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Patterns of policy-making in European politics and the EU’s joint-decision trap

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Introduction

Over the 30 years since Fritz W. Scharpf developed his concept of the ‘joint-decision trap’ (Scharpf 1985; English version 1988), some conditions have significantly changed: the unanimity rule has been replaced by qualified majority voting in most issue areas, significantly lowering the legislative hurdles but still leaving a kind of super-majority requirement foreign to most national policy-making arenas (Selck 2009). At the same time, European solutions are considered indispensable in an ever-increasing number of policy areas and successive rounds of enlargement have increased the diversity of member states and their interests.

Therefore, a comparison of policy processes and outcomes across diverse EU policy areas would seem to serve a useful function, revealing the factors that influence continued ‘problem-solving gaps’ and, alternatively, the pathways that may circumvent or help parties to exit the trap. Based on the work of a team of renowned academic policy specialists (including Scharpf), this chapter will cover nine key EU policies.

The chapter will introduce the reader to the concept of the joint-decision trap and its refinements over time; offer a conceptualization of countervailing mechanisms; provide a condensed overview of the use of these mechanisms in nine EU policies, focusing on the most exciting developments in each area; discuss results in a comparative perspective; and draw conclusions regarding the EU’s still quite limited potential for problem-solving. This analysis explores a crucial aspect of overall patterns of policy-making in European politics.

Disarming the joint-decision trap?

In short, Fritz W. Scharpf’s 1988 analysis predicted systematically generated suboptimal policy outcomes for European integration. Drawing on experiences in the German federal system, he expected these sub-par outcomes to result from (1) the fact that member governments directly participate in central decisions, without a representation principle in place to filter out the immediate self-interests of the lower units during decision-taking at the higher level (Scharpf
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1988: 255), and (2) the requirements demanding unanimous or nearly unanimous decisions, formally or de facto (Scharpf 1988: 239, 254).

The parsimonious assumptions of the initial analysis seemed to capture the situation very well up until 1986. Only the profound changes brought about by the Single European Act (SEA) and its political aftermath provided clear evidence that there were indeed important EU-specific mechanisms at work that could (at least in some cases) unlock the trap. In later contributions, both Scharpf and others investigated certain new or revived powers of the European Commission, the European Parliament (EP) and the European Court of Justice (ECJ). However, other dynamizing facets of the European integration process have remained largely unexplored – in particular the effects of judicial law-making in the political arena (see Scharpf 2011: 227).

In any case, a systematic treatment of all the mechanisms with the potential to counter the joint-decision trap and a comparative empirical study of their relative success in EU policies has remained a research desideratum.

What can break stalemates in European integration? For one thing, a somewhat trivial phenomenon that is typically outside the realm of steering by EU actors: changes in the external environment or other unforeseeable events can bring about a change in actor preferences, allowing a stalemate to dissolve. This includes changes in government (e.g. after national elections – consider the effect of the British Labour government on EU social policy) as well as shocks or crises that may serve as facilitators of change (such as the mad cow epidemic). In terms of EU policy, changes can help decision-taking, but they may also further polarize the positions of member states.

More firmly under the control of EU institutions (most importantly, the Commission, which acts as a process manager and can promote win–win solutions) are strategies that affect not only the possibility of policy output but also its content. In his initial analysis, Scharpf (1988) outlined the conflict-minimizing redefinition of the bargaining issue, a tactic that must be taken into consideration as a log-rolling technique. As discussed in traditional bargaining theory, sequencing, sizing or watering down, granting exceptions or opt-outs, making side payments and/or accepting package deals can all help to forge agreement via a ‘false consensus’ that does not truly represent agreement on the original substantive issue at stake.

Additionally, some strategies can be summarized under the heading of ‘strategic constructivism’. As frequently highlighted by post-rationalist approaches to European integration, norms and perceptions may change during the process of intense and long-term interactions, either by chance or due to purposeful framing by EU actors, learning or the socialization of actors, the raising of expectations to generate second-round effects or the consequences of the perceived shadow of future cooperation. Various new modes of governance (most importantly, the ‘open method of cooperation’ based on voluntary adaptation triggered by common benchmarks and periodic reporting procedures) build on such potentials, as do consensus-oriented mechanisms such as working groups of ‘wise persons’.

However, even under the joint-decision trap model’s assumption of fixed preferences there are at least three different mechanisms that can unlock EU stalemate, permitting escape from the EU’s decision traps, even in the strictest sense:

- The manipulation of applicable decision rules typically comes in two forms, as the policy reports below will indicate: Treaty-base games (Rhodes 1995) modify the necessary quorum in the Council, e.g. qualified majority voting instead of unanimity. Arena shifting, by contrast, may involve different actors (e.g. interest groups such as the ‘social partners’) taking decisions instead of the Council of Ministers (horizontal arena shifting). This may also come in the form of delegation to (usually less politicized) committees (vertical shifts to levels below the Council of Ministers). It is not the governments who are decisive in such cases, but rather bureaucrats or experts.
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- **EU-induced changes in opportunity structures** (see Schmidt 2000) are still extremely under-researched. Veto players’ positions may be undermined by altering their perceptions of potential costs and benefits, e.g. via the strategic reinterpretation of the status quo of EU law or the threat of litigation (‘unsettling’). Alternatively, a change in opportunity structures can also occur through the strategic (non-)cooptation of powerful private actors or by strategically triggering a public discourse (‘pressurizing’). These changes do not bypass the politicians, who must still make up their minds, and they do not equate to a change in the policy’s legal situation (a stronger category in its own right).

- A change in opportunity structures can mean, for example, that a government will perceive its support for a specific position as potentially more costly than before because the Commission has activated opposing lobbies. Frequently, the Commission (e.g. in White Books) and the ECJ (in decisions on related aspects) represent the status quo of a policy issue in a specific manner. Legally, the matter may be less clear, but if this interpretation remains unchallenged it can become the standard interpretation in practice. Governments might redefine their positions on this basis, e.g. because they expect that their previous stance has no chance of being accepted. However, this evaluation of costs and benefits may be different for each of the veto players, and a change in preferences is in any case contingent.

- **Supranational hierarchical steering**, in the narrow sense, is the most powerful mechanism at the disposal of the EU, allowing actors to impose specific policies. Indeed, the actions of the ECJ (for specific issues, the Commission or the European Central Bank [ECB]) may literally bypass political decision-making, rendering governmental stalemate irrelevant.

In light of the ongoing battle between schools in the field of European integration theory, it should be noted that this list of mechanisms crosses the major divides. While none of the stereotypical idealizations of regional integration are advocated, assumptions from both the intergovernmentalist camp (such as the important role of governments and predefined interests) and the supranationalist literature (which focuses on the autonomous impact potential of the European Commission and the Court of Justice) are included. In addition, our approach covers explanatory variables from both the rationalist and constructivist paradigms. Ideological discrimination is neither necessary nor useful for the task at hand. Bargaining over pre-decided interests and learning and socialization can both play a role in the process of EU policy-making; determining whether one is more consequential than the other in any specific field of activity is a question for empirical research.

The following sections will examine individual EU policies, reviewing the mechanisms with the greatest impact in the area. From the plethora of fields affected by European integration, we include old (e.g. Common Agricultural Policy, CAP) as well as new (justice and home affairs), blatantly failing (financial regulation, energy policy) as well as relatively successful (environmental policy), internally focused (tax policy) as well as outward-looking (Common Foreign and Security Policy, CFSP) and, finally, single-market policy as well as social policy, which is probably the area furthest from market considerations.

### The joint-decision trap under various EU policies

**The paradigmatic case: EU agricultural policy**

The CAP featured prominently in Scharpf’s 1988 joint-decision trap article, but there have been a number of changes in the policy field since that time. The recent shift from price support to direct payments and the decoupling of most direct payments from production appear to be
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crucial improvements in terms of problem-solving, or at least in terms of the number of problems created as a consequence of EU policy.

A number of idiosyncracies make the field unusually thrilling. In particular, qualified majority voting was set out in the Treaties but was not put into practice from the mid-1960s to the mid-1980s. Besides the more obvious fact that no government had to fear being outvoted, this robbed the Commission of its main instruments (Roederer-Rynning 2011) for influencing policies under the ‘Community method’ (Dehousse 2011): its monopoly on drafting proposals and withdrawing them (should the Council distort the Commission’s intent) and its leverage (based on the Council’s need for unanimous agreement in order to modify a Commission proposal). This factor contributed to the decades-long dominance of the agricultural policy agenda by the (anticipated) governmental stances and strong interest groups: a secluded policy community managed to externalize the costs of the joint-decision trap’s detrimental consequences.

Only during the 1980s and 1990s was the Commission able to slowly reverse the Council’s consensus orientation and reclaim its leverage based on the above-mentioned institutional features of the Community method. Interestingly, EU enlargement facilitated this shift in power: more diverse farming philosophies and interests were represented, and the costs of opposing the Commission’s proposals rose (as this requires unanimity in the Council, which is an even more demanding constraint in a larger group). In view of the growing diversity of positions in the Council and its renewed possibilities for leverage, the Commission reportedly became more daring. Especially during reform-friendly presidencies when the Commission could team up in a tandem of promoters, controversial proposals were put on the agenda, and, slowly but surely, voting was introduced in the Council of Ministers of Agriculture. This ‘reverse Treaty-base game’ was a manipulation to finally apply the original voting rules. Indeed, the field of agriculture is nowadays one of three areas in which voting is relatively more common (see Hayes-Renshaw et al. 2006). Although this is perhaps less a truly instrumental use of voting than what Roederer-Rynning (2011) calls an ‘expressive-symbolic’ use, her analysis suggests that the return to voting and the shadow of the vote have had a significant impact.

Additional factors facilitating change in the CAP were the threat of bankruptcy and the deteriorating legitimacy of the policy, all skilfully used by the Commission to change the cost–benefit calculations of Council members. New actors were also invited into the arena, and traditional stakeholders were at times excluded from debates to reinforce unsettling and pressurizing potentials. In addition, the BSE (‘mad cow’) crisis and WTO negotiations were employed as external facilitators. The full menu of mechanisms outlined above can therefore be seen at work, except for outright supranational–hierarchical steering, which seems to be of comparatively minor importance (though not impossible) in this area.

The EU’s single-market policy

The so-called ‘common market’ based on the four freedoms (goods, services, capital and workers) embedded in the EEC Treaty should have been established in the 1960s. But even at this very core of the EU’s purpose, the joint-decision trap snapped shut until the single-market programme brought the EU back on track in the mid-1980s (for more detail, see Chapters 39 and 40).

This political relaunch was based on previous developments at the level of judicial policy-making: in its Cassis de Dijon doctrine, the ECJ established the mutual recognition of goods and services as a new method of de-fragmenting the market that would function even when EU-level harmonization was blocked in the Council. The Commission played an important role as well, reinforcing the priority of market freedoms vis-à-vis national regulations in its Communication explaining the judgement. Indeed, the interplay between judicial and legislative
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politics represents ‘the single most important exit’ (Schmidt 2011: 39) from the joint-decision trap in the vast array of EU activities related to market-making.

Stalemate amongst the Ministers can have differential default conditions, depending on the state of European integration in the field. When the ECJ is seized by the Commission, a member government, an individual (or company) or a national court to interpret a provision from either a Treaty or a secondary EU provision, case law results; this is then the default condition of political non-agreement (not simply domestic law, as is often assumed). Indeed, the ‘fuzziness’ of ECJ rulings seems to exacerbate the extreme positions in the Council because legal certainty can only be assured by going beyond the existing case law, e.g. by establishing an even more liberal regime (Schmidt 2011). In terms of managing exits from the joint-decision trap, we find that the Commission has additional leverage over the governments where it can argue that without a Council decision, unreliable and differentially applied case law will stand as the fallback rule, entailing potential costs for both governments and enterprises. Indeed, the cases studied by Schmidt (the Services Directive and the Regulation on mutual recognition for goods) are telling examples. The fact that the political debates concealed the predominant role of ECJ case law does not change the latter’s overwhelming impact.

Of all the policies, the internal market most clearly brings to the fore the EU’s ultimate mechanism for breaking a Council stalemate: supranational-hierarchical action. To be sure, this should not be taken to imply that the ‘softer’ mechanisms are insignificant (e.g. framing and reinterpretation via White Books, also mentioned by Schmidt).

The EU’s taxation policy

The joint-decision trap looms large in the field of taxation. Unanimity requirements play a greater role in this policy area than in the others; even under the Lisbon Treaty, they remain the rule rather than the exception. In addition, the area is highly politicized in the member states, whose governments take very antagonistic stances. Against this background, the explanation of successful exits from the trap is fascinating.

Philipp Genschel’s conclusion is that the joint-decision trap has not prevented the emergence of an EU tax policy, but it has shaped the policy by forcing it to pass through various specific exits. He argues that despite all the problematic preconditions due to the existence of the trap, the EU has been ‘less immune to Europeanization’ than most authors had expected (Genschel 2011) and has become more involved in harmonizing tax regulation issues than, for example, the federal government of the United States. The Council of Ministers has produced a growing stream of secondary tax legislation, particularly concerning indirect taxes; additionally, the ECJ has developed a large body of case law that increasingly constrains the member states, especially with respect to direct taxation. Indeed, Genschel argues that in this area the ECJ has most leverage over the governments where the trap has previously snapped shut at the level of the Council of Ministers. Where the Council has not (yet) agreed on common tax rules, the Court has repeatedly intervened, acting on the basis of an interpretation of the EU’s primary law (e.g. holding that the internal overrules certain domestic regulations).

However, the various mechanisms that have allowed the EU to exit tax policy decision traps cannot be regarded as solutions to all problem-solving gaps in this area. Circumventing the Council via the ECJ ‘bypass’, ‘nudging’ by the European Commission and the partial ‘self-extrication’ successes of the Council do not ‘unambiguously increase problem-solving capacity in taxation’ (Genschel 2011). There is a clear divide between the realms of direct and indirect taxation, with the ECJ playing a major role only in the former. Additionally, not all ‘problems’ have been solved, although practically all of the dynamizing mechanisms outlined above are in
use: market-making has been more successful than preventing tax competition or securing effective tax policy innovation – which fully meets the expectations of the joint-decision trap model.

**EU environmental policy**

Since the early days of European integration, many EU activities, including environmental policy, have served a double purpose (Holzinger 2011): establishing a barrier-free market (hence ‘negative’ integration, reducing restrictions, including some based on environmental concerns) and the correction of (environmental) externalities with market-shaping ‘positive’ integration. For the latter, unanimity requirements played a crucial role up until the Single European Act; after the mid-1980s, however, successive Treaty reforms have tended to facilitate environmental policy-making. Under the Lisbon Treaty, only tax-relevant matters and some issues related to the use of land and water resources require unanimity in the Council. Additionally, the EP has gradually grown in influence; it can now be considered a full veto player, typically promoting pro-environmentalist stances. Like the Commission, particularly DG Environment, the EP has expressed a strong interest in both positive and negative integration in the field. However, these facilitating factors in EU environmental policy-making have been counteracted by recent EU enlargements that have introduced many more environmental laggards.

Data concerning the number of acts approved in various phases reveal that far-reaching environmental policies have been adopted during all periods of European integration. With a rate of 0.71 per month before the Single European Act and 1.48 afterwards, the pace of adoption of legal acts has increased over time, and the number of policies adopted overall is significant (Holzinger 2011: 116). Another finding is that in this field of EU activity, positive and negative integration aspects are so tightly interwoven with each other (and within the individual legal acts) that the two analytical concepts cannot be empirically separated.

Considering these numbers and also the characteristics of the environmental policies adopted, at first glance the EU does not seem to be stuck in a joint-decision trap. This is supported by Holzinger’s lively discussion of the various exit strategies, with examples provided for practically all of them. However, this optimistic conclusion seems to hold only in institutional terms, not with respect to the substantive policies adopted. A closer inspection reveals that some formal escapes have come at the cost of substance, most importantly via a conflict-minimizing redefinition of the issues and the granting of exceptions or opt-outs as an ‘easy way out’ that does not necessarily effectively address the environmental policy problems at stake (Holzinger 2011: 126).

**EU financial market policy**

As in the area of environmental policy, in the realm of finance the introduction of qualified majority voting was not sufficient to realize a satisfactory policy output. We find that Scharpf’s categorization of the joint-decision trap’s decision-taking mode as ‘unanimous or nearly unanimous’ has been confirmed once again.

In the field of the single market in finance, non-decisions presented a real danger, since the speed of financial _de-facto_ integration has long overtaken that of regulatory integration; this has resulted in a blatant problem-solving gap, as highlighted by the current financial crisis. Finding consensus was in this case hindered by the enormous technicality and complexity of the field. At the same time, financial markets require comparatively more regulation than markets for goods, due to greater information asymmetries in the market and the elusive nature of the traded
Box 38.1 The Lamfalussy process

Named after the chair of the EU advisory committee that created it, Alexandre Lamfalussy, this innovation to strengthen the European regulatory and financial sector supervision framework was launched in 2001. It comprises activities at four levels:

- Framework legislation is adopted in the Council of Ministers and the European Parliament (Level 1).
- Detailed measures are developed in sector-specific committees composed of high-level representatives of the member states, with regulators advising on technical details (Level 2).
- Technical aspects are hammered out by representatives of national supervisory bodies, resolving conflicts between experts and ensuring cooperation as well as convergence (Level 3).
- Transposition to the national level is facilitated by the previous steps, as is enforcement by the EU Commission (Level 4).

products. Suboptimal regulation can have unexpectedly dangerous impacts that resonate throughout the entire economy. Against the background of these potential dangers and regulatory complexities, Zdenek Kudrna argues that it is no surprise that regulatory progress has been slower here than in the single market for goods (Kudrna 2009: 74).

A de-escalation of the effects of the joint-decision trap took place only recently, due to the combined effects of qualified majority voting and the innovative procedures of the Lamfalussy process established in 2001 (Kudrna 2011). This process includes substantial delegation to more technical levels of expertise in both the decision-making and implementation control phases. Kudrna compares the 1993 Investment Services Directive to the 2004 Market in Financial Instruments Directive, in what amounts to an almost experiment-like research design testing the new procedures. The payoff matrix is presented as a Battle of the Sexes game. Indeed, the two coalitions of governments (North versus South) replayed the same conflicts under two different procedures, producing qualitatively different legislative outcomes. The newer Directive, it is argued, no longer results in the tortured agreements of the previous regulation, but rather compromises that are formulated as detailed rules. Additionally, the Lamfalussy committees now oversee the Directive’s implementation, ensuring that the legislation is implemented consistently across all 27 member states (see Box 38.1).

These developments in the field of financial market regulation are encouraging, and the model of the Lamfalussy process could improve the EU’s capacity to develop regulatory responses to the current financial crisis (Kudrna 2011). However, to address the underlying causes of the turmoil, more intensely political reforms will be indispensable as well (see, e.g., Kudrna 2012).

EU social policy

Notwithstanding some persistent (and probably irresolvable) problem-solving gaps, ‘Social Europe’ has intermittently escaped the joint-decision trap (Martinsen and Falkner 2011). More secondary law and more ECJ-driven political decisions can be found in this policy area than might have been expected from an examination of the decision rules. There are numerous examples of opportunity structures being tampered with (e.g. via the nurturing and co-opting of strategic partners to pressurize governments – such as the European Trade Union movement,
which used the European Commission as a ‘midwife’) and of changes in decision rules under the joint-decision mode. The latter cases have included both the Treaty-base game, creatively using powers to adopt presumably ‘technical issues’ in the field of health and safety in the workplace, and arena shifting to the so-called social partners during the 1990s. Here, EU social policy represents a paradigmatic example of actors trying to change the decision mode under the EU’s political decision-making framework, though with declining success over time.

What seems most interesting in our context are the cases of supranational-hierarchical steering by the ECJ. Martinsen and Falkner present two examples of extreme cases in which the political positions of all governments have been overruled and ‘court-decision traps’ (Falkner 2011a) are evident. European social integration was deepened significantly as a result, although neither the creators of the Treaties, nor the Commission, nor the governments were willing to create a cross-border market for healthcare or open social-assistance-related benefits to exportability. However, the ECJ’s judgement can only be undone through Treaty reforms – a quite unlikely prospect7 these days, and probably even more unlikely in the future.

While it is striking that the Court should play such an important role in social policy-making, it should be noted that the supranational-hierarchical mode could have been activated much earlier to circumvent various EU decision traps in this field. Most obviously, the Commission should have taken action in fields exhibiting obvious shortcomings on the parts of the member states. It could have, for example, enforced gender equality via Treaty infringement proceedings; however, it chose not to do so for almost two decades. The case of social policy underlines the fact that the truly supranational-hierarchical modes of EU policy-making actually needed long time horizons to mature. Heated debates over potential enforcement by the Commission of EU equal-treatment provisions in connection to the French government’s deportation of Roma EU citizens have highlighted how politically sensitive such action still can be (BBC News 2010).

The EU’s energy policy

In this field, we find a variety of exit strategies from the joint-decision trap at work, combining hard and soft law (Pollak and Slominski 2011, with further references). Furthermore, the European Commission has profited from linking the energy liberalization agenda to the EU’s competition policy. The Commission’s strongest weapon in this regard has been the supranational-hierarchical mode; it also made extensive use of its own powers to enforce the EU’s anti-trust rules against ‘national champions’ such as EON, German Energy and RWE. This had both a direct and an indirect strategic objective: it undermined certain governments’ veto positions in the Council and also compelled them to finally drop their opposition to EU regulation intended to unbundle vertically integrated energy companies by separating the network infrastructure from services of production or supply. The Commission also submitted infringement proceedings to the ECJ to pressurize governments, arguing already in the early 1990s that monopolies in the import and export of energy violated EU competition law. Facing the threat of costly fines, the governments opted for the ‘lesser evil’ (Schmidt 2000: 39) and agreed to start the process of EU energy market liberalization. However, the Commission’s radical competition-oriented strategy cannot always rely on such support; since the late 1990s, the ECJ has increasingly accepted the public service arguments proposed by member states to restrict market opening.

In the face of these developments, the Commission has established various energy forums to gather expertise and sound out potential paths for progress with stakeholders (Pollak and Slominski 2011). The case study of the unbundling of vertically integrated energy companies shows how the Commission has made use of its outstanding role in information and expertise provision to advocate liberalization-oriented interpretations of EU law, including rulings by the
ECJ. Such approaches, advertised in various White Books and information notes, seem to be successful in many but not all instances. Generally speaking, Pollak and Slominski hold, progress in the field of energy market liberalization has crucially depended on the Commission’s role as the motor of European integration; it has exploited openings in the political opportunity structure to propel its market-making ambitions in what could be called ‘politics of stealth’ (Héritier 1999: 98).

Nonetheless, the problem-solving gap is far from being closed in the field of energy markets. Numerous problems can no longer be tackled at the national level, including energy security, interconnectivity and climate protection. Despite incremental progress over time and three major legislative packages (adopted in 1993, 2003 and 2009), the EU’s energy markets are still perceived as dysfunctional. Stalemates in this area stem from diverse energy policy interests among the EU member states (different energy mixes, various levels of import dependency) and from the culture of consensus arising from the perception of energy’s strategic importance, which impedes majority voting and Treaty-base games. Additionally, lowest-common-denominator solutions and vaguely worded regulations that are poorly implemented have characterized the policy output (Pollak and Slominski 2011).

Justice and home affairs (JHA)

This area offers near-laboratory conditions for studying EU decision traps, allowing us to witness shifts in problem-solving activities between modes of decision-making and between the (former) pillars of the EU Treaties. Quite obvious problem-solving gaps have been exposed by the opening of borders and growing pressures following the Balkan crises; for one thing, EU member states are no longer able to unilaterally govern immigration or, significantly, their asylum policies.

The EU managed to improve its response to certain challenges in this field by using the following strategies (Trauner 2011):

- A change in formal decision rules to the Community method during successive Treaty reforms. This was combined with opt-outs and special arrangements for reluctant governments in order to win their agreement. The fact that the decision rules were changed over time to include ever more issue areas under joint decision-making was a facilitating factor in itself, but it also allowed the ‘piggy-backing’ of further strategic moves.

- A specific form of a Treaty-base game that Florian Trauner (2011) refers to as ‘pillar-shifting’ was played in earlier phases of the policy’s development. The tactical move here involved shifting the legal bases of new legislative proposals from one (unanimity-requiring) Treaty basis within the Community method to another that allowed decision-taking by majority voting, as we have seen in other policy fields (environmental and social policies, for example). In the case of JHA, the legal bases for policy projects were strategically cherry-picked, moving from the intergovernmental EU pillar (prior to the Lisbon Treaty) to the realm of joint decision-making under the much more supranational ‘first pillar’.

- Additionally, a form of enhanced cooperation outside the EU’s legal framework was enabled by the Prüm process in the case of police data-sharing. With the support of Germany and Austria as the two main promoters, a minority of member states successfully demonstrated the usefulness of permitting partner states to access national databases. The obvious success – thousands of DNA profile matches with links to open cases – convinced the other member states to join, overcoming prior blockades against the policy under the EU’s joint decision-making mode. However, the shift to a less demanding mode of governance (Prüm was an
Box 38.2 Enhanced cooperation

The Treaty on European Union (Title IV) and the Treaty on the Functioning of the European Union (Title III) allow those countries of the Union that wish to work more closely together to do so within the framework of the Treaties, without the other members being involved. Enhanced cooperation must further the objectives of the Union. Examples are the fields of divorce law and patents. In early 2013, a financial transaction tax was also discussed under these auspices.

international Convention) was only possible because the current state of the EU’s home affairs integration does not yet pre-empt such initiatives, as would be the case in many other areas (see Box 38.2).

The EU’s Common Foreign and Security Policy (CFSP)

The literature agrees that unanimity requirements and intergovernmental procedures impinge on the EU’s capacity for action in the CFSP area. Indeed, Alecu de Flers, Chappell and Müller (2011) identify a considerable problem-solving gap and failures to act jointly; for example, during the conflict in Iraq and the debate over the recognition of Kosovo as a state the EU seemed to lack the capacity to make assertive decisions or to overcome dissent in crisis management situations. At the same time, European foreign policy cooperation has been ‘considerably more successful than many analysts had expected’ (Alecu de Flers et al. 2011: 163). Indeed, this output is far from negligible, with more than 1,000 adopted acts (strategies, common positions, joint actions) and a considerable number of civilian and military missions.

The main factors that seem to explain progress in this EU policy area are the long-term effects of the institutionalization of cooperation and the ensuing emergence of common norms. Observers have described processes of socialization resulting from repeated interactions among foreign policy-makers and from consensus-building practices, particularly in informal working groups and de-politicized committees (where the ‘coordination reflex’ is a recognized effect). At times, the consensus culture in a common normative environment is seen to promote switching from bargaining to arguing as the relevant interaction mode (Alecu de Flers et al. 2011); the shadow of future negotiations also looms large. Reputation-building is therefore essential, as is keeping one’s promises. In the absence of the short-term, sweeping mechanisms that tend to dominate in other policy areas, here we can identify the more ‘constructivist’ mechanisms of European integration.

Alecu de Flers et al. (2011) present a case study outlining what is in principle a very unlikely case of successful cooperation: the EU’s mission to Congo. Germany supported the Congo mission precisely because it attached an intrinsic value to the survival and sustainability of CFSP/ESDP (European Security and Defence Policy). This fits the pattern of linking institutional and material interests in EU politics, as highlighted by Héritier (1999), among others. In contrast, Poland was motivated by the desire to secure its partners’ good will and therefore sought to prove its worth as a constructive partner. These aspects highlight once again that being a ‘member state’ is different from simply being a ‘nation state’ (Sbragia 1994).

Finally, an aspect that connects the foreign policy realm to that of justice and home affairs is the fact that compromises are in part facilitated by the possibility of the cooperation of core
states. All Council members must agree to a mission, but not all must actively participate – a nuance that has facilitated compromise.

A cross-policy perspective

The policy overviews reveal numerous examples of innovative breakthrough and long-term incremental reform. Situations demonstrating insufficient problem-solving capacities are frequent; however, the determining factor of EU policy dynamism seems to be less the absence of mechanisms to exit the joint-decision trap than their specific availability in various fields and eras, as well as the degree of steering potential for politicians and bureaucrats. These will be examined in the next section, following a more detailed comparative discussion.

The comparison of this broad swath of EU policies, including classic ‘intergovernmental’ fields such as CFSP and EU home affairs, exposes significant differences between various areas of EU cooperation with regard to potential exits from decision traps.9

To be sure, the most general mechanisms are universal in nature: consensus-promoting mechanisms that involve strategically redefining or down-sizing policy projects, slowly changing norms and perceptions, and innovation triggered by external events (such as changes in government or global developments or crises). It seems plausible to expect that such occurrences will be relatively equally distributed across EU policies, although the changes they effect are more apparent in fields in which the supranational instruments are not dominant (most importantly, in CFSP).

A number of the mechanisms based on the Commission’s (or other EU actors’) specific potential as a process manager are also universally applicable across the range of EU policies. In all fields of EU activity, there seem to be efforts to realize arena-shifting or delegation to lower-level, less intensely politicized committees – the only mechanism for exit from EU decision traps, in the narrow sense, found even in the CFSP. Additionally, the Commission can always try to strategically interpret provisions and activate interest groups, although it seems to pursue this less actively in ‘younger’ fields of cooperation, such as justice and home affairs.

However, mechanisms to unlock joint-decision traps even against the will of one or several governments are not (yet) available in all fields of EU cooperation. The further an area is from the so-called Community method (Dehousse 2011), in which the EU institutions (Commission, EP, ECJ) can wield their specific traditional powers, the more unlikely exit from a decision trap seems to be. Outside these areas, the mechanisms with the most impact are found in fields comparatively more closely connected to the former ‘first pillar’. In fact, three criteria seem to be useful predictors of exit potential from the joint-decision trap: the applicability of the Community method, the extent of powers the EU has been granted in the field (explicit, but also implied, powers) and the proximity and link-up potential to the market-making activities of the EU.

The supranational-hierarchical mode is exclusively available under the ‘communitarized’ fields of EU activity, where ECJ judgements can at times make governmental agreement irrelevant by simply bypassing the Council. By contrast, changes in decision rules have a somewhat wider scope, but are easier where non-unanimous decisions are allowed at least in proximity to the decision in question, such that link-ups may be done (within-pillar; see, e.g., social and environmental policy). In this vein, linking up to the Community method has even been possible between pillars, as discussed above in the case of justice and home affairs, an area with very mixed modes of governance under recent EU Treaties. However, this strategy is not yet common in CFSP.

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Finally, the unsettling of perceptions regarding opportunity structures is, in principle, also possible where the Treaties still allow comparatively less room for manoeuvre overall. However, prospects are significantly better where the ECJ has jurisdiction and a history of intervention, and where linking up to the internal market is straightforward (consider energy and environmental policy, discussed above).

In fact, a kind of ‘Matthew’s effect’ seems to be at work: where more supranational procedures are well established within any given EU policy, there is comparatively greater potential for linking up and threatening. Where the Treaties provide rather less room for manoeuvre, fewer dynamics can be purposefully activated in day-to-day politics. However, the use of such potentials is affected not only by legal circumstances but also by the presence of a culture of consensus and strategic considerations. The case of justice and home affairs (see Trauner 2011) indicates that the Commission tends to avoid confrontation with the Council in policies still considered to be ‘developing’; agricultural policy is somewhat of a surprise in that despite the proximity to ‘market-making’ of this core area of national interest and EU spending, the supranational-hierarchical mechanisms have been comparatively unimportant (see Roederer-Rynning 2011).

Conclusions

The focus of this chapter has been the patterns of European policy-making. How do institutional dynamics play out in different policy fields? This chapter has targeted the interactions of member-state governments and EU institutions in highly diverse fields of action. The comparative dimensions investigated include policies as well as their development over time. All in all, the resulting picture includes some good news, some less good news and some truly bad news for the process of European integration, and consequently for patterns of policy-making in European politics in general.

The good news is that the EU has a repertoire of mechanisms to cope with the dangers of the joint-decision trap. These opportunities may be overlooked in the short run, resulting in expectations the EU’s (quasi-)unanimity requirements will combine with the structurally fixed gatekeeping role of the governments to create a one-way street leading towards stalemate and decision gaps. The long-term perspective and the cross-comparative design of the research presented here reveal that the available instruments may actually promote policy dynamics more systematically than one might expect. The mechanisms outlined above vary in their degrees of effectiveness and in their time horizons, and they are distributed unequally across the EU’s areas of activity. However, they can actually unlock decision traps, as the numerous examples presented have shown.

The less good news is that escaping the joint-decision trap via political agreement or supranational-hierarchical steering is no panacea in terms of policy-making. In fact, a number of dangers are associated with the use of the various exit strategies: for one thing, exit or consensus-building mechanisms are often outrageously time-consuming. Although real exits from joint-decision traps have occurred in some policy fields and some outputs are of high quality, it seems that decisions have frequently been possible only via consensus-promoting techniques that have downgraded the output. It also should be emphasized that, at times, problem-solving at the EU level may actually further restrict the individual states’ capacities to intervene within their borders. This represents a kind of self-reinforcing process whereby less than satisfactory EU-level solutions exacerbate national-level problems. ‘Exits’ via jurisprudence may additionally lead to incomplete solutions lacking legal certainty. In particular, where the supranational-hierarchical mode is introduced (which is unequally probable across different subject areas, striking down
national rules is easier and more likely as an exit route from the trap than the creation of a supranational regime. Finally, specific situations of escape from the joint-decision trap may even strengthen the trap: for example, bypassing a joint-decision trap via the ECJ can under certain conditions trigger what may be the worst pitfall from the perspective of governments and all other political EU actors: a ‘Court-decision trap’ (Falkner 2011a).

Finally, the really bad news is that the availability of effective mechanisms does not necessarily correspond to the degree of problem pressure. Where the exit mechanisms perform well and achieve their greatest potentials (with the intervention of the supranational hierarchical mode) has no relation to the severity of the political decision gaps. These dynamics are frequently ungovernable, at least for politicians, and several of the exit routes examined here are not under the control of the usual political decision-takers. Most importantly, this is the case for circumventions of the Council of Ministers via the ECJ, whose agenda is, at least in part, outside any political or even public control.

Be that as it may, simply condemning the EU would be an inappropriate response. As explained by the father of the joint-decision trap model, breaking up the (quasi-)federalist system is not a viable option ‘to the extent that joint policies are addressing, however inadequately, real problems which could not be handled at the level of member governments’ because ‘these problems would simply reassert themselves if the joint-policy system were to be dismantled’ (Scharpf 1988: 270). Condemning the discipline of political science Europeanists would be of little use either. We should admit that when our expectations of stalemate were not fulfilled, we may have been somewhat blinded by excitement over the detection of escape mechanisms. However, as our study has revealed, these mechanisms may be more interesting in terms of theory than helpful in terms of political practice.

Notes

1 Classifying the EU’s policy output is a truly difficult task; therefore, the research discussed here was done by academics quite specialized in each field and considered a number of yardsticks: the conclusions of the academic literature, the judgements of policy experts, programmatic documents of the EU institutions and, finally (where feasible), a comparison with federal states’ output in the field.

2 This chapter is based on the insights of an international, collaborative project (Falkner 2011b) under the auspices of the Institute for European Integration Research (eif.univie.ac.at). Many thanks to Fritz W. Scharpf for his support throughout the project and to all participants, in particular Susanne K. Schmidt, Miriam Hartlapp and Zdenek Kudrna, for feedback. I am also indebted to the discussants in our Round Table and in the two ensuing panels at the European Consortium for Political Research’s Pan-European Conference in Oporto, June 2010: Mark A. Pollack, Nicolas Jabko, Klaus Goetz and Michael Blauberger.


4 Hartlapp (2011) offers an innovative analysis of how EU coordination across sectors can both prevent and cement decision traps.

5 ‘Socialization’ involves changes in world views and hence the basic evaluative criteria of policy-making actors. In other words, socialization is a kind of ‘normative learning’, whereas simple ‘learning’ concerns causal effects only, not perceptions of self-interest.

6 Thanks to Amy Verdun for reminding me of this.

7 A recent paper by Sweet and Brunell (2011: 2) even argues that ‘the ECJ’s major rulings on the EU treaties are effectively insulated from reversal on the part of the Member States’.

8 This pattern can also be found in social policy (Martinsen and Falkner 2011), where the corporatist decision mode was productive as long as institutional self-interests of the ‘social partners’ existed and successes were required to uphold the procedures.
However, in overall terms our findings corroborate Héritier’s (1999: 96) assertion that most mechanisms can be found in most areas.

The biblical idea that more will be given to those that already have more; that is, the rich get richer and the poor get poorer.

Such jurisprudence tends to specify individual aspects of EU law but leaves other (potentially conflicting) provisions in place. As a result, the new legal status quo is frequently equivocal and features an unclear scope of application; it is thus prone to be subject to further revision later (Schmidt 2011). This lack of legal certainty can lead to uneven implementation and distortions in competition or equality throughout the EU.

Even if all governments unanimously agree, the EU actors could in such a case not revise the policy set by the EU’s judges because this would require member state ratification. At the same time, a Treaty reform may be both inappropriate and impractical.

Bibliography


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