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Negotiation capacity and collective mobilization in the (enlarged) Council of Ministers

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This paper examines the notion of negotiation capacity as a power resource in the legislative bargaining of the Council of Ministers. Albeit difficult to measure, negotiation capacity manifests itself in the way the member states form and disseminate their negotiation positions. Differences among member states have an impact on the negotiation dynamics in the Council of Ministers. Countries exhibiting high negotiation capacity can control the collective activities in the Council in that they easily identify like-minded delegations and are able to form viable alliances with other member states. The theoretical argument is probed on two cases of legislative negotiations, a new and an old legislation which represent respectively a more and less likely case of negotiation capacity to matter for the legislative dynamics in the Council. The diversity of power resources and the apparent deficits of the Central Eastern European new member states as regards the negotiation capacity make collective mobilization an important mechanism of influence in the enlarged Council.

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¹ Please do not quote, do not circulate and respect the preliminary character of the empirical findings presented here.

Introduction

When the 27 EU member states sit around the working table in the daily legislative negotiations, their primary objective is to see their policy interests accommodated. EU policies have to respond to a variety of national concerns and a vast literature deals with their distribution and determinants (Kaeding and Selck 2005; Aspinwall 2007). Equally each body of knowledge answers the question what makes the member states successful in the intergovernmental bargaining (Bailer 2006; Tallberg 2007). Extensive research that conceptualizes, maps and evaluates member states' input to Council decision-making contrasts with our rather limited understanding of what actually happens with member states concerns once specific Council negotiations start: How are they articulated? How does the aggregation of particular interests work? Why are some, and not others, accommodated? And most importantly: (How) are those stages connected?

This paper approaches those questions while studying one particular aspect of member states appearance on the Council scene, namely their negotiation capacity. The notion builds on an observation that member states differ as regards their preparation for every-day legislative work (Wallace 2002: 335). Consequently, not only the scope, but also the effectiveness of their interventions diverge (Panke 2011b). The paper argues that negotiation capacities of individual member states have implications for the collective dynamics in the Council. Being in possession of this resource greatly facilitates, if not allows, mobilization among member states. Capable delegations are therefore the ones who steer and sustain the processes of coalition building during the Council negotiations.

The paper does not offer an alternative theory of Council decision-making. It does not contest the explanatory potential of preference distribution, voting power or the power of the Chair in analyzing Council politics (Thomson 2011: 157-226). Rather, it shows how a particular power resource, recognized in the literature, matters for the decision-making dynamics within this institution. It enriches a structural or institutional Council analysis by adding a situational factor.

The paper proceeds as follows. The theoretical section embeds the notion of "negotiation capacity" in the debate about bargaining power, specifies the concept and demonstrates how individual negotiation capacity links with collective mobilization. In the second part of the paper, the plausibility of the argument will be probed on two empirical cases: the Patient Mobility Directive and the Working Time Directive. The analysis suggests that collective mobilization might be an important mechanism of structuring member states interactions after the Eastern Enlargement, as the new member states seem from Central Eastern Europe seem to (still) lag behind as regards their negotiation capacity.

Negotiation capacity as a power resource in the Council of Ministers

In the studies of international negotiations, which strongly influenced EU research, structural resources have been regarded as the main source of power. Structural power is one “given” to the member states, as it refers to their material properties, such as size, population or wealth. In Moravcsik’s seminal work on EU history the three biggest member states, Germany, France and the United Kingdom, had been ascribed the greatest influence over the integration (Moravcsik 1998). In everyday Council decision-making it is the voting system that captures the most fundamental difference among member states, their size. Large member states have more votes in the Council. and, thus, their say formally counts more.

Despite the plausible claim that “size matters”, the findings as to what extent the size and voting power differences actually influence the policy-making in the EU are by no means uniform. Studies interested in EU policy-making in general argue that, if united, small states have more influence on the outcome of policy decisions (Mattila 2004; 2006; Arregui and Thomson 2009: 672). Bailer, in contrast, who studied the abstract perceptions of bargaining power of member states, found that “exogenous power resources such as votes or economic size approximate the perceived power of the relevant EU actors to a very large extent” (Bailer 2006: 355). Yet, her data do not exhibit a deterministic relationship between the two. Tallberg came to a similar conclusion studying the European Council: “The centrality of aggregate structural power for European Council is a constant theme in the interviews we have conducted. Yet so are there exceptions to this pattern” (Tallberg 2007: 17).

The idea of negotiation capacity as a power resource rests on the assumption that Council politics leaves ample room for member states to generate power and to organize their influence with other means than size-related structural power. Researchers who worked empirically on the Council observed long ago that governments differ as regards their strategic abilities (Wallace 2002: 335). While some are “professionally adroit” on all Council levels, other suffer from “incapacitating weakness” (ibid). Wallace explicitly refers to the debatable assumption, often made in Council research, that governments easily transform domestic preferences into negotiation goals in their EU-policy (Hörl et al. 2005; Princen 2012: 627). Yet, the EU environment makes this transformation quite challenging. EU policy-making is complex in several dimensions (Richardson 2006). It is substantially complicated, as the EU legislates in information-intensive and highly specialized areas and it is manifold as regards the procedures, length and the participating actors (Häge 2007; Curtin 2009: 81-90; Knodt et al. 2011).

Negotiation capacity can be defined as the ability of member states to cope with the complexities of the EU policy-process, in particular the ability to deal with uncertainty and the ability to interact in diverse settings. I argue that two types of negotiation

preparation capture those abilities: the formation of the negotiation position and the support provided for this position.

Position formation

In the EU it is beneficial to have a negotiation position very early in the decision-making process. Member states can exert policy influence even before the Council formally starts negotiating. Studies have shown that, in fact, important policy decisions are made before a proposal is formally issued by the Commission (Princen 2012: 630). Moreover, the Commission strongly relies on member states' input while drafting new policies (Bunse et al. 2005: 37-38). To intervene early, member states not only have to follow the latest developments in the relevant EU policy areas. The knowledge of the legal environment is equally important, especially when member states wish to make specific wording proposals.

Formulating a negotiation position implies building a link between an abstract policy preference, derived domestically, and the highly specific legislative act on the negotiation table. Smooth cooperation between the state administration and interest groups assures a high level of expertise being provided (Haverland and Liefferink 2011). Moreover, "scanning the domestic environment" requires well organized, highly coordinated and professional national executives (Laffan 2006: 688). Deficits in that area often lead to delays or poor quality of instructions (Panke 2010).

Finally, a "good" negotiation position is a structured one. Having a clear mind about the weight of priorities facilitates flexibility which is necessary for compromises. In EU literature, this strategy has been discussed in relation to small states or the Great Bargains (Panke 2010; Grøn and Wivel 2011: 529). However, there are good reasons to expect that such a highly structured and focused approach is a promising strategy more generally.

Position support

Equally important as early formed, specific and structured negotiation positions is the way in which delegations support their claims. National idiosyncracies have to be convincingly presented in a non-familiar environment. Furthermore, given the agenda constraints which the EU of 27 faces, plausible and credible reasons have higher chances to be heard and be responded to. As Neyer argues, publicity, i.e. a broad participation of various actors in the EU's policy process enhances the argumentative orientation of actors (Neyer 2003: 693-694).

Some researchers argue that hiding own positions behind the interests of the whole EU is the best framing strategy (Keulen et al. 2008: 1; Grøn and Wivel 2011: 534). Yet, this might not always be possible or even necessary. While studying Council decision-making, Lewis concluded that certain types of arguments are well accepted in the Council, despite their particularistic character. In the case of the Local Elections Directive (1994), the COREPER allowed an exception based on constitutional minority protection in one member state. In contrast, forward looking, hypothetical arguments about possible social tensions brought in by others did not get much understanding, even if politically salient (Lewis 1998: 497). Lewis' study suggests that factual underpinning of a

negotiation position and “hard” evidence are important in Council negotiations. Interestingly, this is the framing strategy used by the Commission which accompanies its policy proposals with impact assessments prepared by experts.

Where do good arguments come from? Here again, the domestic coordination between the ministerial bureaucracy, interest groups and the political apparatus matters greatly, as it assures the high level of substantial information, coherence of the position and the clear mandate behind it. Presumably, however, framing strategies for negotiation positions are prepared on the Brussels level. Connectedness facilitating exchange with other delegations and negotiators’ experience in EU affaires are likely factors to influence the success of the argumentative strategy. [565]

Negotiation capacity and collective mobilization in the Council

The previous section specified negotiation capacity as the ability to form specific and structured negotiation positions early in the policy process as well as the ability to support those positions by compelling and reasoned arguments. While it is quite plausible that high negotiation capacity depends on the quality of bureaucracy, executive organization and government-interest group relations, it might also have highly situational components, such as the skills of an individual negotiator. Negotiation capacity might be subjected to changes in time resulting from learning processes, or vary across policy areas. For those reasons it is very hard to measure negotiation capacity and classify member states accordingly.

Nonetheless, there is consensus in EU literature that member states vary as regards their ability to keep up with the demands of the EU policy process. We can take this observation one step further and ask about the implications of those differences for the Council negotiations. One implication is that delegations which can intervene become effective lobbyists for their interests (Panke 2011a). This paper extends this claim arguing that highly capable delegations mobilize and sustain alliances within the Council. Negotiation capacity determines not only member states individual interventions but has important implications for the collective action in the Council.

Coalition formation in EU is issue-based (Thomson et al. 2004). Member states ally pragmatically and on an ad-hoc basis (Tallberg 2007: 42-43). Diverse studies found that collective cooperation and information exchange starts within regional groups (Elgström et al. 2001; Naurin 2009). This type of cooperation seems to lose importance once the negotiation process proceeds, as no regional alliances had been found on the voting stage.

One could, of course, assume (as most Council researchers do) that policy preferences and salience are the only carrier of intra-Council coalitions. However, research conducted on interest groups strategies and influence concluded that even issue-based coalitions display very different degrees of organization, understood as intensity of

cooperation, degree of coordination and common action (Mahoney 2007). Decision to pool negotiation efforts are not only issue and context-dependent, but also determined by actors' characteristics, resources involved and prospective group activities (Mahoney 2007: 372, 381). This paper hypothesizes that a similar mechanism is at work among the member states in the Council, with negotiation capacity being an instrument of organizing alliances among peers. Highly capable delegations mobilize collective action in that they easily identify like-minded member states and commit them through collective interventions. [400]

Identifying like-minded delegations

Countries that form their position quickly and provide factual support for their negotiation claims can easily identify like-minded delegations or even influence the processes of position formation in other countries. We can expect this to happen, because the national diplomats active in Brussels report in their capitals what other countries think about a proposal. National governments are, in turn, motivated to listen because any input or substantial contribution lowers their transaction costs related to own effort of position formation.

The mechanism resembles "bandwagon effects". The phenomenon, discovered in US interest group mobilization, can be found in general policy-making and EU politics as well (Daviter 2009; Halpin 2011). Claims, expectations or assessments which are voiced early in the negotiation process and supported by compelling arguments attract broad attention. The advantage for initial protagonists is that their concerns and requests will be considered important in the Council. Being a "me-too", in turn, is a shortcut in own position formation for countries which for whatever reasons lack a specific positions on the relevant aspects of the proposal. Bandwagoning might also be a desirable mechanism from the negotiation manager's point of view, as it simplifies the negotiation space and efficiently signals the critical mass behind individually voiced concerns. Demands voiced in this way have quite a high chance to be accommodated by the Chair².

To expect bandwagon effects in the Council is not to say that policy preferences of member states may change depending on who is active or intervenes early. The presumption here is rather that clearly formulated and well supported claims provide a negotiation position where there exists a vague or uncertain preference but one which is not yet transformed in a negotiation position due to capacity deficits. Similar mechanism forms the core of the directional theory of voting. In elections, most people have a rather confuse preference about a certain direction of policy-making (Rabinowitz and Macdonald 1989). In the decision-situation, they follow the policy-maker (candidate) who provides intense, but still reasonable, stimulation on the issue (Rabinowitz and Macdonald 1989: 109). Clearly, there are several differences between voters and national bureaucracies operating in Brussels. Yet, the mechanism described

² As Warntjen argues the possibilities of the Presidency to resist such pressures are rather limited (Warntjen 2008, in: Wallace and Naurin 2008, p. 216).

by Rabinowitz and Macdonald is likely to occur when the information acquisition is demanding and costly.

The supply of a negotiation position will not have the same value in every piece of legislation. The object of the stylized exchange between high and low capacity countries is the understanding of the dossier, the assessment of its implications and specific proposals to amend it. Obtaining those assets is particularly challenging in new pieces of legislation, whereas in old, amended dossiers, national bureaucracies dispose already upon a lot of information. For that reason, bandwagoning between high- and low-capacity countries should be stronger in newly integrated, information-intensive policies. [485]

Collective intervention

The second instance of how negotiation capacity matters for collective action in the Council refers to the viability of the formed alliances. Council negotiations are dynamics as the Presidency, assisted by the Commission presents new proposals. Delegations might be tempted to seek side-payments which are a highly individual form of exchange in a bargaining situation. As Mahoney argues for the interest groups, being a member of a coalition can be constraining, as one has to adapt own position to the one of the coalition (Mahoney 2007: 369). Staying in a coalition and leaving it is, therefore, a function of cost-benefit analysis.

A coalition will remain beneficial for its members, if it provides a framework for efficient resources pooling (Mahoney 2007: 368). In the context of the Council this means that member states “offer” the resources they have, such as their voting power, to benefit from those resources they do not have in spades, such as the ability to intervene convincingly, enrich the Council debate through expertise or appealing arguments. The provision of negotiation capacity could be therefore an important component of assuring credibility of coalitions and keeping them together.

The robustness of Council coalitions has been discussed by Nedegaard on the example of the blocking minority in the Temporary Agency Work Directive (Nedegaard 2007). He argues that in order to be credible and persistent, a blocking minority requires a well-established communication network and a common storyline. The former can be understood as the infrastructure among the actors concerned, and comprises early established connections. The latter is the cement of the coalition, called by the author “a common frame of meaning” (Nedegaard 2007: 697). To be taken seriously, a blocking minority should undertake actions, such as writing common proposals or organize meetings with the Presidency. For that, and also for recruiting new allies, the participating countries need a compelling story-line. Finally, a blocking minority benefits from a network coordinator, willing to support the group with his resources. For the blocking minority to survive, continuous argumentative work on all, bureaucratic and political levels, is necessary.

Leifeld and Haunss who studied the EU decision-making on the software patents also found that the organization and argumentative strategy was decisive for an apparently

weaker group of actors to exert decisive influence over the final decision (Leifeld and Haunss 2012). In particular, an integration between specialized and general arguments assured the coherence of this coalition and its stability over time (Leifeld and Haunss 2012: 400).

Both findings point towards the importance of the ability to intervene which was the core of the negotiation capacity. Leading a coalition, a high capacity member state shares its knowledge of the relevant policy field and legal knowledge related to the specific dossier. Both resources are necessary to formulate arguments and make other kinds of interventions, such as wording proposals, letters, statements or pursuit of the media appearance. This is, in turn, what lends coalition a value added for countries that decide to join it. As argued earlier, the coordination of the argumentative work crucially depends on connectedness - a developed network of contacts among peers. This is the most elusive component of the negotiation capacity, as it is certainly shaped by personal qualities of the negotiating team and the experience of cooperation, which is according to Saam and Sumpter, the explanation of the peer-selection in intergovernmental EU negotiations (Saam and Sumpter 2009: 370).

Research design

So far, the paper has developed the argument that negotiation capacity is an important complement of the voting power as a source of influence in the Council of Ministers. Capable states are those who can develop their negotiation positions quickly and support them with compelling arguments, examples and expertise. This ability can be transformed into real influence over the decision-making dynamics because it greatly facilitates mobilizing alliances and keeping the coalitions among member states robust. In this way, high negotiation capacity allows member states to shape and control the dynamics of Council negotiations.

The strategy of this paper is to probe the plausibility of this argument in a process-tracing-based analysis of legislative negotiations. The Patient Mobility Directive (PMD) is the main illustrative case of this paper, supported by a “hard” case of the Working Time Directive (WTD).

Several selection rationales led to this choice. The first selection rationale was to pick politically salient dossiers of broad concern to make sure that member states were interested enough in the issue to mobilize the resources they have. This strategy ensures that the potential reluctance to take position and engage in negotiations is not a deliberate political decision. The Patient Mobility Directive and the Working Time Directive fulfill those criteria, as the former dossier concerns national healthcare systems and the latter one – national labour regulations. Both areas are usually quite important for governments – for economic, financial, social policy and electoral reasons. Furthermore, picking cases of highly divided Council provides the possibility of comparing (groups of) member states in their choice of strategies and power resources used. Thirdly, cases from regulatory policy, in contrast to redistributive policy, make sure

that the basic assumption of the theoretical argument, namely the complexity of EU policy-making, is met. The final selection criterion aims to address the potential limitation of the argument, namely that the negotiation capacity matters more in new than in old and up-dated dossiers. The implication would be to choose one newly proposed (PMD) and one revised piece of legislation (WTD).

Empirical observations

This section provides an empirical illustration of my argument on two cases: the Patient Mobility Directive and the Working Time Directive. The empirical material is structured by the analytical building blocks distinguished in the theoretical section: the articulation of member states positions and collective mobilization in the Council. Before turning to the observable implications of my argument, I will provide the reader with some basic information about those pieces of legislation.

Case 1: Patient Mobility Directive

General information

The Directive on Cross-Border Healthcare is the first binding EU legislation in this policy area. It clarifies the situation of patients who go abroad for medical treatment that is otherwise covered by their national health insurance. Previously, the reimbursement of such treatment was limited to specified circumstances and subjected to strict authorization procedures. The European Court of Justice (ECJ) however, increasingly put those in question while pointing at the freedom of services. A legislation on the matter was supposed to restore legal certainty and stop further ECJ's activism.

The Proposal, as it was put forward by the Commission in July 2008 was very restrictive as regards the member states' control over migrating patients. What is more, the Commission used the initiative to reinforce own rights in promoting healthcare cooperation among the member states (Greer 2008; Abbing 2009; Sauter 2009; Krajewski 2010). Unsurprisingly, the Council criticized the Commission: for the very one-sided interpretation of the case-law and for the "competence creep".

Once the negotiation process in the Council started, another conflict emerged. Member states seemed to disagree about what was supposed to be the main rationale of the legislation: the codification of the ECJ case-law. For a group of member states (UK, Germany, Sweden or the Netherlands), the very essence of the project was to clarify the existing case-law, make it binding and prevent the ECJ from further hollowing out of the member states' authority. While criticizing the specific proposal, those states signaled their commitment to agreeing upon a binding case-law based legislation.

The other group of member states called into question the focus on the mobility of patients and the exclusive interpretation of the latter in the light of the freedom of services. For states such as Spain, Poland, Italy or Slovakia, such market-based conception of cross-border healthcare would clash with the Treaty which reserves the healthcare competence for the member states. The codification rationale was not highly

valued among those states – some of them even openly disagreed with the case-law. In the course of negotiations the opponents became more explicit about their concern. Most importantly, they feared that supranationally codified freedom of healthcare services will induce changes in domestic healthcare systems based on healthcare contracting. The problem of non-contracted providers was indeed an important item, dealt with on later negotiation stage. Yet, several member states from the opponents-camp were dissatisfied with the suggested solutions and left the Council outvoted.

The structure of conflict in the Council merits two qualifications. Firstly, it was not carved in stone from the first negotiation day and rather became more pronounced once the voting approached. Secondly, although the distribution of preferences looks like a map of Europe (North against South-East), the attitudes of member states towards codification can hardly be explained by structural factors. The “idealtypes” of healthcare regimes, insurance and state-owned ones are represented in both camps (Wendt et al. 2009). Member states furthermore differ as regards the number of own healthcare-related ECJ cases with old Nordic states being most experienced. However, there are also several cases against Spain or Greece. As far as new member states are concerned, they had to accept ECJ judgments as part of the *acquis* and some of them even implemented the judgments into their domestic law (Földes 2009: 239-241). The purpose and content of the Proposal demanded from the member states a nuanced, individual assessment – a challenge with which the delegations dealt with differently.

The preparation and articulation of member states positions

Member states were confronted with the idea of regulating cross-border healthcare since the negotiations on the Services Directive, from which healthcare had been excluded. Subsequently, all delegations participated in the High Level Group for Public Health which paved the way for a new healthcare Directive. Those consultations however did not prevent the abovementioned conflict. Possible explanation for that is that member states’ involvement with the dossier at the proposal stage differed considerably.

Several member states, in particular those most interested ones, made effort to get a copy of the Proposal from the Commission officials. The purpose of this strategy was either to start preparing national position as quickly as possible or to influence the wording of articles drafted by the Commission. The United Kingdom, for instance, wanted the Directive to respect the NHS’s competence to determine health services regionally. To achieve that objective, the UK lobbied the Commission to insert a rather general article assuring the same conditions for staying and migrating patients. Subsequently, during the Council negotiations the UK lobbied for further specification of this provision to fit its interest.

Not all member states were this activist at such early stage. In the Spanish case, for instance, the interaction with the Commission was limited to comments on the Commission’s impact assessment or the response to consultation³. A Polish representative admitted, that the responsible ministerial unit had to learn whom in the

³ Interview, Permanent Representation of Spain to the European Union, 28.10.2010.

Commission to contact about a certain issue⁴. In fact, for many health attaches in Brussels making binding legislation in the domain of healthcare was new and therefore challenging. A factor facilitating early information here was the continuity of staff in national health ministries and Permanent Representations. However, with health being a “newly Europeanized” policy area, this continuity was not always given.

Once the Presidencies started the legislative work on article-by-article basis, it became clear that many delegations only now started to examine the Proposal. While some member states were able to intervene with specific concerns, others restricted their contributions to rather general comments. The two kinds of negotiation appearance are exemplified by Germany, UK, Spain and Poland.

Germany adjusted its healthcare law to ECJ’s ruling on patient mobility already during a reform 2004 (Greer and Rauscher 2011: 808). Nonetheless, the German health ministry had prepared a long list of amendments to the Commission’s proposal aiming at limiting any further integration in this area. Moreover, upon an explicit instruction by the Minister, the delegation decided to demand an exclusion of long-term care from the Directive’s scope⁵. The delegation made sure that, long before the negotiations started, everybody in Brussels knew the content of the German negotiation priority and the political mandate behind it. As regards the rest of the wish list, German delegation anticipated shared views in the Council.

United Kingdom proceeded in a very similar way. Its top priority was to make sure that the Directive respects the NHS’s mechanisms of service entitlements: the gate-keeping role of GPs and the entitlement discretion of the regional NHS branches⁶. It was therefore determined to expand the notion of prior authorization and already in the consultation response criticized the Commission for its understanding of the case-law on this point and offered an alternative one⁷. Lobbying the Commission heavily on the proposal stage, once the Council work started the UK became a pronounced opponent on nearly all Commission’s ideas going beyond case-law codification which the UK considered “necessary evil”.

Spain’s position formulation was strikingly different. The delegation was surprised and disappointed to discover the central role of jurisprudence in the Proposal, having itself argued in the consultation responses that the regulation of healthcare services on European level should go beyond the narrow question of mobility and include issues

⁴ Interview, Ministry of Health, Warsaw, 26.04.2012.

⁵ This is interesting as it is an open question whether long term care, notwithstanding the Directive, will be counted as a service to which the services freedom applies. In past cases, the Court already interpreted care services as medical services (AOK Bundesverband 2008: 6). Moreover, there were cases pending during the directive negotiations (Chamier-Glisczinski, C-208/07).

⁶ As the British minister for Health put it: “We want to ensure that [...] the NHS retains the ability to decide what care it will fund” <http://www.ehealthnews.eu/research/1351-uks-consultation-on-patient-mobility-in-the-eu> [24.05.2012]

⁷ UK consultation response to Commission Communication on Health Services; http://ec.europa.eu/health/healthcare/consultations/results_open_consultation_en.htm [16.08.2012].

such as health information systems, coordination or common accreditation framework for medical establishments⁸. In other words, Spain took a pronounced position about what the project should be about, with little reference to the actual dossier. Hostile towards the approach taken by the Commission and the Council, Spain could not contribute much to the article-by article work. Rather, the Spanish delegation reorganized its position and focused on more urgent problems, such as the financial responsibility for healthcare of foreign pensioners residing in Spain.

Similarly to Spain, Poland did not make significant contributions at the beginning of the decision-making process. However, it became much more active later on. The reason for Poland's initial reservation might be the very general negotiation position adopted by the government. In this document, Poland only signaled that the inclusion of non-contracted providers might cause domestic problems, uncertain about the probability and nature of those problems⁹. The issue was furthermore absent both in the parliamentary and in the public debate on the Proposal. Only in the course of Council negotiations did Poland become the most active opponent of the Directive, pointing at the unresolved problem of non-contracted providers.

Negotiation agenda, collective strategies and influence

The differences among member state delegations as regards the timing and specificity of their positions influenced the dynamics of Council negotiations in a number of ways. Most fundamentally, they had an impact on the Council working agenda. Requests which contained explicit means designed at protecting the autonomy of national healthcare systems were dealt with right from the start of the Council work. This had to do with the Presidencies' determinacy to achieve negotiation progress and "send a positive signal"¹⁰. Delegations which were clear about what they wanted were welcome partners for them. In contrast, fundamental debates were either postponed or forwarded to the Council's legal service¹¹.

The first two Presidencies, the French and the Czech one, collected various ideas about the necessary amendments to the Commission's proposal. Due to the encompassing character of the Directive, nearly all member states had stakes in each chapter. Yet, proposing amendments required good arguments, because the Commission was determined to defend its interpretation of the legal status quo. The high number of working party meetings suggests that the legislative work required a lot of debate¹².

⁸ Response from the Spanish Ministry of Health and Consumer Affairs to the European Commission's consultation on Community action on health services, 31.01.2007; http://ec.europa.eu/health/consultations/index_en.htm?Page=9 [10.08.2012].

⁹ Government position plots two scenarios – when the Directive does force member states to reimburse private providers domestically or when such an obligation only applies to transnational exchanges (Budzynska 2008).

¹⁰ Interview, former employee of the Permanent Representation of France to the European Union, 15.12.2010 (phone).

¹¹ Council documents 9431/09 and 14451/08.

¹² There were 10 working party meetings during the French and eight during the Czech Presidency.

It is under those conditions that member states with pronounced extensive positions supported by knowledge were able to put their mark on the decision-making process. Due to the German intervention, for instance, long-term care became an important negotiation item. The original Proposal only vaguely mentioned this type of care in a recital¹³. While explaining the differences between the medical and social care in its own system, Germany made several member states, such as Austria, Belgium or Slovenia, look on the relationship between the two more carefully. Germany issued different kinds of wording proposals, with the intention of having the phrase “everyday assistance” included in the definition of long-term care. The Presidencies were initially hesitant to accommodate the demand, because of the pending ECJ cases on that matter. The Czech Presidency asked the Council explicitly, if the long-term care should be excluded with the possibility of TEC rule still applying¹⁴. By then, Germany gathered enough support so that the Council responded positively¹⁵.

United Kingdom worked with a similar method to get its priorities accommodated. The British delegation linked the quite specialist question of GP’s gate-keeping and NHS regionally diverging entitlements with the notion of equal conditions applying for migrating and remaining patients. Furthermore, it argued that since the Directive should not affect the healthcare entitlements, it has to take into account the different mechanisms of how those entitlements are determined. These were coherent argument that resonated well with more general claims, such as “fairness” and “equal access” in European healthcare. The UK enjoy a lot of support from countries with state owned systems, such as the Scandinavians or the Southern states (later opponents of the Directive).

Besides their special concerns, the UK and Germany were active on a whole range of shared concerns, such as the stronger prior authorization, limited responsibilities for national contact points, weaker competences for the Commission and limited integration of health and safety standards. Those issues touch upon the competence tension between the EU and the member states and there was not much conflict here within the Council. However, arguing the obvious seems to pay off. Observers report attention and trust enjoyed by the most active and critical delegations¹⁶. In fact, once the list of demands had been implemented, the mood in the council shifted towards a more positive one, so that the next Presidency was able to put the dossier to vote¹⁷.

The detailed and strongly technical language of the legislative work put a significant challenge on the countries which disagreed with the direction the Proposal was moving in. It took some time until the issue of non-contracted providers had been put on the agenda. Countries interested in protecting their system of contracting had difficulties defining the providers they wanted to exclude. Initially, they talked about “private” providers, until the better suited term of “non-contracted” ones had been found¹⁸. The

¹³ Commission Proposal, Recital 9.

¹⁴ 10345/09.

¹⁵ 12532/09.

¹⁶ Interview, Secretariat General of the Council, 26.10.2012.

¹⁷ Interview, Permanent Representation of Sweden to the European Union, 20.10.2010.

¹⁸ Interview, Ministry of Health, Warsaw, 26.04.2012.

Council legal service issued an opinion stating that an exclusion of “private” providers from the Directive’s scope would hurt the principle of non-discrimination and contradict the case-law¹⁹.

The issue came back on the Council’s agenda during the subsequent Czech Presidency which noted that “more than a half” of the member states expressed their preference for the limitation of the scope of the Directive to providers contracted to the local public health insurance or otherwise defined public system”²⁰. An exclusion of those providers was legally highly problematic. The Czech Presidency tried to start a debate about what else could be done to accommodate member states’ concerns. However, the relevant countries brought up different arguments about why the non-contracted providers should be excluded: for quality and safety reasons, for financial reasons or for reasons of organizational autonomy of domestic healthcare systems. The last one was particularly challenging to defend, as the EU Directives formally apply to cross-border transactions only. Poland brought up an argument that the Directive could potentially destabilize or even abolish the national system of contracting via the equality principle in the constitutional law. Yet, the delegation did not persuade the Presidency or the Commission of the relevance of this problem²¹.

Several countries concerned by the provider issue, such as Slovakia or Portugal, became active in another debate – a collective call to include the healthcare article of the Treaty in addition to the internal market article as the legal base of the Proposal. Presumably, their intent was to prevent any domestic implications of the Directive once its legal base explicitly preserved member states authority over the organization of the healthcare systems.

Lacking coherence in the opponents’ arguments and strategies allows a suspicion that they did not have much exchange among each other. In fact, organization efforts only started after the Swedish presidency announced a vote on this dossier. Spain and Poland became the leaders of a blocking minority. The announcement of common action, however, did not prevent this camp from losing members. Hungary, once a pronounced opponent of the case-law in general, entered a bilateral interaction with the Swedish presidency and proposed an alternative wording allowing an exclusion of providers under certain circumstances. The effectiveness and legal quality of the added provision were intensely discussed. Yet, other countries with contracting systems such as Slovenia and Ireland accepted the Proposal after this change. The blocking minority fell apart when Spain itself became Council presidency. Interestingly, it did not deal with the fundamental issues it once voiced itself. Rather, it focused on minor corrections (redrafting the pensioners article) in order to control own potential domestic damages from the Proposal.

¹⁹ Council of the European Union, Opinion of the Legal Service, 14451/08.

²⁰ Council of the European Union, Presidency Questions to the Council, 10345/09.

²¹ Interview, Ministry of Health, Warsaw, 26.04.2012.

Case 2: The Working Time Directive

General information

The Working Time Directive is a piece of social-policy legislation from 1993. It sets the weekly limit of the working time (48 hours), provides for rest periods and specifies the methods of working time calculation. The original directive contained the so-called opt-out clause – a provision negotiated by the United Kingdom allowing for exempting from the weekly limit of 48 hours. However, this clause had to be reviewed after 10 years. Further reason for the up-date of the Working Time Directive has been the interpretation of the “on-call” time of doctors by the ECJ. Against the original intent of the member states, the Court ruled that on-call time has to be counted to the working time (yet, it can be paid differently). Many countries found themselves in the infringement of the Directive. For most EU countries, the most convenient solution of this problem has been to redefine the notion of on-call time in the (old) Directive, rather than recourse to the opt-out domestically.

The Proposal put forward by the Commission has been balanced, as some of the changes were rather “liberal” and others, in turn, quite “social”. The Commission showed considerable flexibility as regards the on-call time (above) or the reference periods, in which the working time is counted (from 4 to 12 months). In turn, it suggested to gradually abolish the opt-out. The Commission hoped that while balancing more liberal and more social provisions it would gain the support of the member states, which already in 1993 were deeply divided on labour market issues. Moreover, the inconvenient case-law on the on-call time was supposed to generate enough pressure on the delegations, most of which preferred to revise the Directive than to seek domestic adaptation.

This calculation did not work out. While all delegations agreed that the “on-call” time has to be redefined, the “opt-out” deeply divided the Council. On the one hand, the new member states led by the UK and supported by Germany defended its presence in the revised Directive. On the other hand, Southern member states, led by France and Spain advocated a “social” solution – a harmonized and worker-friendly working time regime. The nuanced agreement, found in the Council after a two-year struggle had been rejected by the EP which is why the project ultimately failed.

The articulation of member states positions

The EU labour market legislation was already in 1993 characterized by a conflict between the UK and the rest of the EU. The UK, itself having a flexible labour market regime, refused any kind of EU intervention in this field. For the British Eurosceptic public, social policy directives and regulations became a symbol of EU’s precarious and illegitimate governance. The Thatcher government negotiated the opt-out and abstained from the Council vote on the original WTD.

Over the 10 years, the position of the UK did not change. The government of Gordon Brown, strongly supported by the British Parliament, linked the flexibility on the labour market with the UK’s economic prosperity. For both British policy-makers and tabloids,

the limitation of the working week to 48 hours represented a danger for civil rights and individual freedom.

Southern member states, such as France or Spain, remained on their traditional positions as well. Their views resulted from trade union-government relations or simply from ideological preferences. The compromise formula presented by the Commission assured them that the abolishment of the opt-out is a fulfillment of the agreement struck 1993.

The approaches taken by the remaining member states were, in contrast, nuanced and ambivalent. Most of the original proponents of the European working time regulation, such as Germany or the Scandinavians, signaled this time their neutrality on the opt-out issue. While claiming that they do not intend to use this regulatory tool themselves, they knew very well that the application of the opt-out is a potential solution to the infringement caused by the Court's interpretation of the "on-call" time provision. The most convenient for those states, however, was a quick revision of the old Directive and a redefinition of the on-call notion.

There was yet another interesting group of countries in the Council – the new member states from Central Eastern Europe (CEE). Those countries implemented the old Working Time Directive and did not use the opt-out. What is more, their systems of labour market governance make the usage of the opt-out quite unlikely, given the strong involvement of trade unions in labour legislation. Polish administration was, for instance, also primarily interested in the introduction of the active and inactive on-call time to alleviate the case-law problems and the issue of opt-out was not the priority of the Polish delegation²². However, those countries faced burning problems in their healthcare sectors, such as the shortage of the medical staff and financial deficits. Clearly, conflicts between doctors and public administration had been exacerbated by the ECJ's judgments. In this situation, Slovenia, for instance, introduced a sectorial opt-out for doctors shortly before Council negotiations started²³. Governments of other CEEs, such as Poland or Czech Republic negotiated domestically with healthcare unions in parallel to the Council's legislative work. For that reason, most new member states declared their uncertainty about the usage of the opt-out²⁴. The fact that the revision of the old Directive just started, potentially promised new regulatory options for them, in the same time aggravating their uncertainty about the legal framework they should refer to while looking for solutions in their healthcare sectors.

Mobilization, interventions and influence

Initially, the Council had been divided in three groups: the UK defending the maintenance of the opt-out, Southern member states with France – arguing for the

²² Interview, Ministry of Social Affairs, Warsaw, 26.04.2012;

²³ STA, 22.09.2004.

²⁴ Interview, General Secretariat of the Council of the European Union, 19.10.2010.

abolishment of this provision, and a vast majority of the Council that was either uncertain or moderate in its preference²⁵.

It is therefore interesting to note that already during the first Presidency dealing with this dossier the Council made an attempt to vote. The majority of the member states agreed with the proposal of the Dutch Presidency to keep the opt-out and, in this way, outvote the socially minded states. The formation of such a clear majority in an initially rather unclear Council resulted, I argue, from the mobilization strategy applied by the UK which used all the diplomatic means at its disposal to organize a firm group of support for its policy position.

First of all, the UK made a deal with Germany, a country that moderated its position towards EU social policy during the 2000s. The UK promised Germany support on the Merger Directive, in exchange for German insistence on the opt-out in the WTD. The German behavior has been impressively consequent: the German presidency refused to put the WTD on the Council agenda in spring 2007 and the German government refused to negotiate the WTD with another labour market Directive as a package. Secondly, Britain launched an intensive diplomatic campaign among CEE countries even before the proposal officially reached the Council. Using the network of embassies in those states, the British government established contacts with respective labour ministries. The strategy proved successful especially on the ministerial level. The Polish minister, for instance, declared the similarity between Polish and British positions even before the official government position had been issued.

The vote did not succeed, because the Commission was at that time not yet willing to accept such a change in its original proposal. However, the UK's strategy generated a strong signal that there is support for the maintenance of the opt-out in the Council. The British government constantly declared that it disposes of the blocking minority and is not ready to move. Such a position was convenient for those member states that adopted a "wait and see" approach because of all the uncertainties they faced.

As many Council delegations initially "hid behind the UK", the opposite camp responded with an equally effective mobilization. Spain and Portugal intensified their contacts to the European Parliament, which, strongly influenced by a Spanish Socialist Rapporteur Alejandro Cercas, issued amendments going beyond the Commission's proposal as regards the protection of workers. The Council slipped into a stalemate. It seems that, paradoxically, the politicization of the working time issue on EU level became an argument for many member states to keep the opt-out as a possibility to renationalize the labour market governance wherever and whenever this is necessary.

Only intensive bilateral consultations with the member states allowed the Presidencies to relax the cohesion of the alliances within the Council. Interestingly, once the Presidencies started discussing more nuanced solutions, such as the conditions for the opt-out application, most member states were ready to move. For instance, a special working time limit had been worked out for the healthcare sector which was the major

²⁵ Interview, General Secretariat of the Council of the European Union, 19.10.2010; Internal Note dated 19.05.2005 obtained in the Interview.

concern of the new member states. The opt-out has been kept, however limited and subjected to strict conditions. After long negotiations, the Presidencies managed to separate the extreme positions and respond to the needs of the moderate majority.

Conclusion

The two discussed cases show that what happens within the Council is not necessarily a straight translation of the underlying policy preferences of member states. In the Patient Mobility case, one could expect a more pronounced impact of the Directive's opponents on the negotiation process. In the Working Time case, in turn, the stalemate is surprising if one considers that for most member states, the usage of the opt-out was initially the least preferred option of labour market governance. In both cases, the interventions of a handful of member states, especially the timing and strategies employed had an impact on how the negotiations unfolded.

In the Patient Mobility Directive, countries that intervened early and had a good understanding of the case-law, managed to lock-in the codification rationale. They dominated the technical discussions in Council, pushing legitimacy discussions outside the working group arena. The opponents, in contrast, too late and too vague with their concerns were not able to maintain the coherence of the group. Initially numerous and successful as a blocking minority, the group eroded and finally left the Council outvoted.

In the Working Time Directive, the strategy applied by the UK encouraged many member states, especially the new ones, to take a position in this debate. The breadth of the mobilization and the reaction it caused in the opposite camp entrenched the conflict in the Council. It took a lot of time and effort to back-paddle the debate on the original rationale of the project – the labour market governance.

These findings suggest that the theoretical argument developed in this paper is plausible. The paper argued that the formation and viability of collective activities in the Council is closely linked to the notion of negotiation capacity. The ability to formulate and disseminate negotiation positions complements the voting power as the power resource in Council negotiations. Highly capable countries control the formation of alliances in that they attract other delegations. Furthermore, they can sustain coalitions, because sharing their ability to intervene they assure an efficient resource pooling and make coalitions attractive to other members.

Indeed, the argument worked better in the Patient Mobility case. Evidently, the lacking knowledge and understanding of the case-law as well as quite vague assessment of the Directive's domestic implications prevented the opponents of this Directive from more effective, earlier and more specific interventions. In the Working Time directive the uncertainty was of another kind and referred to future relations between different governance systems: domestic and European, sectorial and general. However, collective influence had been organized by one early and visibly intervening member state.

The study of negotiation capacity and its implications for Council alliances can enrich our understanding of the processes within this institution. It complements the finding that the Council reaches its decisions by consensus, suggesting that the conciliatory attitude of member states might result from the challenges of pursuing own position in the EU policy-making context. It, furthermore, sheds a nuanced light on the notion of “national” preferences and positions showing that there is a strong exogenous determinant of member states behavior beyond the constructivist notion of “socialization” (Lewis 2005). Finally, the mechanism described in this paper considerably reduces the complexity and fragmentation of Council decision-making, potentially contributing to the Council’s robust legislative performance. The empirical material presented here seems to suggest that for new member states from CEE it is still very challenging to put their mark on the decision-making process.

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