



Project no. CIT1-CT-2004-506392

## **NEWGOV**

### **New Modes of Governance**

Integrated Project  
Priority 7 – Citizens and Governance in the Knowledge-based Society

**Beyond compliance – the Europeanization of Member states through negative integration and legal uncertainty**  
reference number: 13/D06

Due date of deliverable: July 2006  
Actual submission date: 24 July 2006

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:  
**Max Planck Institute for the Study of Societies, Susanne K. Schmidt**

<b>Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)</b>		
<b>Dissemination Level</b>		
<b>PU</b>	Public	X
<b>PP</b>	Restricted to other programme participants (including the Commission Services)	
<b>RE</b>	Restricted to a group specified by the consortium (including the Commission Services)	
<b>CO</b>	Confidential, only for members of the consortium (including the Commission Services)	

## Summary

Europeanization, that is the domestic impact of European integration on Member states, is rightly attracting increasing attention, given the extent to which European integration determines domestic policies. However, the debate on Europeanization focuses predominantly on the conditions for successful compliance with European secondary law. This article argues that this focus captures insufficiently the implications of Member states being part of a multi-level system. By focusing only on measures of positive integration (market-shaping), and assuming that the nature of these commitments is precise, it is largely overlooked how negative integration (market-making) and legal uncertainty about the implications of European law constrains domestic policy-making.

Article submitted to the *Journal of Comparative Policy Analysis* special issue on „The Europeanization of Public Policies in Comparative Perspective”, edited by C. Radaelli and S. Saugruger.

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## I. Introduction<sup>1</sup>

Research on the European Union is focusing increasingly on the impact of integration on the Member states (Héritier 1997, Schmidt 1997, Knill and Lenschow 1998, Börzel and Risse 2003). Because of the depth of European integration, and its impact on the policies, politics, and politics of Member states, these studies of Europeanization cover a wide territory, and attempts to arrive at a unified approach face resulting difficulties. In this article, I argue that these attempts remain insufficient as several typologies of Europeanization effects (Knill and Lehmkuhl 2002, Bulmer and Radaelli 2005, Knill and Lenschow 2005) focus too much on the kind of EU influence. Thereby they neglect what can be termed the nature of commitments, that is the clearness of EU obligations.

As I will show, the extent of EU obligations is often far from clear. There is significant legal uncertainty as to the exact domestic implications of European law, and this legal uncertainty has important consequences for Europeanization: Member states have to devise domestic policies under legal uncertainty; the latter serves some domestic actors as an opportunity structure to pursue their private interests; and Member states react differently to legal uncertainty leading to uneven Europeanization effects across the Union.

In this article I briefly review the Europeanization literature and discuss, how the differentiation into positive and negative integration has been reflected so far. Building on Scharpf (1999), European integration research has shown that the dynamics of European integration cannot be understood by focussing only on positive measures of market-shaping, normally brought about by the Commission, Council, and European Parliament acting together in the legislative process. Rather, negative integration of market-making figures prominently through far-reaching provisions of market freedoms and competition law in the Treaty. Although the distinction into positive and negative integration is well established in European integration studies and part of most taxonomies of Europeanization effects, a bias exists in Europeanization research in favor of implementation studies (Töller 2004: 1-2). To overcome it, I differentiate between two dimensions with regard to the institutional setting: One axis reflects the continuum between positive measures to implement and/or negative measures to abolish. This is the *dimension on the kind of EU influence*. The second axis refers to the *nature of commitment*, that is the specificity of obligations, and the fact that the demands on the domestic systems of Member states are only partly unambiguous. Legal uncertainty as to the implications of European law exists for positive and negative measures alike. While the former is often the result of difficult compromises in the Council and the European Parliament, the latter relies on interpretations of the European Court of Justice (ECJ) of primary law. Next to the realm of relatively clear positive and negative demands thus lies a large area of legally uncertain requirements for the Member states, often subject to attempts by supranational actors – the Commission and the ECJ – to push integration forward (Schmidt 2004).

Because legal uncertainty serves as an opportunity structure for domestic actors, Europeanization effects relate not only to the European political agenda but also to domestic policy-making, which now takes place within the constraints and opportunities of European law. By taking a more comprehensive approach I take arguments about a multi-level system seriously. As Member states are part of the European multi-level polity, the latter's implications refer

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<sup>1</sup> For this article I have profited from my participation in the Integrated Project "New Modes of Governance" (see the website [www.eu-newgov.org](http://www.eu-newgov.org)). Funding provided by the 6. Framework programme of the European Union (Contract No CIT1-CT-2004-506392) is gratefully acknowledged. Annette Töller, Claudio Radaelli, Wendy van den Nouland, and Michael Blauberger gave helpful comments on previous drafts. I would also like to thank the participants of the workshop in Grenoble in March 2006 for their valuable feedback.

not only to the implementation of supranational law but also to the conditions of remaining national actions.

After developing my argument, I give empirical examples for different effects of legal uncertainty. Because of my underlying argument that the Europeanization literature – in fact, comparable to integration studies – has focused disproportionately on measures of positive integration, I demonstrate the relevance of measures of negative integration as well as of legal uncertainty. In order to pursue a comparative perspective, I include examples from several policy fields, and from two Member states, France and Germany. While there are systematic reasons for choosing these two countries, which allow explaining their different reactions institutionally, the choice of cases for showing the impact of negative integration and legal uncertainty is oriented on demonstrating their relevance and the range of different implications.

## II. Europeanization resulting from positive and negative integration

There are several different definitions of Europeanization. While early definitions included the perspective of European integration, that is “the creation of authoritative European rules” (Risse, Green Cowles and Caporaso 2001: 3), in the meantime, a consensus seems to be emerging to restrict Europeanization to “the impact that European policies in particular and European integration in general have on national polities, politics and policies” (Töller 2004: 1, cf. also Eising 2003, Kohler-Koch 2000).

If we take this definition, it is striking that researchers often equate the consequences of membership with the implementation of secondary law (Töller 2004: 2). But the effects of membership are doubtlessly more diverse. A first indication for this is given by the important distinction between positive and negative integration (Scharpf 1999: 45). If integration takes these two pathways, it cannot be possible that the implications of membership relate only to the implementation of secondary law. Yet, the impact of negative integration is not being analyzed much in the Europeanization literature.

The distinction between positive and negative integration is important because positive decisions in the Council, for instance regarding the regulation of markets, face high agreement costs of qualified majority or unanimous voting in the Council, along with varying degrees of involving the European Parliament. Measures of negative integration, in contrast, are supported by the market freedoms and competition law laid down in the Treaty. They can be realized by the Commission and the Court and do not require further decisions of the Council or Parliament. Negative integration, moreover, is not restricted to facilitating cross-border exchange but may threaten domestic institutions:

„But, as was true of dental care abroad, retail price maintenance for books, public transport, or publicly owned banks, the only thing that stands between the Scandinavian welfare state and the market is not a vote in the Council of Ministers or in the European Parliament, but merely the initiation of infringement proceedings by the Commission or legal action by potential private competitors before a national court that is then referred to the European Court of Justice for a preliminary opinion. In other words, it may happen any day. Once the issue reaches the ECJ, the outcome is at best uncertain” (Scharpf 2002: 657).

When discussing positive and negative integration, it is important to keep in mind that this distinction is ambiguous because of its double reference: Primarily, it refers to the thrust of policies (whether they are market-shaping or market-making). In addition, it also refers to

their emergence, either in the legislative process or in the decisions and case law of the Commission and the ECJ. Secondary law, doubtlessly, may include market-shaping and -making. Actions of the Commission and the ECJ may similarly realize both. However, primary law is much stronger on market-making than on market-shaping, due to the far-reaching provisions on market freedoms and competition law.

Knill and Lehmkuhl took up the distinction for Europeanization studies (Knill and Lehmkuhl 1999). Establishing different types of Europeanization mechanisms, they argued that for the implementation of positive measures the question of institutional fit between European requirements and domestic institutions was dominant. For negative measures, in contrast, demands on the domestic systems were less precise so that it would be more relevant, in what way domestic actors were responding to the opportunity structure resulting from negative integration (Knill and Lehmkuhl 1999: 2, 8). While I will expand on this idea of negative integration as presenting an opportunity structure in this article, I cannot agree with Knill and Lehmkuhl completely. As I have argued elsewhere, it is not plausible to expect the implementation of positive measures to be more difficult than that of negative measures if one regards their genesis: Whereas Member states cooperate in the definition of positive measures, and often manage to include several options into directives, they are at most only informally part of negative integration decisions, thus it is at least as plausible to expect the very opposite (Schmidt 2003).

In a more recent article, Knill and Lenschow (2005) have taken up the distinction again. Analyzing the potential for cross-national policy convergence they distinguish three different mechanisms – coercion, competition, and communication. Coercion thereby corresponds to positive integration while competition relates to negative integration. Communication, finally, relates to new modes of governance such as the open method of coordination. This differentiation seems to be gaining increasing support (cf. Bulmer and Radaelli 2005).

As is apparent, the distinction between positive and negative integration is reflected in the Europeanization literature. Nevertheless, it has not yet contributed to a comprehensive understanding of Europeanization processes as implementation studies dominate the field (Börzel 2001, Mbaye 2001). Only Töller (2004) has recently argued similarly in favor of broadening the perspective to asking how domestic policy-making is changed by integrating into a multi-level setting.

### **III. Towards a more comprehensive understanding of the domestic impact of EU membership**

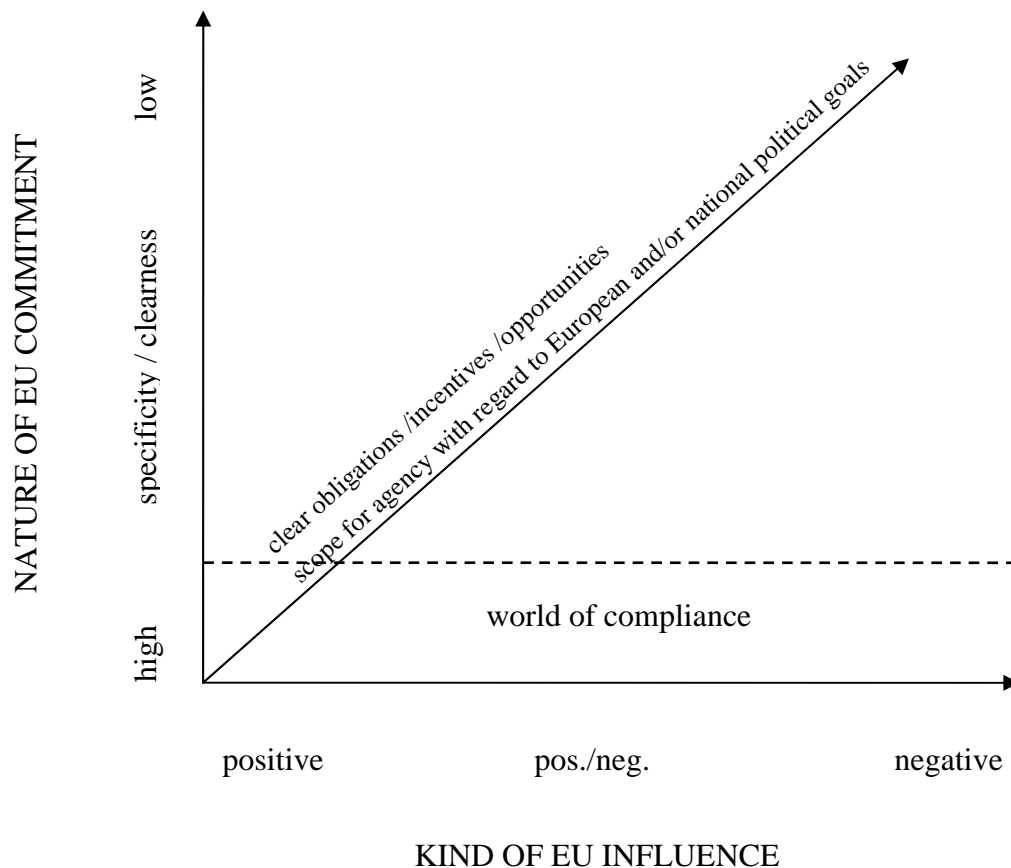
In order to take account of the range of different Europeanization effects, I propose to focus on institutional effects and actor strategies following an actor-centred institutionalist approach (Scharpf 1997). The institutional setting is characterized by two dimensions. One is the continuum between positive and negative integration measures, describing the kind of EU influence. These are the institutional effects flowing from the European level to the Member states, where obligations either to enact or to abolish certain measures are at the two ends of the continuum, while most measures combine positive and negative demands.

As I argue, these EU influences are only in part clear. While some requirements are clearly set and easy to monitor (for example, a certain extent of parental leave), others are much less certain (for example, Does the directive on certain aspects of working time prohibit Member states from demanding off EU-foreigners posting workers compliance with stricter domestic vacation rules?). This is captured by the second dimension, describing the specificity or clearness of the EU influence, which takes into account that there is a large area of legal uncer-

tainty. European law is in constant flux, being interpreted by the European Commission and the European Court of Justice. As the Treaty includes only general statements, and European secondary law is full of compromises, there are many ways in which European law can be interpreted in the context of the divergent domestic settings of Member states (cf. Joerges 2005: 20). As corporate actors interested in securing and extending their autonomy and responsibility, the Commission and the ECJ can be expected to further European integration; and the Treaty also obliges them to act in this way. The treaty is being interpreted by the Court on a case by case basis; moreover much of its case law is based on preliminary proceedings from national courts leading to rulings aimed at very specific situations, with uncertain implications for other settings (Hatzopoulos 2002: 728). Often there is uncertainty in how far a policy question may still be regulated at the national level. The remaining reach of national competencies is contentious, and Member states and supranational institutions may well diverge in their judgment of the situation. Given that the division of competencies between the national and the European level is subject to change in the course of integration, legal uncertainty about the remaining competencies results at the national level. As I will show, legal uncertainty also implies that obligations are likely to be interpreted differently in different Member states.

This institutional setting has specific effects on actor strategies. On the one hand, there are clear European obligations. On the other hand, the EU context provides incentives and serves as an opportunity structure for actors – at the national and at the European level. The Commission as well as the ECJ may use the leeway provided by legal uncertainty to strengthen their role as corporate actors. At the national level actors may further their domestic political goals with the help of European law.

In the following, I show in how far European integration subjects Member states to a situation of legal uncertainty, where the precise impact of European obligations is often far from clear. I take the term “legal uncertainty” to point out that the possibility to predict law is missing, which is one central element of legal certainty. Thus, I do not focus on other elements that equally contribute to legal certainty, such as procedural safeguards.

**Figure 1: Different Europeanization Effects**

Having demonstrated the relevance of the dimension of the nature of EU commitments, I show how the EU serves as an opportunity structure for domestic private and public actors. I will close my analysis by giving an institutionalist explanation why the existing uncertainty on the implications of European law leads to very different national responses. Given that most work focuses on the implementation of requirements and compliance with positive integration, I omit this Europeanization effect, despite its obvious relevance.

The empirical examples I use come from different policy areas: the posting of workers, road transport, insurance, public banks and the utilities (electricity, gas); they are thus all domestically highly regulated sectors, which increasingly conflict with the demands of European competition law and/or the basic freedoms (negative integration). I analyze cases from two countries: France and Germany. They were chosen as most different cases given the structure of their polity (with view to many veto points in the German system compared to a more effective policy leadership in France), while having similarly highly regulated economies, providing for a comparable influence of negative integration. This allows not only to show that Member states react differently to legal uncertainty but also to give a first explanation for it.

#### **IV. Domestic policy-making under legal uncertainty**

Legal uncertainty, I argue, plays a large role in European integration. Given the significant speed and extent of institutional change needed for integration, legal uncertainty is unavoidable as actors adapt to a rapidly changing institutional setting (Streck and Thelen 2005) that is moreover a multi-level one, where national and European rules are intertwined. It is not

surprising that Member-state actors interpret their remaining authority to devise rules in different ways, leading to very different responses to Europeanization as I will show in the following. When defining domestic policies, Member states now have to take into account not only actors' interests and institutional rules at the national level but also European law.

#### **IV.1 Different reactions to legal uncertainty in France and Germany**

In the following, I analyze two cases – road haulage liberalization and the posting of workers – comparatively, showing how France and Germany reacted differently to legal uncertainty. Finally, I show that not only different reactions to legal uncertainty are possible but that legal uncertainty may also entice Member states to use escape routes, which Annette Töller (2004) terms evasion.

##### **IV.1.1 Road haulage**

The implications of the freedom of services for road haulage are a good example for legal uncertainty, as this is a policy field traditionally highly regulated at the national level (Héritier et al. 2001). Pressure from the European Commission as well as from some Member states interested in liberalization like the Netherlands, and rulings of the ECJ which demanded full realization of the freedom of services in the transport sector, led to an incremental liberalization of cabotage services (that is the possibility that EU-foreigners provide domestic transport) between 1990 and 1998. In parallel to this process, far-reaching national reforms were enacted in countries like Germany, which had adhered to strict regulatory regimes. Contingents for market access and regulated tariffs were abolished (see below). A continuation of these national regulations, it was feared, would have resulted in a reverse discrimination of nationals: Market access would be denied to some nationals while EU-foreigners could be present on the market, due to the liberalization of cabotage.

Thus, in Germany, the liberalization of cabotage was perceived as a beginning regime competition, where everyone would be allowed to provide transport services under any rules. However, the Treaty's freedom of services is restricted to temporary activities. Therefore, cabotage could not result in an equivalent presence of EU-foreigners and nationals on the market, but interestingly this was neither discussed at the national nor at the European level. Indicative is a case which reached the ECJ in 2000 (C-115/00, 2.7.2002). A transport company, being established in Luxembourg but using the cabotage freedom to provide its services exclusively in Germany, had been forced by the German authorities to pay vehicle taxes in Germany. In its ruling, the ECJ objected to this duplication of requirements as forcing the company into having an establishment in Germany. At the same time, it became clear, that Germany could have well acted on the grounds of an abuse of the freedom of services, since cabotage services were provided on a permanent basis.

In addition to being restricted to temporary activities, companies have to obey several of the host country's rules, like driving and resting times, weights and sizes, and contract conditions (Basedow and Dolfen 1998: Nr. 176). Moreover, a Belgian company, for instance, that seeks to provide transport services on the French market has to be insured according to the French rules for liability insurance next to naming a representative responsible for collecting value-added taxes. Given these restrictions, it is not surprising that cabotage services made up only 0.76 per cent of total road transport in 2001. In France and Germany, where most of road haulage takes place, it made up 1.6 per cent and 1.1 per cent of domestic road transport respectively. And even in Luxembourg and Belgium with the largest share of cabotage in total

domestic road transport in the EU, the figures reached only 3.2 per cent and 2.9 per cent respectively.<sup>2</sup>

Member states exhibit surprising differences in their awareness of the precise impact of European transport policy, which is shown by the interesting contrast France provides to Germany (Douillet/Lehmkuhl 2001). Since the 1990s France re-regulated road haulage in order to cope with problems that arose after the domestic liberalization of these services, antedating European reforms. Thus, conditions for access to the profession were heightened, and employers and senders were made liable for the transport company's compliance with social and security rules. Working hours were shortened and tariff dumping was prohibited. Interestingly, re-regulation was *not* accompanied by a discussion about a possible reverse discrimination of nationals despite the single market. Different to their German counterparts, French authorities stress the temporary nature of the freedom to provide services (interview Direction des transports terrestres, 7.11.2001). If enforced, this reduces the effects of regime competition considerably.

The example shows well the existing *legal uncertainty* among the Member states about the reach of the freedom of services. Since Member states differ in their judgment as to the scope of their remaining possibilities to regulate EU-foreigners present on their markets, they also judge the economic consequences of the single market and the possible extent of regime competition differently. In as far as they overstate the possibility of EU-foreigners to be active on the domestic market while falling under a different regulatory regime, they also dramatize the odds that domestic regulation can prove to be a disadvantage for domestic companies.<sup>3</sup>

#### IV.1.2 The posting of workers

The posting of workers from low-wage countries – mainly the United Kingdom and Portugal – became a problem for the construction industries of high-wage Member states in the 1990s. This was particularly true for Germany with its high wages and central geographical location; at the time there was moreover a boom for construction services due to unification. Construction services may fall under the freedom to provide services, since the latter is not restricted to the tertiary sector but aims at temporary cross-border activities (Hatzopoulos 2000). Construction work is particularly interesting as it is a highly labor-intensive activity, making wage differentials relevant. Moreover, the restriction at temporary activities of the services freedom is irrelevant, given that construction sites are also temporary.

In the late 1980s France had required work permits from Portuguese workers being posted to France. In the case *Rush Portuguesa* (C-113/89), the ECJ prohibited this as a restriction of the freedom to provide services, arguing that the freedom of labor, which would have allowed such temporary measures, did not apply. However, Member states could evoke the general interest for exemptions from the services freedom and apply their national labor law and wages also to temporary workers (Eichhorst 2000: 149, 137). Following this judgment, France was the first to enact a law for posted workers, applying French labor law and wages instead of those of the home country.

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<sup>2</sup> See Eurostat, *Statistiques en bref, Transport, Theme 7-7/2003*. Josefina Oberhausen : Le cabotage routier de 1999 à 2001. [http://europa.eu.int/comm/eurostat/Public/datashop/print-product/FR?catalogue=Eurostat&product=KS-NZ-03-007-\\_\\_-N-FR&mode=download](http://europa.eu.int/comm/eurostat/Public/datashop/print-product/FR?catalogue=Eurostat&product=KS-NZ-03-007-__-N-FR&mode=download). No newer figures are available.

<sup>3</sup> Wrong prognoses about the take-up of the freedom to provide services have to be distinguished from this. There is a difference between wrong forecasts and a wrong judgment about legal positions awarded by the Treaty.

At the European level, the Commission started work on a common directive for posted workers in 1991, to follow up the ECJ case law and establish a framework for the initiatives of Member states. However, when the directive was agreed on in 1996, all those countries negatively concerned by the posting of workers had already enacted their own national laws. The directive contains few mandatory rules and merely provides a framework for the latter, mainly underlining the legality of restricting the freedom to provide services.

Also in Germany, the posting of workers led to significant economic pressures in the construction industry. In 1994/1995 an estimated half a million foreign workers were active in Germany; unemployment of construction workers was also around this level. Partly, foreign workers were illegal; formally, posted workers were estimated at 150.000 to 170.000 (Eichhorst 2000: 223).

The effects of legal uncertainty can be illustrated taking the conflict surrounding the German law for posted workers. More than in other Member states, in Germany lawyers, economists and politicians doubted that such a restriction of the freedom to provide services would be lawful (Eichhorst 2000: 223, 227). The legality of the German law remained contentious even years after its passing (Bosch, Worthmann and Zühlke-Robinet 2002), and led to several preliminary proceedings before the ECJ, emphasizing the legal uncertainty about EU obligations. For instance, in a preliminary proceeding in 2002 (C-164/99) the ECJ emphasized that the hypothetical possibility of domestic companies to negotiate firm-specific standard wage contracts below the minimum wage, should be seen as an illegal discrimination against EU-foreigners as these could not use this option.

More recently, Eastern enlargement has again demonstrated the existing uncertainty as to the ramifications of the European legal setting. Member states negotiated a transitory regime for the freedom of labor making it possible that Member states do not allow workers from the East European Member states on their labor markets for up to seven years. After enlargement, Germany has been surprised by finding that the services freedom is leading to many problems on its labor market. Here, only exemptions were negotiated for the construction industry, inner decoration, and cleaning. In all other sectors, workers can come in temporarily – which is interpreted as up to one year – and replace German workers for the wages of their home country. As Germany does not have a minimum wage outside of the construction industry, it cannot demand it for posted workers (Christen 2004, Temming 2005). The freedom of labor, in contrast, would have meant that EU-foreigners participate on the German labor market under the same conditions as Germans – which is much less problematic. In fact, it can be argued that the exemptions Germany negotiated are predominantly in those areas where East Europeans could profit least from the wage differential!

#### **IV.1.3 Evading legal uncertainty**

If Member states have to act under uncertainty as to the European legality of their policy instruments and goals, they sometimes have the option to take an escape route from this situation and simply choose policy instruments which realize the same policy goals in a less contested way. Töller (2004) terms this “evasion”. She mentions several cases from German environmental policy, where domestic environmental goals were achieved by self regulation, as it was unclear whether official German policies would be possible under European legislation. Examples are the prohibition of dangerous materials such as asbestos which could have been interpreted as a distortion of the free movement of goods. In order to evade this legal uncertainty, an agreement was sought with the relevant economic actors about the phasing out of this material.

In ongoing research about the state-aid regime in the Czech Republic and Poland, Michael Blauburger also finds instances of evasion, showing that at least with view to legal uncertainty new Member states react similarly to the old ones. As the approval of state aid is a cumbersome process, new Member states have resorted to regional aid schemes which allow the notification of the entire programme rather than having to clear different aids. He also finds that in order to avoid lengthy notification procedures, it is attempted to redirect aid in a way that it falls under block exemption regulations (Blauburger 2006).

#### **IV.2 Uncertainty as an opportunity structure for domestic actors pursuing largely domestic goals**

Different national interpretations of remaining competencies are furthered by the fact that national actors have an incentive to try to instrumentalize the European legal and political context to realize goals, which do not find sufficient support in the national setting alone. The European legal context selectively strengthens particular interests, and serves as an opportunity structure for these. This fact has been analyzed before by Knill and Lehmkuhl, which have not, however, included the implications of legal uncertainty (Knill and Lehmkuhl 1999: 2, 8).

I argued elsewhere, that the liberalization of previously regulated or monopolized sectors in Germany was much facilitated through the European context (Schmidt 2003, see also Smith 2001). Those actors who are interested in liberalization were strengthened as they could now argue that the realization of their interests would be necessary under European law. The national institutional setting, in contrast, had privileged those actors interested in the status quo.

In the liberalization of road haulage, actors instrumentalized the legal uncertainty resulting from a pending preliminary proceeding to abolish the tariff system. It became apparent only later that this had not been necessary; European law would have allowed Germany to keep the tariff system (Teutsch 2001: 143f). The German Parliament abolished the system of regulated tariffs from January 1994 onwards under the impression that the ECJ would rule the existing system to be a violation of European competition law in a preliminary proceeding (C-185/91). A company had transported goods below the official tariffs and declined the penalty payments to the responsible authority (BAG = Bundesanstalt für den Güterfernverkehr). Instead, the freight forwarder started the court case, supported by the relevant association, with the explicit aim of overturning valid national rules with the help of European competition law (Teutsch 2001: 143). In the legal literature, the assumption had been common that tariff decisions could be prohibited as a cartel under European competition law because associations took part in the tariff commissions (Basedow 1993: 166, Monopolkommission 1990: 307). Thus legal uncertainty existed which was aptly exploited by those actors seeking liberalization such as the liberal party. In parliament it was argued that it would be necessary to alter the domestic system immediately, rather than to wait for the – expected – negative ruling of the ECJ. In the end, the ECJ ruled that there was no cartel, since the Minister of Transport had the formal responsibility to set the tariffs. Even though the reform had thus been guided by a wrong anticipation, tariff liberalization was upheld. With the imminent liberalization of cabotage, the authorities wanted to prepare the road haulage industry for competition.

Quite well-known is also the complaint to the Commission lodged in 1993 of the German private banks about the privileges of German public banks. German public banks, belonging to the *Länder*, traditionally enjoyed significant privileges due to their public ownership status: a full guarantee of their liabilities through the governments, with improved credit ratings, allowing them to engage in higher-risk activities compared to their private competitors. Additionally, governments demanded much lower returns on their investment compared to private

shareholders (Smith 2005: 151). Because of their significance for regional development and their close ties to partisan politics, their special status was uncontested. The German private banks could therefore hardly oppose the system in the context of domestic politics. Instead, they placed a complaint with the European Commission on the grounds of the control of state aid. “Failing at the federal level to make their case that the public law financial institutions enjoy unfair advantages that distort competition, the commercial banking federation took its claims outside Germany’s domestic arena, to the European Commission” (Smith 2005: 146).

The Commission was initially reluctant to react due to the highly political character of the system of German public banks, which was perceived as central to the functioning of federalism. The Commission therefore encouraged a compromise among the concerned German actors, which however could not be reached between 1994 and 1997. In early 1997, the Commission opened a formal investigation, focusing on the transfer of a housing promotion agency to the largest bank, Westdeutsche Landesbank (WestLB). The private banks had restricted their complaint to this instance, refraining from the politically too contentious assault on all public banking privileges, but hoping that the Commission would bring these into the investigation by itself. Being pressured by the Länder, the German government achieved an addition to the Treaty of Amsterdam, mentioning the German public banks. However, not much was gained by this statement, and in addition the politicization of the issue had roused the attention of other Member states, which began to become critical of the German system (Smith 2005: 156-158). Germany was isolated in its opposition against the Commission’s investigation, and in July 1999 the Commission ruled that WestLB would have to repay the funds received.

But this was not the end of it. The new Competition Commissioner Monti declared in 1999 an investigation of transfers to all of the German Landesbanken, which were similar in kind to the one to WestLB. In the meantime, it came to a Court proceeding about the Commission decision. At the domestic level, an informal group, headed by the state secretary of the federal finance ministry, Caio Koch-Weser, tried to seek a compromise among the Länder, Landesbanken and the Commission. In late 1999, the Commission announced to expand its investigation into all regulatory privileges, having received a complaint of the European Banking Federation. Interestingly, for the compromise struck between the Commission and the German actors in mid-2001, establishing a separation between public and private activities after a transitory period until mid-2005, it was crucial that WestLB reconsidered its position, in view of the economic impact of the prolonged legal uncertainty (Smith 2005: 165f). In the end, after more than a decade of negotiations and a Court ruling (C-209/00, 12.12.2002), the German public sector banks were restructured and the German private banks claimed a victory they could hardly have gained on the domestic political scene (Bunte 2001, Smith 2005).

Not only private actors take the opportunity posed by the European level to further their interests. Also public actors may do so. An interesting example is the one of the German Federal Cartel Office which used European competition law to fight against the existing electricity monopolies in Germany in the early 1990s, which were at the time still backed by German legal provisions. The Cartel Office used its competence to apply European cartel law in a decentralized way to intervene against the existing exclusive contract (Konzessionsvertrag) between the town of Kleve and the electricity utility RWE. As Kleve was bordering the Netherlands, the Cartel Office argued that the contract violated Art. 85 (now Art. 81) on the prohibition of cartels, as third parties were not able to import electricity from the Netherlands. Interestingly, the Cartel Office acted without any complaints having been brought to it. RWE responded by seeking a clearance (Art. 85 III) from the Commission (Markert 1995: 60f).

Even though the Commission was reluctant to decide on the RWE request given that a possible prohibition of exclusive contracts contravened its own plans for the liberalization of energy utilities (cf. Schmidt 1998: 255f), the Cartel Office went on to prohibit another exclusive contract of a town bordering the Netherlands, between Nordhorn and RWE (FAZ 27.7.1995, 5.3.1996). In addition, it acted against the other central element of the system of German energy regulation (Eberlein 2000), by prohibiting an exclusive contract (Demarkationsvertrag) between Thyssengas and Ruhrgas in April 1994, again interpreting it as a violation of Art. 85 I (Markert 1995: 60f). It is not necessary to decide here, which part these moves of the Cartel Office played for the liberalization of German and European energy markets, soon to follow. Interesting is that even public actors may take up the legally uncertain consequences of the supremacy and direct effect of European law to push domestic reforms.

All these cases are examples from Germany. A final case from France shows that the domestic political system needs not to respond to legal uncertainty, but may wait for more precise guidelines from the European level. In the early 1990s, the association of insurance companies FFSA repeatedly complained to the Commission about alleged subsidies to competitors. Thus, it addressed the Commission when La Poste was allowed to distribute insurance products, arguing that tax exemptions for its public policy obligation would give it an advantage in selling insurance policies (T-106/95). Similarly, the FFSA complained repeatedly to the Commission about different competitive advantages of the mutual insurance companies: They did not have to pay insurance taxes and the government had been very slow in subjecting them to the third insurance directives (Les Echos 15.4.93, S. 20, 20.9.94, S. 6, 26.10.94, S. 4) (C-239/98). These complaints, however, did not prompt the French government into taking any premature reactions.

These cases show how the emerging multi-level polity allows actors to use rules originally directed at trans-border activities for pursuing political and economic interests that are primarily domestic. The national systems of Member states are thereby Europeanized, but these effects have not been captured by Europeanization analyses so far. Moreover, it is likely that different political systems react differently to actors' attempts at using legal uncertainty as an asset in domestic political conflicts as the isolated French example might imply.

### **IV.3 Explaining different responses of Member states**

All Member states may face such uncertainty, depending on the specific compatibility of their national institutions with the European approach. Thus, France, which has a minimum wage, found it easier to respond to the posting of workers than Germany. However, the question of institutional fit, being broadly discussed in the literature (Börzel and Risse 2003, Knill 2001), addresses only one side of Europeanization. Also national actors respond differently to European pressures.

Because I attempted to show that legal uncertainty is a pervasive feature of Europeanization, it was important to present several different cases at the cost of comparing all cases systematically across France and Germany. Nevertheless, differences in response became apparent between the two countries; how may they be explained?

To be mentioned is the absence of significant liberal party traditions in France. It was the liberal party in Germany which interpreted European law as prohibiting restrictions on posted workers. In addition to the much stronger relevance of economic-liberal thoughts in Germany, the important role played by the constitutional court in Germany is probably relevant. Whereas in France abstract norm-control is only possible for a short period, in Germany there are exceptionally strong possibilities for judicial review (Kommers 1996). It is therefore much more common in Germany than in France to expect legal constraints for political acts. In

France the traditional notion of legislative supremacy is still strong (Provine 1996: 179). Where Germans are apt to accept European legal constraints, French political actors are more likely to point to the many possible grounds for exemptions. Given the uncertainty of the legality of domestic legal acts, it is important to turn to the conditions of their making. Here we find a less “costly” legislative system in France, due to the greater possibilities of the government to constrain the parliament and the reduced role of the second chamber. This makes it much cheaper to grasp remaining areas of national competence than in the high-cost German system.

Thus, significant liberal traditions, a higher acceptance of judicial control, and a very costly legislative system add up to explain why Germany is much less likely than France to take up remaining options of national policy-making.

## **V. Conclusion**

Several attempts exist to approach different Europeanization effects in a systematic way according to the kind of European instruments employed. I have argued that a less parsimonious approach is necessary, taking the multi-level character of the European polity seriously. Member states do not only react to European demands of different kinds, a large part of Europeanization also entails that Member states have to devise their policies under the constraints of European law with often uncertain effects. This gives domestic political actors the possibility to use the European context as an opportunity structure to further their own domestic political goals.

Leaving the well-researched area of policy implementation to the side, I have focused on negative integration and showed that Member states’ integration into the multi-level system results in legal uncertainty as to the remaining scope of national competences.

Legal uncertainty, I have argued, has to be taken into account when discussing the effects of integration on Member states. Domestically, this uncertainty is being interpreted on the basis of different institutions and national traditions, meaning that the impact of EU membership at the national level can differ between Member states. For domestic actors, private and public alike, legal uncertainty is an opportunity structure which may allow them to interpret the European legal context in a way that strengthens their policy positions.

Legal uncertainty not only provides an opportunity structure for actors at the national but also at the European level, seeking to enhance their competences. This can be assumed for the Commission as a corporate actor. But also the Court remains often dubious in its reasoning which makes it easier to change its case law later, allowing it to continuously adapt it to the increasing extent of European integration – rather than establishing the boundaries of European law once and for all (Schmidt 2004).

As I have shown with the different cases presented in this article, the much-studied top-down influences of implementation demands are only one part of Europeanization effects. They are biased in focusing on positive integration and assuming clear commitments. In order to capture the whole variety of Europeanization effects, I have suggested distinguishing two dimensions of institutional impact: the mixture between positive and negative integration measures and the dimension of nature of commitment.

## VI. Bibliography

- Basedow, Jürgen, 1993, EG-Recht und Verkehrspolitische Handlungsspielräume der Mitgliedsstaaten nach 1992. Das deutsche Transportrecht an der Schwelle zum Europäischen Binnenmarkt: Symposium der Deutschen Gesellschaft für Transportrecht, Wiesbaden 1991, (Neuwied and Berlin: Luchterhand), pp. 155-179.
- Basedow, Jürgen and Michael Dolfen, 1998, Verkehrs- und Transportrecht, in: Manfred A. Daus (Ed) Handbuch des EU-Wirtschaftsrechts, (München: Beck), pp. 1-148.
- Blauberger, Michael, 2006, Making a Virtue of Necessity. Soft Law in European State Aid Control. Paper presented at the 1st Newgov-Connex Training Course, EUI Florence.
- Börzel, Tanja A., 2001, Non-compliance in the European Union: pathology or statistical artefact? *Journal of European Public Policy*, 8, 803-824.
- Börzel, Tanja A. and Risse, Thomas, 2003, Conceptualizing the Domestic Impact of Europe, in: Keith Featherstone and Claudio Radaelli (Eds), *The Politics of Europeanisation*. Oxford: Oxford University Press, pp. 57-82.
- Bosch, Gerhard, Worthmann, Georg and Zühlke-Robinet, Klaus, 2002, Das deutsche Baugewerbe im europäischen Wettbewerb, in: Dieter Sadowski (Ed) *Die ökonomische Analyse des Arbeitsrechts*, (Nürnberg: IAB), pp. 107-143.
- Bulmer, Simon and Radaelli, Claudio M., 2005, The Europeanization of National Policy. In: Simon Bulmer and Christian Lequesne (Eds), *The Member States of the European Union*, (Oxford: Oxford University Press), pp. 338-359.
- Bunte, Hermann-Josef, 2001, Die Aufsicht über staatliche Beihilfen (Art. 87 ff. EGV) in ihrer Bedeutung für die Kreditwirtschaft. In: Detlev Hummel and Rolf-E. Breuer (Eds), *Handbuch Europäischer Kapitalmarkt*, (Wiesbaden: Gabler), pp. 250-263.
- Christen, Torsten G., 2004, Der Zugang zum deutschen Arbeitsmarkt nach der EU-Erweiterung, *Bundesarbeitsblatt*, 3, 4-16.
- Douillet, Anne-Cécile and Lehmkuhl, Dirk, 2001, Strengthening the Opposition and Pushing Change: The Paradoxical Impact of Europe on the Reform of French Transport, in: Adrienne Héritier, Dieter Kerwer, Christoph Knill, Dirk Lehmkuhl, Michael Teutsch and Anne-Cécile Douillet, *Differential Europe*, (Lanham: Rowman & Littlefield), pp. 99-132.
- Eberlein, Burkard, 2000, Institutional Change and Continuity in German Infrastructure Management: The Case of Electricity Reform, *German Politics*, 9, 81-104.
- Eichhorst, Werner, 2000, Europäische Sozialpolitik zwischen nationaler Autonomie und Marktfreiheit. Die Entsendung von Arbeitnehmern in der EU, (Frankfurt/Main: Campus).
- Eising, Rainer, 2003, Europäisierung und Integration. Konzepte in der EU-Forschung, in: Markus Jachtenfuchs and Beate Köhler-Koch (Eds), *Europäische Integration*, (Opladen: Leske und Budrich), pp. 387-416.
- Hatzopoulos, Vassilis, 2000, Recent developments of the case law of the ECJ in the field of services, *Common Market Law Review*, 37, 43-82.
- Hatzopoulos, Vassilis, 2002, Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms, *Common Market Law Review*, 39, 683-729.
- Héritier, Adrienne, 1997 Market-making Policy in Europe: Its Impact on Member State Policies. The Case of Road Haulage in Britain, the Netherlands, Germany and Italy, *Journal of European Public Policy*, 4, 539-555.
- Héritier, Adrienne, Kerwer, Dieter, Knill, Christoph, Lehmkuhl, Dirk, Teutsch, Michael and Douillet, Anne-Cécile, 2001, *Differential Europe*, (Lanham: Rowman & Littlefield).

- Joerges, Christian, 2005, Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws, *EUI Working Paper Law* 2005/12.
- Knill, Christoph, 2001, *The Europeanisation of National Administrations* (Cambridge: Cambridge University Press).
- Knill, Christoph and Lenschow, Andrea, 1998, Coping with Europe: the impact of British and German administrations on the implementation of EU environmental policy, *Journal of European Public Policy*, 5, 595-614.
- Knill, Christoph and Lenschow, Andrea, 2005, Compliance, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions, *Journal of Common Market Studies*, 43, 583-606.
- Knill, Christoph and Lehmkuhl, Dirk, 1999, How Europe Matters. Different Mechanisms of Europeanization, *European Integration Online Papers (EIoP)*, 3, <<http://eiop.or.at/eiop/texte/1999-007a.htm>>
- Knill, Christoph and Lehmkuhl, Dirk, 2002, The national impact of European Union regulatory policy: Three Europeanization mechanisms, *European Journal of Political Research*, 41, 255-280.
- Kohler-Koch, Beate, 2000, Europäisierung: Plädoyer für eine Horizonterweiterung, in: Michèle Knodt and Beate Kohler-Koch (Eds), *Deutschland zwischen Europäisierung und Selbstbehauptung*, (Frankfurt/Main: Campus), pp. 11-31.
- Kommers, Donald P., 1996, The Federal Constitutional Court in the German Political System, *Comparative Political Studies*, 26, 470-491.
- Markert, Kurt, 1995, Neueste Entwicklungen im Energie-Kartellrecht, *Recht der Energiewirtschaft*, 56, 60-64.
- Mbye, Heather A.D., 2001, Why national States comply with Supranational Law, *European Union Politics*, 2, 259-281.
- Monopolkommission, 1990, *Wettbewerbspolitik vor neuen Herausforderungen. Hauptgutachten 1988/89*, (Baden-Baden: Nomos).
- Provine, Doris Marie, 1996, Courts in the Political Process in France. In: Herbert Jacob, Erhard Blankenburg, Herbert Kritzer, Doris Marie Provine, Joseph Sanders, *Courts, Law, and Politics in Comparative Perspective*, (New Haven and London: Yale University Press), pp. 177-248.
- Risse, Thomas, Cowles, Maria Green and Caporaso, James A., 2001: Europeanization and Domestic Change: Introduction, in: Maria Green Cowles, James A. Caporaso and Thomas Risse (Eds), *Transforming Europe*, (London: Cornell University Press), pp. 1-20.
- Scharpf, Fritz W., 1997, *Games real actors play. Actor-centered institutionalism in policy research*, (Boulder, Co.: Westview Press).
- Scharpf, Fritz W., 1999, *Governing in Europe: effective and democratic?*, (Oxford: Oxford University Press).
- Scharpf, Fritz W., 2002: The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies*, 40, 645-670.
- Schmidt, Susanne K., 1998, *Liberalisierung in Europa. Die Rolle der Europäischen Kommission*, (Frankfurt: Campus).
- Schmidt, Susanne K., 2003, Die nationale Bedingtheit der Folgen der europäischen Integration, *Zeitschrift für Internationale Beziehungen* 10, 43-68.

- Schmidt, Susanne K., 2004, Rechtsunsicherheit als Folge der bizyphalen Struktur der EU, in: Patricia Bauer and Helmut Voelzkow (Eds), Die Europäische Union - Marionette oder Regisseur?, (Wiesbaden: Verlag für Sozialwissenschaften), pp. 51-65.
- Schmidt, Vivien A., 1997, European Integration and Institutional Change: The Transformation of National Patterns of Policy-making, in: Gerhard Göhler (Ed) Institutionenwandel, (Opladen: Westdeutscher Verlag), pp. 143-180.
- Smith, Mitchell P., 2001, Europe and the German Model: Growing Tension or Symbiosis? In: German Politics, 10, 119-140.
- Smith, Mitchell P. , 2005, States of liberalization: redefining the public sector in integrated Europe, (Albany: State University of New York Press).
- Streeck, Wolfgang and Thelen, Kathleen, 2005, Introduction: Institutional Change in Advanced Political Economies, in: Wolfgang Streeck and Kathleen Thelen (Eds), Beyond Continuity: Institutional Change in Advanced Political Economies, (Oxford: Oxford University Press), pp. 1-39.
- Temming, Felipe, 2005, EU-Osterweiterung: Wie beschränkt ist die Dienstleistungsfreiheit?, Recht der Arbeit, 3, 186-192.
- Teutsch, Michael, 2001: Regulatory Reforms in the German Transport Sector: How to Overcome Multiple Veto Points, in: Adrienne Héritier, Dieter Kerwer, Christoph Knill, Dirk Lehmkuhl, Michael Teutsch and Anne-Cécile Douillet, Differential Europe, (Lanham: Rowman & Littlefield Publishers), pp. 133-172.
- Töller, Annette Elisabeth, 2004, The Europeanization of Public Politics - Understanding Idiosyncratic Mechanisms and Contingent Results, European Integration Online Papers (Ei-OP), 8, <<http://eiop.or.at>>