Making Cooperation Work

Informal rules and flexibility in the European Union

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Abstract:

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**Introduction**

The European Union (EU) must be considered the vanguard of economic globalization. European member states have long abolished all intra-European tariffs and now continuously strive for the full elimination of non-tariff barriers to the free circulation of goods, persons, capital and services. The majority of them additionally surrendered their monetary autonomy to adopt the euro as their common currency and sole legal tender. The EU is now the world’s largest single market and leading trader. Today, forty per cent of world exports originate from a member state of the EU, two thirds of which are traded among them.\(^2\) The prices for tradable goods in Europe have constantly converged to reach a level that is now similar to the level of price convergence in the US market.\(^3\) In short, the depth of economic integration among EU member states is astounding and unparalleled in world politics.

To explain how the EU has been able to achieve and maintain this depth of integration, many observers point to the EU’s formal rules that pool sovereignty and delegate authority to supranational institutions. The Commission enjoys extraordinary agenda-setting power and discretion in the implementation of policies; the governments in the Council take decisions by majority vote; and the European Court of Justice enforces compliance with EU law. The rigidity of the EU’s formal rules makes it possible to advance integration even against the myopic interests of one or more member states. To some, these strong supranational features even imply that the EU has gone beyond the status of an international organization to become more akin to a state-like political system.\(^4\)

Yet this legalistic perspective is misleading, for at the heart of the EU lies a set of informal rules that govern what governments and bureaucrats actually do day-to-day. To cite just one example: Although the treaty provides for majority voting for most policies on the regulation of the European market, the Council almost never votes, preferring to reach consensual outcomes instead. In fact, a plethora of informal rules in daily decision-making, described in more detail below, run in parallel to the EU’s formal rules, yet differ from them substantially. Why do informal rules emerge in parallel to rigid formal rules? How do they affect the way formal institutions work?

This article takes the example of the EU to develop a theory of informal rules within formal international organizations. Informal rules are defined in this context as *unwritten prescriptions or proscriptions of behavior that govern interaction*.\(^5\) They increase in formality to the extent that these rules are codified. The article makes three theoretical claims that can potentially be generalized beyond the case of the European integration. First, drawing on the debate about stability versus rigidity of institutions, it is argued that where future domestic demands for cooperation are uncertain, informal rules add situational flexibility to the rigid formal rules – a flexibility that allows governments to resolve unexpected and potentially disruptive conflicts that cooperation may generate at the domestic level. By collectively preventing these conflicts from turning into unmanageable, domestic pressure for non-compliance, governments are able to uphold a level of economic integration that they would otherwise be unable to sustain.

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\(^2\) WTO 2008 trade statistics.

\(^3\) Rogers 2007, 791.

\(^4\) See e.g. Hix 1998, 41.

\(^5\) This behavioral definition excludes formal prescriptions or proscriptions that are “empty shells” in that they have no bearing on behavior at all. On this approach see Greif 2006, chap. 11. It goes back to the initial definition of regimes as “explicit or implicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area” (Krasner 1982, 185).
Second, and in contrast to previous studies on flexibility in institutions, it is argued that governments refrain from codifying informal rules because they serve to resolve conflicts of a political nature that are irresoluble by the letter of the law. This is because the threat to the institution (and therefore the demand for flexibility) arises not simply from unforeseen factors that are exogenous to domestic circumstances. It arises when governments are susceptible to domestic pressure for non-compliance to an extent that was unforeseen at the time of institutional creation. Informal rules consequently render institutions more flexible than formal rules would ever permit.

Third, because flexibility is prone to abuse by its members, the authority to adjudicate whether informal flexibility is pertinent or formal rules apply lies with the government that forgoes short-term gains from a departure from formal rules. The onus to justify situational flexibility is consequently put on the government that claims to be facing unmanageable domestic pressure. This institutional solution entices all governments to reveal information about the actual demand for added flexibility in order to prevent a judgment with unfavorable distributional consequences.

On the basis of these three theoretical claims, the article makes a fourth, substantive argument about European integration: The EU has been able to achieve and uphold its extraordinary level of market integration not only because of its intrusive supranational institutions, but because informal rules allow governments to mitigate the rigidity of the formal rules with a view to harmonizing their effect to the uncertain vicissitudes of domestic politics. As a consequence, the mix of formal rules and informal rules in the EU is functional and constantly re-embeds the EU’s integrated market into the societies of its member states.6

The article develops a mid-range theory about how informal rules add flexibility to formal institutions – not a general theory of informal rules or a general theory of flexibility in institutions. Informal rules may serve functions other than the provision of flexibility, while flexibility may be necessary for reasons other than uncertainty about future domestic demands for cooperation. Since its mid-range character subjects each of the theory’s observable aspects to a variety of alternative explanations,7 the article refrains from presenting a conclusive test and concentrates on what can reasonably be achieved within the scope of the following pages: After a description of the puzzle and of the state of the art, it develops a theory of informal rules within formal institutions, the plausibility of which is subsequently corroborated in an empirical analysis of the emergence and use of informal rules in the EU. The article concludes by explaining how the theory can be applied beyond the case of the EU.

The puzzle

The EU’s legislative procedure is based on a set of formal rules that are rigid in the sense that they provide several opportunities to impose decisions on one or more recalcitrant governments. These formal rules therefore allow the member states to go further beyond the status quo (e.g. achieve

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6 The norm of discretion can therefore be regarded as a rational version of what Ruggie (1982, 399, drawing on Polanyi 1944) called the norm of embedded liberalism, the essence of which is “to devise a form of multilateralism that is compatible with the requirements of domestic stability. [Governments] encourage an international division of labor which, while multilateral in form and reflecting some notion of comparative advantage (and therefore gains from trade), also promised to minimize socially disruptive domestic adjustment costs […]”.

7 This lies in the nature of institutional analysis on the basis of a behavioral definition of rules. Since repeated interaction sustains multiple equilibria, each of which has various observable elements, it follows that any observable behavior can always also be generated by an entirely different institutional equilibrium than the one proposed by the theory. Thus, every single informal rule might well have a different, maybe entirely idiosyncratic explanation.
deeper integration) than it would be possible without or with more permissive rules. However, governments rarely behave in the way that formal rules suggest. In fact, they collectively depart from the formal rules with a frequency that we can speak of informal rules that run in parallel to the rigid formal rules. This section describes the phenomenon in the EU’s legislative process by discussing the formal institutional set-up and then contrasting it with the practices that the governments came to adopt in actual decision-making.

The roots of today’s twenty-seven member state-strong EU lie in the European Economic Community, which France, Germany, Italy, and the Benelux countries committed to establish with the 1957 Treaty of Rome (ToR). At its core was the objective of establishing a common market that consisted of policies governing agriculture, transport and competition, and the free circulation of goods, capital, services, and labor (“four freedoms”). The commitment was taken a step further with the 1987 Single European Act, with which the now twelve member states pledged to establish a single market, an area in which the free circulation of the four factors of production would be as easy between the member states as within them. The expansion of the EU to other policy areas notwithstanding, the pursuit of the objective of deep market integration has always been the EU’s core objective. Its implementation promised to subject governments to ad-hoc societal pressures for and against the project, because it required the removal (by means of elimination or harmonization) of deeply entrenched trade impediments such as incongruous domestic regulations, subsidies and taxes.

Since the treaties remained imprecise about actual conduct, the realization of the objective of market integration necessitated a series of future individual decisions. In light of the fact that the removal of the various non-tariff barriers was certain to generate conflicts both between and within the member states, the formal rules delegated extraordinary rule-making and implementation power to supranational institutions that were insulated from ad-hoc pressure. In addition, governments pooled their sovereignty by surrendering their national vetoes on individual decisions. The result is an original legislative procedure, the “Community Method”, which today governs almost invariably all regulatory policies. It brings together government ministers (Council), an independent bureaucracy (Commission), and a European Parliament (EP). Each stage in the procedure entails the possibility of imposing an outcome on one or more recalcitrant states.

- The Commission initiates the procedure with a legislative proposal. Its exclusive right of initiative allows it to choose one among many feasible proposals for a legal act and to determine the timing of its submission. It can therefore bar proposals from the agenda that undermine the objective of market integration and table own proposals when the constellation of government preferences favors its immediate adoption.
- The Council then decides whether to adopt or change the Commission proposal. The voting rules strongly favor the first option and thus greatly augment the Commission’s agenda-setting power: While a qualified majority vote (QMV) is sufficient for an immediate adoption, the Council needs to attain unanimity in order to amend the legislative proposal. The EP was initially to be consulted before adoption, but it has been gradually empowered (to the detriment of the Commission’s agenda-setting power) to co-legislator status with veto power over Council decisions.

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8 In 1965, it was institutionally merged with the European Coal and Steel Community and Euratom to form the EC.
9 The Treaty of Lisbon (ToL) refers to the most recent version of the Community Method as the “Ordinary Legislative Procedure”.
• Bar a few exceptions, the legislators are free to delegate implementation powers to the Commission or to national administrations. Once delegated, the Rome Treaty provided no means for the governments to change or withdraw effective measures.

Taken together, these rigid, formal rules provide the opportunity to impose decisions on one or more recalcitrant member states. To the present day, no other international organization possesses supranational features that are equally strong. However, actual decision-making practices bear little resemblance to what one would expect to emerge on the basis of these formal rules. Instead, they seem to follow informal rules that are not codified in the EU’s primary law.

Let us first look at the Commission’s monopoly of initiative. Formal rules endow the Commission to choose one among many feasible legislative proposals and to submit it when governments are most likely to adopt it. Yet the Commission quickly lost grip of its agenda-setting powers. Firstly, the Heads of State and Government soon restricted the Commission’s room for maneuver by predetermining the legislative agenda. Although the Heads of State and Government had no official place in the EC, they met with increasing frequency at “summits” (now European Council meetings) to define the agenda and give instructions to both Commission and Council. Secondly, the governments resumed control of the timing of legislation. Instead of dealing with Commission proposals immediately after their submission, they referred them to government experts within a large informal substructure of hundreds of working groups. The number of government experts therefore quickly exceeded the number of EU officials involved in day-to-day decision-making. The consequence of this practice was a loss of control over timing, as a senior Commission official explains:

Constitutional reality diverged [from the legal constitution]. The Commission still prepares proposals, more often than not with the influential assistance of governmental experts. However, whether the Council deals with the proposal, and when and with which content they are adopted, is no longer (or barely) in the Commission’s hands…

The formal rules stipulate that the governments (later on jointly with the EP) adopt the Commission proposal with a qualified majority vote and may only change it if they are able to attain unanimity. Yet the Council substructure served to build consensual decisions that sufficed to change the Commission proposal. The government experts were from the outset instructed to prepare decisions in such a way that the next higher level was willing to adopt them consensually and without further discussion. Working groups hence came to submit preliminary consensual decisions to the committee of permanent representatives (Coreper), which then prepared consensual decisions (“A-Points”) for the government ministers in the Council. To this day, the ministers adopt an estimated number of eighty to ninety percent of all legal acts as A-Points en bloc without further debate. Unsurprisingly, at most only 20 per cent of all decisions that are formally subject to QMV are explicitly contested at adoption.

The EP was implicated in these informal practices as soon as it gained serious legislative powers in the mid-1990s. Because the Council was reluctant to engage it in open negotiations, the Parliament intensified its contacts with the Council substructure and the Commission via informal

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10 In competition, the common trade, transport and agricultural policies.
11 The commission was well aware of its power. See e.g. Hallstein 1965.
12 See already Lindberg 1963, 57-58.
13 Sasse 1972, 88. Here and in the following, all translations from the original are mine.
14 Hayes-Renshaw and Wallace 2006, 53. This does not mean that issues are never discussed at the ministerial level. Ministers often refer dossiers back to the substructure with further instruction.
trialogues. At the same time, it increasingly agreed on legal acts during the early stages of the legislative procedure, thus forfeiting opportunities for public contestation. As a Council official explains:

\[\text{[Trialogues]} \text{ make it possible to speak more frankly and to explain what the underlying reasons are. You also can say: here is a real problem – we cannot go any further than this, please recognize this...}\]

Finally, the original Treaty of Rome allowed for the delegation of implementation powers to the Commission and provided for no means for the Council to withdraw or change effective measures. However, except in matters where the treaty confers these powers directly upon the Commission, governments usually reserve the implementation of policies for their national administrations. And in the event that the Commission is endowed with implementation powers, a number of informal governmental committees (Comitology) monitor its action and often limit its discretion substantially.

The literature

In arguing that informal rules like those described above serve to add flexibility to an institution’s formal design, the article engages with two bodies of literature in international political economy, international law and European studies on, firstly, the trade-off between institutional rigidity and stability, and, secondly, about informal rules in international institutions.

The first body of literature asks how institutions can be maintained when there is uncertainty about its future strategic environment. Uncertainty presents a design problem since overly rigid institutions fail to generate compliance with its rules while too flexible institutions are subject to abuse. In both cases, cooperation unravels as a result. Governments therefore need to find ways to square the circle between providing flexibility without at the same time undermining the credibility of the institution. Studies in this vein identify different types of uncertainty and propose various ways in which it is endogenized in the formal institutional design. For example, Koremenos asks how states deal with uncertainty about the systemic distribution of the gains from cooperation among them, and analyzes how flexibility mechanisms like sunset clauses that allow for renegotiation enable risk-averse states to commit to cooperation. Rosendorff and Milner, among others, argue that the demand for flexibility stems from uncertainty about future domestic demands for cooperation. States therefore include escape clauses in a formal agreement and combine it with a penalty that is set high enough to discourage overuse, but set high enough to encourage states to make use of it. However, Pelc finds that states prefer to allow formal appeals for exceptions that are not conditional on compensation. The literature has so far remained largely legalistic in that the authors seek to explain the rationale for the use and design of formal flexibility mechanisms. Yet there is no a priori reason to think that flexibility can only be provided by formal means.

\[16 \text{Farrell and Héririter 2004, 1194-1999.}\]
\[17 \text{Quoted in Farrell and Héririter 2004, 1199.}\]
\[18 \text{Franchino 2007, 86-87. Commission and EP have contested the legality of this practice.}\]
\[19 \text{See e.g. Pollack 2003, 114-145.}\]
\[20 \text{Koremenos 2005, 550.}\]
\[21 \text{Rosendorff and Milner 2001. See also e.g. Bagwell and Staiger 1990, Downs and Rocke 1995, Rosendorff 2005, Sykes 1991.}\]
\[22 \text{Pelc 2009, 352-353.}\]
The article therefore also speaks to the burgeoning literature on informal rules in (international) institutions. The “institutional design” literature in International Relations explores the strengths of weaknesses of informal as opposed to formal rules. Abbott and Snidal *inter alia* argue that vague rules leaves room for learning processes and permit states to adapt institutions over time. It is therefore likely that “soft law” gradually evolves into “hard law”.\(^{23}\) However, Goldstein and caution that legalization may lead to protection, because formal rules increase the availability of information about the distributive implications of commercial agreements that induces protectionists to mobilize.\(^{24}\) Approaching formal and informal rules as substitutes, this strand of the literature has omitted asking how informal rules that emerge in parallel to formal rules may complement each other.

The field of European Studies has paid increasing attention to the emergence of informal rules within a formal institutional framework. This work starts off from the historical institutionalist premise that treaties, which are always negotiated under the condition of uncertainty about the future, are necessarily incomplete and bound to get out of equilibrium.\(^{25}\) On this basis, Henry Farrell and Adrienne Héritier argue persuasively that supranational actors (as agents) are oftentimes better able than governments (as principals) to exploit disequilibria informally in order to enhance their autonomy.\(^{26}\) Informal rules that favor supranational actors are the result. Other than the aforesaid literature on flexibility, studies in this vein remain vague about the actual source of uncertainty and how it disequilibrates institutions.\(^{27}\)

The work that in combining both literatures is most closely related to the present study is Randall Stone’s lucid theory of informal governance in international organizations. Because powerful states often have viable outside options to institutionalized cooperation that they may suddenly be tempted to exercise, the argument goes that small states offer them a deal that keeps them on board in the long run. In exchange for more favorable formal voting rights, small states agree to tolerate practices of informal governance that permit large states to shake off institutional constraints in the event that they consider their vital interests jeopardized.\(^{28}\) Yet this theory begs the question of why states refrain from formalizing this arrangement. It is also less convincing when applied to the EU, an international organization with oftentimes multiple dominant states. In these cases, Stone expects either formal rules to be weak or formal governance to prevail\(^{29}\) – predictions that, as we have seen above, do not bear up against the empirical record as informal governance in the EU abounds in policies that are based on rigid, formal rules. Drawing on the various insights of the two bodies of literature on flexibility and informal rules, the following section seeks to present a more comprehensive theory of informal flexibility in international organizations that explains why informal rules emerge in parallel to formal rules.

**The theory**

The core argument of this article is that informal rules add situational flexibility to rigid formal rules in order to sustain the level of integration where there is uncertainty about future domestic

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24 Goldstein and Martin 2000, 604.
26 Farrell and Héritier 2007, 229. See also Hix 2002, 271.
27 As Caporaso (2007, 400) points out, incompleteness can be optimal and needs not result in disequilibrium.
28 Stone forthcoming, 34-35.
29 Stone forthcoming, 43.
demands for cooperation. The argument is developed in four steps. First, it is explained why states choose to cooperate within the framework of formal institutions. The second step subsequently discusses why domestic uncertainty renders formal rules inadequate and generates a demand for added flexibility. Third, it is explained why governments refrain from codifying the provision of situational flexibility. The final step discusses how governments adjudicate whether formal rules or informal rules apply when they lack complete information about the circumstances that give rise to demands for flexibility.

The demand for rigid, formal institutions

Institutions are often critical for actors to capture gains from cooperation. Key to understanding how institutions work is uncertainty about the future. If one suspects another actor will renge on the promise to reciprocate, cooperation becomes untenable even under the long shadow of the future. This problem is particularly acute if we allow for state preferences changing over time. Following public choice theory, governments choose the policy that maximizes political support measured as the weighted sum of electoral support for welfare gains from liberalization and rents in exchange for the protection of special interests. This opportunism subjects governments to constant pressure from societal groups to pursue the policy that matches their diverse interests. The result is time-inconsistent preferences that render pledges to a cooperating partner incredible and consequently leave all governments worse off. For governments to reap joint gains, they need to bolster the credibility of their commitments to market integration. Specific rules about conduct in contingent situations enable states to identify and sanction defection. Rules that delegate authority to international organizations to make and enforce common policies insulates decision makers from ad-hoc pressure. Rigid rules like those that constitute the Community Method constrain governments’ choices ex ante in favor of cooperation and consequently allow all cooperating partners to form stable expectations about each other’s future behavior. The codification of these rules signals this commitment beyond the circle of cooperating governments to allow private actors to plan ahead and allocate resources more efficiently.

The demand for flexibility

Institutions have to be self-enforcing to be sustainable, that is, an institution’s effect therefore has to be as such as to constantly reinforce states’ interests in adhering to it. Yet exactly because governments are unable to predict their societal interdependence, which gives rise to a demand for institutions to begin with, they are also unable to predict an institution’s precise future effect. As Kenneth Shepsle put it, “what can be anticipated in advance is that there will be unforeseen contingencies.” Once they are set up, institutions may (e.g. due to technological innovation, change in transport costs, demand and supply shocks) face unanticipated changes in their environment that change the distribution of the costs and benefits of cooperation among and within countries. Situations are therefore bound to arise where the adherence to the letter of the law, even if beneficial for a society as a whole, generates unexpected concentrated adjustment costs for one of its segments (“distributional shock”).

30 Weingast 2002, 672.
35 Shepsle 1989, 141.
In situations like this, the formal rules may suddenly fail to generate governments’ interest in adhering to them. The reason lies in the politics of collective action. Since groups that incur concentrated losses have advantages over those with diffuse benefits, a domestic group that suddenly faces concentrated costs from cooperation overcomes initial barriers to mobilization in order to pressure its government into defying the rules that were meant to embody the commitment to cooperation. This problem is often referred to as “domestic uncertainty”. A sudden rule violation is not just problematic because of deadweight loss or damages to the state’s reputation. Even worse, it casts doubt among governments and private actors on the effectiveness of the rules. These doubts then set off a process that all governments would rather avoid – the credibility of commitments to market integration sustains severe damage, stable expectations about future behavior crumble, and the mutually beneficial depth of cooperation ultimately unravels.

Since institutions are valuable to their members, non-compliance means weakening them, it means losing something valuable. Under conditions of domestic uncertainty, all governments therefore prefer rigid rules with added, situational flexibility – a flexibility that allows for the accommodation of government under unmanageable domestic pressure – to avert sudden rule violations and sustain an otherwise untenable depth of cooperation. Yet in order to use flexibility to prevent the formation of domestic pressure, governments need to regain collective control of the use of formal rules.

**Formal versus informal flexibility**

Some institutions try to endogenize the problem of domestic uncertainty in the formal institutional design by authorizing departures from formal rules in the event of unforeseen developments. For example, Article XIX of the General Agreement on Tariffs and Trade (GATT) authorizes temporary protection in the case of import surges threatening to cause “serious injury” to domestic industries. Also the EU treaties contain a number of derogations on grounds of public morality, public order and safety and the like. However, none of these measures fully captures the situation that gives rise to the threat to the institution. The reason for an unexpected violation of the letter of the law is not only that domestic public goods require protection or that domestic groups face exceedingly high costs. The problem of domestic uncertainty stems from the fact some of these situations (the distributional shocks) suddenly turn into unmanageable domestic pressure that induces a government to defect or obstruct cooperation, even if it is beneficial for a society as a whole.

The political roots of domestic uncertainty help explain why governments refrain from codifying mechanisms that provide flexibility in these situations. Putting such mechanisms into written amounts to acknowledging officially that opportunism is in fact a feature of politics. Furthermore, a codification of this kind of flexibility would also generate the behavior the rigid rules are supposed to nip in the bud: A formal right of being accommodated if one just complains with enough vehemence can be expected to induce private actors to mobilize for invoking

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36 Olson 1965, chaps 1 and 6.
39 Article 36 ToL.
40 For a general discussion of exclusionary reasons and the limits of legal authority see Raz 1979, 31-32.
41 This criterion would violate the legal criteria developed for the use of GATT safeguards. See Pelc 2009, 354.
42 To be sure, this opportunism varies across countries inter alia with the accountability of political systems.
derogations where they would otherwise have sought to adjust to the changes in their environment.43

But would governments accommodate a cooperating partner that faces unmanageable pressure if they were not bound by formal rules? Let us briefly assume that the conditions leading to this sudden domestic pressure for defection are perfectly observable. In this situation, as discussed above, all governments prefer to depart from the letter of the law and accommodate their cooperating partner without an explicit quid pro quo, for it allows them to maintain the credibility of their commitments to cooperation and benefit from a level of economic integration that they would otherwise not be able to sustain. In short, informal flexibility is self-enforcing when information is complete.44 It can be expected to manifests itself in informal practices in decision-making (like those described above) as governments collectively depart from the formal rules in order to exercise situational discretion.45

Adjudicating authority

In reality, the domestic conditions that lead a government to claim to be facing unmanageable interest group pressure may not be perfectly observable. This causes a classical problem of moral hazard: Governments face incentives to exaggerate the pressure they are under and demand excessive concessions from their cooperating partners merely to reap interest groups rents. For informal flexibility to work, governments therefore need to elicit situational information about the actual extent of domestic pressure in order to assess whether formal rules should apply.

The literature suggests two prominent solutions to deal with this problem of moral hazard. A first suggestion is to make the authorization of defection conditional on the payment of an “optimal penalty” that is set just high enough to prevent governments from overusing this option, but also low enough to encourage it in the event of unmanageable pressure.46 However, domestic uncertainty lies beyond what states can know at the point of institutional design. A pre-set a penalty is therefore bound to prove inadequate. A second suggestion is third-party verification and adjudication. In the World Trade Organization, for example, the Appellate Body assesses the legitimacy of a country’s use of the aforementioned GATT escape clause and may order compensation.47 However, a body that is responsible for preserving the legal integrity of an institution compromises its credibility and legal certainty when its decision is based on political grounds, which as discussed above may well be necessary in some situations.

If legal bodies are ill suited to adjudicate the use of flexibility, how do governments deal with the problem of moral hazard? This authority cannot lie with the government that demands accommodation (the claimant), since its incentive to misrepresent its domestic situation gives rise to the problem of moral hazard to begin with. Nor can the authority lie with a government with similar preferences, because it has an incentive to collude with the claimant. Somewhat counter-intuitively, the authority to verify claims and adjudicate whether formal rules or informal rules apply must lie with a government that gains nothing or forgoes some gains from accommodating the claimant, for it has an incentive to grant just enough discretion to prevent defection, and no

43 Goldstein and Martin 2000, 622, Kohler and Moore 2001, 53, Sykes 1991, 259. To be sure, informal flexibility will not remain secret, but they convey less information beyond the realm of cooperating actors than codified rules do.
44 See e.g. Bagwell and Staiger 1990.
45 The result is diffuse reciprocity in political support that serves to maintain the greatest possible depth of cooperation under conditions of domestic uncertainty. Keohane 1986, 8.
47 See Rosendorff 2005.
incentive to accommodate the claimant excessively. Since the decision on situational flexibility has distributive consequences, other governments are consequently induced to provide information about the situation in order to prevent the adjudicating government from taking a false and unfavorable decision. This institutional solution consequently prevents moral hazard in the informal provision of situational flexibility by raising the amount of information about the claimant’s actual domestic situation.

Informal flexibility in the EU

The previous section offered an explanation for the puzzling emergence of informal rules that run in parallel to the EU’s rigid formal rules. Drawing on interviews with officials as well as declassified documents from various European and German archives, this section now seeks to corroborate the theory’s plausibility using three types of evidence for the various steps of the argument. The first part investigates the governments’ motives for the use of informal rules in decision-making and for eschewing their codification by revisiting one of the major disputes about this question in the history of European integration: the 1966 Empty Chair Crisis. The subsequent part describes the evolution of the Council Presidency in order to demonstrate how it came to verify claims about domestic pressure and adjudicate whether formal rules or informal rules apply. Finally, a brief case study on the EU Wine Market Regulation describes the use of informal flexibility in practice, showing how unmanageable domestic pressure prompts governments collectively to accommodate the government without any explicit quid pro quo.

Formal versus informal flexibility

The 1965 Empty Chair Crisis was precipitated by a Commission proposal, which hit a raw nerve with France by extending the scope of majority voting to agricultural and related budgetary matters. The then French President, Charles De Gaulle, demanded the reintroduction of national vetoes in cases where a country considered its “very important interests” to be at stake. To demonstrate his resolve, De Gaulle withdrew senior government representative from the European institutions. The then six member states tried to solve the crisis in secret deliberations, which led to the conclusion of the Luxembourg Compromise in 1966. In spite of appearances to the contrary, the point of contention between France and her cooperating partners was not the demand that majority voting be void in the event that it threatened very important interests. In face, De Gaulle’s public onslaught on this rigid supranational feature was secretly regarded as a pseudo debate. 48 In an internal paper, the German Foreign Ministry notes with bemusement:

The rule has always been in practice that decisions are unanimous even if the treaty provides for majority voting. We simply usually negotiate until we have reached an agreement. There is no reason to believe that we would suddenly discontinue this practice just because the scope of QMV is being extended...49

The main points of controversy among the member state concerned, firstly, the codification of the rule to accommodate a government in this case and, secondly, the authority to determine whether “very important interests” were at stake. France cooperating partners resisted a codification on the grounds that it was simply impossible to specify the term “very important interest” in advance.

48 Représentation Permanente de la Belgique 1966a, 3.
49 Auswärtiges Amt 1965, 2.
Yet leaving this assessment on a case-by-case basis up to the government in question was not an option because this government would be tempted to interpret the term far too broadly. This problem, which we identified earlier as moral hazard, would undermine “the functioning of the Community” and “in effect result in the abolition of the majority principle”. The Dutch foreign minister, Joseph Luns, also strongly cautioned against the demand to codify the French proposal on the grounds that it would encourage even more domestic demands for deflection:

[The French formula] puts the governments in a thorny situation at the domestic level, because they will face great difficulty resisting all kinds of pressure, never missing any opportunity to demand a veto on this or that national interest, no matter how unimportant.

The Six ultimately agreed to disagree. The Luxembourg Compromise states very ambiguously that while France insisted that the Council decide by unanimity when a state’s vital interests are at stake, her partners were ready to search for a consensus “within a reasonable time”. All delegations “note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.” Thus, majority voting in fact remained an option that practitioners agreed was “never ousted from the delegations’ minds.”

The motive for eschewing a formal specification of flexibility is also nicely illustrated in another dispute about the Luxembourg Compromise. The impending first enlargement to the United Kingdom and Denmark in 1973 raised concerns about an immediate blockage of decision-making. The then Commission President, Jean Rey, called on the member states to renounce the extra-legal agreement and apply the treaty rules more rigorously. But his plea met with a cool reception from all six delegations. The German Foreign Minister, Walter Scheel, explained to Rey that while he agreed on the importance of majority voting in principle, formal rules alone were not adequate for sustaining the depth of European integration:

[We] found a felicitous solution in 1966, a formula that is just ambiguous enough for the Community to make important progress. We would not have reached our current, delicate equilibrium with a simple Council decision, and we therefore need to continue to strive for solutions that we can all accept.

Although the actual usage of majority voting has changed over time, the search for consensual outcomes in the event of unmanageable domestic pressure is still (as described above) a very strong informal norm in the Council. Importantly, roll call analysis show that in the few cases that the Council does vote, bigger member states are more likely to be overruled than smaller countries. This can be interpreted as evidence that it is not power, but unmanageable domestic pressure that leads governments to eschew formal voting rules and search for a consensus instead. Furthermore, government officials confirm that the main reason why governments refrain from voting is precisely to avert domestic conflicts about a decision that could develop into unmanageable pressure for defection. A senior Council official explains:

50 Auswärtiges Amt 1965, 3-4.
51 Représentation Permanente de la Belgique 1966b, 5.
52 European Communities 1966.
53 Sasse 1975, 142-143.
57 Mattila 2009, 845.
There will never be a decision against a member state that faces strong problems selling or implementing it. Sometimes several delegations face this problem. In these cases, we always try to find a compromise.58

Adjudicating authority

How do European governments assess whether formal rules or informal rules apply? The deliberations during the empty chair crisis show that the member states were indeed concerned the French demand to leave this assessment up to the affected member state would generate moral hazard. To cope with this problem, the member states gradually adjusted an existing institution to enable it to assume adjudicatory authority.

The institution that would wield adjudicatory authority over the use of situational flexibility was the Council Presidency, a position rotating on a six-monthly basis among governments. The tasks it came to assume soon after the inception of the Community went well beyond what the Rome Treaty had stipulated.59 The most important of these additional tasks was the preparation of compromises among the governments (a task that the Commission was expected to assume) that would permit the governments to change legislative proposals under discussion unanimously. These suggestions soon became known as “presidency compromises” – a term that appears in Council documents as early as the beginning of the 1960s.60

How did governments prevent the Presidency from colluding with the claimant? For this purpose, it was argued, the Presidency needs to be “biased” in that it forgoes short-term gains from an excessive accommodation of the claimant. This was achieved by structuring the legislative agenda accordingly. We described above that although the formal rules provided the Commission with the opportunity to determine the timing of making a proposal, governments resumed this power by setting legislative proposal aside within the Council substructure. This in turn afforded governments the opportunity to structure the Council agenda according to new priorities. In 1960, they informally agreed that the “[…] choice of important subjects, which merit discussion in the Council, ought to be conferred to the Presidency […].”61 The Presidency was consequently able to prioritize issues and, ceteris paribus, let others slide.62 Practitioners report, and statistical analyses confirm,63 that the Presidency usually drops legislative proposals that it would like to alter. The reason is, in accordance with the theory, that while it is expected to respond to recalcitrant delegations, the Presidency’s own demand to change a proposal categorically go unheeded.64 In light of this, it is preferable to keep these dossiers off the agenda until the next government takes over.65 The dossiers that it prefers to adopt largely unchanged consequently move forward. On these remaining issues, there is little opportunity for the Presidency to collude with a government that demands changes to the proposal on the grounds that it threatens to generate unmanageable domestic pressure in its current form.

The resulting structure of the agenda consequently allows the Presidency to assume its adjudicatory function. It is therefore no surprise that in addition to suggesting compromises and

58 Interview with a Council Secretariat official, January 2008.
59 Mégret 1961, 636, 646.
60 E.g. Vertretung der BRD bei der EWG 1964, 1.
61 Communauté Économique Européenne 1960, item 9.
62 van Rijn 1972, 653. See also Noël 1967, 237 and Van der Meulen 1966, 12.
63 Warntjen’s (2007, 1152) statistical analysis confirms that the Presidency is less likely to include topics it dislikes.
structuring the agenda, the Presidency is also granted the prerogative to call votes.\textsuperscript{66} This practice is mentioned in a 1970 report of the “Three Wise Men” on the functioning of the institutions. It explains the link between informal flexibility and the Presidency’s prerogative to call votes as follows:

Each state must remain the judge of where its important interests lie. Otherwise it could be overruled on an issue which it sincerely considered a major one. It is only when all states feel sure that this will not happen that they will all be willing to follow normal voting procedures. [...] The application of these solutions lies in the hands of the Presidency. The Chairman of the Council is best placed to judge whether and when a vote should be called.\textsuperscript{67}

Despite various efforts to change the rotation principle of the Presidency and the addition of rival presidencies in the institutional framework, there is no indication that the adjudicatory function or the tasks of the Council Presidency have changed over time. “A good presidency,” a Council official explains, “is able to discriminate between ‘red lines’ and fake arguments.”\textsuperscript{68} This institutional solution consequently allows the governments to prevent the problem of moral hazard in the informal provision of flexibility.

\textit{Case study: Ebbelwoi}

Tracing cases of informal flexibility is challenging. For one, because the interaction of decision-makers often remains undocumented when it does not follow the official channels. Even worse, the cases of interest usually receive little media attention. The reason is that informal rules effectively depoliticize decision-making because they nip the emergence of domestic conflicts in the bud. The cases that can be documented are therefore those where governments fail to prevent the formation of unmanageable domestic pressure and then try to put out the fire at a later stage. With these caveats in mind, the following case study seeks to demonstrate that a) domestic pressure can arise unexpectedly, b) it becomes unmanageable due to the vicissitudes of domestic politics, and c) governments accommodate the claimant informally and without explicit \textit{quid pro quo}.

In response to a surge in imports of New World wine, the Commission was tasked to present a proposal on the reform of the common wine market with a view to increasing the competitiveness of European producers. It promised to bring up a number of predictably controversial issues. According to the formal rules, the Council would, on a proposal from the Commission and after consultation of the Parliament, adopt the European regulation by a qualified majority vote.\textsuperscript{69} The Southern wine-producing states preferred a strict definition that would protect the sector from imports of artificial wine from the New World. Northern wine-importing states, in contrast, preferred a broader, consumer-friendly definition as well as cuts to the agricultural budget. The wine-producing member states were themselves divided on several other issues. For example, Southern countries wanted to outlaw the Northern practice of adding sugar to the process in order to limit competition from otherwise more acid wines.\textsuperscript{70}

\textsuperscript{68} Interview in Brussels, January 2008.  
\textsuperscript{69} Article 37 TEC.  
\textsuperscript{70} European Commission 2007, 4.
In June 2007, and after consultation with a number of governmental and academic experts, the Commission submitted a proposal that following the interests of importing countries defined, in lines with rules by the International Wine Organization, the term “wine” broadly as product obtained in the Community from harvested grapes. This broad definition nevertheless excluded the so-called Ebbelwoi (literally “apple wine”, also known as Äppler or Stöffsche), a traditional cider-like alcoholic drink made from apples, which is produced in various regions of the German state of Hesse. The definition implied that Ebbelwoi pressers would suddenly have to rename the product, which threatened to damage the drink’s recognition value and standing as a cultural asset. Thus, while other distributional aspects of the regulation were obvious and anticipated, the wine definition clearly constituted a distributional shock in that it threatened to impose unexpected, concentrated costs on a domestic group.

This distributional shock prompted the Hessian Ebbelwoi producers to lobby the regional and federal government to take a strong stand against the proposal. Although this remote and localized distributional shock seems of little importance to the federal government, domestic politics made it at this point highly susceptible to the Ebbelwoi lobby. The Commission proposal was published during a charged election campaign for the regional Hesse Landtag that was of great significance for the composition of the Federal Council and, thus, federal German politics at large. It therefore also caused unexpected media coverage, in which all parties outdid each other complaining about Brussels “regulatory madness.”

There were even semi-serious calls to pull the state of Hesse out of the EU.

The Council therefore sent the proposal immediately to the government experts in the Council substructure with the invitation “to carry out a thorough examination of the proposal and report back.” The German delegation strongly insisted on the derogation for fruit wines. However, the Commission cautioned that derogations would only serve to confuse the consumer. The Portuguese Presidency, although opposed to a watering down of the definition, proposed that the Commission submit a working document with a view to “giving the member states more room for manoeuvre.” On its initiative, the Council also “invited its preparatory bodies to continue the examination of the proposal with a view to presenting a draft compromise text…” Following several bilateral meetings with individual delegations, the Presidency noted in late November a “large consensus” among member states regarding the “fruit wine question”. The member states agreed that fruit wines were allowed to carry the name wine. The Ebbelwoi was saved.

The following weeks then saw hard bargaining especially between Southern and Northern states on questions with obvious budgetary implications. In mid-December, the member states ultimately reached a political agreement on Portugal’s Presidency compromise. The Council Regulation on

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71 European Commission 2007, Annex IV.
72 EUobserver, Brussels soothes German apple wine worries, 6 November 2007.
74 Council of the EU 2007c, item 5.
75 Council of the EU 2007b, 7, Council of the EU 2007f.
76 Council of the EU 2007b, 8.
77 Council of the EU 2007b, 12.
78 Council of the EU 2007e, item 4.
79 Council of the EU 2007a, item 6.
80 Council of the EU 2007d.
the common organization of the market in wine was adopted unanimously as an A-item in a Council meeting in April 2008.\textsuperscript{81}

The \textit{Ebbelwoi} case shows how formal rules can suddenly generate concentrated costs for a domestic group. Not the case as such, but the vicissitudes of domestic politics – in this case elections of high importance – can make governments susceptible to this group’s demand not to comply with a European decision. It is very likely that the European governments accommodated the German delegation without demanding an explicit \textit{quid pro quo} (or a “penalty”) for this concession, because else the Presidency would not have noted the consensus on this issue before the Council began to engage in hard bargaining. The authority of the Portuguese Presidency to adjudicate this case remained unquestioned.

\section*{Conclusions}

The depth of economic integration among the twenty-seven member states of the European Union is astonishing and unparalleled in world politics. Conventional wisdom attributes the EU’s success in achieving and maintaining the level of integration to its rigid formal rules that make it possible to advance integration even against the myopic interests of one or more member states. This article argued that this legalistic perspective on cooperation is misleading. The EU has been able to maintain the depth of cooperation not only because of its rigid formal rules, but because informal rules complement formal rules in that they allow governments collectively to mitigate this rigidity where it would otherwise generate potentially disruptive conflict at the domestic level.\textsuperscript{82} In other words, informal rules within the EU’s formal institutional framework permit the member states to maintain a level of integration that they would otherwise not be able to sustain.

The article used the case of informal rules within the EU’s formal legislative procedures to develop a theory of informal rules in formal international organizations. This theory draws on, and contributes to, the debate in international political economy and international law about rigidity versus stability in institutions where there is uncertainty about its future strategic environment. Following existing models of escape clauses in international economic institutions, the theory localized the root of uncertainty in economic cooperation in the vicissitudes of domestic politics. In contrast to existing studies, it argued further that this type of uncertainty is impossible to endogenize entirely in an institution’s formal design because it generates conflicts of a political nature that are irresoluble by the letter of the law. Instead, governments adopt informal rules that add flexibility to the formal rules – a flexibility that allows them to resolve unexpected and potentially disruptive conflicts that cooperation may generate at the domestic level. The onus to justify the use of situational flexibility is put on the government that claims to be facing unmanageable pressure for defection. Thus, where previous studies in their focus on formal flexibility mechanisms remained overly static, the present study demonstrates that informal rules render institutions entirely dynamic as they enable states constantly to adapt the effects of cooperation to the vicissitudes of domestic politics in such a way that neither formal rules nor informal rules alone permit.


\textsuperscript{82} Since it does not take part in the EU’s legislative process, the empirical analysis disregarded the European Court of Justice. Recent studies (e.g. Carrubba, et al. 2008) confirm that the court tends to mitigate its judgment when it suspects that the defending government will not comply with it.
The scope of this article made it necessary to limit the plausibility probe to the case of European decision-making. In addition, the behavioral definition of informal rules used in this context implies that the theory’s observable implications will vary with the formal institutional framework under study. For example, the observation of consensus-decision-making is crucially dependent on there being formal voting rules. The theoretical claims are nonetheless generalizable beyond the case of Europe in the form of two empirical propositions and two conjectures. A first proposition is that, everything else being equal, we would expect an increase in the rigidity of formal rules to lead to a more frequent use of informal rules. The Dispute Settlement Understanding of the World Trade Organization seems to be a case in point. It has undeniably more teeth that its predecessor, the GATT dispute settlement mechanism. At the same time, about two thirds of the initiated disputes are settled “out of court”. One reason for this phenomenon might be, in line with the theory, that governments are willing to accommodate a cooperating partner that faces unmanageable domestic pressure where a panel, bound by the letter of the law, is unable to authorize temporary escape from a commitment for domestic political reasons.

The second proposition is that, everything else being equal, the mix of formal and informal rules varies with the extent of domestic uncertainty. Two more specific conjectures follow. Firstly, the mix of formal rules and informal rules varies across issue-areas with the extent of domestic uncertainty. Member states can be expected to make more frequent use of informal rules where domestic uncertainty is high. Conversely, they will follow formal rules more frequently where there is little uncertainty about future domestic demand for or against cooperation. Preliminary evidence for this proposition can again be found in the EU where formal rules are followed more frequently in the Common Agricultural Policy, an issue-area of comparatively low domestic uncertainty that by means of direct subsidies, external tariffs and fixed prices deliberately shelters the farming sector from unexpected concentrated costs. Informal rules are far more prominent in all other economic issue-areas despite being governed by similar formal rules. Secondly, claims for informal situational flexibility vary across countries with the extent to which governments are susceptible to special interests. For example, governments of countries with schemes that provide interim assistance to sectors or individuals facing short-term dislocation will be less subject to sudden pressure from these groups than governments of countries where such schemes are absent.

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83 This proposition draws on insights about the effect of welfare states on economic openness (see Cameron 1978, 1249-1251, Katzenstein 1985, chap 2; for empirical tests see Kim 2007, 193-210, Rodrik 1998, 998.) Because losers are compensated, they are less likely to mobilize against liberalization. Thus, societies with high public spending are more likely to engage in trade.
Literature


