Titel/Title: **Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty**

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Research note: Beyond compliance – the Europeanization of member states through negative integration and legal uncertainty

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 note argues that this focus captures insufficiently the implications of member states being part of a multi-level system. It is largely overlooked how negative integration (market-making) and legal uncertainty about the implications of European law constrains domestic policy-making.

1. Introduction[1]

Research on the impact of integration on the member states has become an important part of European Union studies (Héritier 1997, Schmidt 1997, Börzel and Risse 2003, Börzel and Risse 2007). Because of the depth of European integration and its impact on the policies, politics, and polities of member states, these studies cover a wide territory, and attempts to arrive at a unified approach face subsequent difficulties. This note argues that typologies of

[1] For this note I have profited from my participation in the Integrated Project "New Modes of Governance" (see the website www.eu-newgov.org). Funding provided by the 6th Framework Program 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. Last not least, the note was fundamentally rewritten following excellent comments from anonymous reviewers, for which I am very grateful.

Europeanization effects (Knill and Lehmkuhl 2002, Bulmer and Radaelli 2005, Knill and Lenschow 2005) and most Europeanization studies fail to take adequate account of the consequences of negative integration. By overly concentrating on the implementation of directives, Europeanization studies neglect the lessons to be learned by distinguishing between positive and negative integration. As Scharpf (1999, 2006) has convincingly shown, this distinction is important for understanding the dynamics of European integration – and therefore it cannot be neglected when explaining the impact of European integration on member states. **(← p. 299)**

Scharpf (1999) argues that positive measures of market-shaping –normally brought about by the Commission, Council, and European Parliament acting together in the legislative process– explain only partially the dynamics of European integration. Rather, the negative integration of market-making matters immensely, based on far-reaching provisions of market freedoms and competition law contained 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).

The issue is not only one of closing an empirical blind spot. There is also a theoretical interest. Negative integration normally occurs in a specific way – through judicial and not through legislative policy-making. The dynamics of judicial policy-making imply that the extent of EU obligations is often far from clear. There is significant *legal uncertainty* as to the exact domestic implications of European law. The term "legal uncertainty" refers here to the lack of predicting law, which is one central element of the term, next to procedural safeguards. Uncertainty is an analytic concept that is broadly discussed in political science, particularly in international relations (Rathbun 2007). This research note focuses on the lack of predictability, without delving further into the theoretical discussion of uncertainty. Other

empirical studies conceptualizing uncertainty in the sense of predictability proceed similarly (Alexander 2002: 1149). Suffice it to add that the concept of uncertainty is one of fundamental uncertainty, where not only computation of information is at issue but relevant information is missing (Dequech 2001: 918-919).

Legal uncertainty arising in the course of negative integration has important consequences for Europeanization: Member states have to devise domestic policies in the absence of certainty concerning their precise obligations under European law. This situation invites domestic actors to pursue their private interests; it serves as an opportunity structure. Europeanization effects in the case of negative integration much depend on the specifics of domestic interest-constellations, which face the constraints and opportunities of European law. As member states are part of the European multi-level polity, the latter's implications refer not only to the requirement of implementing supranational law. Moreover, all domestic policy-making has to conform to European legal obligations. Including the dynamics caused by negative integration at the domestic level into Europeanization research, thus takes arguments about a European multi-level system seriously.

This research note begins by briefly reviewing the Europeanization literature, discussing how the differentiation into positive and negative integration has been reflected so far. It then turns to legal uncertainty and the question why it matters for negative integration. Some empirical examples are shortly mentioned. The note develops several hypotheses that provide a starting point for testing the differential Europeanization impact of negative integration empirically.

2. Europeanization resulting from positive and negative integration

There are several different definitions of Europeanization. While early definitions included the perspective of European integration (Risse et al. 2001: 3), in the meantime a consensus emerged to restrict Europeanization to "the impact that **(← p. 300)** 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 depending on the thrust of policies (whether they are market-shaping or market-making), there is a different institutional logic.[2] Typically, positive integration follows the legislative process while negative integration relies much more on the decisions and case law of the Commission and the ECJ. 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 far-reaching provisions of market freedoms and competition law in the Treaty. Often (but not always!), they can be realized by the Commission and the Court and do not require further decisions of the Council or Parliament. Negative integration is not restricted to facilitating cross-border exchange but may severely 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

[2] Note that the focus of the argument is on the implications of institutions and not on their genesis.

> 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).

Secondary law, doubtlessly, includes market-shaping and -making. Competition law regulations, such as Council regulation 1/2003, are obvious examples. Actions of the Commission and the ECJ sometimes also realize positive measures. But primary law is much stronger on market-making than on market-shaping (Scharpf 2006: 854). Were there not this different institutional background, one would not need to speak of a bias of the European Union in favor of negative integration: the liberalization and the regulation of markets would need the same demanding majorities in the Council and Parliament. For the rest of this research note, negative integration should thus be read as judicial and positive integration as legislative decision-making, as this is the underlying importance of the distinction.

Knill and Lehmkuhl (1999) were the first to include negative integration into Europeanization studies. Establishing different types of Europeanization **(← p. 301)** 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). This note expands on the idea of negative integration as presenting an opportunity structure. But it rejects the argument of Knill and Lehmkuhl that the implementation of positive measures is more difficult than that of negative measures (see also Bauer et al. 2007: 411). Member states cooperate in the definition of positive measures, and often manage to include several options into directives. Decisions of negative integration, in contrast, involve Member states less prominently, given

the role of the Commission and the Court. Thus it is more 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, and communication is linked to the open method of coordination. This differentiation seems to be gaining increasing support (cf. Bulmer and Radaelli 2005). Again, while the liberalizing effect of negative integration can be expected to further competition, it is not plausible that this could be the main mechanism –the obligation of market-making can be as coercive on member states as are measures of positive integration.

To conclude, the Europeanization literature takes up the distinction between positive and negative integration. But negative integration is misrepresented and implementation studies dominate the field (Börzel 2001, Mbaye 2001, Falkner et al. 2004).

3. The domestic impact of EU membership: including legal uncertainty

To summarize the argument so far: to include negative integration in Europeanization studies is not only important because the thrust of policies differs, with market-making against market-shaping. It is important because the policy-making process differs, with judicial policy-making playing a much larger role for negative integration. Judicial policy-making forms the backdrop of most negative integration, given that the interpretations of the ECJ are decisive.

When member states are concerned by court rulings, this section argues, a distinct dynamic unfolds as legal uncertainty plays a large role in the impact of judicial policy-making. Legal

uncertainty serves as an opportunity structure for domestic actors so that member states are affected very differently compared to the implementation of secondary law.

If legal uncertainty matters specifically for negative integration, it is first of all necessary to establish the differences between judicial and legislative policy-making. While the Treaty –on which negative integration mostly relies– includes only general statements, European secondary law, more relevant for positive integration, is full of compromises in need of interpretation (Everling 2000: 221). Goldstein and Martin even argue that governments may not be able to enter **(← p. 302)** international obligations without the "veil of ignorance" over the precise future consequences of international regimes, as otherwise domestic lobbying groups mobilize against them (Goldstein and Martin 2000: 606). There are thus reasons to believe that legal uncertainty matters in general, for negative and positive integration alike. While directives include some requirements which are clearly set and easy to monitor (for example, a certain extent of parental leave), others are much less precise. One example would be whether the directive on certain aspects of working time (93/104/EC) prohibits member states from demanding compliance with stricter domestic vacation rules on the part of non-national EU posted workers (Giesen 2003: 156) –which they may do, following C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71 (*Finalarte* of 25.10.2001).

Nevertheless, there are good arguments to believe that legal uncertainty is more closely related to judicial than to legislative policy-making. First of all, there are fewer guidelines in primary as opposed to secondary law. While directives delve on specific regulatory topics at great length, Treaty articles cover general topics with comparatively few sentences. There is thus greater need of interpretation when these articles are applied to specific national situations. The following quote makes this point for the freedom of goods and its exception.

> „The bulk of the task was, however, left to the Court. It was the Court that had to determine the scope of the prohibition decreed by Article 30. It was the Court that had to decide in what circumstances a measure caught by Article 30 was justified on the grounds set out in Article 36. (…) The expression "creative jurisprudence", which is often used in mock disparagement of

> courts that give non-obvious answers to questions for which there is no obvious answer, is especially absurd in this context; for whatever the Court did with such scant material, its jurisprudence was bound to be creative" (Keeling 1998: 512).

Secondly, with the exception of those cases where member states recently acceded, they themselves have negotiated the text of secondary law with regards to specific policies. They can therefore be expected to be more familiar with its implications than with the interpretation of primary law, which is shaped by the ECJ. When interpreting the Treaty, the ECJ generally uses the teleological method and is oriented to the goal of further integration (Pescatore 1983). Moreover, the interpretation of the Treaty is not set in stone but subject to considerable development as integration progresses. This is apparent with all landmark judgments such as Cassis de Dijon (120/78), Francovich (C-6/90), or Keck (C-267/91 and C-268/91), to name but a few.

Thirdly and lastly, legal uncertainty follows from the fact that judicial policy-making is much more case-specific than legislative policy-making. Courts are only asked to make decisions on contentious problems. In order to do so they must interpret rules. If these rules do not determine the issue at hand, judges use a method of interpretation to adapt the existing rules to their current problem. This interpretation leads to judge-made law (or case law). Necessarily, such law is primarily focused on the case at hand. Judicial policy-making progresses normally in a very piecemeal and case-specific way – specific questions are resolved but there is **(← p. 303)** insufficient legitimation to provide a more general policy line. As European law is superimposed on different national legal orders of member states, it may be difficult to assess what the results of one preliminary proceeding of the ECJ imply for other member states. Thus, while legal certainty is enhanced for the state concerned by the ruling, it may decrease for all others. National rules may be similar, but likely differ in some – possibly decisive – ways. Consequently, the impact of a preliminary proceeding dealing with a specific national question for other member states is often contentious (Hatzopoulos 2002: 728, Joerges 2005: 20). This discussion leads to the following hypotheses:

H1: Domestic implications of European integration differ, depending on whether they are caused by the impact of secondary law or by court rulings.

H2: The more integration is shaped by court rulings rather than directive and regulations, the more its impact is marked by legal uncertainty for the Member states. Legal uncertainty implies that relevant actors disagree on the relevance of European legal integration for the domestic context.

A result of this legal uncertainty is that it is often unclear as to 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. Moreover, legal uncertainty also implies that EU-obligations are likely to be interpreted differently in different member states.

To summarize, there are many reasons to believe that legal uncertainty plays a larger role in the impact of judicial than of legislative policy-making: Negative integration relies on the provisions of the Treaty, which are much less detailed than secondary law is; member states have better knowledge of secondary law being involved in its formulation; and judges decide specific cases, not being legitimated to draw general policy guidelines. Given that cases stem from a wide variety of backgrounds, the implications of a specific ruling for another member state are difficult to know.

4. Domestic policy-making under legal uncertainty

This section summarizes several empirical examples of Europeanization effects of negative integration, and develops further hypotheses.

National actors have an incentive 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, as has also been analyzed by Knill and Lehmkuhl (1999: 2, 8). The following hypothesis would have to be tested systematically in this context:

H3: The higher the legal uncertainty arising from a Treaty rule and its interpretation, the more opportunities it offers for domestic actors to turn to the European courts in order to press for Europeanization. **(← p. 304)**

Thus, 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 find support in 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 from January 1994 onwards. 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).

Quite well-known is also the complaint to the Commission lodged in 1993 on the part of 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. 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 (Smith 2005).

Not only private actors use the opportunity structure offered at the European level. Also public actors may do so. An interesting example is how the German Federal Cartel Office used European competition law to fight against the existing electricity monopolies in Germany in the early 1990s –despite their legality under German law (cf. Schmidt 1998: 255-256).

These examples 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 hardly been captured by Europeanization analyses so far.

Legal uncertainty as to the domestic consequences of European law may not only entice action but also escape routes. If member states have to act under uncertainty as to the European legality of their policy instruments and goals, they sometimes 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 Blauberger similarly finds instances of evasion. 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 program rather than having to clear different acts of aid. He also finds that lengthy notification procedures are avoided by redirecting aid so that it falls under block exemption regulations (Blauberger 2006). **(← p. 305)**

5. Conclusion

This research note has argued that Europeanization research should take the distinction between positive and negative integration more seriously. This distinction matters not so

much because the thrust of policies differs but because of the difference in institutional background. Behind the institutionalist bias of the EU in favor of negative integration is the dominance of judicial policy-making for the latter, while positive integration relies mostly on legislative policy-making. Rulings by the European courts, more so than legislation, imply legal uncertainty for member states.[3]

Domestic actors interested in changing domestic policies find an opportunity structure in legal uncertainty. In the case of negative integration therefore, Europeanization effects are less determined top-down by the need to implement specific obligations of European secondary law, as is often analyzed in Europeanization studies. Rather, much depends on domestic actors' interests and features of the polity.

The precise impact of negative integration is subject to further research. This note presented several hypotheses as a starting point for such an undertaking. Possibly, there are also differences among member states when reacting to legal uncertainty.

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[3] Another issue touched upon in this note is whether legislative policy-making in the EU always results in precise obligations, or to which extent legal uncertainty plays a role in the implementation of secondary law. If this is the case, the question of compliance may become a matter of degree and cannot be dealt with in an either/or distinction.

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