

Social Policy:

Problem-solving Gaps, Partial Exits and Court-decision Traps

Dorte Sindbjerg Martinsen, Gerda Falkner

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Abstract:

Notwithstanding some persisting, and probably irresolvable, problem solving gaps, Social Europe escaped the joint-decision trap quite regularly. Treaty-base games and arena shifting, most importantly, helped to bring about more secondary law and more ECJ driven political decisions than might have been expected from looking at the decision rules. Furthermore, some progressive steps in European social integration driven by a “court-decision trap” can be seen. Two examples are studied in-depth: health care, and the integration and eventual exportability of social minimum benefits. Indeed, relevant integration was deepened significantly although neither the founding fathers of the Treaties nor the governments were willing to create a cross-border market for healthcare, or to open social assistance related benefits for exportability.

Keywords: Social policy, European integration, European Court of Justice, Treaty-base game, arena shifting.

I. European Social Integration: The Sectoral Problematique

This area is characterised by an expert consensus that market-making would not suffice in the frame of European integration. The social and labour law systems of the member states are affected to a significant extent by the intensified competition in the enlarged EU market. This needs to be taken into consideration when drafting general EU policies, and it needs some active counter-steering with EU-level social regulation. The extent of the latter, however, has been and is very much contested.

Measured against the Commission's proposals, the EU managed to close a major expectations-capability gap during the 1990s, when practically all of the pending legislative proposals from prior decades were finally processed. Moreover, and maybe unexpectedly, the legislative process did not stall, at least before the 2007 enlargement. In 2009, approximately 80 binding norms existed in the three main fields of EU social regulation: health and safety, other working conditions, and equality at the workplace and beyond (see data presented in (Falkner 2010)).¹ However, the increasing amount of labour law provisions imposing minimum standards to be applied throughout the EU may not answer all of the existing challenges in the larger field of social policy. Reconciling the legal gaps ensuing from the unified market is one yardstick for measuring the EU's social dimension, with another being the exploitation of problem solving potentials that nowadays no nation state may enjoy on its own.

Beyond specific aspects of the social and labour law systems being touched by the EU, there is a suspicion that the playing field between labour and industry may have been growing less level than ever, not the least due to European integration. The basic argument is that mobile production factors such as capital can profit comparatively more from the enlarged market, whereas labour might suffer from increased competitive pressures both directly (wage dumping) and indirectly (cross-border tax competition tends to disburden the more mobile factors from their share of the social security and tax contributions). Within labour, the "Services Directive" accepts a degree of inequality for those workers posted to other member states, since for them many of their (often cheaper) home country regulations apply (see Schmidt in this volume, Schmidt 2009). Additionally, controversial ECJ cases have recently touched the borderlines between market freedoms and basic social rights such as union action. Their consequences will only be visible in the years to come. A heated debate is ongoing as to their potential consequences in terms of domestic social and industrial relations systems, in particular concerning the minimum pay of workers and the right to strike if foreign companies providing services, e.g. in the building sector, are not subject to the same rules respected by domestic employers (or at least the majority thereof) in the country of work (Scharpf 2009, Joerges and Rödl, 2008).

In short, it can be argued that the EU's measures in the social realm have performed relatively well if compared to the more ambitious task of completing the social directives proposed by the

¹ Additionally, approximately 90 amendments and geographical extensions to such binding norms have been adopted (e.g. to new member states). On top of these binding EU social norms come approximately 120 non-binding policy outputs, e.g. soft recommendations to the member states.

Commission during the activist phases up to the early 1990s. However, they clearly fall very short of the more far-reaching conceptions of a “social Europe”. There is a suspicion shared by many authors that ‘member governments have lost more control over national welfare policies ... than the EU has gained de facto in transferred authority’ (Leibfried 2005, see also Scharpf 1999, Ferrera, 2005). At the same time, designing far-reaching counter-steering measures is not easy considering that the EU is not a nation state with re-distributive solidarity as a given, and that whatever the EU does is in addition to national social systems. In functional terms, there is hence policy pre-emption, and the national politicians furthermore tend to claim the ‘social’ to be a domestic prerogative (see in more detail Falkner 2010).

Notwithstanding these persisting, and probably irresolvable, problem solving gaps, Social Europe escaped the joint-decision trap in many (though not all) cases. More secondary law and more ECJ driven political decisions can be found than might have been expected from looking at the decision rules. Furthermore, some progressive steps in European social integration driven by a “court-decision trap” can be seen (Falkner 2011): even when they all agree, the governments do not manage to roll back ECJ decisions. This goes far beyond the finding that some EU social policy initiatives had surpassed the lowest common denominator of member state preferences (see Pierson and Leibfried 1995).

One early example was the direct applicability of Article 119 EEC-Treaty on equal pay for women and men which the member states had not implemented for almost two decades when the first cases reached the ECJ. Two more recent examples will be studied in-depth in this chapter, on health care and on the integration and eventual exportability of social minimum benefits.² From the viewpoint of (at least some of the) consumers/patients/EU-citizens, one can say that there was a problem-solving gap: they were denied their rights to the free provision of services and benefits. This gap has been closed, at least partially, although neither the founding fathers of the Treaties, nor the governments were willing to create a cross-border market for healthcare, or to open social assistance related benefits for exportability. From the perspective of the governments, the ECJ did create a problem, rather than solving one, by dissociating the distribution of social benefits from the latter’s financial basis.³

² Social minimum benefits do in many cases resemble social assistance benefits and will therefore also be termed social assistance related benefits in the following.

³ Thanks to Fritz W. Scharpf for this formulation.

II. Exits from the trap and consensus-promoting mechanisms at play

EU social policy is a rich field from which to harvest examples for exit mechanisms from the joint-decision trap. We will in this section study some of them based on two of the mechanisms specified in this book's conceptual chapter: changes of opportunity structures (A) and changes of decision rules under the joint-decision mode (B). The focus will then, in the subsequent sections III and IV, be placed on supranational-hierarchical steering by the ECJ, since here we can present two examples for extreme cases where all governments' wills have been overruled.

A) Changes of opportunity structures

Historically, the first obvious use of the strategy to change the opportunity structure for governments was during the mid-1970s in the field of gender equality. The ECJ had by then established not only the potential direct effect of EEC Treaty provisions, but also that the Treaty could bind private actors – though not yet in the field of gender equality. Against this background, the EU Commission managed to nudge the Council into adopting, first of all, the Equal Pay Directive, and later also a broader framework for non-discrimination at the workplace. One of the effective arguments used by the Commission was the pending cases before the ECJ and that high costs might otherwise result for employers in the member states, or at least for the governments as employers (Falkner 1994). Issues of legal certainty, as discussed in Susanne K. Schmidt's chapter, were raised. It should be mentioned, however, that in the first relevant case (Defrenne I, C-80/1970, ECJ 1971:447) the ECJ had actually not spoken in favour of equality and had not answered some of the relevant questions asked, which is difficult to understand in the light of later doctrines. In fact, the supra-national hierarchical mode could have been chosen in this field much earlier. The Commission, most importantly, could have enforced Article 119 via Treaty infringement proceedings, which it chose not to do. The truly supranational-hierarchical modes actually needed long time horizons to mature, even in fields with obvious shortcomings on the part of the member states.

Meanwhile, equality has developed into one of three major fields of EU social regulation. Further matters, such as the equal treatment of men and women regarding working conditions and social security, and even the issue of burden of proof in discrimination law suits, were over time regulated at the EU level (Hoskyns 1996; Ostner and Lewis 1995). Soon after the adoption of the Equal Pay Directive in 1975, the ECJ actually held that Article 119 'is at once economic and social' and formed 'part of the foundations of the Community' and could hence be relied on before the

national courts, even against collective agreements and contracts between individuals (ECJ case 43/75, Defrenne II, ECJ 1976: 60-77). None of the governments had in 1957 imagined that twenty years later, national law and individual work contracts might be invalidated by legal complaints under Article 119, whose wording was specifically drafted to oblige each of the member states (not the Community!) to ensure the principle of equal pay. This is actually a much older example of what sections III and IV will outline, too: European social integration against the will of all governments.

Another strategy from the menu of “changing opportunity structures” is co-optation of strategic partners to pressurise governments. Here it is important to mention that the Commission served as a kind of midwife in the birth of the European Trade Union movement. Without Commission support in terms of practical and financial means, much of later campaigning and even social partner negotiations would not have occurred. Such processes of polity creation occurred at least twice: By the time of the establishment of the ETUC, and later preceding the Maastricht Social Agreement. During the early decades, setting up the ETUC and funding it were crucial; later, it was a degree of supra-nationalisation of the internal rules of procedure without which the corporatist negotiations under the Maastricht Social Chapter’s provisions could not have worked even to a limited extent (Falkner 1998).

B) Changes of Decision Rules: Treaty base game and arena shifting

The dominant philosophy of the 1957 Treaty Establishing the European Economic Community (EEC Treaty) was that welfare would be provided by the economic growth stemming from the economics of a liberalised market. Welfare was not foreseen to arise from the regulatory and (re-) distributive capacity of a public policy at the European level. For a long time the EEC (and later the EC) possessed no explicit competence provision empowering the Commission to draft legislative proposals for later adoption by the Council of Ministers. It was only due to the existence of so-called 'subsidiary competence provisions' that intervention in the social policy field was – implicitly – made possible, but only if it was considered functional for market integration (most importantly, Article 100 EEC Treaty and Article 235 EEC Treaty). It is crucial to note that from the 1970s onwards these provisions provided a loophole for social policy harmonisation at the EU level. The necessary unanimity, however, constituted high thresholds for joint action. Adopting social

regulation in the Council of Ministers needed unanimous approval. Given the often antagonistic preferences of the governments, there was a severe form of joint-decision trap situation.

However, the 1986 Single European Act introduced a provision selectively allowing for qualified majority voting on minimum harmonisation concerning health and safety of workers (to become Article 118a ECT). Reluctant member states, most importantly the UK whose Prime Minister Thatcher had thought this provision on health and safety would be too technical to matter, could for now be forced to align their social legislation with the majority of member states, even against their will. An extensive use of this provision was possible because the wording and even key terms of Article 118a were unclear. This made it easy to play what has since been called the 'treaty base game' (Rhodes 1995). It allowed the governments to adopt not only measures improving the working environment, such as a directive on the maximum concentration of air-borne pollutants, but also measures which ensured the health and safety of workers by improving working conditions in a much more general sense like, for example, limiting working time. A large part of the social policy directives adopted by the EC during the 1990s came into being via this "escape from deadlock" (Héritier 1999).

Where EU social policy-making is difficult to manage, another potential escape route is arena shifting to social partners. This was initiated by the EU Commission who acted as a mediator between the governments, on the one hand, and the social partners, on the other. Since 1992, bargaining on social policy issues has therefore been pursued in two quite distinctive but interdependent arenas: the Council and its working groups; and the organised interests of management and labour. In this 'corporatist policy community' (Falkner 1998), the Commission consults on any planned social policy measure. European-level employer and labour groups may then inform the Commission of their wish to initiate negotiations on the matter under discussion in order to reach a collective agreement. This process brings standard EC decision making to a standstill for nine months. If a collective agreement is signed, it can, at the joint request of the signatories, be incorporated in a Council decision on the basis of a prior Commission proposal.

The practical effectiveness of this potential exit from the joint-decision trap, however, depends on the willingness to compromise on the part of the so-called social partners. As it turns out, the employers' representatives seem only willing to compromise "in the shadow of the law" and/or where their self-interest in upholding the corporatist procedures are at stake. Not many social regulation issues have fit these criteria in almost 20 years. Only three legally binding, cross-sectoral

collective agreements on labour law issues have been signed and were implemented in directives: on parental leave (December 1995; reformed in 2009 and again implemented via Council directive); on part-time work (June 1997); and on fixed-term work (March 1999). A number of further negotiations failed to reach agreement or were not even initiated (e.g. on fighting sexual harassment, and on information and consultation of employees in national enterprises). Recently, a few further agreements were concluded to be implemented only in accordance with the procedures and practices specific to individual countries, rather than by a Council directive (e.g., on telework, work-related stress, and on harassment at work). In short, EU social policy represents a paradigmatic example for arena shifting and hence changing the decision-mode under the EU's political decision-making framework. A panacea this is certainly not.

We hypothesise that one could find examples for all other aspects discussed in the conceptual chapter as potential exits from the trap, too, such as delegation to de-politicised committees. Furthermore, some of the consensus-promoting mechanisms as outlined in the conceptual chapters have clearly been present at least at times. Changes in government, for sure, have had clear effects, the most blatant of which is the accession of the UK to the Social Protocol of the Maastricht Treaty. John Major had allowed a twin-track Europe to exist which the Labour Party put an end to as soon as it took over government (Falkner 1998). This story can at the same time serve as an example for how opt-outs are being used, a further one being the Working Time Directive and its – though still unsuccessful – successors.

In the rest of the chapter, however, we will focus on what we consider to be the most interesting aspect of how supranational dynamics have driven EU social policy forwards, even against the explicit will of ALL governments.

III. Court-decision trap I: Healthcare as a cross-border service in the EU

As laid down in the constitutional design of the European Community, internal market principles were never meant to affect the member states' organisation of healthcare. As confirmed by Treaty Article 152 (5) (TEC)⁴ and long taken for granted by national politicians, the delivery and organisation of healthcare was set as member state competence. Loud was the outcry therefore,

⁴ Now article 168 (7) of the Lisbon Treaty.

when the European Court of Justice in April 1998 ruled on the two seminal cases of *Decker*⁵ and *Kohll*⁶. This laid down that healthcare also is defined as a service within the meaning of the Treaty. The former German health minister Seehofer was one of the most severe critics of the ruling and its implications, stating that this new case-law was revolutionary and if Germany adopted its premises, it would be a long-term threat to the sustainability of the German health system (Spiegel 17/98, Fokus from 4 May 1998). A Treaty amendment detailing that internal market principles did not apply to healthcare was called for.

As we now know, such a Treaty amendment was never adopted. In the end, member states did not prioritise the matter sufficiently when negotiating the Treaty of Nice, and instead chose a strategy of neglect. Meanwhile, the principles and rights of the European Union are increasingly impacting on key aspects of national healthcare organisation. Although there is still no political agreement on the scope and content of EU cross border healthcare, it is safe to conclude that despite firm political preferences against European healthcare integration, it nevertheless has progressively taken place with considerable speed and substance (Martinsen 2005; 2009).

From its seminal judgements in 1998 onwards, the ECJ has been conducting non-political decision-making. In the context of the judgements, a central question has been the conditions under which free movement would apply without restrictions. Due to the EU social security coordination scheme Regulation 883/2004, which will be treated further in section IV below, member states are entitled to limit cross-border care by means of ‘prior authorisation policies’ (Reg. 883/2004, Art. 20). Such policies state that if a patient wishes to obtain planned treatment in another member state, the competent national institution must authorise or refuse the patient permission to go abroad for treatment beforehand, and thus certify that the cost of treatment will be reimbursed by the national authorities. Whether such prior authorisation requirement is a justifiable national restriction to the free movement principles of the EU is one of the main questions treated by the Court. Although apparently a rather specific and concrete question, this controversy mirrors one of the most central questions on European integration, namely the scope and limits of national control and competences.

In the first cases of *Decker* and *Kohll*, the Court found that prior authorisation was not justified in the light of the internal market. But the cases concerned a pair of spectacles and dental treatment,

⁵ Case C-120/95, *Decker*, 28 April 1998.

⁶ Case C-158/96, *Kohll*, 28 April 1998.

and the member states could therefore – after the initial outburst – reassure themselves that the judicial conclusions had only limited effect on healthcare goods and services provided outside the hospital sector and that they furthermore only concerned the Luxembourg healthcare system. Luxembourg has a social insurance system, where the cost of care is reimbursed and not provided as benefit in kind, and the general applicability of the Court’s conclusions could therefore be refused.

In the subsequent cases, the scope of the initiated legal integration becomes gradually clearer. In the *Geraets-Smits and Peerbooms* case⁷ the Court clarified that internal market principles also apply to hospital care, provided as benefits in kind. This time the Court ruled against the Dutch healthcare system and found that prior authorisation may be a justified barrier to the free movement principles when the service in question is hospital care. However, prior authorisation is only justified if 1) the decision on whether or not to grant treatment abroad is based on ‘international medical science’ and 2) a similar treatment can be provided in the patient’s own member state without ‘undue delay’. Among other aspects this means that waiting lists as a means of capacity planning and to prioritise between treatments and – eventually – patients are conditioned and restricted by Community law.

In the following case of *Müller-Fauré and Van Riet*, another Dutch case, the ECJ proceeds by drawing a distinction between hospital care and non-hospital care. For hospital care – prior authorisation may under certain condition be justified. For non-hospital care it is, however, found to be an unjustified barrier to the free circulation of services. In *Müller-Fauré and Van Riet*, the Court thus settled that for the wide scope of treatment which can be provided without hospitalisation⁸ internal market principles rule. The impact of this legal reasoning is considerable indeed. It implies that for the wide scope of healthcare services that do not require hospitalisation, a patient can go to another member state without authorisation from his/her home state, pay for the cost of treatment up front and subsequently have the costs reimbursed back home – up to what a similar treatment would have cost in the home member state.

So far only the impact on social insurance systems has been interpreted. In the 2006 *Watts* case⁹, the Court for the first time considered the implications for national health services purely organised and

⁷ Case C-157/99, *Geraets-Smits and Peerbooms*, 12 July 2001.

⁸ Hospital care is understood as what requires a one night stay in hospital. According to this definition, treatment that can be provided within less than 24 hours counts as non-hospital care.

⁹ Case C-372/04, *Watts*, 16 May 2006.

financed by the public authorities and provided as benefits in kind. The case considered the UK National Health Service, the NHS. The Court concluded that the internal market principle applies to all healthcare systems, irrespective of how they are financed or how they provide healthcare. The Court repeated that patients have a right to cross border treatment if the waiting-time for a similar treatment in one's own member state exceeds what is acceptable.

The final case to be mentioned here considered the Greek administration of cross border treatment. In the 2007 case of *Stamatelakis*, the Court ruled that a member state cannot exclude reimbursing treatment in another member state on the grounds that it is provided in a private hospital. In the case, the Greek government submitted that the balance of the system is at risk if citizens can travel to private hospitals in EU countries without Greece having established agreements with those hospitals. However, these concerns were ruled out by the Court, which instead clarified that the Greek ban on reimbursement for private healthcare abroad is against Community law.

The line of case law from *Decker*, *Kohll* onwards to *Stamatelakis* by and large draws the scope and the founding substance of an internal market for healthcare. Step by step, it has included all healthcare systems, public and private provisions and limits the justified scope of national conditions. It is not only an agenda set by law, but also the negotiable substance which becomes defined through judicial policy-making. It is clear that up to this point, it is indeed a European healthcare system left to be drawn by courts and consumers/patients (Leibfried 2005).

Since then politics has come to the fore. Politicians in the Council of Ministers and the European Parliament are now in co-decision and by procedural means of qualified majority voting trying to reach a compromise. However, within the political room to manoeuvre, the 'voice of law' as put forward by the European Court of Justice continues to constitute an extremely important exit possibility. Indeed, from different actors and institutions the 'voice of law' is used strategically as a problem solving strategy to overcome opposition (for a more detailed account, see Martinsen 2009).

The EP has been severely divided from the start. By and large, a left – right divide manifests itself on the matter. The European Socialists and the Greens are against the proposal, whereas the European Peoples Party and the Liberals are in favour. However, also in EP negotiations the case-law of the Court is a strong argument why political action needs to be taken (Interviews, MEPs, February, June, December 2009). As the rapporteur John Bowis, from the European Peoples Party, puts forward in his report:

‘For the past ten years, since the 1998 Kohll and Decker judgement at the European Court of Justice (ECJ), the lawyers of Europe have been deciding policy on patient mobility, because the politicians of Europe have failed to do so. If we do nothing, the Court will continue to interpret the Treaties, where patient mobility rights are concerned. They will provide the clarity that we politicians have failed to provide. If we are content to leave policymaking to lawyers, then we need do nothing - except of course pay the resulting unpredictable bills’ (Report A6-0233/2009, rapporteur Bowis, p. 77).

In the Council negotiations on cross-border healthcare, the presidency troika of France, the Czech Republic and Sweden formulated various compromise proposals and at the end of the Swedish presidency a compromise for a common position was on the table.¹⁰ It was, however, turned down by a blocking minority of Spain, Poland, Romania, Portugal, Greece, Ireland, Hungary, Slovakia, Slovenia and Lithuania. This means that for the time being the dossier is parked. The ‘voice of law’ has been crucial during Council negotiations, where the majority of member states agreed on the need to politically regulate in order to take over what the Court had initiated (Interviews I, II, III and IV, Council, December 2009). After the failure to reach a political agreement, the Swedish presidency stressed that the member states have now left it for the Court to continue (G. Hägglund, 2980th meeting, Press Conference, 1st December).

Although the exit possibilities established did not for the time being prove sufficient regarding cross border health care, the progression of negotiations should be noted. As noted by Commissioner Vassillou, only 2-3 member states were in favour when the proposal was first presented by the Commission (A. Vassillou, 2980th meeting, Press Conference, 1st December). In the meantime various veto points have been dismantled, and apparently the Swedish presidency came very close to reaching an agreement by qualified majority voting (Interviews, CON, December 2009).

In sum, the case storyline so far is that member states initially wanted to keep cross border healthcare out of the EU regulatory scope, but the Court brought it in. Only a Treaty revision could have ‘rolled back the Court’, but member states chose to shelter behind a strategy of neglect, prioritising differently and holding that due to the specific circumstances of their domestic healthcare systems, the case-law did not really impact back home. For more than a decade, the European Court of Justice has progressively taken the policy field far into the regulatory space of the internal market. This form of supranational-hierarchical steering has finally made the Commission present a proposal for a patient mobility directive, and although ongoing negotiations have not yet reached an agreement, member states’ opposition is gradually being turned into an

¹⁰ Swedish compromise proposal as of 23 October 2009, Council inter-institutional file no. 14926/09.

acceptance of an EU internal system for healthcare. The ‘court-decision trap’ has made cross border healthcare the binding law of the land, and the initial political will to roll back the Court has been replaced by a majority accepting the once unwanted outcome of judicial decision-making. The ‘voice of law’ has been used strategically to shape preferences and promote consensus.

IV. Court-decision trap II: ECJ Prerogative over the Definition of Social Minimum Benefits and their Exportability

Social regulation in the European Community is as old as the Community itself. In order to realise the principle of workers’ free movement, a Regulation coordinating the social security rights across borders was adopted as early as 1958 and reformed in 1971.¹¹ The regulation coordinates welfare rights when employed persons (now EU citizens) move and reside in a member state other than their own and constitutes an impressive, detailed and quite well-functioning cross-border social security co-ordination system.

Article 4 of Reg. 1408/71 (now Reg. 883/2004) lists the social security benefits included, but explicitly states in Article 4 (4) that social assistance falls outside the material scope of the Regulation. The political rationale for tying social assistance to the nation state was, and still is, that it is different in nature from social security (van der Mei 2002) and should remain within the strict competencies of the member states. Social assistance was an important and indeed deliberate exemption to the member states also because it was seen as opposed to the functional idea of the regulation, which was to mobilise the labour force within the Community (not those receiving social assistance) (Holloway 1981). The historical context of the welfare model is important to note here since by 1971, the difference between (exportable) benefits of employer and employee financed social insurance, on the one hand, and social assistance financed via taxes (and hence related to the place of residence), on the other hand, was still clear cut for all of the original six founding EU states with their Bismarck style welfare systems. This was later blurred when Denmark, Ireland and the UK came in, where tax financed benefits are common in realms elsewhere covered by contributions-based social insurance.

¹¹ The first regulation adopted was Regulation No. 3, adopted by the Council on the 25th September 1958 but later reformed as Regulation (EEC) No. 1408/71 of the Council of 14 June 1971. The regulation has recently been substantially reformed with the adoption of Regulation 883/2004 of 29th April 2004.

The EU co-ordination scheme means that member states grant residing or working citizens from other member states access to their social security benefits and also to bring along social entitlements that they have earned in one member state to another. The Regulation is based on a principle of non-discrimination and exportability in order to establish and promote cross border mobility among EU citizens. It thus introduces an – albeit limited – principle of social sharing, as well as principles set to de-nationalise and de-territorialise welfare rights. The regulatory scheme has up to the Lisbon Treaty been closely guarded by unanimity decision-making rules, and reform attempts have been characterised by strong national preferences. Accessing welfare communities and exporting welfare rights earned have indeed been re-distributive questions of high political salience.

Social assistance or social minimum benefits continue to rely on strongly tied nation-state logics of reasoning. To socially assist those who cannot provide for themselves through benefits in cash or in kind relies on a shared understanding of solidarity within a defined community. Social assistance constitutes the most direct form of redistributive policy. It transfers resources between members of society without making rights dependent on individual contributions. The political preferences regarding coordination of social assistance benefits within the European Union have been both clear and relatively fixed. Politicians generally, across member states and over time, have held that establishing who has the right to access minimum benefits and where such benefits are payable belongs to the repertoire of national competences and the EU should not interfere in such forms of *national* redistribution. However, despite clearly defined national preferences and unanimity, EU coordination of social minimum benefits has taken place. Today, *accessibility* and to some extent *exportability* of social minimum benefits constitute an important part of social Europe's substantive contents.

In the 1970s and 1980s, the European Court of Justice began to challenge member states' understanding of what could be excluded from the regulatory scope and progressively included more nationally defined social assistance benefits into the scope¹². The member states became alarmed and argued that the ECJ had overstepped the competences of the Community and that the relevant social assistance kind of benefits fell outside the spirit and purpose of the Treaties (Verschuere 2007, Christensen & Malmstedt 2000; Martinsen 2005b). In 1992 - in a rare display of the strength of political preferences - the Council of Ministers managed to overrule the Court's

¹² The more expansive interpretations include; case 1/72 Frilli; case 187/73 Callemeyn; case 63/76 Inzirillo; case 139/82 Piscitello and joined cases 379 to 381/85 & 93/86 Giletti et al.

expansive interpretations.¹³ The Council adopted a Regulation which specified that certain benefits with characteristics between social security and social assistance should be made non-exportable to hosting member states. In this way, the Council overruled the Court on the facet of exportability, but the special rule at the same time specified that these “special non-contributory benefits” in the grey area between social security and social assistance were accessible in a host member state for the personal scope of the regulation. Correction of the Court’s decision-making throughout would have required a Treaty amendment, hence the governments yielded regarding one facet.

For a benefit to be coordinated according to the special rule, it should be listed, by unanimous decision, in Annex IIa of the Regulation. One could argue that on the facet of exportability the member states had re-politised control and taught a lesson to the ECJ, but at the same time have had to accept cross border accessibility to these benefits.

At first, the Court seemed to take the political correction of its expansionary course of integration into account, as confirmed the by subsequent cases of *Snares*¹⁴ and *Partridge*¹⁵. The specific regulatory scheme soon found its own expansionary dynamics, fed by politics. When the amending regulation was adopted, the benefits inserted in the Annex were still quite limited (Interview I, Commission Official, February 2007). Over time, the Annex, however, came to include a long list of minimum benefits and special benefits for disabled persons.¹⁶ The member state rationale for wanting to limit these benefits within the national borders was indeed politically highly important and was connected to two important on-going societal developments challenging the welfare state: a) pensioners moving to the South should not be able to export social benefits which were intended to support them in their home member state; and b) workers from Eastern Europe and their family members should not be able to export ‘generous’ benefits from north and continental Europe when returning to their own member state. In this way, the dispute addresses what should be the scope and limits of social responsibility and solidarity in a contemporary mobilised Europe.

¹³ Council Regulation (EEC) No 1247/92 of 30 April 1992..

¹⁴ Case C-20/96, *Snares*, 4 November 1997.

¹⁵ Case C-297/96, *Partridge*, 11 June 1998

¹⁶ The annex included benefits such as income replacement allowance from Belgium; the Spanish minimum income guarantee, cash benefits to assist the elderly; the Irish unemployment assistance; the Italian social pensions for persons without means, social allowance; the Finnish special assistance for immigrants, the Swedish financial support for the elderly, the British income-based allowance for jobseekers, income support, etc.

The Commission was however dissatisfied with this new turn in the coordination system, arguing that it hindered the overall idea of welfare coordination, namely ensuring and promoting free movement for all – not only benefitting the more classic labour force. Back in 1998, the Commission had proposed a substantial reform of Regulation 1408/71, which among other objectives aimed to slim Annex IIa considerably and to return to a more consistent regulatory scheme with fewer exemptions.¹⁷ However, the negotiations were progressing slowly (Interview II, Commission official, February 2007). In particular, many member states vetoed taking their individual benefits out of Annex IIa. The difficult bargaining situation, loaded with divergent national interests, threatened to block the reform process as a whole. The situation came to a head around 2001 in relation to the negotiations on the *acquis communautaire* with the ten candidate countries. The first delegation to negotiate was the Czech Republic, and one demand from the candidate country was to have a long list of benefits inserted in Annex IIa (Interview I, Commission Official, February 2007).

Just five days before the Commission negotiated with the Czech republic, the Court ruled on one of its ground-breaking cases. In the *Jauch*¹⁸ ruling and the later case of *Leclere*¹⁹ the Court ruled that although listed in the Annex, the Austrian long term care in *Jauch* and the Luxembourgian maternity allowances in *Leclere* had been incorrectly governed by the special rule and were indeed exportable according to Community law.

The new rulings of the Court empowered the Commission in the negotiations with the candidate countries and – perhaps more importantly – towards the member states. When the Czech Republic came with its list of benefits to have inserted in the Annex, the Commission refused the demand with reference to the *Jauch* ruling (Interviews I and II, Commission Officials, February 2007). As a result of the new turn in judicial interpretations, the Commission could insist that the long list of special benefits needed to be amended, so that the same criteria that applied to established member states also applied to candidate countries. Leaning against the words of the Court, playing the card of ‘the voice of law’, the Commission regained its capacity to ‘nudge’ the Council (Genschel, this volume). After difficult negotiations, the Council and the European Parliament adopted another

¹⁷ COM (1998) 779, proposed 21 December 1998.

¹⁸ Case C-215/99, *Jauch*, 8 March 2001.

¹⁹ Case C-43/99, *Leclere*, 31 May 2001.

amendment, Regulation 647/2005²⁰. They introduced a new definition of special non-contributory benefits. As a result, the list of benefits was completely revised. Around 40 benefits were removed from the list (Interview I, Commission Official, February 2007).

Despite supposed political codification of the Court's interpretation, the Commission was still not satisfied (Verschuereen 2007). The Commission could not accept that the *UK disability living allowance*, the *attendance allowance* and the *carer's allowance*, the *child care allowance* of Finland and the Swedish *disability allowance* and *care allowance for disabled children* were still placed in the Annex. These three member states disagreed vigorously.

Instead of taking each of the three member states to Court, the Commission chose to bring an *annulment procedure* against the Council and the European Parliament, in accordance with article 230 of the Treaty. That is, the Commission requested the ECJ to annul the adopted Regulation 647/2005, for having wrongly inserted the benefits mentioned above for the UK, Finland and Sweden in the Annex. This confrontational approach by the Commission caused significant uproar among the three affected member states. From having enjoyed considerable discretion in defining their own benefits as not exportable, the prospect of reduced autonomy was far from well received by the member states. The perhaps strongest reaction came from the UK which refused to bend its positions throughout the preliminary negotiations with the Commission and in the Council (Interview, UK Department of Work and Pension, March 2006). The UK maintained that the aforementioned benefits were special and non-contributory. Furthermore, the UK pointed out that the listing of the disability living allowance and the attendance allowance had already been approved by the Court in *Snares* and *Partridge* (para 50 of case C-299/05).

The Court ruled on the annulment procedure in October, 2007.²¹ Like the Commission, the Court found that the benefits had been wrongly listed in the Annex, and should be made exportable according to the rules of the Regulation.

²⁰ Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71.

²¹ Case 299/05, Judgment of the Court (Second Chamber) of 18 October 2007. Commission of the European Communities v European Parliament and Council of the European Union. Action for annulment - Social security - Regulation (EEC) No 1408/71 - Articles 4(2a) and 10a - Annex IIa - Regulation (EC) No 647/2005 - Special non-contributory benefits.

In sum, the case on social assistance related benefits demonstrates that despite unanimity and strong political preferences to maintain control, social minimum benefits exportability has had its own course of European integration. In the longitudinal perspective, supranational hierarchical modes of decision-making continue to progress social Europe, even into the national most unpopular aspects of social sharing. When sequencing out what happens over time, it is clear that case-law interpretations have become considerable assets to the Commission. Furthermore, the patience, persistence and continuous presence of the Commission has helped to overcome long-running resistance to the “bits and pieces” of integration. Together the Court and Commission constitute a powerful tandem of supranational-hierarchical steering and non-political powers. The temporal study of the joint action of the Commission and Court shows that in the many detailed re-interpretations of the scope and limits of the European idea, time is key to understanding exits from the joint decision-trap.²² In the long run, opposition to the voice of law is difficult to maintain, even where all governments agree on it, and isolated positions may become increasingly lonesome against the non-political powers of European integration, who hold the upper-hand of time and who represent the voice of the law.

V. Concluding remarks

From the outset of EU integration, social policy seemed a rather unlikely case for any supranational policy to develop. Nonetheless, this chapter highlighted that there are basically all exit mechanisms from the joint-decision trap at play even in this field where a lack of explicit action capacity for the EU, combined with unanimity requirements, for a long time created major hurdles for policy development. To summarise the policy development alongside the exit mechanisms elaborated in the conceptual chapter to this book, all cells can be filled with at least one example, if not a striking or several examples.

²² We thank Miriam Hartlapp for pointing this out to us.

Table 1²³: Exits from the joint-decision trap in EU social policy

	POLITICAL AGREEMENT under the joint-decision mode facilitated by:		SUPRANATIONAL-HIERARCHICAL STEERING:	
	A) Change of applicable decision rules (Treaty base game, Arena shifting)	B) Change of opportunity structure regarding the specific policy innovation (ECJ or CM reinterpret law, promotion of litigation)	C) ECJ as a de facto policy-maker	D) COM as policy-maker (only in competition policy or financial programs)
Prohibitions to ELIMINATE MARKET RESTRICTIONS (“market making”, “negative integration”)	<u>Relevant:</u> harmonisation of e.g. company law and the related rights of workers	<u>Highly relevant:</u> Commission interprets related ECJ decisions and uses the voice of law to nudge consensus in health services	<u>Highly relevant:</u> e.g. cross-border patient mobility	<u>Rarely relevant</u> competition policy aspects in “outer shell of welfare state” (Leibfried), e.g. employment offices
Common activities to SHAPE THE MARKET	<u>Highly relevant:</u> general working conditions as “health and safety at workplace” issues, Social partner agreements as EU directives	<u>Highly relevant:</u> e.g. gender equality directives in 1970s and 1980s	<u>Highly relevant:</u> e.g. gender equality	<u>Relevant:</u> Financing poverty programs, budget for Europ. works councils

However, it is important to note that exiting the joint-decision trap via political agreement or supranational-hierarchical steering is no panacea. These mechanisms are often outrageously time consuming (see equal pay for women and men, section II in this chapter). Options for circumventing the Council are not equally distributed across various sub-fields but cluster in areas closer to the market (like services, now including health-related services) or regulated on the level of EU primary law (like equal pay, free movement of labour, etc.). Such “exits” may lead to only partial solutions since the ECJ decides basic features but typically further specifications or clarifications would be needed, be it in EU legislation or in later ECJ cases. The cases discussed above show that this is sometimes “exploited” by the governments in a delaying strategy based on the argument that each domestic system is just so different. However, this dangerous strategy can possibly divert them from effective self-defence by jointly overruling the Court, and it can be

²³ This table is based on the categories suggested by Fritz W. Scharpf during the second author workshop at EIF in Vienna, November 2009.

detrimental in the long run if the Court actually further reinforces its line with each ensuing national case. Finally, even the ECJ's verdicts can at times be blocked on the level of practical implementation of EU law, such as in the much-quoted case of the Working Time Directive. Its provisions were interpreted in a worker-friendly way when the ECJ included on-call duties into the allowed maximum working time. However, this would have been very costly in practice and has so far not been realised in most member countries. To sum up, caution is in place regarding the final result of exits from EU decision traps.

In any case, this chapter presented numerous examples for legislation brought about by the dynamics that allow exiting joint-decision traps. They come on top of the EU's classic consensus-promoting mechanisms which may help to reframe antagonistic national preferences in all international and, even more, supranational settings with continued interaction (re-defining issues to limit unwanted effects for some participants, socialisation effects of various variants, and external circumstances making consensus easier over time such as changes in government). But what is even more, social policy is an area where the governments repeatedly were confronted with a "court-decision trap", an extreme form of the joint-decision trap (see in detail Falkner 2011, conceptual chapter of this book): The ECJ decides on the basis of EU primary law and therefore, the EU institutions have no powers of revision under the policy-making procedures as provided in the Treaties. This may occur even against the will of all (!) of the governments and without prior political deliberation on the subject matter, as this chapter's examples show. Most importantly, however, none of the escape mechanisms discussed in this book can work in such a case of joint-decision trap since only a change of the very constitutional basis of EU cooperation, the Treaties, can possibly revise this specific kind of supra-national hierarchical decision of the ECJ.

Note that in our two case studies outlined above, the story is not about a governmental stalemate at all. To the contrary, here the governments had even achieved consensus that they did not want something to be subject of EU social policy. Still, the ECJ did not hesitate to bring (at least facets of) this into its realm of authoritative decision-making. Facing this, the governments could only have gone for a Treaty revision as legal remedy, which would have been hard to manage even if they wanted. For pragmatic reasons, it seems, they did not even seriously attempt this but just tried to buy time (in healthcare, by holding that their systems are yet again different) or by taking selected (social assistance-related) benefits again out of the judgement's realm of application via a simple secondary law solution (which was again stricken down by the Court). Furthermore, in the

case of health care the Court's policy-making gradually came to impact on political negotiations, where the 'voice of law' has been used strategically by the Commission and presidency to shape national preferences and promote consensus. In both cases, a powerful tandem between Commission and Court, holding the upper hand of time and speaking the authoritative law of the land, has forwarded social integration to unexpected extent.

What does this all signify in terms of the problem-solving potentials of European integration? One could venture the interpretation that even against all governments' consensual intentions, some issues that were perceived as problem-solving gaps by individual citizens or patients were indeed made the subject of judicial legislation. This by far outperforms, in terms of supranational steering potentials, what stood to be expected. In many further cases, EU social policy managed to exit the joint-decision trap via more "traditional" pathways such as exit mechanisms (e.g. the Treaty-base game) and consensus-promoting mechanisms (e.g. watering down or opt-outs). However, it must be mentioned that these interesting examples are very interesting from the perspective of political scientists, and (selectively) beneficial from a social rights perspective. As indicated, however, this must not be taken to mean that there are no problem-solving gaps remaining.

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