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# Escaping deadlock: policy-making in Europe

Looking at the European polity and European policy developments, one is struck by the contrast between obstacle-ridden decision-making processes, often ending in deadlock, on the one hand, and institutional change and rapid policy movement, on the other. Thus, since the mid-1980s, we have witnessed significant changes, notably in 'constitution-building, politicisation, mobilisation and enlargement' (Laffan 1997: 6), and a steady expansion of the European policy agenda (Peters 1996), alongside stalled negotiation processes and incremental policy changes. How can one explain this apparently paradoxical co-existence of stalling and swift development? In this book I contend that gridlock and growth are intimately linked, and that this linkage is derived from two central properties of the European polity – its diversity and its consensual decision-making practices.

In European policy-making, the diversity of actors' interests, the consensus-forcing nature of European institutions and the redistributive elements present in most Community policies would inevitably lead to a stalemate or 'joint decision trap' (Scharpf 1991), were it not for the widespread and ubiquitous use of informal strategies and process patterns that circumvent political impasses, referred to collectively as subterfuge or escape routes.[1] Subterfuge then consists of policy strategies and patterns that 'make Europe work' against the odds of the given institutional conditions and the enormous diversity of interests. It not only comprises deliberate strategies, such as the creative use of institutional channels, windows of opportunity, elements of surprise and 'a policy of

[1] For the analysis of subterfuge or escape routes from decision-making traps in sub-state negotiations among the German *Länder*, see Benz (1992).

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stealth' (W. Wallace 1996) to accommodate diversity and bring about
policy change in the face of a probable decision-making deadlock, but
also evolves from the overall structure of the European polity. It is this
'logic of diversity' (Hoffmann 1974) which initiates a spontaneous
acceleration of policy-making by regulatory competition and mutual
learning. I claim that the emergence of such escape routes has indeed
become second nature to European policy-making in all its interlinked
arenas, and examine the reasons why such patterns emerge in specific
policy domains, and how they contribute to the three crucial functions of
a polity: the accommodation of diverse interests; policy innovations; and
democratic legitimation.[2]

First, how are the wide variety of interests, regulatory modes and
cultures in Europe accommodated in the formulation of policy? European
policy-making is heavily conditioned by this fundamental variance of
political, geographical, cultural, institutional and economic features. And
it is this diversity that must always be taken into account when policies
are shaped, making the reconciliation of unity with diversity and
competition with co-operation the greatest challenges currently facing
European policy-making (Majone 1995). Given this striking degree of
divergence and consensual decision-making practices, how are potential
policy-making deadlocks avoided, and what policy solutions are being
used to cope with diverse sectoral, regional and local circumstances?

Second, how can policy innovations be brought about in a rapidly
changing environment alongside the need to make compromises between
conflicting goals?[3] The institutional conditions of European policy-
making – consensual decision-making despite the existence of the
Qualified Majority Rule (QMR)[4] – would seem to favour the *status quo*

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[2] The central functions carried out by political systems are the aggregation and
accommodation of diverse societal demands addressed to decision-makers, policy
formulation and the production of democratically legitimised decisions by a
legally responsible and democratically accountable government.

[3] Policy innovation is defined as the establishment of: (a) a new European policy
area; and (b) the introduction of a new problem-solving approach linked to new
instruments in an existing European policy and/or the significant widening of the
latter.

[4] Although decisions may be taken on the basis of a qualified majority in the
Council in many policy areas, it is interesting to note how seldom this rule is
actually used. Of the 233 decisions regarding the integrated market taken by the
Council of Ministers over a period of five years, only ninety-one were enacted
against opposition from one or two member states (*Financial Times*, 13 September
1994). One can argue that the very existence of QMR, as a 'shadow of hierarchy',
will speed up the decision-making process (Scharpf 1997a), but this factor alone
does not explain the frequent recourse to subterfuge.

and decisions based on the lowest common denominator.[5] Yet European policy activities have expanded steadily, and, at times, innovatively, over the years. One should not forget that the Community which emerged from the Treaty of Rome set out to resolve *precisely* those problems of interdependence that could not be dealt with by member states on their own. The question therefore arises as to which factors, process patterns and actor strategies promote policy innovation.

Finally, with the expansion of the scope of European policy-making, what attempts are being made – within the tight institutional boundaries of unanimity – to find new forms of democratic legitimation? First, parallel to the discussion on how to strengthen the role of the European Parliament and to enhance traditional forms of democratic legitimation which have been taking place in the last Intergovernmental Conferences (IGC), another development has gone largely unnoticed. Given the stalled institutional reform process, the Commission has taken a number of small – yet important – steps to expand public support for existing European policies. Moreover, an increase in accountability may actually be derived from Europe's very diversity and the watchfulness among member-state actors (Héritier 1999).

In seeking answers to these questions regarding interest accommodation, innovation and legitimation I hope to gain new insights into the dynamics of European policy-making to complement the existing explanatory approaches of European politics. Thus, while the formal institutional rules – which have been amply described – form the context in which these policy patterns develop, they do not entirely account for them. Although existing theories of European integration, such as neo-functionalism (Haas 1990), and liberal intergovernmentalism (Moravcsik 1993), go some way toward discerning the important features of European policy-making and point respectively to 'spill-over' processes and the weight of member-state bargaining, they only offer partial insights into the dynamics of decision-making in specific policy areas.

In order to examine patterns of policy-making I have selected policy areas,[6] grouped according to specific analytically meaningful problem-types that offer initial clues to policy-field-specific processes. The policy

[5] The 'race to the bottom' is not a dominant result of European regulatory policy, such as in the field of environment. What is more common is a tendency to a medium level of environmental standard-setting (Golub 1996).

[6] The analysis is based on the author's empirical research in the fields of environmental policy (Héritier, Knill and Mingers 1996), and transport policy (Héritier, Kerwer, Knill, Lehmkuhl, Teutsch and Douillet forthcoming, research project funded by the German Science Foundation). For the other policy areas examined here, the secondary analysis of empirical research has been used.

problems dealt with here are *market-making* in the sense of market creation such as the elimination of trade barriers (transport and telecommunications policy), the provision of *collective goods* by reducing negative externalities (environmental policy), and market-correcting *redistribution* (regional and social policy) and *distribution* (research and technology policy).[7] This schema allows us to relate problem-types to different strategic interest constellations (Scharpf 1997a), and provides an initial indication as to the 'why' of deadlock situations. For, depending on whether an actor anticipates gains or losses from a given policy, he or she will support or oppose those same measures. But beyond the immediate material gains and benefits, two other aspects come to bear on the political decision-making process. First, the institutional implications of a policy proposal affect the *position* of actors concerned. The latter will ask themselves: 'Will I gain or lose decision-making powers if a specific policy is adopted?' Furthermore, in a diverse polity, conflicts are shaped by the possible costs of instrumental adjustment generated by a decisional proposal, so that policy issues entailing substantial administrative adjustments because of the need to fit new instruments into the traditional tool-kit will tend to produce a negative reaction on the part of national actors.

Thus, the four basic problem-types, which provide significant information about the stakes of the actors in the policy areas examined, constitute a point of departure in analysing the plausible cleavage structure. These cleavages interact with two additional conflict lines – the maintenance of decisional powers, and the avoidance of instrumental adjustment – which also play a role in the policy formulation process at the European level. The different dividing lines are interwoven, so that, for example, a change in institutional decision-making rules may be sought to increase specific economic gains (Tsebelis 1990), or the use of a particular instrument may serve specific economic interests.

The first of the two central claims made in this analysis is that – under the given institutional conditions, and taking into account European diversity – redistributional conflicts along the three conflict levels –

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[7] An aspect which complicates the analysis of policy areas is that many policies do not have a single problem property, but combine aspects of market-making, the provision of collective goods by reducing negative externalities, or market-correcting redistribution and distribution. Thus, market-making problems also imply redistributional elements when it comes to the distribution of the large-scale gains obtained by market integration. The same holds for collective good problems that involve a redistribution of costs when the negative external effects of an activity are sanctioned. Consequently, in analysing empirical policy fields, there may be a need to focus more narrowly on the dominance of a specific cleavage at a particular point of time within the policy field.

economic, decisional and instrumental – abound in European policy-making and will tend to stall the decision-making process. Frequently, the prospect of conceding economic resources or decision-making powers, or incurring the costs of instrumental adjustment, will induce European policy actors to reject new policy measures. The second central claim is that, were it not for the existence of formal and informal strategies and policy-making patterns triggered by the dynamics of diversity, a decisional deadlock between promoters and opponents would almost always ensue.

The argument is developed in the following steps: Chapter 2 examines the wider context of policy-making by escape routes in the European Union;[8] in Chapter 3 the analytical approach and theoretical background underlying the analysis are outlined; Chapters 4 to 7 analyse the patterns of interest accommodation, policy innovation and substitute democratic legitimation in market-making policies, the provision of collective goods, and market-correcting redistributive and distributive policies respectively; and the final chapter draws comparative conclusions and raises the question of the overall implications of subterfuge for the European polity.

[8] The term 'European Union' or simply 'EU' has generally been used in place of 'European Community' or 'EC' throughout the book, except when referring explicitly to the pre-Maastricht era.

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# The context of subterfuge: diversity, fragmentation and the malleability of the European polity

## The simultaneity of deadlock and development

It has been claimed that the parallel presence of gridlock and growth evolves from two central properties of the European polity – its diversity and its consensual decision-making practices. The variance in the goals pursued by actors has generated an institutionally fragmented polity which demands consensual and interlocking decision-making practices developed to conciliate conflicting goals rather than to provide strong executive leadership. Yet, paradoxically, the very fragmentation and complexity of the decisional structure created to accommodate diversity, and which, in the straightforward decision-making process in the central arena (Council), tends to lead to a stalemate or 'joint decision trap' (Scharpf 1988), simultaneously offers ample room for escape routes to overcome potential deadlocks and to speed up policy developments. The very complexity and opaqueness of the institutional structure offer multiple opportunities for creative actors, not only in the Commission and the European Parliament, but also in the member states, to take policy initiatives and to see them through by side-stepping existing obstacles in the decisional process. This leads not only to a strong element of policy entrepreneurship, and the chance for first-movers to wield influence in the process of policy definition, but also to a good deal of policy improvisation and policy unpredictability (Mazey and Richardson 1992). Escape routes can be reverted to more easily in a fragmented and relatively concealed institutional setting of joint or mutually interlocking decision-making (H. Wallace 1996; Wessels 1990) where multiple actors are engaged in all kinds of bodies and committees. Indeed, one can say

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that the 'structure of Community policy-making was designed . . . to disaggregate issues where possible' and to 'disguise broader political issues, to push decisions down from ministerial confrontation to official *engrenage* within a ''hierarchy of committees'' ' (W. Wallace 1996: 449).

Over and above this, however, the concurrence of deadlock and development as two sides of the same coin must be placed in a wider context and temporal perspective of the development of the European polity, if it is to be properly understood. The European Union is an on-going process, an unfinished polity, and it is this very open-endedness which exacerbates the interplay between stalling and speeding at both levels – in the overall development of the polity, as well as in more routine everyday policy-making. For – given the diversity of goals pursued and the imminent danger of deadlock – the struggle over the general development of the European polity may be used to overcome policy stalling, and vice versa, rapid past policy developments may force institutional polity changes in the present.

What then are the implications for polity and policy development if Europe is viewed as an on-going process on the basis of interest diversity, consensual decision-making and institutional fragmentation? In order to explain the co-existence of stalling and speeding in on-going and contemporary policy-making,[1] I start from two assumptions. First, taking a dynamic-temporal perspective, Europe, as a relatively young polity, is still in a state of flux (Héritier 1993). As an 'unsettled polity' (Laffan 1997), responding to global and regional changes (Sbragia 1996) it should be understood as a process rather than as a stable institutional and policy framework. Both its borders and its overall decision-making rules are still taking shape. As regards membership, the European Union has been, and will continue to be, subject to a process of enlargement. Similarly, the allocation of competences to various decision-making bodies is not definitive, and has been, and will continue to be, subject to modification. Thus, the EU may be described as a young polity in a state of flux, where institutional actors, both public and private, are all engaged in endless skirmishes for procedural terrain.

Second, from a structural view, the hallmark of the European Union is its socio-economic, cultural, institutional and policy diversity. There is a strong tendency to preserve this diversity, leading to a clash of goals which are subsequently pursued in the central political arena. However, the determination to preserve diversity is matched by the conviction that co-operation offers long-term gains, which in turn creates a willingness to

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[1] The past development of EC/EU *qua* polity and policy-making system does not come within the scope of this study.

make concessions and to accommodate diverse interests. The very extent of heterogeneity, characteristic of the fifteen-member Union makes diversity, and the concomitant need for reconciliation, overwhelmingly important principles in European policy-making.[2]

Against this background, I argue that actors – for the greater part public and private formal organisations at the European and member-state level – try to realise their policy goals in interaction with other actors in a specific institutional context, and that the latter have a facilitating and restraining function vis-à-vis these attempts. More specifically, I propose that, if institutions limit the pursuit of policy goals, actors will seek to change these institutions, such as decision-making rules, in order to realise their goals (Tsebelis 1990). Moreover, the incentive to seek to change institutional structures is stronger in a polity which is still taking shape than in one which is consolidated and stable. Accordingly, the likelihood of linking institutional questions with policy questions and vice versa is high. Finally, in the European context, given the diversity of actors' interests and the unanimity rule for institutional reform, the decision-making process is likely to end in deadlock, or to generate only modest change unless escape routes are used to bring about institutional innovation.

The likelihood of decision-stalling also looms large at the policy level since actors' interests are just as diverse, and cleavages – as opposed to institutional reform – develop, as suggested above, along the following three dimensions: the material benefits and costs of a policy decision; the prospect of gaining or losing decision-making power through a specific policy decision; and the costs of necessary instrumental adjustment deriving from that policy. However, I claim that escape routes are indeed available, particularly in conditions of institutional fragmentation, which is in turn a consequence of the diverse polity-building goals.[3] For under the given institutional conditions of 'messiness' and lack of transparency, key actors, mostly the Commission, and the European Court of Justice (Caporaso and Stone 1996), move into the vacuum created by shared and

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[2] It is arguably simpler to accommodate fifteen, rather than two or three, diverse member-state interests within one polity in the sense that heterogeneity constitutes such an overpowering element in the nature of the polity that accommodation and compromise-seeking becomes *the* cardinal feature of decision-making. I would like to thank Paul Sabatier for his comments on the accommodation of diversity in the Canadian context.

[3] In their 1976 work on the joint decision-making of the federal government and the *Länder* in Germany, Scharpf, Reissert and Schnabel pointed to escape routes from decision deadlocks and a lack of problem-solving capacity, which show interesting similarities with the analysis presented here (Scharpf, Reissert and Schnabel 1976).

somewhat unclear structures of responsibility, and profit from the general uncertainty, overcoming the veto of actors' resistance by subterfuge.

### A diverse polity in flux

In trying to understand the on-going process of change and, in particular, the specific link between deadlock and development in the overall context of a polity in flux, one needs to distinguish the *polity* from the *policy* level, and to conceive of them as two strands of development which to some extent run parallel, but are also linked.

At the *polity* or institutional level, change occurs in terms of the definition of the overall aspects of the polity, that is, the delimitation of membership, the modification of the institutional rules of decision-making and the allocation of competences to specific European bodies. As regards changes in the overall polity features of the European Union, these are relatively infrequent. New members do have access, but rarely, and overall changes in decision-making rules and the (re)allocation of competences to new or existing bodies only take place when the overall institutional structure of the EU is under review. Cases in point are the latest accession of Austria, Sweden and Finland, and the envisaged enlargement by Eastern European and other countries. The modification of overall decision-making rules is under consideration by the Inter-governmental Conferences on the reform of the Treaty of Rome. Given the required unanimity rule, change may prove a cumbersome and lengthy process, since very diverse goals are pursued with respect to a desirable development of the European Union. While some member-state governments are eager to forge ahead with the development of state-building, others prefer to stick to a rather loose regulatory framework of a market polity. As a consequence, solutions in terms of the lowest common denominator must be found, making ambiguity or particular options typical of the formulation of institutional goals.

At the *policy* level, change occurs by establishing new policy areas and modifying existing ones, for instance by introducing new instruments. The sheer amount of policy expansion, modification and innovation, such as in the areas of environment, telecommunications and consumer protection to name but a few, which occurs in this continuous, piecemeal yet pragmatic way – rather than in great leaps and bounds – is quite literally enormous (Peters 1996; W. Wallace 1996).[4]

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[4] This does not necessarily mean *more* substantive European intervention. The power to shape policies may also imply the ability to choose instruments allowing for more latitude for member states in line with the principle of subsidiarity.

So far, the two strands of development at the policy and polity level have been perceived as running parallel to one another – changes take place at both levels, but at differing speeds and frequency. However, they often interlink in specific ways and thereby constitute an important source of transformation and, indeed, direct or indirect means (subterfuge) to circumvent a decision deadlock. Two modes of linkage may be distinguished. On the one hand, there are 'official windows of opportunity' (Kingdon 1984) where the two strands cross openly and are debated centre stage. On the other hand, there are more stealthy modes of interlinking on a daily basis, and subtle attempts to broaden decisional power through handling policy issues and vice versa, widening policy activities by incrementally pushing forward the frontiers of European decision-making power.

### Official windows of opportunity for change

Official windows of opportunity are opened by the scheduling of institutional reforms, that is, the redefinition of boundaries (membership and enlargement decisions), constitutional changes and the creation of new institutions and may be exploited by actors to achieve specific, and otherwise unrealisable, policy goals. When new members join the European Union, policies are frequently redefined in two ways. The acceding member may formulate policy conditions for its entry to the EU, and existing member states may stipulate the terms for their willingness to support the accession of a new member. An example of the first is the extension of the structural funds programme to include the polar regions when Finland joined the European Union. An example of the second is the response to demands made by Italy, Ireland and Greece for the introduction of the Integrated Mediterranean Programmes (IMPs) when Portugal and Spain, with their large agricultural sectors, became members of the Union.

The second official window of opportunity – constitutional change – may also be linked to the realisation of large-scale policy innovation. Instances of this are the inclusion of research and technology policy and environmental policy as official European policy areas under the Single European Act, the introduction of the third-pillar policies under the Treaty of European Union and the beginnings of an employment policy in the Amsterdam Treaty (Bergström 1997).

Moreover, the reform of an existing decision-making rule in an established policy area may facilitate policy expansion. Thus, the introduction of the Social Protocol under the Maastricht Treaty allows for faster policy developments in social policy-making, by enabling the