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Abstract:

As membership expands and institutions involved, European governance grows increasingly complex. One way to make sense of this complexity is to approach the European Union (ECU) as a constitutional system whose component parts interact in regular patterns. Analysis of the ECU's constitutional logic can illuminate the history of European cooperation and generate predictions about future interactions. The institutions of the ECU have evolved through a dynamic process of interaction among member state governments, their publics and the central institutions themselves. The interaction combines features of the traditional international agreement by sovereign states and the new federal constitutional system. Economic analysis can help explain the ECU's evolution and the interaction of its institutions. We describe the institutions of European government and then analyze them.

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After the Second World War, Europe realized an ancient dream by creating its first unified government since the Roman Empire. Beginning as a treaty of cooperation in coal and steel production, the ECU (European Union, to use its current name) deepened its cooperation to include new policy areas and broadened its membership to fifteen states, with many more in line to join. Free trade has proved a stronger force in uniting Europe than the armies of Napoleon or Hitler.

During this period, the institutions of the ECU evolved through a dynamic process of interaction among member state governments, their publics and the central institutions themselves. The interaction combines features of a traditional international agreement by sovereign states and a new federal constitutional system. Economic analysis can help explain the ECU's evolution and the interaction of its institutions. We describe the institutions of European government and then analyze them.

Institutions of the European Union

Europe divides its law into “primary” and “secondary.” Primary law consists of the treaties establishing the ECU, whose amendment requires ratification by all member states. Although Europe has no formal constitution, primary law is its *de facto* constitution. Our analysis of the European constitution concerns how primary law divides powers among Europe’s four most important institutions of government. Later we discuss secondary law, which is Europe’s legislation.

The ECU has four primary institutions of government: the Commission, the Council, the Parliament, and the Court of Justice. The **Commission** is an administrative body that sits in Brussels, and currently has 19 commissioners. The Commission is made up of 23 Directorate-Generals, and is headed by a President who is appointed by the Council for a renewable two-year term. The Commission has been described as the most “genuine” European institution, in part because of its

persistent advocacy of ever greater union (see Schuppert 1995: 339). The Commission combines some executive powers and powers of administration. The Commission administers "common" policy areas, meaning the ever-expanding set of initiatives directly implemented by the Union. It negotiates international agreements when authorized to do so by the Council. The Commission also has exclusive power to propose new European legislation.

The governments of the member states meet regularly, either in the **European Council**, which is made up of the heads of member states, or more frequently in the **Council of Ministers**, which is made up of cabinet level officials from the member states. The Council -- the collective name for the meeting of governments -- is the primary body for making policy and enacting legislation. The Council can authorize the Commission to undertake international commercial negotiations, and must approve any treaties and agreements. To link the Council and the Commission more closely, a Secretariat for the Council was introduced in 1987 under the control of the Presidency.

The **European Parliament** is a 518- member body that sits in Strasbourg. Until 1979, the national parliaments sent representatives to the European Parliament, but now citizens directly elect a certain number of members from each country. Whereas the Council represents governments, the Parliament represents people. The original procedures for legislating gave almost all power to the Council and no power to Parliament, but procedures are changing, as we explain later.

The **European Court of Justice**, which sits in Luxembourg, consists of one judge from each member state plus one additional judge, so that currently there are 16 judges. There are also 6 *avocats-général* who advise the judges, but do not themselves make decisions. The Court interprets legislation and assures that secondary law is consistent with primary law. The Court can even annul acts of the Council when necessary.

Besides these basic institutions, there are other institutions in the ECU which do not play a direct role in the formation and interpretation of European law. These include the Presidency of the Commission, a new Council of Regions, the Economic and Social Committee, and a Central Bank. The Central Bank, in charge of

overseeing the European Monetary Union, deserves brief mention because it illustrates the principle of variable geometry. Under this principle, certain features of European cooperation will have different states involved in them to different extents. This device was designed to ensure that states more reluctant to integrate, such as Denmark, could still participate in many aspects of the ECU programme. Because the European Monetary Union (EMU) requires states to meet certain objective conditions regarding public spending by 1999, many of them are likely to have difficulty joining it, so this deep aspect of European cooperation may have the fewest members. Other shallower aspects of integration may have more members. Variable geometry is an innovation of European law allowing states to tailor their participation.

Powers

Europe's legislation comes in two basic types. *Directives* consist of instructions to member state legislatures to harmonize their legislation in order to unify European markets ("build the single market"). Directives must be implemented as national law by the legislature in each of the member states, so different states may enact somewhat different laws to implement the same directive. *Regulations* are laws enacted by the ECU which apply directly to the member states. Unlike directives, regulations are uniform everywhere in Europe and they take effect without action by the member states. Regulations are restricted to activities under the exclusive jurisdiction of the Union, such as the Common Tariff, the Common Agricultural Policy, and European competition policy.

The interactions among these various institutions in lawmaking are complex and varied. To simplify, the Commission proposes a law, the Council enacts it with varying degrees of cooperation from the Parliament, the Court interprets it, and the Commission or the member states implement it.

We fill out this summary with some detail. Only the Commission can propose legislation. Under the initial treaties, the Council enjoyed the exclusive power to enact the Commission's proposals. Today, when the Commission proposes legislation to the Council, the Council can sometimes enact the proposal on its own, but sometimes enactment also requires the European Parliament. Different subject matter calls for different procedures and different forms of cooperation, as we explain

later.

The Parliament's powers have expanded since the Single European Act (SEA) of 1987, and it can now be analogized to a second house of the legislature. It can now comment on legislation. It can remove the Commission with a 2/3 vote, and veto (but not amend) the budget proposed by the Commission and Council.

Since 1987, Parliament has been able to participate in legislation related to the common market through the co-operation procedure. Under this intricate procedure, described in Article 148 of the Treaty, Parliament can block proposals on which the Council is not unanimous. Legislation proposed by the Commission is sent to the Parliament for a first reading before going to the Council. After the Council adopts a common position, the Parliament has a second reading during which it can reject or amend the proposal by an absolute majority. Once amended it goes back to the Commission. If the Commission rejects the Parliamentary amendments, the Council can adopt the legislation only unanimously. If it accepts the Parliamentary amendments, the Council can adopt it with a qualified majority, and further amend the proposal only by unanimity. A "qualified majority" refers to a practice of assigning more votes to ministers from larger nations, and then requiring the total votes to reach a designated level exceeding 50%. In brief, "qualified majority" means "weighted super-majority."

Another new procedure -- "co-decision" -- gives Parliament still more power. Under co-decision, if the Parliament rejects the proposal sent to it by the Council, it cannot be over-ridden, even by unanimous agreement of the Council. The co-decision procedure applies to approval of international agreements and other areas (see Art 139b).

We label and summarize the procedures for making European law:

1. Unilateral Unanimity: The Council can adopt or amend the Commission's proposal by unanimous vote. If unanimity is not reached, the proposal is rejected.
2. Unilateral Qualified Majority: The Council can adopt the Commission's proposal by qualified majority. Otherwise, the proposal is rejected.
3. Consultation: Same as the two unilateral procedures, except Parliament has the right to be consulted.
4. Cooperation: The Council can adopt the Commission's proposal by a qualified majority and amend by unanimity. If, however, Parliament rejects the proposal, the Council can only adopt by unanimity.
5. Co-decision: Adoption of a proposal by the Commission requires approval of the Council by a qualified majority and approval of Parliament by a majority.

Now we describe the powers of the court. Cases may be brought before the Court by the main European organs of government and also by the governments of member states. National courts in the member states can ask the Court for an advisory opinion when a suit before them raises an issue of European law. Where a national court certifies a question to the Court, the Court issues an interpretation of European law, but the national court must implement it. Individuals can directly petition the Court for review only where they can show detriment from a Community Act. If the Court finds detriment, relief is given to plaintiff, but the Community Act in question remains valid. In 1987, a Court of First Instance was introduced to try to reduce the backlog of cases before the Court. The Court of First Instance has jurisdiction over those areas of policy which the ECU directly administers.

INTERACTIONS: THEORY

Having sketched the powers and procedures of European lawmaking, we explain how the latter affects the former. Define the discretionary power of an institution as its ability to get the laws that it wants. Discretionary power increases when an institution can get enacted more of the laws that it wants.

The Commission has the exclusive power to propose legislation. Some of its

proposals will be enacted and others will be rejected or amended. The Commission has more discretionary power when it can choose among a larger range of alternatives from which to frame proposals that will be enacted into law. This range is set by the difficulty of enacting new legislation.

Consider how the discretionary power of the Commission changes with the procedural rules for enacting legislation. The unilateral procedure, or the procedure of consultation, permits the Council to enact proposals on its own, regardless of Parliament's opposition. Under the unilateral procedures, the Council enacts proposals under a unanimity rule or a qualified majority rule. The change in procedure from unilateral-unanimity to unilateral-qualified majority in the Council increases the power of the Commission. The power of the Commission increases because it only needs a qualified majority in the Council to enact its proposals.

In contrast, the change from unanimity to consultation, or from consultation to cooperation, or from cooperation to co-decision, decreases the power of the Commission. Its power decreases because, as the role of Parliament in making law increases, the Commission must anticipate objections by two bodies (Council and Parliament) when proposing legislation. The Commission has a smaller range of alternatives from which to frame proposals that will actually become law.

In reality, the Commission cooperates closely with the Council and Parliament in developing proposals. The power of the Commission over legislation, as explained above, presumably affects its strength in bargaining with the Council and Parliament, as well as affecting the ideology defining appropriate behaviour by the institutions of European government.

Now we turn from the Commission to the Court. Fresh legislation can be enacted to repeal judicial interpretation of existing law. Repeal of judicial interpretation curtails the Court's power. Consequently, an increase in the power to repeal judicial interpretation by fresh legislation decreases the Court's power of interpretation. The change from unanimity to qualified majority voting under the unilateral procedure, or under the procedure of consultation, decreases the scope of Court interpretations invulnerable to repeal by fresh legislation. Thus Council majoritarianism decreases the discretionary power of the Court. Conversely, the

change from the procedure of consultation to cooperation, or from cooperation to co-decision, increases the Court's discretionary power of interpretation. Notice that the discretionary power of the Commission and Court change in opposite directions with changes in the procedural rules for enacting proposals by the Commission.

The judges on the Court have different philosophies about making law by interpreting law. These philosophies influence their willingness to exercise the power that they possess. We suspect that procedures which give the Court more real power will ultimately lead them to exercise more of it. (For evidence that courts behave in this way, see Cooter and Ginsburg, 1996).

The preceding argument about the connection between power and procedure predicts how Europe's "democratization" redistributes power. The move towards bicameralism decreases the Commission's power and increases the Court's power, whereas the move from unanimity to majority in the Council increases the Commission's power and decreases the Court's power. (These conclusions are worked out formally using the technique of game theory in Cooter and Drexler, 1994.)

The power of the Council is in large part related to its voting rules and size. Legislation requires negotiation and compromise. These transaction costs increase with size. Until 1973, there were only six member states: Germany, France, Italy, Belgium, the Netherlands and Luxembourg. In 1973, the UK, Ireland, and Denmark joined, followed by Greece in 1981 and Spain and Portugal in 1986. More recently, Austria, Sweden, and Finland joined in 1993. The more members in the Council, the greater the transaction costs of making decisions, which decreases its power. In fact, the power of the Council has not declined with expansion, because of another offsetting change, which reduces the transaction costs of making decisions: the change from the procedure of unanimity to qualified majority.

The move from unanimity to qualified majority in effect reduces the role of bargaining and increases the role of voting. Bargaining with low transaction costs tends towards efficiency, according to the Coase Theorem, whereas majority rule tends toward inefficiency and irrationality. If majority rule has an equilibrium, as with Black's "median rule," inefficiencies arise because voting does not record intensity of sentiment. If majority rule has no equilibrium (a special case of Arrow's

Theorem), then it merely spins its wheels. An enlarged Council will, presumably, come to rely more heavily on devices such as agenda-setting in order to overcome the irrationalities of unstructured majority voting.

A significant question for the ECU, especially its Parliament, concerns parties. Parties can unify powers that a constitution separates, or parties can fragment powers that a constitution unifies. Duverger's Law (1955) predicts that winner-take-all plurality voting will lead to a two-party system, whereas proportional representation fragments parties. Elections to the European Parliament are typically by proportional representation (except for the UK which uses a first-past-the post system), but they are conducted at the national level. European level parties typically consist of amalgamations of different national parties that share a label (e.g. socialists, greens) but little else. At present, no dominant European parties have emerged, and they will presumably remain weak for years to come. Thus the ability of Parliament to constrain the power of other institutions is limited not only by constitutional factors such as its powers, but also by the political factor of its internal fragmentation.

HISTORY OF INTERACTIONS

According to the Treaty of Rome, the Council of Ministers operates with qualified majority voting. In the 1960s, France under Charles DeGaulle grew frustrated with Commission incursions into its national sovereignty, and pressured for the adoption of the so-called "Luxembourg compromise". Under this system (never legally binding but followed in practice), any country could exercise a veto over any decision when it deemed that important national interests were at stake. In practice, this norm meant that unanimity was required for all significant decisions. The intended effect of the Luxembourg compromise was to paralyze the primary decision making body and thereby to slow integration. The Compromise indeed slowed down Council action on integration, and this was exacerbated by the addition of six new member states under a unanimity voting procedure.

However, integration of the internal market was not completely impeded. Because the Court of Justice was empowered to interpret the Treaty, the power of the Court expanded as legislative resistance increased. The Court thus became the crucial promoter of the internal market during the 1960s and 1970s, particularly through

efforts to harmonize non-tariff barriers to the free movement of goods. In the absence of legislative action, the Court weighed in with its famous *Cassis* decision, mandating that under the Treaties, goods lawfully manufactured for sale in one country had to be accepted in others. Exceptions to this had to be justified and pass judicial scrutiny under a balancing test. The unanticipated consequence of the Luxembourg compromise, therefore, was a shift in the primary mechanism of integration from the Commission and Council to the Court.

Shapiro (1991) argues that this dynamic indirectly spurred the member states to adopt the Single European Act programme. Legislative stalemate slowed the harmonization of business regulation in Europe. Without European regulations and with free trade, highly regulated economies like Germany were at a competitive disadvantage relative to poorer countries with less regulation. To avoid losing in this "race to the bottom phenomenon," high-standard countries sought to change the procedural rules and cooperate on producing high-level regulatory harmonization.

The Single European Act of 1987 can also be seen as an attempt by the Commission and Council to reclaim the primary role in shaping European integration from an aggressive court. Importantly, it reintroduced weighted qualified majority voting for the Council (Art 100a) for certain areas of the ECU programme (especially having to do with the internal market). In practice, to block legislation under the current system of Qualified Majority Voting requires the cooperation of any two large countries and one or two small countries. Furthermore, the small countries voting as a bloc can veto legislation desired by the big powers (see Hosli, 1993). However, by moving away from a unanimity model, the change in voting structure decreases legislative resistance and thus increases the power of the Council.

If these changes were intended to reduce the power of the Court, they may not have succeeded. The Court is entrenched in the decision making processes of the community, and appears to enjoy a relatively high level of legitimacy from publics otherwise frustrated with the ECU. In addition, the increase in European legislation has provided a flow of new cases for adjudication and resolution. Instead of fencing the court in, new legislation can provide the opportunity for decisions in new areas. In addition, the complexity of European procedures for making law presents the court

with fundamental decisions about the allocation of powers. For example the SEA's introduction of qualified voting for some areas of law, while retaining the Luxembourg compromise for others, requires authoritative decisions about when to follow which voting procedure. Similarly, the Maastricht emphasis on subsidiarity, which favours decentralization of power, requires authoritative decisions about the appropriate level for action in the federal system.

We thus predict that the expansion of the European Union, both in deepening cooperation and broadening to new members, will increase the power of the Court, which has already served as an important engine of integration (see Weiler, 1991).

ISSUES

The agenda of the currently sitting Intergovernmental Conference, a kind of constitutional convention for the ECU, includes a number of issues likely to affect the division of powers in the future. Foremost among these is the issue of widening the Union eastward to Central and Eastern Europe. There are now ten Eastern European countries with pending applications to the ECU, along with Turkey, Cyprus and Malta. More countries makes unanimous voting in the Council much more difficult.

Even under qualified majority voting, bargaining within the Council takes on greater significance and is more difficult as the number of parties increases. The level of the threshold required for the Council to pass new legislation is an important variable. If the threshold rises, the Court's power will increase.

Talk of strengthening the European Parliament to counter the "democratic deficit", for example by expanding the number of issues under co-decision procedures, would obviously increase the power of the Parliament relative to the Council. It also strengthens the Court by increasing resistance to legislation and creating a whole range of jurisdictional conflict between the Parliament and the Council concerning appropriate legislative procedures. Similarly, the proposal to develop a Council of the Regions would complicate the two-level federal relationship and invites the Court to insert itself in deciding questions of jurisdiction.

CONCLUSION

As membership expands and institutions evolve, European governance grows increasingly complex. One way to make sense of this complexity is to approach the

ECU as a constitutional system whose component parts interact in regular patterns.
The analysis of the ECU's constitutional logic can illuminate the history of European cooperation and generate predictions about future interactions.

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