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**Interlinking
neofunctionalism and intergovernmentalism:**

**Sidelining governments and
manipulating policy preferences
as “passerelles”¹**

Gerda Falkner

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Institute for European Integration Research

eif

Strohgasse 45/DG
1030 Vienna/Austria
Phone: +43-1-51581-7565
Fax: +43-1-51581-7566
Email: eif@oeaw.ac.at
Web: www.eif.oeaw.ac.at

Abstract

The EU's founding fathers had the protection of the EU's constituent units as a key concern and set up serious hurdles to policy innovation in the absence of unanimous governmental agreement. These institutional design features, aptly characterised as "joint-decision trap" by Fritz W. Scharpf, were only softened but not erased over time. Nonetheless, the problem of how to innovate has, at times, been overcome through eclectic means. There are indeed some well known and quite visible practices as well as some less expected and more obscure strategies that have propelled the EU's policy system beyond what has for a long time been expected.

This paper argues that there are two strategic moves the European Commission (and, at times, other supranational actors such as the European Court of Justice) can use to actively overcome member state opposition: first, sidelining some or even all national governments; and, second, manipulating relevant policy preferences. These two basic strategies can be seen to interconnect the diverging basic assumptions of intergovernmentalism and neofunctionalism as 'passerelles'.

Keywords:

EU decision-making, unanimity requirements, integration theory, intergovernmentalism, neofunctionalism.

General note:

*Opinions expressed in this paper are those of the author
and not necessarily those of the Institute.*

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1. INTRODUCTION²

This paper discusses the mechanisms at the EU's disposal for bringing about policy innovation even in the case of governmental resistance. Empirical material from various fields is used to illustrate this.

The topic is highly relevant because new policy initiatives are frequently met with opposition and stand little chance to be adopted given that the EU is a political system with particularly great barriers to innovation. Even the introduction of legislative action via the co-decision procedure has not changed the status quo in principle; the recent or future systems of qualified majority voting in the Council of Ministers are, at least at the policy-setting level, still types of supermajority procedures hardly practiced in national level systems (e.g. Selck 2009). The protection of its constituent units, and consequently of national autonomy, has been a key concern of the founding fathers. As will be discussed here, the problem has been overcome through eclectic means. There are indeed some pre-pondered and easily visible practices (the Commission acts as a broker between the Council delegations, which facilitates learning and striking deals³), as well as some less expected and harder to reveal strategies that have propelled the EU's policy system beyond what stood to be expected. The latter will be the focus here.

After discussing the theoretical background of clashing ideal-typical schools of integration theory, I will argue that there are two basic strategic moves the European Commission (and, at times, other supranational actors such as the European Court of Justice) can use to actively overcome governmental opposition. In doing so, this article offers a discussion of empirical phenomena that can interconnect the diverging basic assumptions of intergovernmentalism and neofunctionalism. They both turn a blind eye to some aspects of the EU's practical workings – which can be useful as a strategy in as far as it allows to more easily derive generalised assumptions, but it must not be left out of sight as it obscures important aspects of European integration which can actually turn the tables in policy-making processes and hence

² Many thanks to Zdenek Kudrna for insightful comments.

³ In this paper I will not discuss the 'normal' influence of the European Commission in the EU's policy process, the impact it has e.g. via presenting policy proposals and via being a broker between Council delegations applying various traditional bargaining techniques. Log rolling, package dealing and the like have been analysed in-depth under the perspective of bargaining theory, and they are all in fact easily covered by a strictly intergovernmental perspective.

impact the EU's integration output. The linking perspective between the opposing camps⁴ discussed here stresses the importance of institutional dynamics and mechanisms in the EU's policy process, on the level of individual decisions. In a sense, what follows is a specific, micro-level linking of the two opposing macro-level 'grand theories' of European integration.⁵ In doing so, I build on the work of great colleagues, summarising the state-of-the-art on the basis of a fresh categorisation, aimed to facilitate systematic thinking about the sources of EU policy dynamism – as limited as the latter may seem, in overall terms. I would like to mention that although my attention here is on explaining how innovation can be brought about, this should not be read to mean that the EU's potentials for policy reform are actually satisfactory (please see the relevant debate about problem-solving gaps in Falkner 2011c).⁶

The remainder of this analysis will anchor my perspective in the classic theoretical literature (section B) and outline two major pathways or 'passerelles' that can connect the approaches. More specifically, I argue that two basic strategies can explain the supranational institutions' great impact on at least some cases of EU policy-making: sidelining some or even all governments (section C.) and manipulation of relevant policy preferences (section D.) The text will end with an outlook (section E).

⁴ It should be stressed that the specific processes discussed here are not 'half way' between the two approaches since they fit the neofunctionalist assumptions much better. I conceptualise them as 'missing links' between the opposing camps (which in fact both fell short of outlining them in detail) not for reasons of 'equidistance' but because they explain exactly how, empirically, the EU can despite many intergovernmental characteristics end up with policy innovation against the will of governments. They hence can be seen to link the schools' expectations, in empirical terms, although in theoretical terms they are closer to one of them. In fact, one could also consider the argument as a refinement of neofunctionalism and the two passerelles as specific mechanisms of spillover brought about by EU institutions.

⁵ At the same time, this approach transgresses another major paradigm cleavage by including explanatory variables from both the rationalist and constructivist paradigms of ontology. From the perspective of problem-oriented empirical research, there is no reason to not expect that both rational choice of interested actors and socialisation should play a role in European integration.

⁶ In particular, the ongoing financial and economic crisis highlights that the mismatch between far-reaching market liberalisation, on the one hand, and often blocked political re-regulation at the EU- or global levels, on the other hand, might possibly even endanger the future of the integration process, as a consequence of market imbalances bringing banks and states to the brink of bankruptcy and confronting the European polities with electorates that are disappointed if not impoverished and might for this reason be even more ready to vote for parties far off the centre, which in turn will most probably rather endanger than support European integration.

2. THEORETICAL BACKGROUND

In a nutshell, one can argue that the classic approaches of intergovernmentalism and neofunctionalism represent two opposing ends of a continuum, and that they are both overly scarce when it comes to opening the black boxes of actual decision-making, particularly on the level of the EU's day-to-day policy-making (Peterson 1995).

Neofunctionalism can be summarised as foreseeing loyalties, expectations and political activities to shift⁷ towards a new political setting in a 'process whereby nations forgo the desire and ability to conduct foreign and key domestic policies independently of each other, seeking instead to make joint decisions or to delegate the decision-making to new central organs' (Lindberg 1963: 103). The crucial question is how that works, and the neofunctionalists' answer regarding that is the 'spillover process.' In an early and simple formulation by Haas, spillover refers to a situation where 'policies made in carrying out an initial task and grant of power can be made real only if the task itself is expanded' (Haas 1964: 111). Thus, integration was perceived to have the potential to move on from one decision to another, from one sector to another, and even from less salient matters to issues which are traditionally perceived as touching the core of national sovereignty and identity (Mutimer 1994: 28ff.; O'Neill 1996: 44f.). Whether this was a necessary logic unfolding in an automatic way, was not central in Haas' two groundbreaking books.⁸ Believing in an automatism was nevertheless a crucial reproach⁹ against neofunctionalism¹⁰, combined with the apolitical understanding of

⁷ In his seminal 1958 book on the Coal and Steel Community, 'The Uniting of Europe', the founding father of neofunctionalism, Ernst B. Haas, defined political integration as 'the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre' (Haas 1958).

⁸ In fact, many passages in Haas' two early books implicitly or even explicitly suggest that spill-over was not thought as an automatism in the narrow sense of this word (Haas 1958, 1964), and some contemporary authors stress as a characteristic for neofunctionalist thought that 'integration is not necessarily a progressive, linear process' (Mutimer 1994: 41; C. Rhodes and Mazey 1995: 8).

⁹ In addition to the failure to specify the causal relationships between economic and political integration and between social values and political behaviour (Lewis 1995: 13; O'Neill 1996: 43). Among the other reasons for the decline of neofunctionalism as the leading integration theory seems to have been the high quantity of 'neofunctionalist' writing in combination with the significant internal discrepancies within this school: '(I)t should be noted that neofunctionalism has come to mean different things to different people. This stems from neofunctionalists increasingly ad hoc reformulations, internal disagreements, and very selective and narrow interpretations by their successors' (Lewis 1995: 8).

¹⁰ 'In early neofunctionalist writings it was asserted that task expansion and spill-over would be automatic' (Groom 1994: 117; Moravcsik 1993: 476f.). Stanley Hoffmann (1966) went as far as completely dismissing the neofunctionalist notion of spill-over as an unproved deduction and a misleading metaphysics, an act of faith (O'Neill 1996: 61).

politics.¹¹ Indeed, a profound shortcoming of classic neofunctionalism was that it provided neither a theory of bargaining nor a theory of political choice.¹²

Exactly the latter two focuses (bargaining and preference formation) are at the centre of intergovernmentalist thinking which succeeded neofunctionalism as the dominant school of integration theory in the 1970s. Now the governments, as the players on the EU's Council of Ministers, are the focus of academic attention, they are indeed regarded as the only crucial actors in EU decision-making. The later, 'neo-liberal' variant to this theory adds a layer of assumptions regarding the sources of domestic preference formation preceding the EU-level negotiations¹³, but it does not enrich the somewhat 'anorexic' ideal-type picture of the EU as a polity in day-to-day decision-making. Delegation of powers to the European Commission or the Court of Justice will, in this light, not significantly undermine state sovereignty (Moravcsik 1993: 513f.) and it was not considered a relevant factor in Fritz Scharpf's intergovernmental model of the joint-decision trap, either (Scharpf 1988; but compare Scharpf 2011). The common reproach against this school of thinking is that it lacks a deeper understanding of the important role of EU-level processes and institutions beyond the Council¹⁴, and therefore the governments' power is overrated, at least for day-to-day politics of the EU which in turn tends to be underrated vis-à-vis the grand bargains (Peterson 1995).

One should not be overly critical of either neofunctionalism or intergovernmentalism as long as they understand themselves as opposing ends of an ideal-typical continuum. In fact, they focus – at least, in their basic variants – on different aspects, as well as driving (or blocking) forces, of the phenomenon of European integration, as so aptly expressed in Puchala's picture of the blind men touching an elephant (Puchala 1972). Table 1 highlights the basic differences between the two approaches discussed, in an admittedly very crude summary that, for

¹¹ 'There is an end to ideology: politics is about giving people what they want, which is crudely interpreted as an increase in goods and services, and the means to achieve this is further integration. Consensus on values is assumed, and so high politics or power politics which deals with dissensus is not relevant.' (Groom 1994: 116)

¹² Caporaso and Keeler stress that neofunctionalism paid much attention to EC decision-making, '(b)ut this attention was almost completely of a descriptive nature with the "presence or absence of political will" often invoked to "account for" the outcomes.' (Caporaso and Keeler 1995: 36)

¹³ Andrew Moravcsik's liberal intergovernmentalism consists of two components: 'a liberal theory of how economic interdependence influences national interests, and an intergovernmentalist theory of international negotiation' (Moravcsik 1993: 474).

¹⁴ 'Whether it is the old or the new form, whether sophisticated mathematical calculations are present or absent, the problem with intergovernmentalism is not cosmetic but congenital. National governments are not the only important decision makers in the EU. The Commission of the European Communities and the European Parliament also play important legislative roles. It is only by analyzing the effects of institutional rules on the interactions among these institutions that one can understand the policies that are produced every day in the EU and hence the nature of the integration process itself.' (Garrett and Tsebelis 1996: 294)

purposes of parsimony, neglects many scholarly efforts to fine-tune each of the ‘schools’, particularly in recent years.¹⁵

Table 1: Focuses of the major theories of European integration

APPROACH	CENTRAL ACTORS	LEVEL OF FOCUS
Neofunctionalism	political elites, interest groups; in recent revivals also: EU Commission, European Court of Justice ECJ	day-to-day EU policy-making
Intergovernmentalism	governments	intergovernmental conferences, ‘grand bargains’

While clashes between intergovernmentalists and neofunctionalists were commonplace in earlier phases of European studies, the more recent past already saw an increased pragmatism. It constitutes, without a doubt, a progress towards moving beyond painting either ‘governments matter’ or ‘supranational institutions and pressure groups matter’ in black and white. It has been stressed that ‘our explanatory goals are best served by specifying the analytical strengths – and limitations – of approaches that work better in combination than alone’ (Sandholtz 1993: 39), and that ‘(d)ifferent kinds of theory will be suitable for different aspects of the EU’ (Sandholtz 1996: 405). We thus witnessed an increasingly peaceful co-existence of different analytical focuses in integration theory.

But, the other side of this coin is that ‘anything goes’ is hardly helpful when it comes to theorising. It may prove more fruitful to work towards an analytical integration of the various frameworks, forming practical tools from differing theories.

One step in this direction is this paper’s discussion of the two major strategies¹⁶ that can be used to overcome the situations of governmental predominance that will often lead to the

¹⁵ Outstanding examples, in the direction of neofunctionalism, are (Niemann 2006; Stone Sweet and Sandholtz 1998; Stone Sweet 2010a).

¹⁶ More specific ‘mechanisms’ were developed in a recent research project that followed the concept of the ‘joint-decision trap’ through a large number of EU policies (Falkner 2011a). Whereas all discussions in the book just mentioned reflect the particular lens of the joint-decision trap and comparable fallacies of EU decision-making under various decision modes apart from the classic community method, this paper builds on the analytical tools developed in that context and re-aggregates them in a more parsimonious manner, to shed fresh light on the level of the ‘grand debate’ between the two major camps of European integration theory. Many empirical

stalemate expected by some intergovernmentalist perspectives (e.g., Scharpf's joint-decision trap), helping to bring about spillover as expected by neofunctionalists – which, however, we acknowledge does arrive neither automatically nor regularly.¹⁷ Drawing on empirical studies in the field of European integration, a number of mechanisms can be identified, and two major 'passerelles' can be grouped on this basis to connect the opposing camps of integration theory. These bridges can be used to explain in a parsimonious manner why there is more policy dynamism than would have been expected by strictly intergovernmental approaches. Table 2 presents these passerelles in the lowest right-hand cell, putting them in the context of the other 'layers' of European integration theory.

Table 2: Levels of theory in the field of European integration

LEVEL	SCOPE of explanation	CAUSAL ASSUMPTIONS
Macro	European integration process, overall	Spillover processes drive integration (neofunctionalism); governments are the decisive actors (intergovernmentalism)
Meso	Mid-range phenomena in European integration	There are different dynamics driving 'grand bargains' vs. day-to-day policy-making ¹⁸ (Peterson 1995)
Micro	Individual processes of EU decision-making	Mechanisms to override governments are at the disposal of EU actors (e.g., the Treaty-base game ¹⁹), falling in the two major strategies outlined below (sidelining governments and manipulating preferences)

It goes without saying that the overall effects of the individual micro-level processes will have an impact in terms of the overall European integration process and that, therefore, what is discussed in this paper is by no means irrelevant also viewed from a macro level. However, the overall aggregate effect is less than clear and certainly more ambiguous than expected by either camp of 'grand' integration theory – it needs much further research (see section E., below).

examples used here are assembled from the scattered pre-existing literature, but where I know of no equally illustrative or trustworthy case studies elsewhere I will refer to empirical examples from the above-mentioned book.

¹⁷ I have accordingly, a similar ambition as Adrienne Héritier in her prominent 1999 book 'Policy-Making and Diversity in Europe', which however used different categorisations and focused on slightly different aspects, most importantly the at times covert (as opposed to overt) quality of EU strategies that may work as 'subterfuge' (Héritier 1999). Much more complex than mine is also Niemann's approach (Niemann 2006).

¹⁸ See also (Christiansen et al. 1999; Falkner 2002).

¹⁹ See in more detail below (M. Rhodes 1995).

The ensuing two sections will explain the two pathways and will also include brief empirical examples to convince the reader that these passerelles are indeed a working practice of European integration.

3. PASSERELLE I: SIDELINING GOVERNMENTS

Although one classic assumption is that the Council has primacy in EU policy-making, it can be demonstrated that the governments represented in the EU's Council of Ministers can be bypassed altogether in supranational-hierarchical actions (below a) and that, alternatively, veto players on the Council can be sidelined in creative day-to-day politics (b).

a) There is little controversy over the fact that the ECJ case law can go beyond the intergovernmental consensus and reach realms never even pre-meditated by the representatives of the member states. One of the clearest examples is the development of the doctrines of the supremacy of EU law over national law and of the potential direct effect of EU law in the member states, which were incrementally accepted in the jurisprudence of national courts (Alter 1998, 2009; Stone Sweet 2000, 2004, 2010b).

Apart from these developments on the doctrinal meta-level of the EU's legal system, 'judicial policy-making' is also ongoing on the level of simple policies, on an almost daily basis.²⁰ Because the ECJ's powers²¹ have in recent times been applied to policy areas with high political salience in member states, it has been argued that the Court's 'dictatorial power' (Scharpf 2006: 860) may even threaten the legitimacy of the European multi-level system (Joerges and Rödl 2008; Scharpf 2009). If ECJ judgments are directly based on a Treaty provision (instead of an EU-made provision adopted on the basis of this 'primary law'), they can only be reversed by unanimous agreement by the governments in either an intergovernmental conference or, at the very least, in the European Council, which would be followed by the member states' approval. This is a very demanding process even now that the Treaty of Lisbon has come into force. But even if a specific ECJ decision is only based on 'normal' EU law (e.g., a Directive or a Regulation), it is indeed very hard to countersteer through political action.

Two policy examples should highlight the important role of the ECJ in the shaping of specific EU policies that were entirely unwanted in the Council of Ministers: social security, and tax policy.

²⁰ It should be mentioned that the ECJ's 'power' is limited in the sense that it can only take effect when cases come before it. That is typically triggered by the EU Commission in Treaty infringement cases or by domestic courts in the preliminary reference procedure where the ECJ does not rule for the case as such but over the interpretation of EU law used within the national proceeding. However, if they are directly and individually affected, enterprises and at times even individuals can refer to the ECJ. Hence, the gate towards judicial policy-making cannot be kept under control by the governments.

²¹ *Nota bene*, it is an important task to guarantee the rule-of-law and a coherent interpretation of any constituency's rules. This essay discusses effects in terms of integration theory and this is not meant as a criticism of the ECJ.

In the field of social affairs, it has been shown, at least for one specific but important issue, that undoing the effects of ECJ jurisprudence was, in practice, impossible for the governments. The case is from an area very dear to national sovereignty; social assistance. As opposed to insurance-based social security, which was seen to be closely related to the international mobility of the labour force and to the EU's common market, social assistance had been a deliberate exemption in the relevant EC Regulation 1408 from the year 1971 (see already Martinsen 2005). Until the Lisbon Treaty, these matters were protected by unanimity requirements and it could not have been made more obvious that the governments wanted social assistance and the exportability of such benefits to be off limits for EU discretion. However, judge-made policies meanwhile also cover accessibility and, to some extent, exportability of social minimum benefits. Although the member states at one point stood united and adopted a regulation undoing part of the ECJ's impact, they would have needed a Treaty reform to undo all of it. Over time, further judgements undid the governments' countersteering and in the end, they lost against the powerful tandem of the ECJ and Commission. Martinsen shows in detail how the ECJ acted as a policy setter against all member state governments' wills, using primary law so that even the governments' united political action in the Council could not undo the outcome.²² In such cases, where a Treaty reform with national-level acceptance would be needed, the governments are entangled in a 'Court-decision trap' (Falkner 2011b).

Viewed from a distance, the overall importance of the ECJ seems to be even larger in the area of EU tax policy. This is because in the absence of political agreement, judge-made rules largely dominate one of its major subfields. Philipp Genschel has recently argued for EU tax policy that, under the condition that a matter can be linked up to the EU's internal market, it may indeed be that judicial policy-making is most effective exactly where the governments wanted to protect their sovereignty most fiercely – in the fields with long lasting unanimity requirements for Council decisions (Genschel 2011). These have in practice led to the blockage of most policy projects regarding direct taxation in the EU. As a consequence, when the ECJ was asked to judge potential market distortions based on national tax rules, it interpreted general provisions of EU primary law to fill the gap of absent EU policy in a given field. In the field of direct taxation, case law fills in for absent Council legislation against the will of the governments. Although the member states had planned high barriers to losing autonomy, they ended up with much more EU influence on their systems of direct taxation and less sovereignty than they had expected. Even compared to the US, Genschel (ibid.) holds that the EU is more deeply involved in lower-level taxation policy issues, although the ECJ's

²² The 'non-political powers of European integration' representing the voice of the law seem in such cases to hold 'the upper-hand of time' (Martinsen and Falkner 2011: 22).

impact goes only in the direction of bringing down existing national rules in ‘negative integration’ style while it cannot itself construct a positive EU-level system.

b) At times, it is not the Council as an institution that is sidelined in EU policy-making, but individual Council delegations that might otherwise block decision-taking. This is the realm of the so-called Treaty-base game. Originally, this expression was coined by Martin Rhodes, and his example of Article 118a EC-Treaty after the Single European Act’s 1987 reforms to the original social chapter of the EEC-Treaty is still the most telling illustration of this concept (M. Rhodes 1995). It is important to recall that despite the member states’ commitment to a Single Market Programme, the Europeanisation of social policy remained controversial even during the 1980s. The disagreement over how much social regulation was needed to balance the common market was extremely intense. In various other so-called ‘flanking’ (supporting) policy areas, notably environmental and research policy, Community competence was formally extended, but this was not so for social policy. In particular, the British delegation was unwilling to give the Community a broader role in this field. Only one important exception was made, and it provided an escape route out of the unanimity requirement because reluctant member states could for the first time be forced to align their social legislation with the majority of member states, even against their will.

Article 118a EC-Treaty allowed directives containing minimum regulatory standards concerning health and safety of workers to be agreed upon on the basis of a qualified majority in the Council. Agreement on this Article was only possible because occupational health and safety issues were perceived to fall within the realms of the single market and to be a rather ‘technical’ matter. It was not expected that this provision would trigger a significant boost of social EU regulation during the decade to follow. The truly extensive use of this provision was made possible by its vague wording and the absence of a definition to its key terms: “Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made. In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, ... shall adopt, by means of directives, minimum requirements for gradual implementation.” This wording allowed the governments to adopt not only measures improving the working environment (for example, a directive on the maximum concentration of airborne pollutants), but also measures which ensured the health and safety of workers by improving working conditions in a much more general sense (for example, limiting working time).

Playing a Treaty-base game, the EU Commission and the majority of the member state governments chose Article 118a rather frequently as the legal basis for social Directives that

would otherwise have required unanimous decision-making on the Council (Falkner 1998: 69, see Table 2.1 there). In later times, the Treaty-base game was also played in another policy area, e.g. in the EU's environmental policy (Holzinger 2011). What is even more interesting, the game has spread beyond the limits of the so-called Community method. In the realm of Justice and Home Affairs, the EU for many years had rather differential legal bases and quorums for various measures, termed the 'first' and 'third' pillars of the Treaties, respectively. Over time, ever more issue areas were actually processed under the Community method. The development happened both formally, in successive Treaty reforms, and informally in a Treaty-base game that for strategic reasons moved decisions in an incremental manner from the intergovernmental pillar to the realm of joint-decision making under the EU's first pillar (Trauner 2011).

In short, European integration has developed means to sideline both the Council as such or some Council delegations in order to boost the dynamics of the policy-process. This development was certainly not expected by the intergovernmental camp of integration theory. It had not been analysed by the classic writers of original neo-functionalism in detail either. However, these are mechanisms that allow us to understand how 'spillover' processes may happen in the absence of full political agreement – or, to use the words of Haas, when the political leaders themselves have not (yet) shifted their loyalties to a sufficient extent to bring about the same results in a political decision.

The subsequent section will explain that another equally unexpected but less discussed pattern with similar effects exists.

4. PASSERELLE II: MANIPULATING POLICY PREFERENCES

Not only can the Council be bypassed, entirely or in part, it is also a characteristic of the EU's integration process that the governmental policy preferences, as expressed in the Council of Ministers, can be manipulated.

As opposed to the expectations of rational-choice frameworks typically used in classic versions of intergovernmentalism, the preferences negotiated amongst the EU's national delegations are not always pre-determined and/or immutable. Two arguments matter here. First, the orientations of political actors are 'shaped not only by "objective" reality but also by "socially constructed" beliefs and institutionalised "norms of appropriateness"' (Scharpf 2011: 16). The EU nowadays represents one relevant environment in which such norms are developed and at times negotiated. Despite the great difficulties of actually proving that socialisation takes place on the EU-level (see Beyers 2010 for an interesting state-of-the-art report with many references), some convincing case studies have been presented. One major example is the EU's entrapment in liberal norms and rhetorical action when it was about to decide Eastern enlargement (Schimmelfennig 2001).

Second, there needs to be a more thorough discussion over whether there is a 'crucial distinction between relatively stable actor interests and highly contingent policy preferences' (Scharpf 2011: 16). The latter are what matters primarily in many day-to-day policy-making issues, and they can indeed become the target of EU intervention and turn out to be quite malleable. Scholars have argued that both the ECJ (at least to some extent) and the Commission are indeed purposeful actors in that respect.

Fabio Wasserfallen's recently published findings hint that 'the Court can successfully promote distinct legislative outcomes' (Wasserfallen 2010: abstract) and act as a wilful actor. The argument is that the Court decisions impact European integration effectively when the Council takes up judicial considerations in policy-making, and his story suggests that at times the judges actually have this effect in mind and draft tailor-made verdicts. Under such circumstances, 'constitutional review can promote distinct policy outcomes and shape new legislation that would not have been in the zone of possible agreement without judicial activism' (Wasserfallen 2010: 1135). The argument seems to combine socialisation aspects with a power aspect. Wasserfallen argues that the leverage of reluctant member states is seriously impinged on when the EP and the European Commission share the Court's policy goals and when the governments cannot agree on a common position in the Council, but also that 'the Court forced reluctant member states to overcome their resistance' (Wasserfallen 2010: 1129).

Wasserfallen empirically shows the judiciary taking up the leading role in policy-making (Wasserfallen 2010: 1135) with a case study on the EU's recent legislation on exchange students' social rights. Although the doctrine of social security coordination affords equal treatment in social issues to migrant workers, and also more recently for Europeans moving to another member state, there has been a deep divide over whether or not national welfare benefits should only be granted to economically active people (Wasserfallen 2010: 1130ff). During the 1970s and 1980s, those warning against 'welfare tourism' prevailed. During the 1990s, however, activist interpretation of Union citizenship by the ECJ introduced exchange students' right to claim welfare payments in their host state, despite the clear wording in secondary legislation. The relevant judgement was considered revolutionary because it introduced exchange students' right to claim social assistance in their state of residence, but Wasserfallen outlines that in fact, the relevant Grzelczyk ruling fits the assumption that the Court balances legal and political demands (Wasserfallen 2010: 1139), thus practicing the most promising strategy to ensure that judicial doctrines will eventually be incorporated into new legislation. Indeed, the judges are said to have considered political concerns even at the expense of legal coherence in order to foster the establishment of a new European right, and their strategy was successful.

Regarding the European Commission (instead of the Court, as stressed by Wasserfallen), a similar line of arguments have already been presented a couple of years ago by Susanne K. Schmidt (2000). She demonstrated in a very systematic manner how the Commission can exert autonomous influence in the process of EU policy-making, hence clearly exceeding its role as an agenda setter. Schmidt differentiated two strategies:

a) The 'divide-and-conquer strategy' means that the Commission breaks up blocking coalitions in the Council via affecting the policy preferences of some delegations. It does so, more specifically, by singling out a few member states to pressurise. To do that, it uses primarily its competition law powers, those being its ability to impede mergers or fight market dominating positions, or it launches infringement proceedings with the ECJ against alleged breaches of EU law by the member state in question. Once the affected governments have given in and changed their domestic regulation, they no longer have an incentive to oppose the relevant EU-level measures as promoted by the Commission. In contrast, they change their policy preferences regarding EU policy, which in the Commission's strategic ideal case will tip a balance in the Council and bring about the needed majority or even unanimity. In short, the lever is used against national legislation in a cross-levels strategy to create a more favourable environment for EU legislation in the Council of Ministers.

Schmidt presents an array of empirical examples, inter alia the liberalization of airport services where seven countries initially opposed the Commission's proposal (Schmidt 2000:

47). But the Commission threatened to intervene on grounds of its powers over competition law and made four countries alter their domestic situation, which paved the way for adoption of EU standards as these governments no longer opposed EU-regulation but in fact – and as expected – became strong supporters: ‘Having had to open their own markets for other Community actors, they want to assure that their firms find reciprocal conditions in all other member states’ (Schmidt 2000: 47).

A recent contribution in the field of EU energy policy also outlines an example of this strategy (Pollak and Slominski 2011: 10): When at the beginning of the liberalisation process during the early 1990s, a couple of member states strictly opposed any market opening of their energy sectors, the Commission started infringement proceedings against them to break stalemate in the Council. It argued that existing monopolies regarding import and export of energy violated the EU’s internal market as provided for in the Treaties. Five states were formally sued and subsequently decided to pre-empt potential condemnation by the ECJ via agreeing to EU-regulation.²³ Additionally, the Commission is said to have ‘aggressively applied anti-trust rules imposing significant penalties on big energy companies’ (Pollak and Slominski 2011: 7, with further references) to make governments become supporters of its liberalisation agenda. It seems that the threat to investigate a merger between a French and a German company (EDF and EnBW) made the former open up the French electricity market and the latter support the Commission’s desire for an independent regulator.

It seems unnecessary to outline many more examples here – although, at a closer look, the literature would probably reveal many more – since the mechanism is quite clear and convincing: leveraging out the domestic status quo can change a government’s (or any other major player’s) preferences. This does not necessarily alter the basic ‘interest’ of a member state, but it may certainly change the revealed policy preferences that matter in EU-level negotiations.

b) The second instrument available for the Commission is the ‘lesser evil’ strategy, a threat with a number of worst-case scenarios on the basis of judicial review (Schmidt 2000). Compared to the divide-and-conquer strategy, this strategy is purely at the EU-level, and it needs the ECJ’s support. However, if it is plausible that the judges will back the Commission’s line of reasoning (e.g. the liberalising interpretation of the Treaties) this strategy can be even

²³ In addition to these power-based arguments, electricity re-regulation in the EU has also served as an example ‘that the EU institutional setting influences not only bargaining strategies but also basic policy preferences of member states that occupy a central position in EU decision making’ (Eising 2002: abstract), as briefly hinted at the start of this section.

more powerful because it changes the default condition for all governments at the same time.²⁴

Schmidt's empirical examples are, inter alia, from the field of merger regulation. The Council had refused earlier Commission proposals in that field. After the *Cassis de Dijon* judgement and a line of ensuing cases established the mutual recognition as the internal market's basic principle, the Commission could threaten with legal action should the member states continue to pursue their national rules (Schmidt 2000: 53). The argument has been taken up prominently in the literature, combined with the expectation that the *Cassis* doctrine regarding the mutual recognition of domestic standards can be used as a threat in numerous fields of EU integration, and can be expected to work as a powerful lever whenever it is not an acceptable fallback solution in the eyes of a government. It has been stated that the mere threat of Court action by the Commission would 'greatly increase the willingness of all governments to accept the minimum harmonization directives proposed by the Commission' (Scharpf 2006: 853).

In her contribution from 2000, Susanne K. Schmidt already hinted that the insecurity arising from 'a poorly defined European competence they had not had any input in bringing about, made it desirable for the governments to delegate explicit European powers, whose conditions they would specify' (Schmidt 2000: 53). In a recent manuscript, she develops a fresh argument that the need for legal security drives the governments in the Council to adopt policies that go even beyond the case law's base line. Legal uncertainty is considered highly damaging as it hampers long-term private and public investment, and particularly if it brings about indemnity claims, there is an incentive for governments to re-establish legal certainty – a slippery slope towards specific policy options: 'Once there is case law, the legislature has an incentive to settle on the most far-reaching interpretation of the ambiguous case law, as otherwise an interpretation of secondary law in the light of the case law may again fail to secure legal certainty. Where the Court delicately balances between national regulatory concerns and community interests, this may imply favouring community interests one-sidedly.' (Schmidt 2011: 27) Outlining two examples in detail, the Services Directive and the Regulation on Mutual Recognition, Schmidt argues that 'fuzziness' of case law may impose 'a bias for secondary legislation to settle on the extreme position – and to go even beyond it.' (ibid.) Overall, this seems to suggest that within the member states' interests, their position on legal certainty ranks high amongst the various aspects considered under the political science label of 'policy preferences' and has to date been underrated as a lever in the shaping of EU policies. From a perspective of democratic legitimacy, it is highly interesting to note that neither the people's representatives in the European Parliament nor the governments on

²⁴ However, some may be more affected than others.

the EU's Council of Ministers made public how much case law actually restrained their options, in the two outstanding and controversial cases discussed by Schmidt.

The goal of summarizing this insightful scholarly work was to convey that the Commission and the ECJ can largely temper the 'interests' of member states. More specifically, we can witness in these detailed accounts that, if the long-lasting basic convictions about overall national self-interest were not changed fundamentally, at least the immediate policy preferences were significantly affected – and consequently the options that matter directly in the day-to-day business of the European policy process. They decide on matters of breakthrough and stalemate in specific projects of EU decision-making.

5. OUTLOOK

As outlined in the introductory section, we can say – at least in a black-and-white approach – that intergovernmentalism perceives the governments as the sole crucial decision makers in the process of European integration. The outcomes reflect their interests, and there is a great danger that non-decisions or clearly sub-optimal policies result from their bargaining in a situation of joint-decision trap (Scharpf 1988). By contrast, the neofunctionalists highlighted that spillover processes could overcome governmental stalemates although their classic writings tended to black box the exact process of how that could happen. At least, Philippe Schmitter specified that next to the underlying interdependence of functional tasks and issue arenas, also 'the creative talents of political elites, especially the administrators of regional institutions, who seize upon frustrations and crises in order to redefine and expand central organizational tasks' (Schmitter 1969) would be helpful. But how exactly?

The aspects discussed in this article represent a concrete link between these two opposing ideal types of EU integration theory. Two basic strategies were presented²⁵ that can potentially allow for an exit from intergovernmental stalemate, even against the will of all or some governments. This paper's contribution to the state-of-the-art in this field is in the specific conceptualisation²⁶ with only two parsimonious 'passerelles' (sidelining of all or some Council delegations, and re-forming policy preferences). Indeed, a line of research can now be said to have matured both qualitatively (regarding the refinement of the various arguments) and quantitatively (regarding the number of examples available in the, hitherto scattered, literature) so that the arguments could here be presented more parsimoniously and well-documented than before.

Do we need this kind of analysis? One could argue that we have 'grand' theorising such as that of the opposing schools discussed here in the initial section; we have empirical case studies; and we have negotiation theory²⁷ – EU integration scholars do not suffer from a lack of commendable literature. However, the author would counter that the arguments of the highly elaborated versions of intergovernmentalism and neofunctionalism of the last two decades are not easily comprehensible and that the clear-cut differences of earlier decades were increasingly blurred (which is why the author opted for an extremely simplified representation of them for our purposes here). In any case, there is still a gap in the scholarship at the crossroads of different approaches. It seems a worthy topic to help reveal

²⁵ However, what is discussed here is not on the level of each individual mechanism that can possibly be found in day-to-day policy-making, as the author has done elsewhere (Falkner 2011a). The mechanisms are now aggregated in only two major strategies (passerelles) for an easier grasp of the argument.

²⁶ Specifying categories is an acknowledged step of theory formation (Mayntz 2002).

²⁷ My approach is actually more fine-grained – more micro-level – than negotiation theory (see the recent JEPP special issue 5 / 2010 on Negotiation Theory and the EU: The State of the Art).

what actually can be done to combine the thinking of one with the other. After all, they are simply opposing ideal-typical descriptions of the EU's workings and so there must be connecting mechanisms in the day-to-day workings of this institutional setting.

At the same time, the limitations of this paper's approach are clear. To date, we avail only of a limited number of case studies on the workings of these mechanisms and cannot (yet) offer a causal theory about when these strategies will be able to overpower one or several governments. A model of the relative importance is also generally difficult to offer. Detailed knowledge is needed to judge if and how an ECJ verdict or a Commission threat or action can actually impact governmental stances; we therefore cannot realistically hope to quickly and economically answer the question of how important these processes are, in overall terms. It would be worthwhile, however, to progress in the direction of this major research desideratum.

In any case, one argument is clear: The overall importance of the mechanisms outlined here is in all probability very great, as the ECJ's powers of constitutional review are particularly influential. This is because the Treaties are rather incomplete contracts (Stone Sweet 2004: 24), to be specified by legislation or by judicial means, in the absence of such legislation or if the secondary law is again less than complete (Wasserfallen 2010). The famous market freedoms of European integration grant a remarkably great scope of application to the effects of judicial review, since there is 'hardly any field of public policy for which it will not be possible to demonstrate a plausible connection to the guarantee of free movement of goods, persons, services and capital' (Scharpf 1994: 6).

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