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Institut für europäische Integrationsforschung



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Europäische  
Integrations  
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# The EU's Decision Traps: Comparing Policies

Edited by:  
Gerda Falkner

forthcoming  
May 2011  
with

**Oxford University Press**  
**Oxford: UK**

Strohgasse 45/DG  
1030 Wien, Österreich  
Tel +43 1 51581-7564, 7565  
Fax +43 1 51581-7566  
eif@oeaw.ac.at  
www.eif.oeaw.ac.at  
Bankverbindung: BA-CA 00262650519  
BLZ 11000  
IBAN: AT541100000262650519  
BIC Code: BKAUATWW

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# The EU's Decision Traps: Comparing Policies

Edited by Gerda Falkner

## Abstract of Book

Fritz W. Scharpf's renowned joint-decision trap model has suggested that the requirements of (nearly) unanimous decisions in the EU's Council of Ministers, combined with conflicting preferences among member governments, will systematically limit the problem-solving effectiveness of European policies. Certain conditions have significantly changed during the 25 years of this theory's existence: The unanimity rule has been replaced by qualified-majority voting in most issue areas, and successive rounds of enlargement have augmented the diversity of member state interests and preferences.

This book presents a comparative study on the differential politics in EU policies. Looking at the political dynamics in an array of EU activities, it analyses breakthroughs as well as stalemates and asks why leaps occur in some areas whilst blockades characterise others. The dynamics that allow the EU to escape various forms of decision trap are analysed in-depth. Such mechanisms are from both the type expected by 'rationalist' theorists (supranational-hierarchical steering, Treaty-base games and arena shifting) and from the kind acknowledged by 'constructivist' approaches (socialisation). The downside of the findings is that when the EU is confronted with a high degree of problem pressure in a given issue area, these mechanisms will often not be available because most remain outside politicians' immediate grasp.

**Keywords for book:** European Union, European integration, EU policies, EU decision-making, problem-solving capacity, joint-decision trap.

## Chapter abstracts and keywords

### **The EU's Decision Traps and their Exits: A Concept for Comparative Analysis**

Gerda Falkner

#### Abstract:

The introductory chapter outlines the conceptual tools used throughout the volume. It presents, in brief, the original model of the joint-decision trap and the developments that ensued after its conception. It extends the realm of the debate by highlighting further forms of EU decision traps, working outside the joint-decision mode under the *Community method*, such as in intergovernmental negotiations or supranational-hierarchical decisions. As a basis for the subsequent cross-policy study, various mechanisms to exit decision traps or to countervail their effects are discussed in-depth. The chapter concludes by highlighting the overall importance of such analyses for European integration theory and outlining the research design and the chapter arrangement of the book.

#### Keywords:

Integration theory, modes of EU decision-making, EU decision traps, joint-decision trap, research design

### **The Paradigmatic Case: Beyond Emergency Exits in the Common Agricultural Policy**

Christilla Roederer-Rynning

How was agricultural policy reform possible in a context of almost unchanged institutional rules that provided ripe conditions for inertia and gridlock? This chapter argues that the original joint-decision trap argument presented an analytical model of EU policy-making that corresponded most closely to pre-1990 Common Agricultural Policy (CAP), and sets out to elucidate the puzzle of reform in this area. Beyond the high politics of CAP reforms, the analysis highlights the evolution of the day-to-day policy business, which is captured by contrasting ideal types of CAP policy-making: 'hegemonic policy-making' and 'competitive policy-making'. Change took place, it is argued, through a combination of exogenous pressure, social and cognitive learning, and institutional maneuvering, leading to what one might call 'punctuated evolution'. In spite of recent changes,

however, CAP will continue to be one of the most controversial policy areas in the EU for reasons that are both material and ideological.

Keywords: agriculture, CAP, consensus, externalising costs, Luxembourg Compromise, day-to-day policy-making, voting, crisis.

## **Overcoming the Joint-Decision Trap in Single-Market Legislation: The Interplay between Judicial and Legislative Politics**

Susanne K. Schmidt

The chapter discusses the interplay between judicial and legislative politics as a possible exit from the joint-decision trap. The extensive interpretation by the European Court of Justice of the four freedoms and European competition law allows a 'direct effect' of the EU's Treaties on potentially any political issue. The EU legislature in such instances must decide on the basis of case law, which sets the default condition. At times, legislative measures even go beyond existing case law; Taking the examples of the Services Directive and the Regulation on Mutual Recognition for Goods, it is argued that the 'fuzziness' of case law may allow legal certainty to be restored only by being more radical than the Court.

Keywords: joint-decision trap, single market, European Court of Justice (ECJ), Commission, Cassis de Dijon ruling, regulation of goods, Services Directive, mutual recognition.

## **One trap, many exits, but no free lunch: How the Joint-Decision Trap shapes EU tax policy**

Philipp Genschel

The joint-decision trap has not prevented the emergence of a substantial EU tax policy regime. Three key actors have contributed to this outcome: the European Court of Justice, by substituting judge-made tax law for deadlocked Council tax legislation (exit by judicial bypass); the European Commission, by using its powers as 'Guardian of the Treaty' and legislative agenda setter to break Council deadlock over tax legislation (exit by nudging); and the governments of the member states, by employing various negotiation techniques to prevent intergovernmental conflict from leading to Council deadlock (exit by self-extrication). The effects on problem-solving capacity are mixed. European market integration has improved but national tax autonomy has declined. The balance of costs and benefits

depends on the normative convictions of the observer, as well as the structural position of member states in the single market and their institutional traditions.

Keywords: European Union, tax policy, joint-decision trap, European Court of Justice (ECJ), European Commission, Council of Ministers, problem-solving capacity.

### **Financial Market Regulation: A 'Lamfalussy exit' from the joint-decision trap**

Zdenek Kudrna

The joint-decision trap complicates the adoption of financial market regulations in the EU. This chapter examines the capacity of the Lamfalussy procedure to provide an exit from the trap by supporting complex, yet consistently enforceable, technical compromises. The member states' preferences over key regulatory measures remain divided and tend to split them into two equally sized policy coalitions. In the case of the 1993 Investment Services Directive, the contested compromises proved too ambiguous to be enforced consistently across the EU. In 2001, the EU introduced the Lamfalussy procedure that delegated certain rule-making and monitoring powers to technocratic committees. As a result, the recent regulations, such as the 2004 Market in Financial Instruments Directive, are based on more complex technical compromises that are expensive to implement but can be monitored and enforced consistently, thus supporting EU regulatory integration.

Keywords: EU decision-making, financial services, regulation, Lamfalussy procedure, Market in Financial Instruments Directive (MiFID).

### **Liberalising the EU's Energy Market: Hard and Soft Power Combined**

Johannes Pollak / Peter Slominski

From the outset, the liberalisation of the EU energy market has been vastly controversial. Given the diversity in interests among EU member states and the strategic importance of energy policy, it is remarkable that progress in this regard has been made at all. This chapter discusses how the European Commission has successfully used its power in the field of competition law, initiated infringement procedures, adopted soft law, and engaged in informal institution building in order to overcome reluctant member states and advance its project of completing an internal energy market.

Keywords: competition policy, European Commission, energy, liberalisation, soft governance, informal regulation

## **Environmental Policy in the Joint-Decision Trap? The Critical Balance between 'Market Making' and 'Market Correcting'**

Katharina Holzinger

The EU began its environmental policy in the early 1970s, long before its legal base was introduced into the Treaty in 1987. Unanimous decision-making and the consultation procedure applied until 1987, only gradually substituted by qualified majority voting and the codecision procedure. The level of conflict over environmental proposals was often high among member states and in the supranational institutions. Nevertheless, more than 500 legislative acts had been adopted by 2008. These were not only concerned with the creation of the internal market (negative integration) but often established ambitious goals to overcome environmental problems and correct market failures (positive integration). The chapter demonstrates how member states and supranational institutions succeeded in escaping the joint-decision trap through the effective employment of techniques for avoiding deadlock.

Keywords: environmental policy, internal market, positive integration, negative integration, joint-decision trap

## **Social Policy: Problem-solving Gaps, Partial Exits and Court-decision Traps**

Dorte Sindbjerg Martinsen, Gerda Falkner

Notwithstanding some persistent, and likely irresolvable, problem-solving gaps, Social Europe has escaped the joint-decision trap on a regular basis. Most importantly, Treaty-base games and arena shifting helped to bring about more secondary law and ECJ-driven political decisions than might have been expected considering the decision rules. Furthermore, progressive steps in European social integration were induced by a 'court-decision trap'. 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 persons of the Treaties nor the governments were willing to create a cross-border market for healthcare or open social assistance related benefits for exportability.

Keywords: social policy, European integration, European Court of Justice (ECJ), Treaty-base game, arena shifting

## **Increased differentiation as Integration Engine? Studying Justice and Home Affairs**

Florian Trauner

This chapter maintains that the transition of formal decision rule to the Community method, in combination with a high acceptance of conflict-minimising special arrangements for cooperation-reluctant member states, has been at the centre of the EU's efforts to mitigate problems associated with the joint-decision trap in the field of Justice and Home Affairs. The role of supranational actors in undermining veto players' positions has been less influential than in other policies, although it has evolved with the entering into force of the new decision rules. Using the Prüm Process of police data sharing as a case study, the analysis illustrates how a group of member states managed to escape from a particular decision-making blockade by promoting an enhanced form of cooperation outside the EU's legal framework.

Keywords: Justice and Home Affairs, joint decision-making, political opportunity structure, problem-solving gaps, differentiation, Prüm Process

## **The EU's Foreign and Security Policy: Incremental Upgrading of Common Interests and the Effects of Institutionalised Cooperation**

Nicole Alecu de Flers; Laura Chappell; Patrick Müller

As decision-making in European foreign and security policy has remained an intergovernmental process where unanimous decision-making is the norm, this policy field seems a likely case for becoming entangled in the 'joint-decision trap'. Nevertheless, this chapter reveals that through various mechanisms, the member states have managed to escape the trap to an extent that many analysts had not expected. Besides functional adaptation to changed external circumstances, learning from joint foreign policy experiences – particularly from the failure to address joint problems – is identified as an important mechanism. Additionally, the institutionalisation of European foreign policy cooperation has facilitated the emergence of important procedural and substantive EU norms which, through elite socialisation processes, influence the outcome of policy-

making. This is illustrated in the case study on the EU's military mission EUFOR RD Congo, which was successfully deployed even though key participating states like Germany and Poland have no immediate defence interests in Africa.

Keywords: European Security and Defence Policy, Common Security and Defence Policy, EUFOR RD Congo, Poland, Germany, joint-decision trap, socialisation, learning

## **Organising exits from the Joint-Decision Trap? Cross-sectoral (non-)coordination in the European Union**

Miriam Hartlapp

How are decisions coordinated across sectors in the EU political system? Frequently, more cross-sectoral coordination is seen as increasing the number of veto players, thus increasing the likelihood of blockages and lowest common denominator solutions. It is for this reason that historically low cross-sectoral coordination in the EU political system is often believed to facilitate decisions. This chapter explores actual coordination processes in the European Commission and Council and finds that, over time, the organisation of cross-sectoral coordination has increased. Combining procedural knowledge with case study insight on legal acts such as the Liberalisation of Services Directive or the REACH Directive, it challenges that these developments necessarily lead to a joint-decision trap. When used strategically, cross-policy coordination can also yield exit, because it allows certain actors to influence who becomes a veto-player and/or to move a decision horizontally or vertically into an arena favourable to the desired outcome.

Keywords: cross-sectoral coordination, veto player, decision arena, Commission, Council, Liberalisation of Services Directive, REACH

## **Escaping Joint-Decision Traps: National and supranational experiences compared**

Arthur Benz

This chapter compares multilevel governance in the EU and in federal systems of nation states. While federal states use a variety of modes of intergovernmental coordination of policies, patterns of joint-decision making can be found most often when constitutions are amended. A comparative analysis of selected cases of constitutional reform reveals that institutional change is

facilitated by an appropriate design of negotiations. Under particular conditions, constitutional policy provides an escape from the joint-decision trap. In the EU, the Convention process indicates a new arena for constitutional negotiations that support a successful reform of decision rules. However, this approach, as well as the simplified procedure in the Intergovernmental Conference, comes to its limits if powers for particular policies are to be changed by Treaty amendment.

Keywords: constitutional policy, Convention, federal state, intergovernmental coordination, multilevel governance, negotiation, Treaty amendment

## **The JDT Model: Context and Extensions**

Fritz W. Scharpf

### **Abstract:**

This chapter re-examines the original joint-decision trap (JDT) model in light of this author's later work and the research presented by Gerda Falkner and her colleagues in this volume. Pointing out that a focus on the joint-decision mode was not meant to deny the existence of other modes of EU policy-making, I nevertheless argue that the mechanisms identified in the JDT model continue to shape the possibility, quality and direction of EU legislation. But in order to increase its explanatory power, the model should be extended to take explicit account of the impact of judicial law-making and Commission strategies on bargaining constellations in the Council. Even then, however, the model cannot provide complete explanations. Thus the chapters in this volume have indeed identified empirical influences on the perceptions and preferences of policy actors, and hence on the chances of agreement, that should be explained within a 'constructivist' frame of reference, rather than by reference to a 'rational-choice' bargaining model.

Key Words: bargaining, default conditions, veto players, legislation, joint-decision trap (JDT)

## **In and Out of EU Decision Traps: Comparative Perspectives**

Gerda Falkner

### **Abstract:**

The book's concluding chapter offers a meta-level analysis, revisiting each of the mechanisms that may facilitate an exit from the EU's joint-decision trap or similar pitfalls. The findings show that the most potent mechanisms are supranational-hierarchical action taken by the European Court of Justice or the European Commission that bypass the political arena. Also important are Treaty-base games, arena shifting and nudging the Council into agreement via changes to opportunity structures. Chapter 14 ranks these mechanisms by availability in various policy areas, propensity to overcome veto players, and degree to which decision-makers and further practitioners of European integration can purposefully make use of them. The book concludes by discussing if and when the exits from the EU's decision traps do in fact serve as problem-solving vehicles for the policies concerned and how new challenges may arise as secondary effects.

**Keywords:** EU decision traps, joint-decision trap, court-decision trap, problem-solving capacity, EU policies European Court of Justice (ECJ)