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**The EU's Green Dynamism,
Decision-making Strategies and the
Alignment of Legislative Actors**

Henning Deters

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Institut für europäische Integrationsforschung

Strohgasse 45/DG
1030 Wien/Österreich

Telefon: +43-1-4277-22401

Fax: +43-1-4277-9224

Email: eif@univie.ac.at

Web: eif.univie.ac.at

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1. Introduction

How is it possible that the European Union (EU), a political system riddled with diverse veto-players and often beset with intergovernmental conflict, promotes ambitious environmental policy? Why is it that leading environmental policy researchers find that “the emergence and evolution of European environmental policy has been – by and large – a success story” (Lenschow and Sprungk 2010: 151)? Since environmental policy-making depends on a qualified majority, and de facto often on unanimity among member states, the empirical record of a dynamic policy area with high levels of protection needs explanation.

The expectation of low policy-making effectiveness is informed by the “joint-decision trap” (Scharpf 1988). Environmental policy falls largely within the realm of the “community method” (Scharpf 2011: 219) or “joint-decision mode” (Scharpf 2001: 12): Member state governments participate directly with their unfiltered interests in the decisions of the central level (environmental policy is a shared competence exercised by the member states (article 4 TFEU)); their collective decisions are governed by unanimity rule or a large supermajority rule (just three large member states plus Malta form a blocking minority); and the default outcome is the status quo ante rather than subsidiary decision-making (domestic goings-alone are often constrained by single market rules or previous harmonization (Holzinger and Knill 2004)). In this institutional configuration, policy-change appears limited by the constellation of governmental interests, and these are often in conflict due to different welfare levels, different priorities, and different policy legacies (Börzel 2002; Liefferink and Andersen 2005).¹

However, a cursory look at the policy area seems to confirm the initially cited evaluation by Lenschow and Sprungk. From a merely accidental by-product of economic integration, European environmental policy has quickly emerged into a full-blown, independent policy-area with its own institutions and competences. As the EU extended its powers, the substance of European environmental law covered ever more issues and reached high levels of protection. Also quantitatively, the environmental *acquis* grew impressively rather than wither

¹ For these institutional preconditions of the joint-decision trap see Scharpf (1988: 254) and Falkner (2011b: 7).

in the joint-decision trap (see eg. Holzinger 2011; Knill and Liefferink 2007 Chapter 10; Weale 2005).

The notion of “exits” from the joint-decision trap (Falkner 2011c) is a relevant explanation for the surprisingly high level of decision-making effectiveness in EU environmental politics (Holzinger 2011). Three groups of such mechanisms can be distinguished: (1) changes of applicable decision rules and arenas, (2) changes in negotiator’s opportunity structures, and (3) supranational interventions (Falkner 2011a: 238). The latter correspond to Scharpf’s observation that the joint-decision mode combines “aspects of intergovernmental negotiation and supranational centralization” (2001: 12), and that policy-decisions should therefore depend both on the “institutional resources and strategies of supranational actors, and on the convergence of preference among national governments” (2001: 12–13).

The purpose of this paper is to provide an overview of the relevant actors, their “institutional resources and strategies”, and their typical preferences, including the formation of these preferences. This review also surveys the literature on European environmental governance for clues as to why the joint-decision trap may or may not constrain environmental policy-making. I start with a brief introduction of the main decision-making procedures, distinguishing between policy-making by legislators and policy-making by technical experts. As a rule, environmental policy-decisions require the cooperation of the member states, the European Commission (Commission), and the European Parliament (EP), against the backdrop of case law made by the Court of the EU (European Court of Justice, ECJ). The paper considers each actor in turn. It concludes by sketching the typical constellations of actor’s preferences, the distribution of their influence over EU environmental policy, and their role in facilitating policy-change.

2. Political and Non-political Decision-making

The following two sections briefly sketch the main decision-making procedures in EU environmental politics. Secondary environmental law is directly derived from the EU treaties through political legislation based on the pertinent legislative procedures. Secondary law often leaves open certain details for subsequent administrative implementation through tertiary law.

The latter is thus derived from existing secondary law through its technical implementation according to the procedures specified in the relevant secondary law provisions. The non-political character of tertiary law-making may provide an exit from the joint decision trap.

2.1 Political Decision-making: Environmental Legislation

For the formulation of environmental policy, nowadays the ordinary legislative procedure, formerly known as codecision, applies. There are very few exceptions. Those regard provisions primarily of a fiscal nature, certain issues related to spatial planning, land and water management, and measures significantly affecting a member state's choice over its energy mix.²

In the ordinary (codecision) procedure, the Commission initiates legislation by drafting a directive or regulation, and the Council and the EP cooperate on formally equal terms, in this respect akin to a bicameral system (Crombez 2000). The procedure consists of up to three readings. In the first reading, both actors adopt positions on the proposal, usually including several amendments. The EP decides by a simple majority of those members who turn out to vote. The Commission incorporates or rejects the EP amendments and forwards the text to the Council. The Council decides by a qualified majority according to a system of weighted votes. If it accepts all EP amendments right away, the text becomes law and the procedure ends. Otherwise, the Council adopts a revised common position, which the EP again amends, adopts or rejects. During this second reading, the EP decides by absolute majority of all MEPs, not only of those present. At low turn-out, this may come close to a de facto two thirds majority.³ After the Commission has reviewed the draft for a second time, it goes back to the Council. The Council now needs a qualified majority to accept the EP's amendments that are backed by the Commission; if it wants to reintroduce an EP amendment that the Commission has thrown out, the Council has to decide unanimously. If the Council does not accept all amendments, a Conciliation Committee made up of 25 members of both "chambers" and a non-voting Commission member convenes to resolve the differences. In the third and final

² These exceptions are listed in article 192 (2) TFEU.

³ For example, the EP failed to propose stricter requirements for the so-called "consolidated directive" on vehicle emissions, because of this threshold. Most amendments were voted with large majorities of those MEPs who had turned out to vote but failed to achieve a majority of the component members (Arp 1995: 281).

reading, the resulting joint text is submitted to Council and EP, where it needs a qualified majority or, respectively, a simple majority to be approved and to subsequently become law. Otherwise, legislation ultimately fails (Hix and Høyland 2011: 68–69).

Increasingly, legislation does not pass through all three readings. Especially in urgent cases, legislators may choose an early agreement version of the codecision procedure, in which Council and EP members coordinate the positions of their institutions during informal meetings. These so-called trilogues can take place as early as the first reading, with a view to obviate the need for a second or even third reading. They are conducted in a simultaneous and much less formal manner of negotiation. The EP is usually represented by the rapporteur in charge of the draft and the chair of the responsible committee; the Council by a Coreper I deputy permanent representative from the country holding the Presidency, and the Commission by the responsible director or director general. Additional persons may attend, such as the shadow rapporteurs on the EP's side, but they do not take part in the discussions, and in total there are not more than 25 officials present (Shackleton 2000: 334–335).

In sum, environmental decision-making through political legislation takes place in the “joint-decision mode”. It involves the Commission as agenda-setter and the EP and Council of Ministers as collective veto-players. The high majority requirement in the Council should make environmental policy prone to deadlock, assuming conflicting positions. However, environmental law is partly made in non-political venues, as will be discussed in the following section.

2.2 Non-political Decision-making: Implementation of Environmental Law

After legislation is adopted, the Council regularly delegates its implementation to the Commission. The basic legislation then outlines the tasks that are to be implemented in the form of implementing measures or, as it were, “tertiary law”. Tertiary law amounts to a considerable part of the EU's quantitative output (see table 1). Specialized officials from

national authorities assist the Commission with implementation. They form a myriad of transnational administrative committees, the so-called comitology.⁴

The implementation of secondary environmental law through comitology opens a potential exit from the joint decision-trap by changing the applicable decision rules and arenas. In comitology-style decision-making governments are no longer directly represented with their unfiltered interests, but mediated through technical experts. One school of thought, rooted in principle-agent-analysis, sees comitology as a way to ensure “police patrol” style control over the decisions that the Commission takes when it implements policy on behalf of the member states (Pollack 1997a). Others, closer to social-constructionist thinking, emphasize the Commission’s need for the expertise and information of domestic administrations, which is grounded in their practical experience “on the ground” (Joerges and Neyer 1997a).

⁴ Comitology began as an informal practice in the common agricultural policy in the 1960s (Huster 2008: 40). The first comitology decision of the Council in 1987 laid down the existing working practices in formal law and reduced the number of procedures to five (Council of the European Union 1987). Subsequent institutional reforms (see Héritier and Moury 2011) culminated in the 1999 Comitology decision of the Council, which above all gave the EP a greater say during implementation (Council of the European Union 1999). The EP’s role was again elevated in 2006 with the introduction of the regulatory procedure with scrutiny, an amendment to the existing regulatory procedure (Blom-Hansen 2011: 613).

Table 1: Number and Activity of Committees per DG in 2009⁵

Commission DG	Number of active committees	Number of implementing measures	Number of matters referred to the Council
Agriculture	15	460	1
Anti-Fraud	1	0	0
Budget	2	0	0
Education	6	39	0
Employment	5	14	0
Enlargement	3	56	0
Enterprise	39	108	0
Environment	36	80	0
EuropeAid	7	221	0
External Relations	4	1	0
Fisheries	4	39	0
Health & Consumers	16	249	35
Humanitarian Aid	1	46	0
Information Technology	2	1	0
Information Society	8	65	0
Internal Market	14	27	0
Justice	24	54	0
Regional Policy	1	2	0
Research	7	191	0
Statistics	10	24	0
Taxation	12	52	0
Trade	10	4	0
Transport & Energy	39	78	0
Sum	266	1811	36
Median (Arithmetic mean)	7 (11.57)	46 (78.74)	0 (1.57)

The social constructionist “school” argues that, due to their role-expectations and socialization in transnational “epistemic communities” (Haas 1992), experts share an interest in producing technically sound decisions, implying that sectoral views and positions override territorial differences (Benz 2003: 329; Flynn 2000: 87; Peters 1997: 32). Failure to attain consensus is seen as an accident, and in fact proposals are rarely rejected in comitology (Pollack 1997a: 115). Likewise, expert committees tend to be governed by a problem-solving interaction style, in which arguments are exchanged against the backdrop of shared criteria of validity (Elgström and Jönsson 2000: 689; Joerges and Neyer 1997b: 617–619; Schmidt and Werle 1993: 13–14). However, problem-solving seems to require that deliberations are shielded from distributive questions – be it that the distributive implications of a decision are taken care of in political venues authorized to discuss side-payments and

⁵ Own illustration, cf European Commission. 2010. Report from the Commission on the Working of Committees During 2009. Com(2010) 354 Final. Brussels: European Commission.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0354:FIN:EN:PDF>, accessed 21.12.2016.

other forms of compensation, or be it that these more political implications are simply disavowed (Scharpf 1997c 130-132; Schmidt and Werle 1993: 31).

By contrast, the rationalist “school” sees national experts as guardians of member state’s interest. Governments delegate implementation tasks to the Commission and see to it that their “agent” does not overstep its mandate (Pollack 2003a: 126). Depending on the degree of control that member want to exercise, they can choose between different comitology procedures. The regulatory procedure with and without parliamentary scrutiny is by far the most frequently used in environmental policy (Blom-Hansen 2011: 611; Huster 2008: Chapter 6). A qualified majority of votes among committee members is necessary to adopt a measure. A rejected proposal travels upward to the Council for further discussion. In practice, this is uncommon. There were only 36 referrals but 1811 implementing measures in 2009 (see table 1). The low number of referrals can be interpreted as evidence of successful problem solving or equally as successful control of the principal, who thus remains within the confines of its mandate (Brandsma and Blom-Hansen 2009: 724).

Game theoretical analysis suggests that of all comitology procedures, the regulatory procedure allows member states most control over the Commission’s implementing decisions (Ballmann *et al.* 2002; Steunenberg *et al.* 1997).⁶ However, in principal-agent relationships the problem of “who watches the watchmen” cannot be ultimately resolved (Dehousse 2003). In turn, another layer of procedural controls was set up to ensure that comitology does not run afoul of its mandate. The main instrument in pre-Lisbon comitology was the so-called “scrutiny” period. However, scrutiny is a rather weak instrument: First, it allows Council and EP only to overthrow but not to amend the implementing act; and second, the veto is restricted to narrow ultra vires grounds (Council of the European Union 2006 Article 5a). After the recent comitology reform in the Lisbon treaty, the regulatory procedure continues to apply in more than 300 existing legal acts, until these will be formally amended (European Commission 2014).⁷

⁶ Not counting the rarely used and today almost defunct safeguard procedure.

⁷ The reform introduced a distinction between Delegated Acts (article 290 TFEU) and Implementing Acts (article 291 TFEU). The system of Delegated Acts succeeds the regulatory procedure with scrutiny. The original committee system has been abolished; EP and Council were instead given the power to veto individual implementation decisions and to revoke the entire

Comitology committees are spread unevenly across policy-areas, and their activity varies. Table 1 represents a sample of the situation in 2009, the last year before the Lisbon reforms. There were 266 committees in 23 policy sectors, and the median Commission department (Directorate-General, DG) was assisted by seven committees. DG Environment had the second highest number of committees: 36. These committees are also more active than the average in terms of the number of implementing measures they have adopted, but the raft of measures are the result of deliberations in the agriculture committees.

The issues delegated to comitology are usually technical or administrative and require special expertise. The European Commission (2007) thus rightfully cautioned that “the sheer number of measures adopted as such gives no indication of the political, economic or financial importance of decisions taken”. On the other hand, we simply do not know, which issues might have stirred controversy, had they been taken in a more public and political venue. Examples of controversial comitology decisions include the whole realm of genetically modified organisms (Pollack and Shaffer 2010), the use of “body scanners” at airport security (Hardacre and Damen 2009: 17), or the phase-out of incandescent light-bulbs (Deters forthcoming).

In sum, depoliticized decisions may explain part of the decision-making effectiveness in environmental policy. Due to its often technical character, many decisions in environmental policy-making are deferred to the implementation stage and thereby delegated to non-political actors operating at arm’s length from direct governmental interests. However, the significance of this mechanism depends on the nature of the issues that are, in fact, delegated, and on how the low number of referrals back to the political arena is interpreted.

3. Actors

As with most EU legislation, the European Commission, the Council of Ministers, and the European Parliament are the main legislative bodies also in environmental policy. The

delegation. However, the Commission now uses other expert groups for discussing implementation decisions. For Implementing Acts, the original comitology committees continue to be used, but with new procedures. Most importantly, the regulatory and management procedures were merged into a new examination procedure. In case of divergence of opinions, the decision is referred to an appeal committee rather than to the Council (Hardacre and Damen 2009).

European Court of Justice has moreover shaped the legislative playing field through judicial decisions of a quasi-constitutional nature. This section covers each topic in turn. The Commission and the EP are analyzed, taking into account the institutional resources and strategies through which they may influence the level of environmental protection, as well as the institution's typical policy-positions. Typical patterns of conflict and the modes of decision making in the Council are discussed including mechanisms of conflict accommodation, as these apply to environmental policy. The last subsection looks at the role of the ECJ as a source of supranational intervention through law. The ECJ does not directly influence policy-making, but it authoritatively interprets the other institution's competences and is thereby able to shift the distribution of power. In particular in the formative periods of EU environmental policy, Court decisions have opened up important exits from the joint-decision trap.

3.1 The European Commission

The European Commission is a supranational body that is appointed by,⁸ but formally independent from, the member states. As such, the Commission can use institutional resources such as its agenda-setting power and its executive prerogatives as “guardian of the treaties” to avoid a deadlocked Council in the first place, or to provide an exit from the joint-decision trap, once it has closed. However, the Commission faces certain constraints when using these institutional resources. The resources and said constraints are examined more closely in the following.

The Commission plays an important role in environmental policy-making, mostly because it enjoys the exclusive right of initiative. The right of initiative gives the Commission leverage over the outcome of legislation in the form of “hard” (formal) and “soft” (informal) *agenda-setting power* (Pollack 1997a: 112). The Commission enjoys soft agenda setting power to the extent that it can first prepare the ground for a legislative proposal and wait with its presentation until the political climate is receptive. Moreover, the Commission sometimes has

⁸ At least until the 2014 EP elections, when the leading EP party groups nominated candidates for the office of Commission president, which formally the member states were not required to accept.

hard agenda setting power to the extent that it may draft legislation in such a way that the proposal remains close to its own ideal position while still in line with the necessary majority of member states.

The degree of hard agenda setting power, however, depends on the legislative decision rule. The Commission had no hard agenda setting power when, prior to the Single European Act, the Council decided by unanimity; and its power again decreased with the introduction of codecision (but see Burns 2004; Tsebelis and Garrett 2000: 25–26). While, in codecision, the Commission still submits the initial draft, the EP (by absolute majority) and the Council (by qualified majority) can overrule the Commission and amend the proposal (Tsebelis and Garrett 2001: 374). But even if today the Commission's agenda setting power is only of the soft variant, a fundamental overhaul of its proposals is unlikely. As Sbragia (2000: 298) observes, "the Commission [...] is the key player at the stage of policy formulation, since the regulatory approach it adopts can be very difficult to change completely. Commission proposals tend to define the ground on which governments negotiate".

The Commission is usually discussed in terms of its agenda setting role, but in addition to its ability to decide whether and when to propose legislation, the Commission can also withdraw a proposal during the first stage of codecision. It could thus also be conceived as a *veto-player* (Boranbay-Akan *et al.* 2016; Majone 1996a: 68; Röttches 2006: 127). In the ambit of environment, consumers and health protection (Eur-Lex directory code 15), there have been, as to-date, 50 withdrawals of proposals for a directive or a regulation, the earliest dating from 1983, the latest from 2014. In comparison, the Commission has between 1983 and 2014 adopted 940 proposals in the same area. The practical relevance of this power does not seem overwhelming at first sight; however, the sole threat of a withdrawal might suffice to convince the co-legislators of reconsidering attempts at watering down a proposal.

In addition to veto- and agenda-setting powers, the legislative influence stems from the Commission's *executive powers*, which it has in fact used to coax member states into agreeing to policies against their initial preference (Schmidt 2000). Except in some implementing procedures (see previous section), the Commission does not depend on member state

approval when it applies these powers. A non-majoritarian institution, it acts in a hierarchical fashion. Its executive powers result from the Commission's treaty-mandated task to supervise, in conjunction with the ECJ, the observation of the EU's founding treaties, in particular concerning competition law. However, this strategy to break gridlock pertains mostly to the realm of negative, market-making integration, where the Commission's executive powers are strongest (Schmidt 2000: 44–46). In the field of environmental policy, the Commission's executive powers have become relevant in an early decision to go to Court over national environmental policies that in the eyes of the Commission threatened to restrict the European single market (see section 3.4).

In order to assess the potential influence of the Commission on the stringency of the Unions' environmental policy, it is not enough to discuss its procedural power; we also need to know about its *typical policy positions* and the process of their formation (Hörl *et al.* 2005: 593). A look inside the institution that is usually treated as unitary actor is warranted to assess its collective position (Mayntz 1999: 82). The Commission is differentiated vertically into a political level, the College of Commissioners, and an administrative level, the Directorates-General (DG) and Services. Horizontally, each level is differentiated according to its area of competence, such as Energy, Environment, or Enterprises (Cram 1994). The College consists of 28 Commissioners, one appointed by each member state. It is headed by the Commission president, a Commissioner acting as *primus inter pares*. Each Commissioner is assisted on the political level by her personal cabinet, and on the administrative level by the respective DG. The division of labour necessitates coordination, especially in dossiers touching on multiple policy areas. Thus, before the Commission adopts a legislative proposal, the text has to be approved by each Commissioner and DG during inter-service consultation. Usually one lead DG assumes responsibility for a given file, but the principle of collegiality demands that all Commission members are jointly responsible for the final decision (Hix and Høyland 2011: 35).

Since the Commission is not a unitary actor, the level of environmental protection proposed by the Commission may vary according to various factors in its internal position-formation. A Commissioner's political and national affiliation or the nature of her portfolio are factors that

can determine her stance on a matter (Wonka 2008b). In the past, however, Commissioners from the north, such as Ritt Bjerregaard from Denmark, as well as from the south, such as Stavros Dimas from Greece have supported ambitious policies (Deters forthcoming). Empirical evidence on the Commission's internal preference-formation is scarce, but it suggests that conflicts tend to run along sectoral and national lines, with ideology being a lesser factor (Hartlapp 2011: 188; Wonka 2008b). In environmental policy-making, most of the time, DG Environment is the leading service. Due to its mandate, and because it is the main target of green lobbying, DG Environment tends to favour environmentally friendly proposals (Majone 1996b: 77–78; Pollack 1997b: 580). Along with its tasks, also the staff and resources of DG Environment have increased, but it remains one of the smaller DGs, both in terms of budget and staff (Knill and Liefferink 2007: 60).

With different services in play, the position that the Commission takes as a whole depends on how the inter-service consultation works in practice. According to the *portfolio model*, the development of policy proposals is “strongly structured along departmental lines and heavily conditioned by the views of the political department head” (Laver and Shepsle 1996: 27). In this vein, the technical nature of many proposals, the specialization of each DG and Commissioner, and the general workload may prevent different Commission services from interfering with each other's jurisdiction and endow the leading Commissioner and DG with considerable agenda power (Hörl *et al.* 2005: 599).

Against this view, the *median voter model* (Downs 1957) suggests that the leading Commissioner is not able to determine the proposal alone, as a result of the fact that decisions may be taken by majority vote in the College of Commissioners. Most frequently, the College decides by the written procedure, that is, by consensus, but each Commissioner may request that a vote be taken, which then leads to the application of the oral procedure. In this rare occasion, a simple majority is required for the draft to be approved, with the Commission president casting a tie-breaking vote (Wonka 2008b: 135–144).

Which of both models comes closer to the truth is an empirical question on which the jury is still out. Anecdotal evidence confirms that each notion has merit. The Commissioner in

charge of the dossier has more sway over the contents of the proposal than her colleagues, but she must take the “shadow” of the vote into account. In other words, “the green proposals of [DG Environment, HD] are often watered down in negotiations with other DGs and in the full College of Commissioners” (Pollack 1997b: 580), but it still matters greatly, which DG has the lead (Holzinger 2011: 115; Wonka 2008a).⁹ Moreover, because it can always resort to majority voting, the Commission remains able to act even in cases of severe conflict, unlike the Council.

While different points of view may exist within the Commission regarding the level of protection of a proposal, this is not necessarily true for the level of integration. Following Niskanen’s (1971: 36–42) model of public bureaucracies, it is generally assumed that the Commission’s preferences are a matter of institutional self-interest. Since it cannot easily maximize its budget, the Commission is construed as a competence maximizer that favours the integration of new policy-fields over the preservation of national autonomy (Majone 1996a; Pollack 2003b: 35–36). This also explains why the Commission is so receptive to new policy ideas: They can serve as vehicles for further integration (Majone 1996b: 74).

In sum, the Commission is a powerful actor in EU environmental politics mainly because of its agenda-setting power. The strong position of DG Environment suggests that the Commission often tries to achieve stringent environmental policies, and as a bureaucracy it has an incentive to extend its powers and deepen European integration. In terms of the exits from the joint-decision trap, the Commission has various instruments for supranational intervention at its disposal, and it can be expected to use them in order to increase the level of environmental protection. However, the power of the Commission in environmental legislation is limited; first because its executive powers are more effective in the area of negative integration, and second because its formal agenda setting power has decreased with each procedural reform. The Commission still plays an important role in framing

⁹ In addition to the strong position of DG Environment, another reason for the Commission’s relatively green profile, especially during the earlier periods of European integration, may have been its desire to champion diffuse interests such as in environmental policy, consumer protection, and work safety in order to increase its legitimacy in the face of the European public (Eichener 1997; Pollack 1997b).

environmental proposals and in strategically managing the decision process by suggesting compromises and avoiding conflicts.

3.2 The Council of Ministers

The Council of the European Union (or Council of Ministers, shorthand: Council) is the EU's main decision-making body. Consisting of national ministers or their deputies, it is an arena of intergovernmental bargaining. The Council is a *collective veto player*. All legislative drafts need its approval in order to become law. Accordingly, Golub (1996: 335) notes that “all the technical expertise, agenda-setting and influence of the Commission and Parliament come to nothing unless these two institutions have the determination to risk paralyzing decision-making processes, because ultimately power resides with the Council”.

With very few exceptions, the Council nowadays decides on environmental policy by a qualified majority vote. In *qualified majority voting* (QMV) under the rules of the Treaty of Nice, member states are accorded different numbers of votes, reflecting the unequal population sizes as well as the need to ensure a balance between small and large member states. 260 of the 352 votes constitute a qualified majority.¹⁰ Accordingly, 94 votes constitute a blocking minority. Already three large member states and one small state together may thus impede the adoption of a proposal (see table 2). In addition, a majority of member states has to support the proposal and each of them may request that the supporters represent at least 62% of the EU's population. These thresholds add to the status-quo bias of the EU's legislative machinery (Tsebelis and Yatağan 2002). Although larger member states have more votes, the weighting over-represents the number of citizens in the small states. According to the Shapley-Shubik index (Shapley and Shubik 1954), which expresses the likelihood of being the pivot of a winning coalition under the assumption that all voting coalitions occur with the same frequency, large states still have more voting power (Hix and Høyland 2011: 65). However, coalition patterns are in fact not distributed randomly, as argued later in this section. Since November 2014, if no member state requests otherwise, the new “double majority” voting rules of the Lisbon Treaty apply. A qualified majority is reached if 16 out of

¹⁰ This reflects the situation with 28 member states, since the accession of Croatia in 2013.

28 member states are in favour and the proposal is supported by states representing at least 65% of the EU population. The new rules increase the voting power of the three largest member states, Germany, France, and Italy, mostly at the expense of the “second row”: Spain and Poland (Hix and Høyland 2011: 65).

Table 2: Voting weights in the Council of the EU under the Nice Treaty rules.¹¹

Country	Number of Votes
Germany	29
France	29
Italy	29
United Kingdom	29
Spain	27
Poland	27
Romania	14
Netherlands	13
Belgium	12
Czech Republic	12
Greece	12
Hungary	12
Portugal	12
Austria	10
Bulgaria	10
Sweden	10
Croatia	7
Denmark	7
Ireland	7
Lithuania	7
Slovakia	7
Finland	7
Cyprus	4
Estonia	4
Latvia	4
Luxembourg	4
Slovenia	4
Malta	3
Sum	352
QMV	260
Blocking minority	93

Discussions in the Council are facilitated by a Secretariat and directed by a rotating *Council presidency*. Every six months, another country assumes this office, chairs the working level negotiations and prepares the meeting agendas. It has to navigate between its institutional role as an honest, neutral broker and facilitator of compromises on the one hand, and its desire to

¹¹ Council of the European Union, Voting System: Qualified Majority. Brussels: Council of the EU and the European Council. <http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>, accessed 23 December 2016.

advance own national priorities on the other hand (Warntjen 2010). As a broker, the presidency clarifies and takes stock of member states' positions. Important instruments in this regard are bilateral "confessionals" between presidency and individual delegations (Hayes-Renshaw and Wallace 2006 Chapter 5). The presidency here confidentially sounds out member states' true preferences, in contrast to their strategic negotiation position. The presidency therefore depends on trust to play its mediating role. It must not use its information and procedural advantages for its own end but may be tempted to do so. In preparing the Council agenda, the presidency can postpone or prioritize Commission proposals, and combine or frame them in a certain way. The presidency, in sum, facilitates policy-change and efficient bargains. For the progress on and the stringency of environmental legislation, it can make a difference, which country holds the presidency at the time of negotiation (Wurzel 1996).

The Council *Secretariat* is a permanent office that acts in "active partnership" (Hayes-Renshaw and Wallace 2006: 141) with the presidency. Its elaborate system of summarizing differences of opinions, possible compromises and the various positions of the national delegations in footnotes to the draft legislation are essential for the rotating presidency to move a dossier forward (Hayes-Renshaw and Wallace 2006: 111, 118).

Like the Commission, also the Council is a compound institution. Horizontally, it is differentiated into sectoral Council formations, such as the Transport, Telecommunications and Energy Council or the Environment Council. Vertically, it is differentiated into a committee, ministerial, and summit level (Hayes-Renshaw and Wallace 2006 Chapter 2; Huster 2008: 35–39).

In the ENVI Council national environment ministers come together to negotiate EU environmental legislation. In practice, most decisions on environmental policy are made here (Grant *et al.* 2000: 28). The *horizontal differentiation* according to policy areas reduces the space for package deals (Scharpf 1997: 132–133), but it also means that environmental ministers act in relative isolation from their national cabinets. This might increase ministerial autonomy vis-à-vis other domestic departments and the prime minister or chancellor.

Ministers of the same Council formation hold more homogeneous preferences than across departments, due to increased influence of interest groups and sectoral constituencies (Franchino and Rahming 2003; Steunenberg 2003). Thus, ministers have an incentive to use the sectoral Council for “venue shopping” (Baumgartner and Jones 1991). Without citing empirical information, Sbragia (2000: 300) claims that “environment ministers have undoubtedly been able to approve some legislation in Brussels for which they would have been unable to win support in their national cabinets”. Anecdotal evidence speaks in favour of (Knill and Liefferink 2007: 62) and against (Sturm and Pehle 2005: 50) this hypothesis. Ultimately, it will also depend on the domestic mechanisms of interest intermediation and inter-ministerial coordination as well as the specifics of the case (Kassim *et al.* 2000).

Below the Council’s ministerial level, its underpinnings consist of the two-layered Committee of Permanent Representatives (Coreper I and II) and, further beneath, the various working groups. These working groups are responsible for the administrative and preparatory legwork, and they form the area of expert politics. Coreper “filters and approves the outcomes of the deliberations of the working group before the item continues on the Council” (Andersen and Rasmussen 1998: 589). Agenda items that are ready for conclusion without debate are presented to the Council as A-points. B-points, by contrast, are topics which are contested and need consideration on the ministerial level. Hayes-Renshaw and Wallace (2006: 53) calculated a share of 78% A-points versus 22% B-points on Council agendas between October and December 2004.

The *vertical differentiation* of the Council has been credited with increasing the EU’s capacity for policy-innovation (Lempp and Altenschmidt 2008; Neyer 2004). Council official’s long-term interaction and socialization into a supranational community and their common specialist background arguably encourage a more accommodating interaction-style centred on problem-solving that facilitates inclusive compromises as opposed to bargaining from fixed positions. But the fact that the Council adopts most items as A-points might simply indicate that the permanent representatives, like any good subordinate in a hierarchical organization, know how to anticipate their superior’s position. In that vein, Andersen and Rasmussen (1998: 591) find that of the 43 environmental acts in their study, in 29 cases “the

environment working group was the main primary negotiating forum”, but nevertheless conclude “that it is exceptional for an act to pass through the Council of Ministers on the recommendation of the working group and Coreper with no policy debate”, and that eventually “ministers are closely involved in the substantial debates”.

Formally at the EU’s apex and therefore above the Council of Ministers, the European Council is an institution independent from the Council of Ministers. This is the summit level of intergovernmental bargaining. In the European Council, the heads of state and government meet to discuss “the general political directions and priorities” of the Union (art. 15 TFEU), as opposed to the more day-to-day issues that are on the agenda of the ministers. Occasionally, however, it happens that a legislative project that is gridlocked in the Council of ministers is discussed on the summit level among heads of state, either informally or in the setting of the European Council.

In sum, the Council decides formally with large majority requirements. Frequently it even operates under an informal unanimity rule. A small minority of member states or even just one dissenter may thus block a decision (although the Council’s internal differentiation may facilitate agreement). Whether or not this procedural arrangement in fact produces deadlock or allows policy-change depends on the level of conflict within the Council. *Member states’ typical alignment* in environmental politics thus have to be taken into account. Conflicts about environmental policy within the Council frequently concern the level of protection or the policy styles underlying a proposal or both (Knill and Liefferink 2007: 102).

Regarding the former, a distinction is often made between *poor and rich member states* (Holzinger 2011: 114; Scharpf 1996: 226–235). The rich member states insist on a high level of protection. These countries are ready to bear the economic costs of strict environmental policy, and their comparatively affluent populations have attached greater relevance to post-materialist values, including the quality of the environment. The poor countries, by contrast, assign a lower priority to the environment. Most of these countries have acceded to the EU more recently and are still catching up economically. They are reluctant to afford costly

environmental regulations that could undermine the competitive position of their industry vis-à-vis the more developed EU economies.

The environmental front-runners are therefore found among the most affluent member states. Typically, these are Denmark, the Netherlands, Germany, and after their accession in 1995, Sweden, Finland, and Austria (Lieberink and Andersen 2005). The UK has introduced innovative policies to the EU level in the past, but mainly to avert the implementation of European policies foreign to its domestic regulatory system (Héritier *et al.* 1996). It is hesitant toward European integration in general and can no longer be considered a driving force. It remains to be seen, whether “Brexit” will ease the passage of blocked environmental policy items such as the soil framework directive. With Greece, Portugal, and most eastern European countries, it constitutes the group of states most reluctant toward strict European environmental policy. France, Belgium and Italy occupy a middle position (Holzinger 2011: 114; Weale *et al.* 2000 Chapter 14). Geographically, there is thus a divide between Europe’s north-west and its south-east. The grouping must be taken with a grain of salt, however (Weale *et al.* 2000: 470), since the individual preferences have varied over time and from issue to issue. Moreover, industrial geography, that is, the location of important production sites that are affected by a certain policy can differ from case to case and affect the distribution of positions among member states.

Single market jurisprudence has affected member states’ political opportunities and bargaining position. The distinction between *product standards* and *process standards* determines to a large extent how environmental policy conflicts rooted in economic considerations affect the preference alignment and bargaining dynamics in the Council. Both the poor and the rich countries want to safeguard the competitiveness of national industries. All states have a common interest in harmonizing product standards; differences here are mostly about the level of protection. The rich countries are in a more powerful position to determine the protection level of product standards, because they can always threaten to introduce stricter standards single-handedly and exclude non-compliant products from their markets. In contrast, there is no common interest in harmonized process standards. Single market law prevents the rich countries from excluding products manufactured under laxer,

foreign production standards; but at the same time, the rich states do not wish to harmonize process standards on the low level of protection of the poor countries. The latter also prefer the continuation of different national standards, because even a lax common standard, let alone harmonization on a northern level, would undermine the competitive position of their industry (Scharpf 1996: 226–235).

Turning now to the second conflict dimension, the *policy style*, the grouping of countries is less straightforward. Member states have different policy legacies, entrenched administrative practices and concepts that are often incompatible with each other and with the policies under discussion at the EU level. This incompatibility or “misfit” (Börzel 2000) renders the domestic implementation of EU law costly and cumbersome. Member states therefore seek to reduce the misfit and thereby the legal and institutional adaptations required to implement European provisions. This desire is an important motivation to influence the shape of pending EU environmental policy: In order to minimize future adaptation costs, member states try to “upload” (Börzel 2002: 194) their national regulatory concepts to the EU level during the policy formulation stage (Börzel 2002; Héritier *et al.* 1996; Knill and Lenschow 1998). As Knill (2008: 110–111) observes, “the main concern here is not so much the concrete level of European regulations, but rather the question of whether and to what extent European patterns of governance and regulatory instruments can be integrated into national structures and regulatory processes without great efforts”.

This competition about the policy agenda is often centred on the rich member states, because their domestic environmental law is more developed. In contrast, the poor states are less concerned about misfit, because their domestic policies can still evolve in various directions. Rather than forming coalitions among themselves, the poor member states more often act as coalition partners to the rich countries (Héritier *et al.* 1996: 14–15). They may even be interested in learning from the domestic experiences of the front-runners and chose from the policy menu offered at the bargaining table. During the negotiations, these countries are “fence-sitting” rather than “foot-dragging” (Börzel 2002: 194). In this respect they behave differently than in conflicts that are rooted in economic competitiveness.

In a nutshell, the Council is the main site of intergovernmental bargaining and, as a collective veto player, the needle's eye of the EU's decision-system. The presidency and secretariat as well as the Council's horizontal and vertical differentiation might smooth out some of the issues that would otherwise lead into deadlock, although the compartmentalization into separate Council formations renders it more difficult to find compromise packages. Intergovernmental conflicts over environmental policies can be severe. They are frequently rooted in economic concerns and divergent policy styles.

3.3 The European Parliament

The EP is, like the Commission, another potential source of supranational interventions to open of joint-decision traps. The EP has been frequently hailed as a promoter of environmental policy and empirical research shows that it was often successful in defending high levels of protection against attempts of the Council to water down environmental policy. This section first examines the strategies that the EP may use to "safeguard" the level of protection. Second, it explains why and to what extent the EP can be expected to have "greener" preferences than the Council; the reasons go beyond the simple fact that the EP decides by simple majority and thus cannot be held hostage by a blocking minority.

Next to the Council, the EP is the other *collective veto player* in EU environmental policy-making. Since the Amsterdam reform of the codecision procedure, the final legislative text must be ratified by a qualified majority of the Council and a simple majority of the parliament in the conciliation committee, the final step of the procedure. Neither of the two actors has an agenda-setting advantage, and both share veto-power to the same extent. The "chambers" are therefore on an equal footing, and their respective bargaining success depends on the location of the status quo or on factors outside of the legislative procedure (Crombez 2000: 365–366; Tsebelis and Garrett 2000: 15, 23–25). The Commission, as the EU "government", does not depend on permanent support by a majority coalition in the EP. As the 751 Members of the European Parliament (MEP) do not need to anticipate a vote of confidence, the EP is independent from the Commission and free to amend proposed legislation at will (Hix and Høyland 2011: 54).

European citizens directly elect the EP according to a system of degressive proportionality, over-representing citizens in small states. By design, the parliament should be an arena less of intergovernmental bargaining than of political deliberation along transnational, party-political lines. It is often likened to the federal chamber in a bicameral federal system, with the Council assuming the position of the state chamber (Crombez 2000).¹² However, the preponderance of the intergovernmental cleavage in EU politics and the absence of a true EU government have prevented the emergence of a full-fledged transnational party-system. National political parties within the EP are organized in transnational political groups, and because membership determines access to important legislative resources, national parties usually want to belong to a group. Nevertheless, the national delegations within the transnational groups have remained strong (Hix 2008).

Two logics thus govern the position-formation of the EP: *Party-political and national* (Hörl *et al.* 2005: 600–601). The national logic suggests that positions within the EP mirror the alignment of governmental positions in the Council. However, since the EP, unlike the Council, decides by simple majority, it can overrule a minority position and is less constrained by individual states' reservations. The party-political logic suggests that the position of the EP reflect its party composition. Since left parties are more pro-environment than conservative parties (Carter 2007), a left-leaning EP will adopt a greener position than a right-leaning EP. Analyses of roll-call votes show that, while MEPs vote more frequently along transnational than national lines (Kreppel and Tsebelis 1999), the “main factors behind voting in the EP are the policy positions of national parties” (Hix 2002: 696), when transnational political groups and national delegations hold diverging positions and MEPs are torn between conflicting loyalties.

Coalition patterns also depend on the issue area (Kreppel and Tsebelis 1999: 951). Aside from the eurosceptic fringe parties, the EP has a common interest regarding institutional and integration issues, namely to deepen European integration and to extend its own power in European legislation. Between the SEA and Amsterdam reforms, the EP has, for instance,

¹² More precisely, the comparison is with the chambers in (German) executive federalism rather than (Swiss) compound federalism or (United States) divided federalism.

favoured the single-market article (114 TFEU) over the environment chapter (title XIX TFEU) as legislative base, because the single-market article provided for a legislative procedure in which the EP had greater influence (Holzinger 2011: 115). In the same vein, the EP's early advocacy of a European environmental policy agenda appears as a strategy to deepen European integration and to extend its own political reach. By contrast, socio-economic issues divide MEPs more frequently than integration issues (Thomassen *et al.* 2004: 162). As the EP has consolidated its institutional position and today stands on an equal footing with the Council, the party truce has become more fragile. Intergovernmental (Knill and Liefferink 2007: 66) as well as party-political (Burns and Carter 2010: 137; Burns *et al.* 2011) differences about environmental policy now play out to a larger degree.

The division of labour within the EP is organized around *legislative committees*. Each committee is responsible for a distinct policy area, and the compartments by and large mirror those of the Commission DGs and Council formations. The committees are where the actual legislative work, the drafting and discussion of individual bills, takes place. EP committees also monitor the implementing measures adopted by the Commission under the regulatory procedure with scrutiny. This division of labour introduces a third logic of decision-making: sectoral politics. Environmental policy falls in the jurisdiction of the Environment, Public Health and Food Safety Committee (ENVI). It is one of the largest committees in the EP. Practitioners and researchers have often portrayed ENVI as a preference outlier (Judge 1992; Judge *et al.* 1994; Pollack 1997b: 581), but it has over time become more like an ordinary committee. As a rule, EP committees, including ENVI, are representative of the entire floor as regards their voting behaviour as well as their national and party affiliations (McElroy 2006: 9).

Within a committee, the *rapporteur* is responsible for drafting the legislative reports and for managing the committee's amendments. In the ever more frequent trilogue meetings (see), the rapporteur also negotiates on behalf of the EP with the Council delegation. The rapporteur is thus able to shape legislation more than any other MEP. For example, studies of EU environmental legislation in the nineties often credit ENVI's rapporteur Ken Collins with the production of stringent amendments (Golub 1996: 326; Pollack 1997b: 581). Since

rapporteurships are allocated in an “auction-like system” (Kaeding 2004: 354), party groups can accumulate rapporteurships in issue-areas that are salient for them. Thus, environmental preference outliers like the Green group and Dutch MEPs produced four times and twice as many reports as proportionate to their share of seats (Kaeding 2004: 355).

Many case-studies underscore the EP’s *positive influence on the environmental stringency* of EU legislation.¹³ In their study of 727 amendments of legislative acts adopted between 1989 and 2001, Burns and Carter (2010: 132) find that “the vast majority [...] were intended to strengthen environmental protection”, irrespective of the legislative procedure and the EP’s composition. At the same time, the percentage of amendments that Burns and Carter (2010) classify as “important” decreased after 1999 (Burns and Carter 2010: 133). This finding coincides both with the conservative’s taking-over of the majority in the 1999 elections and with the notion that the EP became a more ordinary legislator after the Amsterdam treaty had settled most of the EP’s battles for institutional power.

In sum, the EP in general demands a higher level of environmental protection than the Council. Studies of the EP’s legislative behaviour suggest four reasons: First, the EP forms its position not only by aggregating national, but also sectoral and party-political interests. Second, it decides by simple majority and can therefore overrule a reluctant minority. Third, rapporteurs disproportionately often belong to green countries and parties. Finally, the EP has in the past used legislative amendments as bargaining chips in procedural turf-battles.

3.4 The European Court of Justice

At least in two respects, the ECJ is highly relevant in the context of environmental policy in general and of the joint-decision trap in particular: First, its authoritative rulings may change applicable decision rules, and second they change negotiator’s opportunity structures. This section first explains the Court in its general contours; then it examines how the Court has used its unique powers to open up exits from the joint-decision trap in EU environmental policy.

¹³ Earnshaw and Judge 1993; Earnshaw and Judge 1995; Friedrich *et al.* 2000; Hubschmid and Moser 1997; Judge 1992; Judge *et al.* 1994; Ryland 1999; Selin 2007; Smith 2008; Tsebelis and Kalandrakis 1999.

The ECJ is the judicial branch of the European Union. As its final interpreter, the Court ensures the observation and uniform application of primary and secondary law. The ECJ is composed of one judge per member state and eleven advocates-general, but the Court only rarely decides in full plenary. Judges and advocates-general act in formal independence from national governments.

Three judicial procedures are most relevant: Under the *infringement procedure*, member states and the Commission can file a complaint against a state that they believe fails to comply with EU law. Since the Maastricht Treaty, the Court can issue a fine against a member state that has not followed its ruling. Many parts of EU law are directly applicable in member states. In the interest of its uniform application, the *preliminary ruling procedure* allows national courts to ask the ECJ how to interpret a given aspect of EU law that is relevant in a current proceeding. The preliminary ruling procedure has helped to create a densely integrated European legal system by giving private litigants greater access to jurisdiction and enabling national courts to enforce ECJ judgments and sidestep domestic high courts (Alter 1998). Finally, the ECJ has the power to review the legality of legislative and executive decisions taken by the EU institutions. An institution or sometimes even an individual can file an *action for annulment* against an act that they believe to be illegally adopted, for instance on an improper legal basis. Vice versa, if the treaty requires EU institutions to make certain decisions but the institution has neglected this obligation, the same actors can ask the ECJ to record a failure to act.

In addition to ensuring compliance with existing EU environmental law, the ECJ influences environmental policy also during its formulation. The Court's influence on policy-making is indirect, however. It shapes the legal-institutional framework in which member states and the other Union institutions negotiate environmental policy. In particular, it defines the legislative competences of the EU institutions and by delimiting the boundaries between domestic environmental protection and the European single market, its rulings may change the opportunity structures in which veto-players negotiate (Holzinger 2011: 120–121).

Regarding the first aspect, the legislative competences, the Court has regularly interpreted the Union's legislative powers in the environmental realm broadly and thereby contributed to the formation of the policy field, especially during the early period when a formal treaty basis was missing (McCormick 2001: 42–44; Reh binder and Stewart 1988: 21). Many times, the ECJ declared admissible environmental policy-making either on the basis of article 114 TFEU (ex-article 100 EEC) that actually pertains to the approximation of laws affecting the functioning of the single market, or on the basis of the “catch-all” article 325 TFEU (ex-article 235 EEC), or on both.¹⁴ It has moreover interpreted the treaty preamble and ex-article 2 EEC in a progressive fashion, maintaining that the “accelerated raising of the standard of living” mentioned in these provisions as one goal of the Community entails the protection of the environment. In the preliminary ruling of *ADBHU* (1985), the ECJ explained that the market freedoms must not be seen in absolute terms “but are subject to certain limits justified by the objectives of general interest pursued by the Community” and went on to describe environmental protection as “one of the Community's essential objectives”.¹⁵

The ECJ also supported the EP when it demanded a greater say in environmental policy-making. The 1980 *Isoglucose* ruling¹⁶ afforded the EP the power to delay unwelcome decisions (Reh binder and Stewart 1988: 268). The mere threat of such a delay was often enough to convince the Council to take EP positions on board, and in urgent matters it de facto amounted to a power of (suspensive) veto even before the introduction of the codecision procedure (Judge *et al.* 1994: 266).

After the Single European Act (SEA) had introduced formal environmental policy-making powers, the Court supported the view of the Commission and EP against the Council that legislation must be based on the single market article 114 TFEU (ex-article 100 EEC) instead of the new environment article 192 TFEU (ex-article 130s EEC), when the substance of the legislation falls into the realm of both.¹⁷ The SEA introduced qualified majority voting for legislation based on article 114 TFEU and it required the new cooperation procedure, while

¹⁴ For example in *Commission v. Italy*, Case 91/79, 1980 for ex-article 100, and in *Commission v. Belgium*, Cases 68-73/81, 1982.

¹⁵ *Procureur de la Republique v. l'Association de Défense des Bruleurs d'Huiles Usagées (ADBHU)*, Case 240/83, 1985, 555.

¹⁶ *Isoglucose*, Case 138/79, 1980.

¹⁷ *Commission v. Council*, Case 300/89, 1991

article 192 still demanded unanimity and required the consultation procedure. The decision thus strengthened the procedural powers of both the EP and the Commission in environmental policy-making and it decreased the likelihood of legislative stalemate due to a deadlocked Council. Yet article 114 TFEU also prohibited member states to adopt more stringent national standards than agreed on the EU level, which to some extent they could under the environmental competence title. In that regard, the Court emphasized negative over positive integration. At the time of these rulings, the EP was still a relatively junior player and anxious to establish itself as a defender of the environment in the eyes of the European publics (Judge 1992; Pollack 1997b: 581). Its empowerment by the ECJ may very well have contributed to the rapid development of the policy-area.

Regarding the second aspect of the ECJ's influence on environmental policy-making, the opportunity structures in which veto players operate, the Court has gradually strengthened the bargaining position of the more ambitious actors (Holzinger 2011: 120–121). At first, the Court emphasized the functioning of the single market over member states' autonomy in domestic environmental policy-making. National environmental regulations were seen as distortions of competition or barriers to trade. In legal terms, they could amount to “measures having equivalent effect” to quantitative import restrictions that are prohibited according to the principle of free movement of goods under article 34 TFEU (ex-article 30 EEC). The 1974 *Dassonville* ruling¹⁸ clarified that this prohibition applies regardless of whether or not the measure discriminates between domestic and foreign products. However, article 36 TFEU exempts various measures including those justified on grounds of “the protection of health and life of humans, animals or plants”, provided they do not “constitute a means of arbitrary discrimination or a disguised restriction on trade”. In addition, the Court ruled in *Cassis de Dijon*¹⁹ (1979) that trade restrictions can be justified, which are non-discriminatory, strictly proportionate, and protect “mandatory requirements”.

¹⁸ *Dassonville*, Case 8/74, 1974.

¹⁹ *Cassis de Dijon*, Case 120/78, 1979.

In *Cassis de Dijon*, the German restriction on French liquor failed the proportionality test, as did Belgian legislation on the shape of margarine packaging,²⁰ while the allegedly health-related German Beer purity ordinance was seen as a disguised trade restriction.²¹ These and other decisions discouraged member states from introducing domestic environmental provisions on their own that affected foreign products. When the ambitious states planned to introduce such provisions, other member states threatened with court action (Holzinger 2011: 121). Member states thus had to find a compromise in the form of European legislation. As the Court apparently tended to strike down national measures, the ambitious members were in a weak bargaining position. Aside from noncompliance, they could only chose between the weak legislation acceptable to the less ambitious coalition and the absence of policy, domestic and European.

Around the time of the SEA, the stance of the Court changed. Already before a formal treaty basis, the 1985 *ADBHU* decision recognized environmental policy as a goal of the community that had to be balanced against free trade. Once the SEA in 1987 had moreover upgraded environmental policy from a *de facto* to a *de jure* EU competence, the ECJ was even more outspoken. In *Danish Bottles* (1988), the Commission challenged a Danish packaging requirement that admitted only reusable containers for beer and soft drinks approved by Danish authorities. With the hitherto restrictive jurisprudence of the ECJ, the Commission was certain that it would win the case. In fact, it designed the lawsuit as a “test case” to establish “whether and to what extent the concern to protect the environment has precedence over the principle of a common market” (cf. Koppen 2005: 78). The Court however declared the largest part of the Danish regulation admissible. Citing *Cassis* and *ADBHU*, it recognized explicitly that “the protection of the environment is a mandatory requirement which may limit the application of Article 30 [now 34, HD] of the Treaty”.²²

The ECJ consolidated this reasoning in subsequent cases. In *Wallonian Waste*,²³ (1992) it extended the concept of “goods” to waste. While the Belgian restriction on waste imports that

²⁰ *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, Case 261/81, 1982.

²¹ *Commission v. Germany*, Case 178/84, 1987.

²² *Danish Bottles*, Case 302/86, 1988.

²³ *Wallonian Waste*, Case 2/90, 1992.

was at issue in the case therefore also fell under the prohibition of article 34 TFEU, the Court explained that environmental concerns had to be taken into account in deciding whether or not the restriction was illegal under the principle of free movement. Following its reasoning in *Danish Bottles* (1988), the ECJ found that the violation was in part justified by the mandatory requirements doctrine. Because mandatory requirements only apply when there are no common rules, and directive 84/631/EEC already regulated the shipment of hazardous waste, the Belgian prohibition remained unlawful, of all kinds, just for toxic refuse.

As one result of the 1992 *Wallonian Waste* decision, the Council adopted a regulation (259/93) on the trans-border shipment of regular waste, for which no common rules existed at the time. The regulation expressly allowed national bans on the importation of such waste for disposal, as it was adopted under article 192 TFEU (ex-article 130s EEC) that permitted more stringent national measures (Wheeler 1993: 95). Regulatory autonomy over environmental matters thus took precedence over the uniformity of the single market. The waste shipment regulation demonstrates how the new legal situation empowered the greener member states. As the threat of Court action against domestic measures had become less convincing, effective veto power was taken out of the hands of the environmental laggards and went to the green states. The latter could now threaten to introduce stringent measures single-handedly if they were dissatisfied with the legislative proposal under debate (Gehring 1997: 347).

The new situation affected the discussions surrounding the 1991 German packaging waste ordinance. The provision required companies wishing to sell their products on the German market to take back their packaging waste or join a special purpose association that would handle the waste collection in return for a membership fee. Foreign companies saw this requirement as anti-competitive and lodged complaints with the Commission. The latter considered to take the issue to the ECJ but eventually refrained, in part due to the risk of legal defeat. The domestic scheme therefore again prompted legislative action at the EU level. This time, however, the resulting packaging directive (94/62/EEC) reflected a compromise between ambitious and conservative positions. After a long fight, it was based on the harmonization article 114 TFEU, which meant that the ambitious coalition (Belgium, Denmark, Germany,

the Netherlands) could be outvoted, without it being able to exceed the agreed standards by domestic regulation (Gehring 1997: 350–351; Weale *et al.* 2000: 419–424).

The fate of the packaging ordinance demonstrates that, while ECJ jurisprudence sets the confines in which EU policymakers negotiate, it does not alone determine policy. There are other institutional and situational factors that affect the result. Moreover, it is important to note that member states remain obliged under the free movement of goods principle to admit goods on their markets that are manufactured under foreign production processes. The *Danish Bottles* jurisprudence allows exemptions only for product regulations and does not apply to process regulations. These generally do not interfere with the single market and affect the importer state only indirectly via regulatory competition. In other words, ECJ jurisprudence has facilitated the harmonization of product standards on a high level of protection, but European process standards can still be defeated by the effective veto of the less ambitious member states (Scharpf 1999: 97). The same logic applies when product standards are already harmonized and member states want to exceed the European norms, as the Belgian prohibition of hazardous waste shipments demonstrates.

In sum, the ECJ not only ensures the uniform implementation of existing EU environmental law, it is also an important actor during the legislative stage. This is because its judgments affect the legislative competences of the EU institutions and because, by delimiting member states' regulatory autonomy, it indirectly shapes the distribution of their bargaining power in the Council.

4. Conclusion: Actor Alignments and Strategies in EU Environmental Politics

Environmental policy-making in Europe frequently requires international cooperation. Even if an environmental problem in itself does not create interdependence, as soon as a domestic policy affects the single market or other existing European provisions, member states have reason to coordinate their decisions. Various actors are involved in the formulation of common European environmental policies. At the centre, the member states in the Council form a negotiation system. Environmental legislation requires their agreement or at least a qualified majority of their votes. Given member states' socio-economic and regulatory

diversity, agreement seems unlikely, and any compromise depends on the distribution of bargaining power in the Council.

While the ECJ does not participate in day-to-day legislation, its judgments have in the past shaped the power distribution between member states. Ever since *Danish Bottles*, the ambitious governments can pressure the more reluctant member states into agreement by regulating products through unilateral decisions, regardless of their external effects. By contrast, European process standards and the tightening of existing European provisions can still be defeated by the veto of the least ambitious states. In these cases, deadlock can be expected.

The inquiry into actors and institutions allows some speculations about exits from the joint-decisions trap: First, in terms of *preferences*, divisions in the Council seem to be rather issue specific than purely determined by economic development. They also depend on the level of misfit between European and domestic solutions. The competition for the European environmental policy agenda revolves around the rich and green member states, while the others are more reactive. Both the Commission and the EP, as a rule, have in the past advocated a higher level of environmental protection than the Council. The reason has to do with sectoral dynamics within their respective processes of preference formation, and with strategical considerations. Strategically, these institutions used substantive policy issues as bargaining chips in procedural power plays, and they seized popular issues to increase their perceived legitimacy. However, the days of the big inter-institutional fights are over, and the EP has become more “moderate” in its environmental policy demands as its procedural powers became stronger.

Strictly speaking, it makes little sense to attribute preferences to the ECJ, since its decisions follow a judicial logic. Its case law has nevertheless contributed to European integration in the area of environmental policy, first by adopting a broad reading of the Community’s environmental law-making powers, and second by accepting environmental issues as mandatory requirements that justify market-restricting product regulations.

Second, the supranational institutions may use various *institutional resources* to influence policy. Because they decide by simple majority, EP and Commission are less constrained by internal differences than the Council is. Their constraints are external: The positions of the member states and the location of the status quo. In this regard, the ECJ's delimitation between environmental policy and the single market in *Danish Bottles* was consequential: The ambitious governments can pressure the more reluctant member states into agreement by regulating products through unilateral decisions, regardless of their external effects. This has also rendered the EP's veto more credible. By contrast, European process standards and sometimes also the tightening of existing European provisions can still be defeated by the veto of the least ambitious states. In these cases, deadlock can be expected.

The Commission's formal agenda-setting power has diminished over each treaty reform, but it still lays the groundwork for subsequent negotiations in the Council. Even so, the Commission's "good services" in brokering compromises should greatly facilitate environmental decision-making. There is surprisingly little research on the Commission's power to withdraw legislative proposals. It would be interesting to analyze the withdrawal of the long-time deadlocked European soil policy from this perspective.

Finally, the institutions that structure intergovernmental negotiations are perhaps more complex than a pure bargaining system. Eighty committees silently work away under the direction of DG Environment. Most of their decisions are made below the political radar. Moreover, the Council itself is differentiated into multiple levels, from the working groups up to the summit. While member state officials are at the centre of all of these institutional venues, there is reason to believe that the multiplicity of these enhances the overall effectiveness of the system.

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