are relatively clear, the degree of uncertainty is much higher in constituent policies. In addition, procedural requirements—unanimity in the case of the EU[5]—produce a 'strong status quo bias' (Pierson 2000a: 261). These requirements undermine the likelihood of 'fixing' (Bardach 1977)—that is, corrective action in a subsequent stage—while the perceived magnitude of the potential unintended consequences remains large. Hence, political actors that engage in institutional change in constituent policies are likely to prefer path dependent and incremental change, proceeding in a trial-and-error manner, to the radical and rapid transformation of institutions.

The notion of path dependence has considerable methodological implications for the study of institutional change. Institutions reflect much more than the problems and pressures that exist at the time when they are being analysed. They are the residue of a history of problem-solving and political battles (March, Schulz & Zhou 2000: 162). Hence, a history-dependent process-tracing perspective is necessary for the analysis of institutional change. It is a way of avoiding the pitfalls of giving undue credit to recent actions and their promoters or opponents. Thus, the key methodological implication is the need to take account of the sequence of events that constitutes the path as well as the critical event(s) that have triggered it.

The following section places the protection of the free movement of goods in the wider, historically-defined context of the protection of legality in the EU. The role of the European Commission and the relative autonomy of the member states are highlighted as the defining characteristic of this system.

The protection of the free movement of goods in a historical perspective

The European Commission as guardian of the Treaty

Under Art. 226/169 procedures, if the Commission considers that a member state has not fulfilled its Treaty obligations it raises the issue and requests the member state in question to present its own views within a specific period of time. If during this period the member state

either fails to reply or does not provide a convincing answer, the Commission has the right to bring the matter before the ECJ.

The significance of Art. 226/169 procedures for the protection of the free movement of goods must be placed in a wider context that is underpinned by a number of factors. First, this is the main (and only Treaty-wide) instrument with which the Commission can perform the role of 'guardian of the Treaty'. Second, its importance has increased as a result of the deepening of economic integration and the expansion of the areas of economic activity that are covered by EU law. This has increased the opportunities for cross-border trade as well as the potential for violations of the principle of the free movement of goods. Third, although the Commission remains a comparatively small administration, the territory that it has to monitor is expanding. Fourth, as the geographical territory of the EU expands, so does the likelihood of new infringements. Finally, Art. 226/169 is one of the relatively few provisions of the Treaty that have not been modified since 1958. The combined effect of the lack of other instruments and of any history of amendments has allowed Art. 226/169 to acquire the status of a *systemic* provision, i.e. one which is of cardinal importance for the maintenance of the system as a whole as well as of its individual components, such as the free movement of goods.

The implementation of this provision since 1958 has enhanced and further highlighted four fundamental norms that underpin the Commission's role of guardian of the Treaty. First, both the Commission and the member states concerned have remained capable of assessing *autonomously* both *whether* and *how* to pursue a case. Second, although the initiation of Art. 226/169 procedures is typically triggered by events that happen at the national level—since this is where the alleged violation of EU law is thought to have taken place—the dialogue between the Commission and the national government in question develops at the level of the EU, because it focuses on the obligations of national governments that stem from membership of the EU. Third, although the Commission has consistently encouraged individuals and firms to make extensive use of *national* legal instruments and procedures to protect their interests, they, in turn, have preferred to raise such issues with the Commission, which has then acted as an intermediary between these actors and national governments in the context of Art. 226/169 procedures (Commission des Communautés Européennes 1997: 2). Finally, and most importantly, member states have consistently avoided the use of Art. 227 (ex Art. 170) which allows them to take another member state to the ECJ on grounds of failure to fulfil Treaty obligations. Rather, they have consistently preferred the use of Art. 226/169 by the Commission for the same purpose.

Although these practices have undoubtedly enhanced the systemic dimension of the role of the Commission as guardian of the Treaty in the sense that it has turned the Commission into a *natural* focal point for the protection of legality in the EU, it has also allowed national governments to maintain a sense of autonomy with regard to the handling of cases of alleged infringements. Indeed, national governments have developed this sense by managing to protect their interests (by bringing the Commission into play) while avoiding the blame for taking action against each other. Thus, they have balanced the more manifest role of the Commission. This sense of autonomy has mirrored another significant aspect of the normative order of the EU, namely, the principle of 'institutional autonomy' (Rideau 1972). The ECJ has established this principle, which allows member states to fulfil obligations stemming from membership by means of their own, historically defined institutional arrangements. Hence, neither the Commission nor any other institution of the EU has the right to determine the shape of these arrangements[6].

Given these aspects of the EU's normative order, the Commission faced a Herculean task in devising a proposal that had to be both effective and acceptable to the member states.

Arguably, the proposal of the Commission was regarded as seeking to distort the balance that had developed since 1958, which is why it was ultimately watered down.

The case of the protection of the free movement of goods

Despite its importance for economic integration and the establishment of a single market in Europe, the free movement of goods has, in a number of cases, become the victim of illegal practices at the national level. The Commission and the ECJ have repeatedly taken action to remedy these problems. This action was based not only on Art. 226/169, but on Art. 30 of the Treaty of Rome (now Art. 28) as well. The latter provision bans restrictions on intra-EU trade but it refers essentially to *state* actions, that is, practices and rules that stem from *authorities of the member states.* In that sense, this provision did *not* cover the actions of individuals or groups of individuals (Orlandini 2000: 344).

Nevertheless, since the mid-1980s and the re-invigoration of the single market project, the Commission has received a growing number of complaints regarding individuals and groups of individuals who have engaged in illegal activities such as the destruction of mainly agricultural goods imported from other member states and the use of threats against importers and retailers of such goods. These complaints concerned France in particular and the passivity of the French authorities *vis-à-vis* these acts. This problem took an even more serious turn after 1993 when a new French organisation, *Co-ordination Rurale*, launched what the Commission called 'a systematic campaign to restrict the supply of agricultural products from other member states'[7].

These events led the Commission to take the French government to the ECJ in 1995 accusing it of inaction in the face of these illegal activities. In December 1997 the ECJ upheld the views of the Commission (ECJ 1997) and condemned France for failing to fulfil Treaty obligations. In particular, the ECJ condemned the *inaction* of the French authorities in the face of acts of private individuals that led to serious breaches of the free movement of goods. By doing so, the ECJ effectively extended the scope of Art. 28 (ex Art. 30) to acts of private persons (Orlandini 2000: 344), thus significantly reducing the autonomy of the member states in this field. In the meantime the issue of the protection of the free movement of goods had already been placed on the agenda of the IGC which was already under way.

The Commission asked the Italian and the Spanish delegation to raise the issue, on its behalf, at the level of the IGC (interview with Commission official, Brussels, 26 April 2001). This claim was supported by the British delegation. These countries were particularly interested in resolving this problem since their producers and hauliers had previously suffered the consequences of the lack of an effective mechanism for protection. Although the IGC seemed to provide a window of opportunity, the timing was not good. Indeed, the Spanish-Italian proposal regarding the amendment of Art. 169 of the Treaty required an in-depth debate as well as a long period for reflection which would allow the member states to better understand its potentially positive repercussions. However, no such maturing process occurred because the proposal was submitted towards the end of the IGC (Mattera 1999: 18) when delegations were trying to close the *dossiers* in an effort to conclude the negotiation. Thus, the wider issue of the protection of the free movement of goods was dealt with by means of a reference in the conclusions of the Dutch Presidency. The necessity of 'active enforcement of Community law in the Member States' was noted and the Commission was asked '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' (European Council 1997: 5). The proposal of the Commission has tested the political resolve of the national governments. In that sense, this was indeed 'a moment of truth', as Commissioner Monti put it (*Agence Europe*, 6 November 1997: 6).

The Commission, backed by the aforementioned path-breaking judgement of the ECJ, seized this opportunity and submitted an ambitious proposal (Commission des Communautés Européennes 1997). The proposal linked the growing problem in hand with the cumbersome and time-consuming nature of Art. 226/169 procedures. The Commission argued that a more flexible and rapid mechanism had to be established to combat the new forms of breaches of the free movement of goods. It sought to generate a new set of rules and enforcement procedures that would constrain the capacity and willingness of national authorities to use their discretion in a manner similar to that employed by the French authorities, i.e. by remaining passive. The Commission proposed[8] the establishment of a mechanism that would come into play in cases of a *serious disruption* of the free movement of goods, producing *serious loss* to the individuals affected in a manner that required *immediate intervention* so as to prevent the continuation, extension or aggravation of the disruption or loss. Typical cases include the destruction or the immobilisation of large quantities of goods originating from other member states (Commission des Communautés Européennes 1997: 6).

According to the proposal, in such cases the Commission would adopt a Decision requesting the member state concerned to take all necessary and proportionate measures, within a specific *legally binding* deadline set by the Commission, so as to remove the obstacles to the free movement of goods. Unlike Art. 226/169 procedures, whereby the Commission has a significant margin of discretion, the Commission stated in its proposal (Commission des Communautés Européennes 1997: 7) that it would be *obliged* to adopt a Decision when the three aforementioned conditions were met. Moreover, unlike the decision to refer a member state to the ECJ under Art. 226/169, the Decision of the Commission taken in the context of the proposed mechanism would have legally binding effect at the national level. Indeed, the objective of the Commission was to enable domestic injured parties (firms, groups and individuals) to invoke the Decision in *national courts*[9] to protect their interests (or even obtain damages), thereby putting the member state in question under even more pressure to take remedial action. If the member state concerned failed to do so, the Commission would have the right to refer it to the ECJ.

Furthermore, the proposed mechanism differed from the traditional Art. 226/169 procedures in three significant ways. First, the Commission would have the power to adopt a legally binding Decision which would produce *immediate* effects through the legal action that aggrieved individuals, firms or groups would then be able to take in national courts. This was a significant departure from the traditional Art. 226/169 procedure, which allows the Commission to enter into dialogue with a member state and to continue to do so *until the case is heard in the ECJ*. In the course of this dialogue the two parties can—and member states frequently *do*—change their minds, take remedial action and then abandon the case altogether. Second, unlike Art. 226/169 where the ECJ is the *locus* of the resolution of the dispute, under the proposal of the Commission *national courts* would play this role. Finally, and most importantly, the proposed regime would change the balance of power in favour of the Commission. Unlike Art. 226/169 procedures, whereby the Commission *promotes* compliance, under the proposed system the Commission would be transformed into a 'fixer' (Bardach 1977). The coercive element of fixing proved extremely unpopular with most member states.

Subsequently, a number of amendments were put forward in what eventually became a successful attempt to weaken the proposal radically. In addition, the initial reaction of the European Parliament was negative, on two grounds. As Peter Skinner, the European Parliament's *rapporteur*, put it (European Parliament 1998a), the Parliament considered that the Commission proposal was disrespectful of the principle of subsidiarity and the fundamental right of workers to take industrial action and strike[10]. Contrary to long-established patterns of inter-institutional alliances, the Council thus found in the European

Parliament an unexpected[11] ally who allowed it to 'draw the teeth of the original Commission proposal' as Friedrich Wolf (a German Green MEP) put it (European Parliament 1998a).

The Council capitalised on this attitude of the Parliament. It has rejected the idea that the Commission should have the power to adopt a Decision which would then be invoked by individuals and firms in national courts, thus significantly diluting the power of the new mechanism. In doing so, it followed the views of its Legal Service (Conseil de l'Union Européenne 1998), which argued that the Commission's proposal would distort the institutional balance established by the Treaty[12]. Rather, the Council has opted for a less restrictive mechanism (Council of the European Union 1998a) which is, nevertheless, much more compliant than the Commission proposal with the normative order regarding the protection of legality and the free movement of goods in the EU.

Council Regulation No. 2679/98 and the protection of the free movement of goods

The new mechanism introduced by Council Regulation No. 2679/98 focuses explicitly on a new form of breach of the free movement of goods: cases of 'serious disruption […] by physically or otherwise preventing, delaying or diverting their import into, export from or transport across a Member State' (Art. 1). It relies essentially on the flow of information between member states and the Commission with regard to the occurrence of an obstacle (or the threat thereof) to the free movement of goods. It seeks to constrain the discretion of the authorities of the member state where the disruption occurs (or seems likely to occur) by establishing specific procedural obligations.

- Member states are now under an obligation to circulate to other member states and the Commission information regarding actual or potential obstacles to the free movement of goods.
- When an obstacle occurs in a member state, the member state concerned ensures that all appropriate measures are taken in accordance with the Treaty and informs the Commission accordingly within five working days.
- When the Commission considers that an obstacle is occurring, it shall request (by means of a notification) the member state in question to take all necessary and proportionate measures to remove it within a specific period.

If a member state fails to comply with these obligations, the Commission will have to resort to Art. 226/169 procedure. However, when it uses a notification it can skip the first stage of Art. 226/169 procedure, which entails the exchange of views between the Commission and the member state concerned, thus accelerating it, albeit only marginally.

This mechanism introduces a number of interesting elements into the system for the protection of the free movement of goods. First, it places significant emphasis on the flow of information between the member states and, more importantly, between the member states and the Commission. In that sense it differs from the classical Art. 226/169 procedures that rely on the capacity of the *Commission* to *discover* whether and how the free movement of goods (or other EU laws) was violated. Second, the new system allows the Commission to set tight deadlines for its dialogue with the member state where a disruption occurs. Finally, under classical Art. 226/169 procedures the role of the member states in identifying and dealing with breaches of the free movement of goods is covert and indirect, since they raise such issues with the Commission rather than the member state concerned; in the new system, by contrast, the role of the member states is recognised formally and explicitly.

In addition to Regulation No. 2679/98, the member states and the Council have re-affirmed in a Resolution (which is not legally binding) their decision to adopt all necessary measures within their powers to maintain the free movement of goods, including the establishment of 'rapid and effective review procedures' at the national level (Council of the

European Union 1998b). This was more than a mere expression of their 'political resolve' to deal with this matter. Arguably, the Resolution constitutes a confirmation of the member states' pivotal role in the protection of the free movement of goods. In that sense, it indicates that the pattern established under Art. 226/169 is preserved rather than disrupted. However, it also indicates the inadequacy of the new system.

The new system is inadequate[13] for a number of reasons. First, to the extent that it highlights the political commitment of the member states to resolve this problem, the Regulation and the Resolution add nothing new. By becoming members of the EU, the '15' have agreed (a) to adopt the measures that are necessary to comply with the corresponding obligations and (b) to abstain from taking action that could jeopardise the attainment of Treaty objectives (Art. 10 (ex Art. 5) of the Treaty[14]). Second, the new system entails no penalties against member states that fail to comply with the obligation to provide information regarding actual or potential disruptions. In such cases, the Commission will have to rely on Art. 226/169 procedures. Third, the problems of Art. 226/169 procedures, especially their lengthy and cumbersome nature that instigated these attempts at institutional change in the first place, have remained unresolved. Finally, in the first two years of operation of the new system the member states' attempts to put in place the network of contact points for the exchange of information were dogged by problems (Commission of the European Communities 2001: 7). How, then, can one explain this mediocre result?

Explaining timid institutional change

The argument presented in this article highlights the role of the normative order that underpins an institutional arrangement in the process of change. It has been argued that this normative order conditions change by providing the criteria for the assessment of attempts at change. Indeed, in conditions of uncertainty, actors with ambiguous preferences legitimise attempts at change when they are meant to resolve novel problems, but assess them on the basis of the historically defined normative order that underpins the institutional structure in which the issue arises.

The *functional need* to protect the free movement of goods from a new form of barrier was the source of the attempts at institutional change. However, after the initiation of this process the Commission, in promoting a specific set of proposals, highlighted both the *normative* and the *systemic* dimension of the issue, thereby mobilising the power of inertia. Under Art. 226/169 procedures, the role of the Commission is supervisory and—potentially—punitive. The system proposed by the Commission entailed the transformation of its role. It would become corrective. Indeed, the Commission would assess *autonomously* on an *ad hoc* basis whether the authorities of a member state had remained 'inactive'. In other words, the Commission was going to assess whether a given member state had used its legal 'arsenal' to protect the free movement of goods. Conceptually, therefore, the proposal of the Commission was coherent in that its target was the behaviour of the member states, i.e. the actors whose behaviour was at the heart of the problem. Politically, however, the proposal was inappropriate in that it did not comply with the normative order that had been established under Art. 226/169 since 1958.

Change, it was argued, is difficult to bring about because rules are nested. Nesting has a horizontal dimension (relations between rules of the same level) and a vertical dimension (relations between rules of different levels and the normative order that holds them together). The Commission stated that it had drafted its proposal in a manner that would allow the future expansion of its scope. Then, speaking in the European Parliament, Commissioner Monti highlighted the prospect of extending the scope of the proposed mechanism to the protection of the free movement of workers (European Parliament 1998a). Thus, the

Commission indicated clearly the potential *systemic* repercussions of its proposal. This led the member states to conceive of what was at stake in *systemic* terms although the task in hand was primarily of *sub-systemic proportions*.

Aware of their inability to control the Commission, the member states, supported by the European Parliament, did not try to provide a comprehensive solution to the *functional* problem in hand. Rather, they opted for the modest final outcome which was, nevertheless, more consistent with the historically defined normative order that underpins the protection of legality in the EU. Although they were aware of the technical superiority of the Commission's proposal, they preferred a small, marginal step along the path established under Art. 226/169 since 1958 because they were also aware of their inability to control the Commission over time. In that sense, the strong impact of bounded rationality and incrementalism on the *pace* of institutional change became evident.

The normative order acts as a brake on radical change under conditions of ambiguity and uncertainty. The new system reflects the ambiguity of the member states' preferences that have evolved from the Amsterdam summit—-where even the possibility of imposing fines on recalcitrant member states was evoked—until the end of the decision process. Moreover, this is also an indication of the implications of vertical institutional nesting. Although the European Council may initially express its 'wishes' and determine the broad direction in which a particular issue must be resolved, when the dossier reaches the Council 'then one begins to think more vigorously', as a Commission official has put it (interview, Brussels, 26 April 2001). The logic of incrementalism then takes hold of the process.

This is clearly exemplified by the small increment added to the system by the new obligation imposed by Regulation No. 2679/98 on national authorities to allow and promote the exchange of information regarding actual or potential disruptions. This obligation reflects the importance of the flow of information as a means to prevent such disruptions—in the sense that hauliers, for example, can choose alternative routes if need be—but fails to address the key issue of the *discretion* of national authorities in dealing with these disruptions. This norm, which is valued by the member states, has impaired the Commission's attempts to promote a more radical form of change. Indeed, the Commission's proposal went against the established norm that allows a member state to assess a case of alleged infringement of EU law *autonomously*. The conflict between the Commission's proposal and this norm has further increased the stakes for the member states by linking the attempts to resolve a policy-specific problem with system-wide changes and the potential for the creation of unintended consequences on the part of autonomous supranational actors. Otherwise, the system proposed by the Commission was much more likely to achieve the common objective, that is, the protection of the free movement of goods.

The member states' decision to place on themselves the obligation to promote the exchange of information has legitimised the orientation of the Commission's proposal, since it too focused on constraining the discretion of the member states. Nevertheless, by falling short of giving more powers to the Commission, Regulation 2679/98 has confirmed the idea that Art. 226/169 procedures, to which the Commission must resort if a member state fails to comply with the provisions of the Regulation, essentially remain the *only* legitimate path for the protection of legality at the level of the EU.

At the same time, the *direction* of change has remained path dependent essentially due to

- the power asymmetries between the Commission and the member states, and
- the fact that the free movement of goods is a constituent type of policy at the level of the EU.

The Commission's proposal was functionally superior to the solution adopted through Regulation No. 2679/98. However, the member states have remained unconvinced because the Commission has not managed to address the potential *immediate* repercussions of its

proposal upon the EU system as a whole. On the contrary, the Commission has not managed to stress the *positive* long-term outcome and the certain socialisation effect that would be generated by its proposed system. Rather, it has highlighted the systemic dimension of its proposal and has thus evoked the inability of the member states to control this supranational body over time. Thus, it has led the member states to use their formal powers to water down the initial proposal. To be sure, the use of Art. 308/235, which is meant to allow the EU to resolve problems regarding the operation of the single market for which the Treaty has no other legal basis, and the subsequent need for *unanimity* (which is typically reserved for amendments to rules of a higher standing) have highlighted the idea that what was at stake was a potentially unintended change of path. Therefore, they have opted for the timid, small step described above, despite its functional inferiority.

Conclusion

Institutional change in the EU was, and remains, remarkably under-researched. This article has sought to shed some light on this issue. For that purpose, an approach that is informed by historical and sociological institutionalism has been adopted. It is argued that, under conditions of ambiguity and uncertainty, attempts to promote institutional change are not assessed on the basis of their functional merits alone. Rather, they are examined against the background of the normative order that underpins an institutional framework and provides the 'compass' by means of which attempts at change are assessed. This was demonstrated by a means of a case study regarding the protection of the free movement of goods in the EU. Although the initial proposal of the Commission was undoubtedly more suited to the task in hand, that is, the effective protection of the free movement of goods, it was subsequently watered down because it went against the historically defined normative order that underpins the wider issue of the protection of legality (under Art. 226/169 of the Treaty) in the EU.

The emphasis on the notion of the normative order that underpins this system has not obscured the impact of power asymmetries and cognitive limits upon the process of institutional change examined in this article. On the contrary, it is argued that the normative order plays a significant role when the given cognitive limits do not allow key actors to make sense of a decision situation. In this case there was a clear conflict between the functional superiority of the Commission's proposal and its potential systemic consequences. It has been demonstrated that the member states have used their advantage stemming from the need for a unanimous decision in order to achieve *two* objectives: the enhancement of the protection of the free movement of goods and the maintenance of their systemic position *vis-à-vis* the Commission. The normative order discussed earlier has provided the 'compass' that they have used in this process.

Two broader conclusions can be drawn from this analysis. First, at the level of the methodology, the study of institutional change has to be placed within a wider, historically defined context. Secondly, the analysis of institutional change in complex, nested, systems such as the EU, necessitates the combination of normative, cognitive, and power-related factors. Indeed, empirical enquiry demonstrates that change is difficult in nested systems not only because of the actual (and potential) linkages between the different levels involved but also because changes in one area evoke the idea of wider systemic unintended (and potentially unwelcome) ramifications.

These conclusions are only tentative in the sense that they relate to institutional change in the context of a 'constituent' policy. Thus, more research is called for before a fully-fledged theory of institutional change in the EU is developed.

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Notes

[1] March and Olsen (1989: 107) an interesting and particularly illustrative example of the manner in which the normative order conditions change.

[2] Competency traps are typically found in organisations. Organisations tend to engage more frequently in the activities in which they are more effective. This leads to greater accumulation of experience, knowledge and, thus, increased competence in those activities rather than others.

[3] To be sure, incrementalism has four central features (Braybrooke & Lindblom 1963). First, actors do not attempt to achieve a stable and clearly defined goal; rather, they try to move away from known 'ills'. Second, decisions are tried in a sequential manner: they follow one upon the other in the quest for a solution to a problem until one that is good enough is found. Third, decision makers adapt objectives to means. Fourth, decision making focuses on the small increments by which the potential result of a decision differs from the status quo.

[4] Decision rules that govern the process of institutional change symbolise the status of an institution within its context. Typically, systemic institutions, e.g. national constitutional rules, are harder to change—that is, their amendment requires large majorities—because of their link to entrenched conceptions of identity. The link between the status of an institution within its context and the procedural requirements for its amendment is evident in the EU as well. Unanimity is required for the amendment of the founding Treaties whereas qualified majority voting is the typical requirement for changes in most policy-specific (i.e. lower-ranking) rules.

[5] All rules can be conceived of as instruments *against* uncertainty. Nonetheless, they simultaneously constitute *sources* of uncertainty (Crozier & Friedberg 1977: 88).

[6] By the same token, the ECJ has also stated that the member states do not have the right to invoke these arrangements so as to justify failure to fulfil obligations stemming from member of the EU.

[7] The Commission's submissions to the ECJ in case C-265/95 (ECJ 1997) contain an extensive account of these events.

[8] Art. 308/235 of the Treaty requires a unanimous decision of the Council after the European Parliament is consulted on the basis of a proposal of the Commission. This provision allows the adoption of measures that are necessary for the operation of the single market in cases where the Treaty does not provide the powers required for this purpose.

[9] Currently, this is possible only on a *post hoc* basis, i.e. after the end of Art. 226/169 procedures (Mattera 1999: 17).

[10] It was considered that the initial proposal could endanger the ability of workers to engage in industrial action. This view was also shared by the Economic and Social Committee (1998).

[11] A Commission official has noted that this attitude of the European Parliament had changed after the appointment of Jacques Santer. Indeed, he has stressed the fact that the Parliament frequently proposes significant amendments to Commission proposals (interview, Brussels, 26 April 2001).

[12] A senior Commission official has rejected this view (interview, Brussels, 26 April 2001), arguing that, according to the initial proposal of the Commission, the Council would *attribute* powers to the Commission as it has already done in other areas, including the regulation of intra-EU air transport.

[13] Orlandini (2000: 358) provides a more positive assessment of the new mechanism (cf. European Parliament 1998b: 14).

[14] This is a pivotal provision that has been used by the ECJ in its jurisprudence regarding failure of member states to fulfil their obligations under the Treaty (Louis 1990; ECJ 1997).

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