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The impact of mutual recognition – inbuilt limits and domestic responses to the single market

Susanne K. Schmidt

ABSTRACT What have been the consequences of integrating the single market via mutual recognition? Did competitive deregulation result? Or were its implications less significant than expected? In this paper I analyse two previously highly regulated service sectors, insurance and road haulage, and study the impact of European policies in Germany and France. I find that the Council instituted mutual recognition in a restrictive way. This limits its impact on member states, which is moreover mediated by national factors. In both sectors, the use of the freedom to provide services has stayed much below expectations. Consequently, the single market rules have primarily resulted in a liberalization of national markets, where this had not already been achieved, for instance, in Germany. The domestic insurance and road haulage markets have become very competitive, but they remain largely national markets.

KEY WORDS Domestic change; insurance; liberalization; mutual recognition; road haulage; single market.

1. INTRODUCTION[1]

When the Community was relaunched in the mid-1980s with the single market initiative, the former attempt to fully harmonize national regulations was replaced by the principle of mutual recognition. Each good and service lawfully produced in one member state could be exported into another, without prior testing or licensing requirements. Only minimum harmonization would be necessary when member states could otherwise limit the import of goods or services because of health or other reasons relating to the general good. Compared to full harmonization mutual recognition allows national regulations to remain largely intact. And the requirement to agree on common rules at the European level is reduced to those areas where minimum harmonization is needed. However, the danger is that national regulations are being undermined, and that the single market is built on competitive deregulation (Streeck 1995).

Some years into the official realization of the single market in 1992, the consequences of mutual recognition as an integration principle can be analysed. Interestingly, there have been few empirical analyses of how the single

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market has affected member states. Thus, while we know that the European institutional framework is biased towards liberalization (Scharpf 1999; Schmidt 2000), we do not know much about the impact of this institutional bias on member states. Possibly, they find escape routes to keep their markets relatively sheltered, just as there seem to be escape routes on the European level to facilitate agreement on regulations (Tömmel 2000; Héritier 1999). What has happened de facto is interesting not only with a view to validating previous expectations. As eastern enlargement is on the agenda, questions about the importance of a level playing field have a new relevance. In addition, mutual recognition is also being discussed outside the European Union (EU), for instance in the General Agreement on Trade in Services (GATS) (Zampetti 2000).

In this paper I examine two service sectors: insurance and road haulage. I concentrate on services because their delivery normally requires some presence so that regulatory competition has a more direct effect than with goods. The two sectors were chosen for the following reasons: they were previously highly regulated at the national level so that we can expect continued domestic regulatory interests despite European liberalization; they differ greatly – for instance, in their skill requirement, sectoral structure (family enterprises in road transport), and the need for the presence of the service deliverer (lower in insurance than road transport). With these differences between the sectors, it may be possible to relate different outcomes to sector differences. Or, in the case of similar outcomes, the cross-sector variance may allow us to generalize conclusions as it is unlikely that such dissimilar sectors share unique properties that distinguish them from all other sectors.

Germany and France were chosen for the following reasons: in both sectors, these countries largely followed the same regulatory approach. This parallel regulation at the outset means that European policies may imply similar problems in France and Germany. For instance, both countries had a tradition of regulating road haulage in order to protect their railways (Deregulierungskommission 1991: 40). A comparison with the Netherlands, where this was never an issue, would add much more variety at this point. The institutional differences between the French and German polities, in contrast, possibly allow us to assess the remaining scope for national action as different institutional preconditions permit different uses of this scope. Institutional variety concerns first of all the relationship of the executive to the legislative. Because of rationalized parliamentarianism, the French government enjoys broad action capabilities, while the German government is often hampered by the need to get the approval of the Bundesrat, which may follow other objectives than the federal government. Secondly, both countries differ in their tradition of state intervention, which is much more pronounced in France (Kempf 1997; Ismayr 1997).

What could one hypothesize about this set of cases? Concerning the impact of European policies it is plausible that it will be more pronounced in Germany, though this contradicts the sometimes noted parallelism between the

German and the European polity (Schmidt 1997). Given the tendency of institutional gridlock one can expect a greater backlog of regulatory reform in Germany than in France. Concerning reregulation at the national level, one would expect France to be more likely to grasp an existing potential than Germany.

In the following I will first expand on mutual recognition as an integration principle. I will then focus on road haulage and describe the European policies and their impact on France and Germany. This is followed by a parallel discussion of the insurance sector. I argue that mutual recognition is already enacted by the Council in a way that limits the danger of regulatory competition. Member states continue to have some regulatory leeway to address policy problems at the national level. Moreover, the impact of European policies is highly country-specific. Because of the stability of the previous regulation (which can be explained by institutional features of the polity), the regulatory framework for both sectors was overhauled in Germany, whereas in France the impact was comparatively slight because of frequent national reforms. As concerns national reregulation, we also find that France was more active in road haulage but in insurance the results are less clear-cut. Finally, and very significantly, European policies (so far) have their greatest impact at the level of the member states as markets remain largely national but regulations have been Europeanized.

2. MUTUAL RECOGNITION AS AN INTEGRATION MECHANISM

Originally, the European Community (EC) attempted to achieve the common market by fully harmonizing divergent national regulations. In the early 1960s, the Council of Ministers drew up general programmes to realize the freedom of establishment and the freedom to provide services (Eickhoff 1983: 3f.). But divergent national regulatory traditions made it almost impossible for the Council of Ministers to agree.

As is well known, in this deadlock the European Court of Justice (ECJ) took over, and paved the way for further integration through a series of judgments in the 1970s (Alter and Meunier-Aitsahalia 1994). Following up on *Dassonville* (1974), the Court stipulated in the *Cassis de Dijon* case (1979) that goods legally produced in one member state could be exported into another even if national regulations in that member state prohibited the production of such a good. Only in rare cases would member states be able to block such products under the exemption of Art. 30 (ex 36).

In its White Paper on the single market the Commission took up this legal reasoning and abandoned full harmonization. Given this case law, and the direct effect and superiority of European law, there was no longer the need to fully harmonize divergent national regulations. Member states could no longer bar the import of goods or services with reference to national law; they had to mutually recognize goods and services lawfully produced in other member

states. Harmonization was only necessary in those areas where member states could invoke the exemption of Art. 30, mainly to protect health. Minimum harmonization coupled with mutual recognition thus became the new approach to realizing the single market (Majone 1994).

Compared to other integration principles, like the most favoured nation system (MFN) practised in the General Agreement on Tariffs and Trade (GATT), the originality of mutual recognition lies in the fact that a reverse discrimination of nationals can occur. Under MFN the most foreign companies can hope for is to be treated like nationals. Under mutual recognition, they may be better off than nationals should their domestic regulatory system be more favourable. Mutual recognition builds on home-country control; the host country can no longer impose its regulations. Consequently, there is a particular danger that mutual recognition leads to competitive deregulation. Stricter national regulations inhibit companies not only abroad but also in their domestic markets where companies from other member states can be active under home-country control (Streit and Kiwit 1999).

However, the EU does not only lend particular scope to regulatory competition. By providing the institutions for common problem-solving and the effective implementation of decisions, the EU may also be able to come to grips with regulatory problems. However, Scharpf has convincingly shown that the institutional preconditions of the EU are very asymmetric: while negative integration, i.e. the lifting of national barriers to trade, can rely on interventions of the Commission and the ECJ, positive integration, i.e. establishing common economic regulations, is largely dependent on agreement in the Council and therefore on a qualified majority of the member states (Scharpf 1999: 45, 70–2).

The consequences of this institutional imbalance of the EU on the European level have been broadly analysed. Thus, we have some idea as to which problems may be solved at the European level and which mechanisms exist to help overcome the decision-making problems in the Council (Héritier 1999; Scharpf 1999: 89–120; Grande 2000). Much less is known about the impact of these European policies on the national level. Do we see in fact competitive deregulation at this level? What scope remains for member state governments to pursue their own regulatory goals? It is to these issues that I turn now, looking first at road haulage and then at insurance.

3. THE INTEGRATION OF ROAD HAULAGE AND ITS IMPACT ON MEMBER STATES

The integration of road haulage, as for insurance for that matter, corresponded largely to the pattern one would expect given the previous analysis. Progress in the 1960s and 1970s was slow owing to divergent national regulatory traditions. In the Council, the question of liberalizing road haulage was strictly tied to prior harmonization. And since the unanimity principle allowed hardly any progress here, the former was very slow (Héritier 1997: 541).

Some regulations emerged in this period dealing with a common tariff system and a contingent of licences that could be used for transport throughout the Community (Button 1984: 42f., 77–9). But the traditional system of bilateral quotas remained strong. In addition, attempts to tackle the different harmonization issues, such as different taxes on vehicles and fuel, social regulations concerning working times, and technical issues like the size and weight of vehicles had little success.

Further progress here (as in insurance) depended on the changes that came in the 1980s – the increased use of the Court to force through negative integration and the switch to qualified majority voting with the Single European Act. For the integration of road haulage the impact of the Court was particularly marked. Given the slow progress in European transport policy and the special chapter on transport in the Treaty, the European Parliament addressed the Court about the inactivity of the Council of Ministers. In its inactivity verdict (Case 13/83) the ECJ emphasized the obligation of the Council to realize the freedom to provide transport services within a reasonable time period. Now it was no longer possible in the Council to tie concessions of liberalization to prior agreement on harmonization issues (Erdmenger 1985: 386f.). In the subsequent political process those actors interested in further liberalization, namely the Netherlands and the Commission, repeatedly threatened to refer the matter again to the Court, should the Council not lift restrictions quickly.[2]

In response to the ruling, the Council agreed to liberalize all transit transport from the beginning of 1993 (regulation 1841/88). At the same time market access was harmonized, focusing only on subjective criteria (namely training, respectability and financial endowments) (Basedow and Dolfen 1998: 169). It proved more difficult to realize the freedom to provide services within the member states. This so-called cabotage was contentious as different competitive preconditions would become effective in domestic transport markets. In particular, German companies felt disadvantaged by high taxes on vehicles and fuel. In view of the legal pressure, the Council agreed on a preliminary liberalization of cabotage in 1989 and achieved an understanding in 1993 on final liberalization from mid-1998 onwards. This was part of a package deal that included a directive on minimum vehicle taxes and a directive on road pricing (Gronemeyer 1994: 271).

Thus, under continuous legal pressure, road haulage was liberalized while harmonization remained weak. Integration thus followed exactly the pattern that one would expect given the European institutional framework. However, the principle of mutual recognition was not strictly adhered to. While hauliers acquire a European-wide licence in their home country, under the cabotage rule the legal and administrative provisions of the host country are relevant, not those of the home country (Gronemeyer 1994). Consequently, there is a complicated regulatory mix: the home country oversees the licence; the host country controls the conditions and tariffs of transport, the measurements and weights of vehicles, the rules for certain types of transport (e.g. live animals),

driving times and breaks and value-added tax; finally, some rules are harmonized like working times or the carriage of dangerous substances.

What have been the implications at the level of the member states? Has competitive deregulation resulted? The traditional regulation of road haulage markets in France and Germany showed parallels. It focused on limiting market access and binding tariffs. The market for road transport was subdivided into shorter and longer distances, the two being regulated differently. In both countries, the hauliers' associations held some responsibilities for the supervision of tariffs (Feick *et al.* 1982: 217, 234–6, 240). Compared to Germany, however, France regulated road haulage more lightly.

In the following I will in turn review the implications of European road haulage policy on Germany and France.

3.1 Germany

As one would expect given its polity, European policies faced regulatory stalemate in Germany. Despite high transport costs and much criticism, regulated tariffs (the Reichskraftwagentarif dating back to the 1930s) and quotas on licences remained in place. Because of very high vehicle and fuel taxes, German hauliers were in a disadvantaged position *vis-à-vis* their European competitors. Opposition to European liberalization was strong, and hauliers demanded prior harmonization to create a level playing field (Héritier 1997: 547). Road haulage provides a clear example of the disadvantages of positive over negative integration. At the European level, the inactivity verdict of the ECJ meant that liberalization could no longer be tied to harmonization. As a consequence, the German government tried to reregulate at the national level: here it was not feasible to simply improve the competitiveness of the domestic trade through tax cuts because of countervailing interests to protect the railways and the environment. Instead, a road toll for heavy vehicles was devised, which would also have to be paid by trucks from other member states so that they would contribute to the costs of road building in Germany. The competitiveness of German hauliers was to be strengthened at the same time by cutting the vehicle tax. Only their competitors were to pay a net price.[3]

This plan failed under European law. The Commission immediately intervened and called upon the ECJ, which stopped the toll with an injunction and later ruled it to be illegal under the Treaty. Under Art. 72 (ex 76) member states could not discriminate against nationals from other member states, and the Court found that this was what had happened. Regulatory competence was no longer at the national level. Could Germany have proceeded as it wanted, the measure could have led to a sort of 'California effect' (Vogel 1995): since hauliers already had to pay in Germany, the number one transit country, it would have been easier to agree on a European measure, regulating road haulage more environmentally and in a railway-friendly way. But the Court did not see this dynamic and argued that, by going alone, Germany would hamper agreement in the Council (C-195/90). After its failed domestic

attempt, Germany had to go through the Council where the toll was set on a comparatively low level,[4] tied to the final liberalization of cabotage.

Concerning national regulations, the European framework allowed member states the possibility of leaving these intact, just as the idea of mutual recognition prescribes. Germany could have continued to regulate the market access of its hauliers through licences, differentiating between short- and long-distance, which the hauliers' association favoured (Zobel 1991: 192f.). However, this would have led to a reverse discrimination against nationals (Inländerdiskriminierung) as hauliers from other member states would not need a licence. Consequently, the number of licences was gradually extended in the 1990s, and the contingents were abandoned when cabotage was fully liberalized in mid-1998.

The tariff system was another matter. In this respect European policy abandoned the idea of mutual recognition: host-country control applied. But before this had become clear, the system was abolished (from 1994 onwards) under the impression that a preliminary proceeding at the ECJ would find fault with it under European competition law (Basedow 1989: 193f.). Earlier in 1991 the governing coalition had agreed this step.[5] One reason for lifting the system was to prepare German hauliers for the forthcoming competition (Teutsch 2001: 143). Since the measure was contentious, and the hauliers resisted it, the pressure of European law was emphasized.

In the end, the ECJ found no fault (Case 185/91) but by this time the tariffs had already been abolished. Under the cabotage rule Germany could have even obliged hauliers from other member states to apply its tariff system. However, as their home-country authorities would have had to oversee the application of German tariffs in part, there would have been a problem of effective controls, again disadvantageous for Germans (Teutsch 2001: 142).

Mutual recognition therefore implied that previous domestic regulations were abolished. Also reregulation was hampered at the national level, while agreement on the European level faced lowest common denominator problems.[6] However, and this becomes much clearer with the French case, this is not the whole picture. Thus, in 2001 Germany passed a law against illegal employment including fines up to DM500,000, making chargers co-responsible.[7] Here, it was unproblematic to act ahead of an EU initiative.

What have been the economic implications? With the liberalization of trans-border transport at the beginning of 1993, the German share clearly declined. Before liberalization in the mid-1980s, German hauliers had a share of 40 per cent. In 1999, German hauliers had only a share of 25 per cent of trans-border transports.[8] The liberalization of cabotage, in contrast, did not have the expected dramatic consequences (CEC 1997: 40f.). Although Germany's share of all EU cabotage was 70 per cent, this made up less than 1 per cent of all commercial transport in the country.[9] Note that figures include those hauliers which have relocated, and use cabotage to service established customers from a cheaper member state. Since the tariffs were lifted in 1994,

prices have come down significantly. Hauliers continuously complain about their disadvantaged competitive position as taxes in Germany remain high.

However, it has also to be seen that road haulage was a lucrative business before liberalization. German hauliers did not face economic hardship, unlike the situation in other member states (Monopolkommission 1990: 311). Thus, the German trade was not well prepared for European liberalization. Many companies were too small and inefficient as a result of their prolonged protection from competition and of an allocation of licences that favoured small enterprises.[10] Consequently, one cannot distinguish the effects of domestic and European competition. Of course, it is not possible to take the low share of cabotage among total transport as an indication of the low impact of liberalization, as this impact would certainly be higher had German hauliers not responded with drastic price cuts.

Nevertheless, low cabotage figures show that German hauliers have not been swamped by competition and that relocation has not become a dominant strategy. As the reports of the Federal Authority for Goods Transport (Bundesamt für Güterverkehr, BAG) show, road transport also has aspects of a local market where trust and reliability count (see note 9). In general, the BAG sees German hauliers' competitive position secure as long as they provide not only pure transport services but include logistics in their offer.

To conclude, European integration has had an impact on German road haulage largely much as one would expect. The national regulatory framework was overhauled. Reforms, which failed under the institutional conditions of the German polity, became possible in the European context. Interestingly, the use of cabotage remains low so that a real European market for road transport cannot be said to have been established. Thus, while leading to a reform of national regulations, freedom of services has not transformed national markets into a European one.

3.2 France

The French regulation of road haulage was similar to the German system with regulated market access and tariffs. However, in contrast to the German situation the French system had been continuously adapted, reflecting the more favourable conditions of the French polity. European liberalization, therefore, did not encounter a sheltered domestic market. Licences for short distances had already been abolished in the early 1970s. From 1986 onwards the number of licences for long-distance transport was no longer restricted. Tariffs had always been regulated only for transport above 150 km; moreover, transport with rented vehicles had been exempted. In the late 1980s the whole system was eliminated. There was, therefore, no pressure to liberalize because of European policies (Douillet and Lehmkuhl 2001: 101).

Interestingly, France reregulated partly in response to the European market. In 1990, 1992 and 1998 professional and capital requirements were increased. In 1994, an agreement was signed by hauliers' associations and unions on

working time, which was followed up by decrees in late 1996. In addition, laws in 1992 and 1995 combated low tariffs by imposing fines on paying subcontractors too little and offering services too cheaply. These measures were taken in reaction to experience with domestic liberalization, but European liberalization served to strengthen the request for reregulation (Douillet and Lehmkuhl 2001: 102, 116).

In the aftermath of the single market for road haulage, France has thus reregulated while Germany has liberalized. On the one hand, the fact that the take-up of cabotage – and therefore the competitive pressures from the single market – stayed much below expectations was beneficial. Cabotage made up only 0.1 per cent of domestic traffic, and French hauliers ranked third after the Netherlands and Belgium in using cabotage (Douillet and Lehmkuhl 2001: 107f.). On the other hand, the broad validity of the host-country principle has facilitated reregulation. This has been used by France more actively than by Germany. For instance, it allows France to apply the law of subcontracting to foreigners operating in the country (int. 18).[11] Moreover, with strict working-time regulations and the recent 35-hour week (which can only apply to nationals), France has shown that markets are local enough to institute regulations that are unfavourable *vis-à-vis* European competitors.

4. THE INTEGRATION OF INSURANCE AND ITS IMPACT ON MEMBER STATES

In insurance, a first directive in 1964 dealt with re-insurance. This was unproblematic as re-insurance was barely regulated on the national level. In 1973 and 1976 the so-called first co-ordination directives followed for non-life and life insurance respectively. They implemented the freedom of establishment by harmonizing solvability and licensing requirements (Badenhoop 1988: 103). Thus, companies were free to establish themselves anywhere in the Community, being regulated by the host country. In 1975 the Commission made a proposal to tackle the freedom to provide services. This directive, however, stalled in the Council of Ministers until an important judgment of the ECJ at the end of 1986 (Knudsen 2001: 174–80). At issue was the implementation of the so-called co-insurance directive (dating from 1978) in several member states as well as a legal case in Germany. The latter dealt with an insurance broker who had placed insurance contracts with mainly British insurers not licensed in Germany. He had been fined by the German insurance supervisory authority. In its rulings (C-220/83, C-252/83, C-205–206/84), the ECJ demanded that the freedom to provide services should be introduced for large-risk insurance. For mass-market insurance, in contrast, the Court granted greater regulatory leeway to member states: in view of the special nature of insurance, member state governments were free to enact regulations in the interest of the 'general good', for as long as the market was not harmonized (Edward 1987). The 'general good' was the exemption from the freedom to provide services that the Court had established in view of the fact

that the Treaty lacked such an exemption for services, parallel to Art. 30 (Schoubroeck 1995).

On the basis of this judgment the Council agreed on the second co-ordination directive for large risks in 1988, which had been negotiated since 1975. A matching directive for life insurance followed (Lohéac 1994). In parallel, the Commission prepared further directives to liberalize the mass market. With these 'third' directives, all insurance could be offered using the freedom to provide services. On the basis of harmonized rules concerning solvability, technical reserves, and investment, and partly relying on minimum standards, insurance companies would be regulated under home-country control.

Although the ECJ had not exerted pressure to liberalize the mass market, the Council agreed these far-reaching steps in 1992, to become effective in mid-1994. Because of the underlying British regulatory model of solvability control, member states such as Germany following the continental regulatory model had to enact extensive changes to meet the new legal framework. Other than the Commission, British and Dutch actors who hoped to export insurance services, had been most interested in the liberalization.

Compared to the directives for road haulage, those for insurance left less scope for national discretion. The ex-ante authorization of policy conditions and partly of tariffs that had been common, for instance in Germany, France and Italy, was prohibited by the third directives. Thus, regulatory competition between different national regulatory models was prevented from the start. Given the principle of home-country control, theoretically, insurance companies regulated under the British and the German model could have competed under mutual recognition, on the basis of the harmonized minimum financial standards.

While models of regulatory oversight were thus harmonized, in another area significant scope for national regulations remains similar to that in road haulage: for insurance contract law, the third directives specify that the law applies in the country of the policy holder, i.e. the host country. Since insurance contract law has a direct impact on insurance contracts, this is a significant hindrance to entering the markets of other member states. In fact, the Commission had already been working on the harmonization of insurance contract law since the 1960s. In 1993, the Commission finally withdrew its proposal, in view of persistent deadlock in the Council (Cousy 1994: 303). Thus, as minimum harmonization failed, an agreement took its place to keep insurance contract law under host-country control.

4.1 Germany

With the prohibition of an ex-ante control of insurance conditions and tariffs in the third directives, the German regulatory model had to undergo far-reaching changes. Interestingly, it was expected from the beginning that these directives would result primarily in a deregulation of the German market while

the freedom to provide services would be hardly used (Farny 1994: 246). Compared to the original intentions of mutual recognition, the directives were thus expected to have the opposite effect!

The ECJ, in contrast to the case of road haulage, had not required mass-market liberalization. Under qualified majority voting, Germany, by itself, could not have blocked European insurance liberalization. Unlike the case of road haulage, Germany did not attempt such a step. In parallel to the implementation of the large risk directive in 1989, the government changed its position in favour of liberalization for several reasons: first, the dominant neo-liberal ideology of the times has to be noted (Knudsen 2001: 182);[12] with the increasing internationalization of finance, the 'Finanzplatz Deutschland' became an important policy issue, and although this discussion focused on banks and stock exchanges, the highly regulated insurance market was also criticized in this context; many small and medium-sized German companies were not benefiting from the large-risk liberalization of the second directives; finally, German unification was imminent and with it pressure from other countries, notably Britain, that this market would also be opened to foreign competitors (int. 4, 5).

With the realization of home-country control, insurance companies licensed in any member state can now offer their services throughout the Community. They only have to notify their home authority, which will inform the relevant national authorities. Legally dependent branches also fall under home-country control. In the harmonized financial regulation, Germany – but also France – surpasses European minimum standards.

Interestingly, the new freedom has hardly been exercised. In 1997 companies from the entire European Economic Area operating under home-country control (branches and freedom of services) had a market share of 0.6 per cent of life, and 0.9 per cent of non-life, insurance in Germany (BAV 1999: 6). Generally, companies interested in the markets of other member states had already established themselves. The dominant method of expansion has been to acquire companies in other member states (SwissRe 2000). The trend to mergers and acquisitions in the European insurance industry had already started in the 1980s and has continued after liberalization.

There are two reasons for the disappointing take-up of the freedom to provide services. First, harmonization was insufficient. As mentioned, the insurance contract law of the country of the policy holder applies. This is a major impediment. The same is the case with non-harmonized taxes. Taxes on insurance contracts apply where the risk is situated. And member states may restrict the tax deduction of life insurance premiums to domestic companies, as the ECJ ruled in 1992 in the Bachmann case (C-204/90) (Hogan 1995: 348).

It is possible that the Commission may take up the harmonization of insurance contract law again while a harmonization of taxes is unlikely in view of the unanimity requirement (Genschel 2000). But it is questionable whether this would promote the single insurance market significantly. This relates to

the second major reason why the freedom to provide services is barely used. Insurance markets are local markets (Goodman 1993). For life insurance, death tables differ among member states. For risk insurance, detailed knowledge of the local market is necessary, for instance about liability law and the frequency of damages. In addition, insurance contracts are long term. This is particularly the case in life insurance, but also in risk insurance unlike other services, for instance road haulage, where one may try another provider relatively easily. For risk insurance, it is necessary to see an insurance representative for claims settlement. Because of the lack of independent brokers in Germany, the sale of personal insurance relies on a network of sales representatives. To enter a market thus requires long-term commitment and it is only rarely sensible to do this without being established. Possibly, when European legislation was drawn up, this was not foreseen. Thus, at the beginning of European liberalization, some British life insurers sold insurance in Germany via the freedom to provide services, using British death tables and making a loss (int. 1). Even in industrial insurance, the freedom to provide services works less well than expected, although this is the only area where liberalization was demand-driven (int. 4). With the single market, industry wanted a single insurance cover for all its activities, which were increasingly of a trans-border kind. But different legal requirements, for instance with regard to liability, make it difficult to supply this insurance cover using the freedom to provide services.[13]

The impact of European legislation for insurance, as for road haulage, has been very similar in Germany. In both cases the existing regulatory framework was completely changed. But if we look at economic activity the single insurance market is being built via mergers and acquisitions for which such a change in regulation would not be a precondition. In principle, it would have been feasible to regulate this sector according to domestic preferences, notwithstanding the fact that large insurers may profit from harmonization to realize economies of scale (int. 16, 22). It is highly improbable that companies would have relocated under a more company-friendly regulatory regime, to penetrate markets via home-country control (int. 6). Nevertheless, the European legislation went much further than in the example of road haulage and prohibited core elements of the former regulatory framework.

4.2 France

French insurance regulation had parallels with the German system. It focused on ex-ante control of insurance products. But as in the case of road haulage France had already enacted reforms before European liberalization. In 1986, the new government under Prime Minister Chirac lifted the control of tariffs (Balladur 1987: 421f.). With the insurance law of December 1989 a comprehensive reform was enacted that brought insurance regulation in line with banking regulation. Part of this reform was the ending of the ex-ante control of insurance conditions (Schedlbauer 1995: 149, 251). With this reform, the

French market was very liberal according to European standards. The third directives were implemented in January 1994 (Bellando *et al.* 1994: 11, 206).

It is interesting that, in spite of this starting position, France has had many more conflicts with the Commission about the transposition of the directives than Germany. I will briefly summarize these conflicts:

- France did not abolish the requirement to hand in a standardized information fact sheet (*fiche de commercialisation*). The Commission started infringement proceedings, which resulted in an ECJ ruling in May 2000 (C-296/98). Subsequently, the law was adapted as was the case with the contentious requirement that all insurance contracts needed to be in French (int. 14).
- A long drawn-out conflict concerns the French mutual benefit societies. At the request of the French government these had been included in the third directives so that the French mutuals would be able to profit from the single passport. But it proved to be extremely difficult to adapt the Code de la Mutualité to European requirements. As a result, there was a Court ruling in December 1999 (Case C-239/98), after which France still did not meet its obligations, so the Commission launched new infringement proceedings. At issue was the implementation of technical provisions and the solvency margin; the separation of insurance activities from social activities of the mutuals; the transfer of portfolios which was restricted to other mutuals; and re-insurance which was similarly restricted to other mutuals.[14] At the heart of the conflict was the exemption of the mutuals from the 7 per cent insurance tax, leading to complaints from the insurance association Fédération Française des Sociétiés d'Assurances (FFSA), which was eager to see that all competitive distortions would be eliminated. France has tried to adapt the laws up to the end of 2001; however, the decrees specifying the new rules will take longer (int. 14, 17).
- Another pending conflict deals with the mandatory no-claims bonus system in automobile insurance. The Commission sees its maintenance as a distortion of competition. But since France believes in the positive, accident-reducing effects of the system, it is risking another legal conflict with the Commission in this case (int. 14).

Thus, France and Germany followed opposite paths in the single insurance market. Germany started out with an old-fashioned regulatory system that was subsequently modernized partly under the pressure of the directives. France had a recently modernized regulatory framework, but it did not correspond in all details with the European provisions. Compared to Germany, these not very far-reaching changes took much longer to be enacted, despite the comparative strength of the French government. It is interesting that with the mutuals the

domestic conflict with the insurance association has complicated the adaptation significantly.[15] And with the bonus system it is obvious that different political goals, not a lack of capacity to act, are causing the problem.

The economic consequences are similar to the German market. The use of the freedom to deliver services is below 1 per cent (int. 14). Thus, as in Germany, in the French case the European directives mainly led to a change of national regulations, which is still ongoing.

5. CONCLUSION

What can we conclude about the domestic impact of mutual recognition, having discussed the examples of road haulage and insurance in Germany and France? First, decision-making in the Council deviates from legal doctrine. There are two sides to this point. First, there are significant differences in the way legal obligations are being translated. European insurance directives proved to be much more intrusive on the national regulatory framework than European regulations for road haulage. Rather than face the competition of regulatory systems which is part of mutual recognition, member states went further and forbade ex-ante control. Second, the difficulties of positive integration also pertain to minimum harmonization. This cannot be a surprise but it has not been noted in the literature. The example of insurance contract law and also the integration of road haulage show that one escape route out of the agreement problem is to simply agree to host-country control. Member states in the Council thus agree not to agree, and leave the realm of national regulations intact. In this way, member states reconstruct an area of *regulatory autonomy* for themselves. Thus, the single market shaped by the Council differs from the single market as shaped by the Commission and the ECJ, which allows for much fewer exceptions.

What follows from this for the impact of negative and positive integration? Negative integration via the Court works much as assumed. But if the Council cannot agree on minimum harmonization and reverts to host-country control, the consequences of regulatory competition through the freedom to provide services are mediated. How mutual recognition impacts on member states is thus influenced by these changes at the level of the Council. In road haulage, the German law against illegal employment and the many cases of French reregulation show how, under host-country control, national regulatory priorities can be pursued. These regulations cover foreigners and nationals alike. Moreover, the French working-time regulation offers evidence that higher regulations are also possible when only nationals are concerned. In insurance, the contract law and the general-good provisions allow member states to keep national regulatory goals. The fact that France and Germany surpass the minimum standards in the different directives shows that here also discrimination against national firms is possible.

In both sectors, the freedom to provide services is rarely used. Even in the large German market, where most of European cabotage takes place, it does

not amount to a noticeable share of total transport. But prices have come down significantly and there is a restructuring towards larger companies, offering logistic services related to transport. Questions of competitiveness remain a recurrent issue as some member states give in to lobbying for tax reductions, putting pressure on other member states.[16] But low levels of cabotage show that there have been advances in securing a level playing field.

The single market for insurance was even more of a failure. Although the Commission is engaged in further regulatory efforts, it is uncertain whether this will bring any significant alterations. With the exception of large industrial risks, insurance does not lend itself to the freedom to provide services. With the necessary long-term commitment, establishment is preferable and differing oversight regulations do not play such a significant role. The single market is shaped largely by 'traditional' forms of market expansion, namely mergers and acquisitions, for which harmonization of regulations is not a precondition.

Regulatory changes by the Council and the limited use of regulatory competition thus add up to a similar picture in these very different sectors. I have argued that it would be highly unlikely that these different sectors were both unique in their legal set-up and economic consequences. Also, the review of the single market by the Commission in the late 1990s showed that its macro-economic effects were disappointing (see Ziltener 2001). Most likely both sectors offer quite good examples of how the single market actually works: it is being used in as far as there is a demand for freedom of services, but in general markets remain largely national. Whether this picture would be different had the Council acted otherwise seems unlikely, but cannot be answered with certainty in the context of this study.

While the impact on the single market has been slight, the consequences for national markets and regulations have been significant. Here I argue that these are mediated by national institutional factors, and we find the expected differences between France and Germany. In Germany, where the regulation of insurance and road haulage markets had been highly stable, regulatory changes were immense. More than Germany, France has used the opportunity to reregulate. And since France had adapted its regulatory framework continuously, the changes required by the directives were less far-reaching. However, where changes are required, as in insurance with the bonus-malus or the mutuals, these are more difficult to achieve. Against the background of a polity that makes it easier to respond to changing actors' interests than the German one, required changes from the EU are less likely to be met by significant support of domestic actors than in Germany. The introduction of the freedom of services thus actually served to restructure domestic regulations and markets in both countries.

In sum, the single market seems more like a marginal affair. There is little demand for it. Its significant implications stem from the fact that, when building it, it was believed to be *substituting* rather than *complementing*

national markets. Thus, some national regulatory frameworks, as was shown with German road haulage and insurance, were thoroughly changed in preparing for it. Partly European policy demanded such far-reaching adaptations, partly regulations were changed to avoid a reverse discrimination of nationals. With hindsight one could say that, given the marginal relevance of the single market, national markets could be shaped more by national concerns; to an even greater extent than the wide application of host-country control already allows for.

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NOTES

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2 *Süddeutsche Zeitung*, 22 December 1992.
3 *Süddeutsche Zeitung*, 30 March 1990.
4 *Süddeutsche Zeitung*, 9 March 1993.
5 *Die Welt*, 9 August 1991.
6 It is arguable, of course, whether the road toll for heavy goods vehicles could not have been introduced, had the tactics been better. By introducing the toll and reducing the vehicle taxes in one law, the discrimination of hauliers from other member states predominated all assessments (*Süddeutsche Zeitung*, 30 May 1990).
7 *Deutsche Verkehrszeitung*, 17 July 2001.
8 Das Parlament, 7 August 1992, Bundesamt für Güterverkehr: Marktbeobachtung Güterverkehr. Jahresbericht 1999. März 2000, S. 6.
9 Bundesamt für Güterverkehr: Marktbeobachtung Güterverkehr. Sonderbericht: Die Auswirkungen der weiteren Liberalisierung des europäischen Verkehrsmarktes im Jahr 1998 auf die Unternehmen des gewerblichen Güterkraftverkehrs. August 1999, S. 3f.
10 Blick durch die Wirtschaft, 5 August 1992.
11 Information from interviews is referenced by 'int.' and a number.
12 The monopoly commission had called for a liberalization of insurance markets shortly before (Monopolkommission 1988), and in addition the deregulation commission had been instituted to analyse the scope for further deregulation, among others in insurance (Deregulierungskommission 1991).
13 *Financial Times*, 27 March 1996.
14 EC Commission: Insurance: CEC launches new infringement proceedings against France concerning mutual benefit companies. 11 May 2000.
15 *Les Echos*, 20 September 1994, S. 6, *Les Echos*, 26 October 1994, S. 4.
16 *Frankfurter Allgemeine*, 13 February 2001.

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