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# Only an Agenda Setter?

## The European Commission's Power over the Council of Ministers

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**ABSTRACT**

What is the scope for autonomous action of the European Commission? Its independence is much more contentious than that of the European Court of Justice, which is generally considered quite autonomous. While the literature on the Commission focuses predominantly on its ability to use its agenda-setting powers, the Commission's other means to influence European integration have been less well established. In this paper, I demonstrate how the Commission can use its role as a guardian of the Treaty to coax the Council of Ministers into action. In addition to agenda setting, the Commission can manipulate the Council's default condition, or change the preferences of some of its member states. Thereby the Commission may achieve decisions from the Council that would not have come about had the Commission only agenda-setting powers at its disposal. Effectively, the Commission here uses the greater autonomy of the European Court strategically for its own ends.

**KEY WORDS**

- agenda setting
- Council of Ministers
- European Commission
- European Court of Justice
- liberalization



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## Introduction

The importance of the European Commission and the European Court of Justice for European integration is generally recognized, but precisely what role they play is in dispute (Moravcsik, 1995; Garrett et al., 1998). The delegation of responsibilities from the member states to these bodies has given them the means to use their mandates in ways arguably transcending original intentions, furthering European integration to an extent intergovernmentalist negotiations among the member states could not have agreed upon (Marks et al., 1996).

The possibilities of the European Court of Justice (ECJ) to act independently of member states' control has been intensively discussed in a series of articles (Burley and Mattli, 1993; Garrett, 1995; Mattli and Slaughter, 1995, 1998; Alter, 1998; Garrett et al., 1998). By establishing the direct effect of European law and its supremacy over national law in its jurisdiction, the ECJ has provided the integration process with legal momentum. Judge-made law may substitute for agreements of the legislative bodies – the Council of Ministers and the European Parliament.

The Commission, in contrast, is much more confined in its actions. While the Court profits from the established independence of the judiciary, the member states have installed different oversight mechanisms to control the Commission. The very long-term and recurrent nature of Commission–member states' interaction, and the Commission's dependence on the cooperation of the member states constrain it. Consequently, the loss of member states' control is likely to be small and very case-specific (Pollack, 1997).

However, the Commission can realize some of its interests by using its agenda-setting powers. In most areas of legislation, it enjoys the formal monopoly to direct proposals to the Council. Under qualified majority-voting the Commission has agenda-setting powers since it is easier for the Council to adopt a proposal than to alter it, for which it needs unanimity.[1]

The Commission's agenda-setting powers are generally recognized while its other powers are less well established (Peters, 1994; Kerremans, 1996). In this article, I show how the Commission may force the Council into adopting its proposals. By using its competencies as a guardian of the Treaty and as an administrator of European competition law strategically, the Commission may manipulate either the Council's default condition of decision making (Ostrom, 1986: 12–13) or the preferences of some of its members. The Commission, I argue, can force the adoption of proposals in the Council which would have been rejected were it not for this combination of different Commission competencies.

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My dependent variable is the Europeanization of policies which I show to be predominantly caused by the strategic behavior of the Commission. Its strategies are a necessary, but not a sufficient, condition for change. The Commission puts pressure on the Council by drawing on supranational legal obligations which alter the preferences of some member states or the default condition of decision making. This makes the adoption of the Commission's proposals more likely. More specifically, I map out two ways in which the Commission can influence the Council: it may break existing opposition with a *divide-and-conquer* strategy; or it may threaten the Council with a worst-case scenario so that adopting legislation becomes a *lesser evil* compared to non-adoption.

In manipulating the Council's decision making, the Commission acts on the foundations laid by the European Court of Justice. Following the wide recognition of the latter's independence, implications for the Commission's role have received little attention in the literature. In this article I will show how the Commission can use the autonomy of the Court for its own ends. By following up on existing or by initiating new Court rulings the Commission can deliberately set incentives for the adoption of its legislative proposals.

I will back my argument with several empirical examples. On the basis of my cases I explain why the member-state governments cannot prevent the Commission acting as it does. As I strive to establish an institutional capability of the Commission that complements its agenda setting I can say little as to the overall relevance of these strategic possibilities across all sectors. However, neither can most other studies of institutional aspects of European integration. Even the Commission's agenda-setting powers have been better theorized about than documented (Pollack, 1997: 124). In light of the variety of cases I refer to, the Commission's manipulation of decision making does not seem to be an exceptional phenomenon.

The following section provides a short review of the literature on the Commission's role in European integration and its agenda-setting powers. On this basis, section 3 outlines my argument on how the Commission may put pressure on the Council to adopt its proposals. After introducing the institutional resources the Commission may use strategically to that end, I will present several case studies backing my argument.

## The role of the Commission in European integration

Despite some refinements, European integration theory still evolves around the debate between neorealism and neofunctionalism (Caporaso and Keeler, 1995). Thus, Stone Sweet, Sandholtz and Caporaso have recently presented a

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revised neofunctionalism, called supranational institutionalism which is meant to counter Moravcsik's well-known approach of liberal intergovernmentalism (Moravcsik, 1993; Stone Sweet and Sandholtz, 1997; Stone Sweet and Caporaso, 1998). With regard to the role played by supranational organizations in the integration process this debate has led to attempts to claim or disclaim their importance in a rather categorical way (Golub, 1996; Eichener, 1997).

Several case studies map out instances of the Commission's considerable influence over European integration, which is purported to fall outside of governments' control. Examples include the ability of the Commission to influence policy making through the initiation of discussions, called 'informal agenda setting' (Pollack, 1997: 124–8). Teaming up with private actors or with member-state experts having pronounced sector-specific interests, the Commission may promote policies, whose adoption could not be explained by member-state governments' interests alone (Green Cowles, 1995).

The problem with these and other contentions of the important role of the Commission lie in a double shortcoming: these analyses have a hard time showing that their findings are generalizable rather than case-specific. Moreover, they have difficulty establishing the counterfactual that it was really the Commission, instead of – possibly not very pronounced – governmental interests leading to the outcome (Fearon, 1991; Schmidt, 1996). Methodological difficulties abound when arguing that the Commission acted against the member states, as it is difficult to disprove that member-state governments were not simply hiding their real preferences in order to put blame on the Commission (Moravcsik, 1995; Eisner et al., 1996). Therefore it is hardly surprising that intergovernmentalism has remained a strong contender in the literature.

The Commission's ability to influence the course of European decisions by using its formal monopoly on the right of initiative to the Council is less contentious. In most areas, the Council and (recently) the European Parliament may only request the Commission to draw up a legislative proposal, but the Commission prepares all drafts. Since the Council may alter proposals only unanimously, under qualified majority-voting, the Commission has the advantage that its propositions are more easily adopted by the Council than changed. Practically, the Commission may therefore pick from among different winning coalitions the one proposal that is closest to its own preferences (Steunenberg, 1994; Schneider, 1995; Garrett and Tsebelis, 1996).

Agenda-setting analyses are part of a recent strand of research that investigates the conditions under which supranational actors may have an independent impact on integration, instead of striving for more absolute claims (Pollack, 1997; Garrett et al., 1998). Often, a principal-agent framework

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is used (Majone, 1994a, 1994b; Moravcsik, 1995: 622f.; Pollack, 1997). Member-state governments have delegated a range of different competencies to the Commission which evolve around the preparation and implementation of Community law. Their renouncements over rights can be explained with their interests in transaction-cost savings, and in a strengthened commitment to pursue policies vis-a-vis third parties and among themselves. By delegating rights to the Commission, as the 'guardian of the Treaty', and to the European Court of Justice, the implementation of agreed policies can be made credible. With different control mechanisms, in particular over the Commission, governments take care that delegated competencies cannot easily be used against their own interest.

The principal-agent framework offers the advantage of clearly indicating why the Commission may escape the control of the governments. Three major structural reasons can be singled out. First of all, the neutral agent may profit from information asymmetries, using information advantages arising out of its specific mandate (Arrow, 1985; McCubbins et al., 1987: 247). Second, bureaucrats and politicians have different capacities for long-term planning (Moe, 1990: 124; Pierson, 1996). The fact that politicians may play down future disadvantages in order to obtain momentary benefits can give the Commission scope to realize its own interests. Third, the agent can exploit differences in interests among multiple principals (Hammond, 1996: 143). In the European Union, where a strong sanction of the Commission requires the unanimous consent of 15 member-state governments for a Treaty revision, the Commission may therefore have considerable latitude.

Using the principal-agent framework, Karen Alter (1998) has recently given a convincing three-tiered explanation for the Court's independence. The Court has a longer time horizon than governmental actors, allowing it to slowly build up new interpretations and precedents over several rulings. The support of lower national courts of the ECJ implies that member states cannot simply disobey unwanted rulings, which are enforced alongside national law. Finally, Court rulings can hardly be changed, in particular if the Court has been interpreting Treaty principles, as is the case in the examples I will discuss. Governments may respond to interpretations of the Treaty only through changes to the Treaty which require unanimity. As long as the Court favors at least one government, it is unlikely that the unanimity required to return to the former status quo can be reached. Governments are confronted with the 'joint-decision trap' in which a majority is unable to bring about changes as long as the minority uses its veto power under unanimity (Scharpf, 1988).

In the literature, to conclude from this short overview, claims on the power of the Commission have a hard time against intergovernmentalist

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arguments that the Commission is only successful if it pursues the interests of member-state governments. It is only with agenda setting that the Commission has the institutional power to realize its own interest and therefore has a well recognized impact on the integration process. Compared to the Court, the Commission is a much more constrained actor. Whether the Commission can take advantage of the Court's independence has not yet been discussed. I show how the Commission may profit from the Court's greater autonomy by threatening the member states with the Court or following up on judgements when placing proposals in parallel to the Council.

## The argument in brief

In this article I demonstrate how the Commission can do more than set the agenda. It can also put pressure on the Council to adopt its proposals by changing the preferences of some of its members or by manipulating the default condition of decision making. I introduce institutional resources of the Commission that are neither captured by the agenda-setting argument, nor a mere epiphenomenon within a basically intergovernmentalist setting. The Commission has these resources because it is endowed with rights as the guardian of the Treaty, being able to take member states to the Court. The Commission can use the latter's independence to its own ends as I will show.

*How does my argument differ from agenda-setting powers?* With its agenda-setting powers, the Commission exploits the fact that its proposals can be adopted by qualified majority but can only be changed unanimously. Because member states have different numbers of votes, ranging from two for Luxembourg to ten for France, Germany, Italy, and the United Kingdom, analyses of the Commission's agenda-setting powers are usually based on a simplified model of the Council (Garrett and Tsebelis, 1996; Moser, 1996). The need for a qualified majority is equated to one where the support of five out of seven member states is necessary. Accordingly, the Commission's agenda-setting power can be illustrated as in Figure 1.

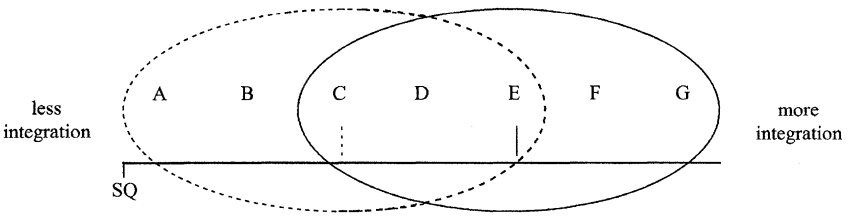


**Figure 1** The Commission's agenda-setting powers.
*Note:* SQ = status quo

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In view of the necessity to assure the support of five out of seven member states, the Commission – in favoring more to less integration – will match its proposal to the coalition of C to G as Figure 1 shows. An alternative coalition of A to E, around the ideal point of C (instead of E), will not come to determine the policy.

Typically, such analyses pay little attention to the way member states' preferences were formed and to the default condition of the Council's decision making. Analyses of the impact of decision rules normally postulate a *stable default condition*. Governments choose between the status quo and the Commission's proposal. If the latter is not accepted, the previous policy continues. It is here that my argument takes effect. I argue – and I will show empirically – that the Commission may manipulate either some member states' preferences or the default condition of the Council, making the adoption of its proposals more likely.

In short, my argument is the following: I will show that the Commission may also successfully make proposals corresponding to the position of G, which could not be achieved merely using agenda setting. That the Commission intervened in the Council's decision making, I argue, is a necessary independent variable to explain the adoption of some European policies, my dependent variable. Note that I do not aim for a unidirectional causal mechanism in which the Commission's action is both necessary and sufficient. Needless to say, I will also not claim that the Commission always manipulates decisions in the Council.

In analyzing the role of the Commission, I establish two strategies with which the Commission may act. First, it may bring about domestic reforms in at least two of countries A to D in such a way that these support subsequently a proposal corresponding to the preferences of the most integrationist member state G. I call this strategy of breaking the opposition by changing member states' preferences *divide and conquer*. Second, the Commission may threaten governments with unilaterally bringing about a worst-case scenario. In the light of this threat, which could correspond, for instance, to a point I still further distanced from governments' preferences, the adoption of a proposal at G becomes preferable to the originally opposed governments. I call this a *lesser evil strategy*.

Which *alternative explanations* do I have to challenge in making my argument? First of all, I have to demonstrate that the Commission's agenda-setting powers alone would not be a sufficient explanation of the outcome. Second, it is necessary to dispel intergovernmentalist counter-arguments, given the strong role of governments in European integration. Third, I have to establish that I do not attribute powers of the ECJ to the Commission. Thus, if agenda setting fails as an explanation, it is still necessary to ask

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counterfactually whether 'Absent the Commission's action, would the same outcome have been likely?' to disclaim an explanation attributing the outcome to intergovernmentalism or to the Court.

## The Commission's resources for building up pressure

So far there has not been any systematic analysis of how the Commission may put pressure on the Council's negotiations by using existing supranational legal obligations. But the fact is well known that European law severely influences governments. Because of the direct effect and supremacy of the Treaty, Community law may be directly applied. Established national orders are not only Europeanized under explicit agreement of the Council, but national rules may become obsolete in the light of the Treaty, as the famous Cassis de Dijon case has shown (Alter and Meunier-Aitsahalia, 1994). National regulations may restrict intra-community trade and the four freedoms for the movement of goods, services, capital and labor only within narrow limits. The Commission may use the fact that judge-made law may substitute for Council legislation strategically. Such pressure from the supranational legal background has formed part of some case study analyses – for instance in explaining European telecommunications liberalization – but it has not yet been analyzed systematically (Montagnon, 1990; Sandholtz, 1998).

As the *guardian of the Treaty* the Commission has the right, and in a certain sense also the responsibility, to become active whenever member states do not meet their obligations under European law (Article 169).[2] The Commission can start an *infringement procedure*, leading eventually to a Court ruling if the government concerned does not respond to the requests.

In addition, the Commission enjoys administrative powers under *European competition law*, with which it can confront existing national regulations. Member-state governments have only limited formal opportunities to influence the way the Commission handles its competition law powers. These are directed, on the one hand, at private actors, prohibiting cartels and the abuse of dominant positions. On the other hand, they deal with the actions of member states, whose potential is restricted to protect certain sectors from competition or to grant aid.

The Commission's powers under competition law are not only important with regard to competition policy. They are important because the Commission may use them to force related changes. Where the Commission's competition powers are directed at public actors, the Commission may even enact far-reaching changes itself. If governments protect certain sectors or industries with regulations from the market the Commission has the

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extraordinary right to issue generally binding directives for the member states, in addition to specific decisions (Article 90). These directives do not have to be passed by the Council or the Parliament. The use of competition law powers shows that governments have multiple means to put significant pressure on 'their' Commissioners and the Commission as a whole when controversial measures arise (Ross, 1995: 130–5; Schmidt, 1998). But having delegated these rights, they do not control them any more. The Commission, therefore, finds here a pool of potential means to put pressure on the Council.

Thus, European law draws a distinction between the different market freedoms, which prohibit the discrimination of cross-border market transactions, and the competition rules, which safeguard the competitive order of markets. Both sets of rules may be restricted only in exceptional cases (Behrens, 1992: 149). Accordingly, the Commission has the potential to seriously interfere with those parts of the national economies that are *not* predominantly *structured by market principles*. This is very different from national competition law which normally exempts some areas. And even though European law only aims to outrule hindrances of the single market and does not bother with purely national concerns, the likelihood of such disturbances has been interpreted very broadly. Since a country's national restrictions almost always hamper a potential economic activity of other European nationals in addition to governing its own citizens, there may be, in fact, few inherently national affairs (Scharpf, 1994).

*Consequently*, while both sets of rules are complementary, referring either to trade or to competition, they may partly serve as substitutes. Whenever national monopolies prevail it may be possible to realize liberalization either by applying competition law or by allowing foreigners to offer their services in this domestically protected market. As a result, the Commission could start infringement proceedings based on the market freedoms to support the opening of monopolies instead of drawing on its competition law powers. Table 1 summarizes the Commission's options.

It is important to note that the use of these competencies does not presuppose that the Commission is ideologically precommitted to a free market. Rather it is sufficient, next to being empirically plausible, to assume that the Commission has an institutionalized self-interest in furthering European integration in order to consolidate and expand its competences as a corporate actor (Schneider and Werle, 1990). Because the Commission's rights – and the Treaty for that matter – are stronger with respect to the liberalization (or making) of markets than in their regulation (or shaping) (Scharpf, 1996b), the Commission's action will reflect this bias. In using these resources to put pressure on the Council, the Commission exploits the constraints of European law as they are or may be formulated by the European Court of Justice. This makes

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**Table 1** The different powers of the Commission

| | | *Procedure* | |
|---|---|---|---|
| *Competence* | *Target* | *I* | *II* |
| Infringement procedure (Art. 169) | state actors | Interaction with member state on the allegations | Appeal/Reference to the European Court of Justice |
| Control of cartels (Art. 85) | private actors | Decision prohibiting the action, requiring alterations, and/or imposing fines | |
| Prohibition of abuse of market power (Art. 86) | private actors | | |
| Control of subsidies (Art. 92–94) | state actors | | |
| Control of the granting of special rights (Art. 90) | state actors | Decision or directive prohibiting the action or requiring alterations | |

it impossible to determine in advance in which sectoral policies the Commission may use European legal constraints as a pressure.

In the following discussion, I leave out the cases in which judge-made law directly replaces decisions of the Council (Pescatore, 1983). In these cases the Commission's role is restricted to withdrawing or not making proposals so that Council legislation cannot contradict previous judicial policy making. An example is the right of residence of university students which the Commission excluded from a proposal for a directive on the freedom of movement after a Court ruling (Case 293/83) (Stein, 1986: 638). The Court had already fully granted this right. In contrast, I am interested in how the Commission may use these legal constraints strategically to influence the Council.

## Divide-and-conquer: specifically targeting the opposition

Of the two strategies I present, divide-and-conquer is the less widely applicable one. Among the member states potentially opposing European legislation, some are singled out by the Commission and targeted with requests to adapt their domestic situation in order to adhere to European law. In adjusting to these domestic changes, member states gradually change their position in favor of more liberalization. Consequently, they increasingly prefer a European policy that they would have opposed had they been able to keep their previous domestic regime (on preference change as a consequence of policy

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change see Hathaway, 1998; Knudsen, 1998). Following domestic changes, the adoption of the Commission's proposal becomes feasible.

That the Commission may in fact facilitate the adoption of its proposals in this way can be shown with the *liberalization of airport services*. In this case, seven countries (Spain, Ireland, Greece, Italy, Luxembourg, Germany and Austria) initially opposed the liberalization of ground-handling services, amounting to 42 votes where 26 votes were needed for a blocking minority in the Council. Thus, solely using its agenda-setting power – as an alternative explanation – the Commission could not have prompted member-state governments into liberalization (Dussart-Lefret and Federlin, 1994).

As early as 1990 the Commission started to examine ground-handling monopolies in several member states. Airlines (for instance, Air France, British Airways, KLM, Lufthansa, Sabena and SAS) increasingly complained about restrictions on more than 20 airports mainly located in Spain, Italy, Germany and Portugal (European Commission, 1991: § 71, 1992: § 335, 1994: § 367). From 1992 onwards the Commission announced possible decisions based on Article 90.3. Subsequently, Ireland, Greece and Spain ended their monopolies or promised reforms.[3] In the case of Greece, the Commission had tied the approval of state aid for Olympic Airways to concessions in airport liberalization (Reed, 1994). Simultaneously, the national competition authority initiated changes in Italy (Braghini, 1995).

In parallel, the Commission started to prepare legislation to liberalize ground-handling monopolies. In 1994, a proposal for a directive was sent to the Council. After some concessions as to the thresholds and timing of liberalization, the Council agreed on a common position for a directive at the end of 1995, which was passed against Germany and Austria. For this compromise, it was crucial that the Commission had been able to break down the blocking coalition in advance by requiring domestic changes.[4]

An important effect of using this strategy, which is summarized in Figure 2, is that the Commission not only breaks the resistance of some member states but wins simultaneously strong supporters for a directive. It effectively *changes the member states' preferences* in its favor. Once the targeted countries have responded to Commission requests and incurred the costs of domestic reform, they are themselves interested in comparable community-wide changes.[5] 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.

The example clearly indicates that the directive could not have been passed with agenda setting alone. Neither was the Court the decisive actor. But is it plausible that the Commission can break the member states' resistance in such a way? After all, we are talking about a relatively small bureaucracy

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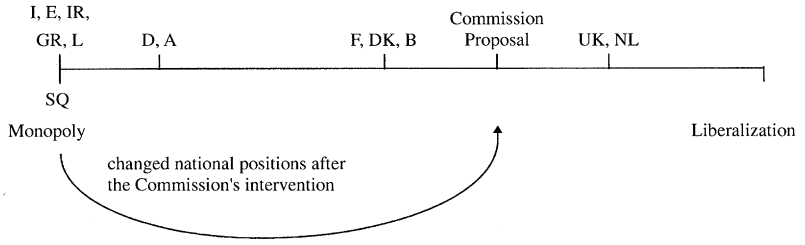


**Figure 2** Divide-and-conquer: the example of ground handling.

having this impact. Why should member states give in to Commission pressure, given that originally there is a majority in the Council opposing the changes? The answer relates to information asymmetries in favor of the Commission, the sequence of changes, and the unusually binding nature of European law.

When the Commission decides to engage in policy making in a sector it normally initiates studies, allowing it to acquire the necessary knowledge of the situation in the member states. It is against this background that the divide-and-conquer strategy might be chosen by the Commission in order to prepare for a Council measure that otherwise could not be realized. The concerned member states, importantly, are likely to be neither aware of the fact that a certain infringement or competition procedure is initiated with a view to facilitating the adoption of legislation, nor that other member states are affected as well. To explain why several member states may respond to Commission requests for domestic change, even if this will break down their blocking coalition in the Council, it is important to see that there is not only an *information asymmetry* with regard to Commission plans. Member-state governments, despite their larger resources, know little about their respective situations, and nation-specific differences hardly allow them to compare the Commission's interventions, if they learn at all about the procedures the Commission initiates to enforce European law in time. To pursue such cases – often concerned with specific directives – is the bread-and-butter of the Commission and one of the main reasons for delegating powers to this corporate actor. Only through the delegation of such oversight can European cooperation be maintained (Majone, 1995). It is therefore unlikely and, in fact, unfeasible that the member states double-check each and every intervention of the Commission in order to trace the very small fraction of these cases that are being used in a divide-and-conquer fashion. Moreover, this strategy is not simply a hidden conspiracy of the Commission against the member states, which

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could hardly hope for non-detection. For the Commission there is also a perfectly legitimate reason to be following up some cases in this way.

According to its mandate the Commission shall see to the realization of the Treaty's goals, by monitoring enforcement *and* directing proposals for secondary legislation to the Council of Ministers. It is in this context that the Commission proposes, for instance, the liberalization of airport services, as an area not yet adhering to the single market goals. In order to prepare and improve on a proposal, the Commission may take up some investigations in the field and push for adherence to the Treaty without prior secondary legislation, helping it to get to know the problems of an area, and to improve its legislative proposals.[6] It is merely as a side effect, in this line of reasoning, that opposition is being reduced to the adoption of the eventual directive at the same time. While divide-and-conquer is being used as a conscious strategy that may be applied using similar tools in different sectors, in particular by officials in the Directorate General for Competition, it may also be presented in a purely legalistic sense.

Why, then, should the single member state conform to the Commission's demands? And why will not only those member states respond to pressure which would have changed anyhow, effectively reducing the Commission's importance? When picking member states under the divide-and-conquer strategy, the Commission is likely to focus on two things: it will decide along *legal* criteria, and choose member states for which a necessary adaptation to Community law can be argued particularly well; and it will pick countries according to *political* criteria, where some domestic actors are inclined towards the changes and resistance will be lower. Accordingly, it is reasonable to assume that there will be a bias in the case selection favoring change, as the Commission will not want to risk too much opposition at a very early stage of policy making. Thus, in the example presented, the strong opponent Germany would have been an unsuitable candidate for the Commission, showing the limits of the divide-and-conquer strategy.

In sum, the example shows how the Commission may use the binding, supranational legal context to influence Council negotiations. It demonstrates why the member-state governments have little possibility to control a divide-and-conquer attempt of the Commission. Profiting from its information advantages, the Commission may optimize the sequence of events by pressuring single countries into national reforms before common measures are discussed and the positions of other member states become transparent. Once they have changed their domestic regimes, these member states will have different preferences concerning European policy. However, doubts may persist as to the effectiveness of this strategy, which may not be suited to break strong resistance. Other examples cannot dispel these doubts. Thus, in

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telecommunications policy the Commission used the divide-and-conquer approach to minimize the opposition to its Commission (not Council!) directives based on Article 90.3 for the liberalization of terminal equipment monopolies and mobile telephony (Schmidt, 1998: 326). But in telecommunications there was also strong domestic demand for liberalization.

It is with this caveat in mind that I now turn to the other Commission strategy. With it, I will show also that entrenched opposition may well be overcome if the Commission strategically activates the constraints of the supranational legal context.

## Convincing threats: the lesser evil strategy

In the examples representing the lesser evil strategy, Council agreement is precipitated by the fact that member-state governments want to avoid a lingering worst-case scenario. Compared to divide-and-conquer, this is not a sequentialized strategy where some domestic changes precede the adoption of European legislation, so that the latter profits from changed preferences of some member states. With lesser evil, the Commission threatens to impose high costs on the member states if they do not adopt its proposals in the Council. This strategy can be established best when analyzing the case of European electricity liberalization.

Shortly after starting to define a European policy for network-based energy, the Commission, in 1991, initiated infringement procedures against the existing import and export monopolies for electricity and gas in 10 member states. The argument was that with gas and electricity being goods like any other, these monopolies were infringing the market freedoms of the Community (Slot, 1994: 525). These infringement proceedings progressed very slowly. It was not until 1994 that the cases were handed to the European Court of Justice. At that time their number had dropped to five (Spain, France, Italy, Ireland and the Netherlands). Some member states could disprove the Commission's allegations, but some governments also enacted domestic adaptations to meet the Commission's demands.

Though an abolition of exclusive rights for the import and export of electricity and gas would leave most of the national monopolies largely intact, the cases exerted considerable pressure on the member states. They were essentially the first application of the Treaty to these monopolies, with possibly many more to follow. Judicial policy making had to be feared. Only in view of these cases did France decide to start cooperating in the Council, where a Commission proposal for the partial liberalization of national electricity systems was being discussed. France proposed an alternative model for liberalization, called the single-buyer concept. As the largest exporter of electricity

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in the EC with several member states relying on its exports, and in view of its political weight, France had been in a good position to simply obstruct the Council discussions. The parallel application of Treaty law, however, rendered this strategy useless. Rather than seeing the monopolies crack in a piecemeal and unplanned way in the Courts, an actively designed transition to Treaty conformity was preferred. In 1996, after long negotiations, a Council agreement was finally reached, based on the modified Commission proposal and the French single buyer, which in future shall coexist. Importantly this compromise could be achieved before the Court ruling. Thus, the governments managed to evade impositions by the Court that would be difficult to change later, trusting the fact that the Court would be most unlikely to define requirements conflicting with a recent, complicated Council compromise.

What is the *logic* behind the lesser evil strategy as illustrated by the electricity case? Member states had differing interests, situated between the maintenance of the monopolies (the status quo which was preferred by France) and a substantial, planned liberalization (which was favored by the UK). The electricity case is one where the decision had to be taken unanimously despite the formal decision rule of qualified majority-voting, so that it is not necessary here to note the positions of all member states. It was for two reasons that France – occupying the extreme position of keeping the monopoly intact – could not be isolated. First, in matters of significant political salience for a member state, the agreement persists that it will not be isolated in the Council (Westlake, 1995: 111). Second, France was too important, being the largest exporter of electricity, to draw up an agreement against it.

In this situation, agenda setting alone would not have brought a result. Had it been left to the member-state governments to adopt the Commission's proposal, the outcome would have been comparable to the one on withholding taxes on capital income, where agreement has been sought by the Commission with no success since the late 1960s (Deheija and Genschel, 1999). Because of France's opposition to change and its factual veto, electricity is a crucial case for proving the Commission's powers (Eckstein, 1975). By applying the Treaty's rules directly to the electricity monopolies the Commission could threaten an unplanned liberalization through the Courts. What is important is that this potential status quo was much more distanced from (and therefore less in line with) the outcomes preferred by the member states than the Commission's proposal for a directive. Figure 3 demonstrates this. An unplanned liberalization would not be more liberal than a planned transition but implied legal uncertainty. Faced with this new default condition of action, governments agreed on the directive.

The lesser evil strategy depends on the highly negative consequences of the Commission's threat for the member states. Again, it is the Commission

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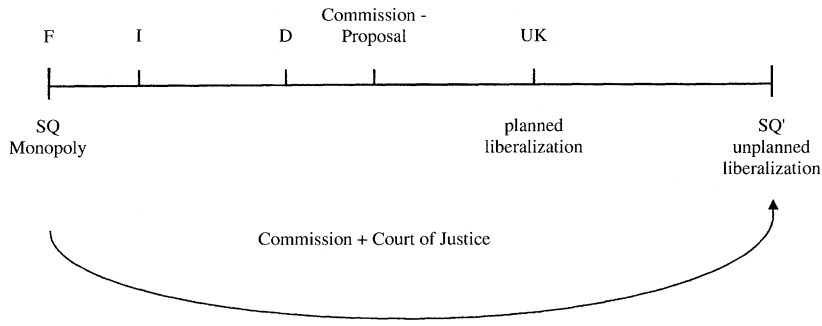


**Figure 3** 'Lesser evil': the example of electricity.

and not the Court putting pressure on the Council, although the relative importance of the Commission may vary with this strategy. Rulings of the Court establishing the Treaty's implications for a sector – which was menaced in the electricity case – are both hard to predict and to influence from the outside, and having been made, are difficult to alter. Because the Treaty can only be changed unanimously, interpretations of its obligations pose a high risk for sectors which have not been integrated. Moreover, since only isolated aspects of domestic orders are raised in court proceedings, a very fragmented and uncertain legal order results. In view of the need for long-term sectoral planning and significant sunk costs, such a scenario is the worst possible option for the established actors. However, if the Council agrees on legislation before the Court has mapped out its Treaty interpretation, and this is crucial, the latter is highly unlikely to deviate far from the Council's plan for a common sectoral policy. Thus, by being in a position to credibly threaten litigation, the Commission has the possibility to alter the previously rejected option of a common European policy into a second-best solution that comes next to the non-defendable status quo.

Why could the member states not prevent the infringement proceedings? As is well known, governments may have an important informal influence on the Commission. In contrast to the divide-and-conquer strategy where member-state governments suffer from an information asymmetry, the lesser evil strategy *relies on the fact that governments know* which game is being played. Internally, the Commission decides by majority rule to pursue cases, so that governmental control over Commissioners could possibly avoid the Commission's action when measures could cause contention with a sufficient number of member states.

Sometimes governments may indeed successfully control the Commission, and with it the danger of evils being threatened. But there are

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significant limits to such control. A first kind of limit can be illustrated on the basis of the electricity example. While it made concessions in the speed with which it conducted the infringement proceedings, the Commission did not back down entirely in order not to damage its overall credibility as a guardian of the Treaty and an administrator of competition law.

Governments are also constrained by the fact that the control over the Commission cannot fully prevent the 'evil' occurring. There are other actors yet more difficult to control, whose actions can partly substitute for those of the Commission. Because of the supremacy and direct effect of European law, private actors may directly turn to national or European courts to claim their rights. Purposefully or sometimes even as a mere byproduct of a court case, the significant costs of legal uncertainty and of highly binding judicial policy making by the European Court may be brought about without much Commission input. The Commission, in turn, may subsequently exploit this situation; control over this actor could no longer fully contain the situation.

Looking at some other policies which were drawn up as a lesser evil may illustrate this point. Moreover, these cases spell out how the importance of the Commission with respect to the Court varies under this strategy. Once again the *Cassis de Dijon* case can serve as an example. It helped to establish the principle of mutual recognition. As Alter and Meunier-Aitsahalia (1994) show, the Court established in *Cassis* an idea for integration which the Commission subsequently promoted. By basing the realization of the single market on this principle, the Commission threatened the member states with possible Court action should they continue to give priority to national rules. A similar case is the adoption of the *merger regulation* in 1989 after the Council had refused several times to accord this power earlier (Bulmer, 1994). A Court ruling in 1987, the *Philip Morris* case, broke the former resistance of the member-state governments, by implicitly according the Commission the right to control mergers. Companies increasingly notified the Commission on planned mergers, and the Commission actively highlighted the drawbacks of the new situation. Without an additional Council regulation, there was no threshold for notifications, hostile takeovers were not included, and the property rights involved in mergers could not be dealt with appropriately (Bulmer, 1994: 431). Facing this new default condition of 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. Before *Philip Morris*, in contrast, governments had been able to choose between their national responsibility and a new European competence.

Also the liberalization of *road haulage* is a case where the Commission followed up on an opportunity created by the Court (Héritier, 1997). In 1985, the Court ruled that the Council of Ministers had violated the Treaty by failing

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to realize the freedom to provide services in the transport sector. For the member states the ruling 'was an implicit threat that, if the Council did not redress the shortcomings in road transport quickly, the Court would directly apply the Treaty (. . .), which could have meant the instantaneous liberalization of the road haulage market' (Young, 1994: 6). Again the Commission could act on this basis and, in the aftermath of the ruling, the Council agreed on the necessary measures despite a significant amount of opposition to the liberalization of road haulage at the outset (Young, 1994: 15).

The threats the Commission may exploit or actively bring about for a lesser evil strategy need not relate only to a loss of planning capacity due to an uncertain legal situation. I will briefly allude to other examples falling under this heading in order to bring attention to the variety of threats that may be imposed and to the frequency with which this happens.

That lesser evil may also refer to direct financial losses is shown in the following example: The *liberalization of air transport* required unanimity in the Council and had been pursued by the Commission without success when the *Nouvelles Frontières* ruling of the European Court of Justice, based on a preliminary reference, affirmed the general relevance of European competition law to the airlines in 1986 (Argyris, 1989: 8–11; O'Reilly, 1997). On this basis, the Commission strengthened its examinations into the bilateral agreements between airlines (European Commission, 1986: § 32). By fixing capacity in advance and sharing revenue, the airlines effectively hampered competition, thus infringing the prohibition of cartels (Article 85). In 1986 and 1987 13 airlines were charged, so that indirectly all member-state governments were concerned (European Commission, 1987: §§ 36, 46). Had the airlines not adhered to the demands of the Commission, which were also detailed in proposals for two regulations submitted simultaneously to the Council, Commission decisions would have come into force, implying high fines for the airlines. The Commission deliberately made this linkage, to put pressure on the Council.[7] In view of this threat, the Council reached an agreement on the Commission's proposals (the 'first package') in December 1987 (European Commission, 1988: § 46).

Another possibility is that the Commission imposes opportunity costs in related areas to foster agreements. Thus, the Commission imposed the liberalization of alternative telecommunication networks (held by railway companies, electric utilities, etc.) as the necessary price to pay for the acceptance under the cartel law of the cooperation of the French and German telecom operators, originally called *Atlas*. It served as a blueprint when approving alliances between other network operators, allowing the Commission to liberalize the use of alternative networks.

The Commission's broad powers in the administration of European law

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give it ample scope to design prerequisites for the approval of mergers or state aids, or to threaten inquiries into established national practices if a government maintains its opposition to proposed liberalization measures. However, since such a linkage will be rarely made as openly as the one between the approval of *Atlas* and the liberalization of alternative networks, it is difficult to establish the relevance of this possibility empirically.

## Conclusion

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

With both strategies the Commission finds the means to influence the Council's decision making which go beyond its agenda-setting powers, as I have shown. In addition to refuting this alternative explanation I have been careful to counter possible intergovernmentalist arguments against such an influence of the Commission. Thus, I have explained why we should reasonably expect the Commission to be successful with these strategies despite the resources of member-state governments and their multiple means to control the Commission. By delegating responsibilities to the Commission, member-state governments face some structural disadvantages. The divide-and-conquer strategy builds on information asymmetries which make it highly difficult for the member states to obstruct the Commission's plans. In the case of lesser evil, in contrast, the member states know their disadvantageous situation well, but here the Commission exploits their heterogeneous preferences to prevent an unanimous sanction.

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Both strategies complement the often analyzed right of formal agenda setting. Because Council negotiations are embedded in a supranational legal context, the Commission can construct pressures for the Council to adopt its proposals. Moreover, it is only when considering these additional rights that the Commission's option to withdraw proposals from the Council can be viewed as a credible threat. Often the Commission may be able to use single cases to push European liberalization of a sector further than could result from decision making of the Council alone, so that withdrawing its proposals becomes a viable alternative for the Commission. When analyzing Commission–Council interactions only with a view to agenda setting, in contrast, scholars tend to neglect this possibility (Garrett and Tsebelis, 1996). On the assumption that the Commission's agenda-setting right is its major possibility of furthering integration, it makes no sense for the Commission to threaten a possible withdrawal.

For both strategies the Commission is dependent on the European Court of Justice. This dependence may be examined further when taking the ruling on import and export monopolies for gas and electricity of 23 October 1997. In this case the Court sided with the member states against the Commission.[8] Although the ruling did not justify the monopolies under the Treaty, it was a significant blow to the Commission. Had the governments foreseen such a cautious stance of the Court, most probably they – in particular France – would have agreed to a less liberal regime.

However, lacking support of the Court does not necessarily bring an end to the lesser evil strategy. While expectations about the tenor of the Court's interpretation determines at what point between liberalization and monopoly the governments agree, the incentive to reach a decision remains. Only by passing legislation in time can the Council ensure that an interpretation of the Court will not deviate from the political consensus. Moreover, new market fragmentations arising from national exemptions that are granted by the Court can provide a motivation for Council legislation: this time for re-regulation (Scharpf, 1996b).

So far the relevance of these Commission powers has not been analyzed systematically. Moreover, it seems to be cited frequently in support of a neofunctionalist explanation of European integration (Burley and Mattli, 1993; Leibfried and Pierson, 1995: 44), despite the weaknesses of neofunctionalism in dealing with institutions (Scharpf, 1988: 266). In contrast to the notion of 'spillover', I have aimed to show how an institutionalist analysis focusing on the changing default condition of decision-making may grasp the dynamics of integration more precisely.

But the options available to the Commission analyzed throughout the article also have repercussions for institutionalist analyses. Although it is

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surprising given Weiler's (1981) seminal analysis of the 'dual character of supranationality', that emphasized the connection between the Council's intergovernmentalism and the supranational legal context, institutionalist analyses often focus on the Council's decision making in isolation. It is overlooked that the Commission may manipulate the default condition of the Council as well as setting its agenda. The likelihood of governments accepting a Commission proposal clearly depends on the value of existing alternatives, among which the default condition is particularly significant. Further research is required to determine whether the Commission can manipulate the Council's decision making regularly to bring about – sometimes only very incremental – institutional change.

## Notes

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1 As one reviewer pointed out this power is rooted in the fact that the Council cannot use simple majority-voting.
2 Articles refer to the Treaty establishing the European Community.
3 *Aviation Europe* 4(5), 3 February 1994, p.5. European Commission, 1996 (§ 121).
4 Interview with Commission official, 24 May 1995.
5 Interview with Commission officials, 17 January and 24 May 1995.
6 Interview with former Commission official, 18 March 1998.
7 Interview with Commission official, 17 January 1995.
8 Judgement of 23 October 1997, C-157/94, C-158/94, C-159/94 and C-160/94.

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