

MEMO: INFORMAL NORMS IN EUROPEAN GOVERNANCE

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Informal practices abound in global and European governance. Yet, they are misunderstood. The predominant view in both scholarly contributions and public commentaries is that informal practices are institutional pathologies: Some hold that they enable states to escape their commitments whenever they deem their interests at stake. Others assert that informal practices are the unintended and erratic result of an inter-institutional power struggle that ultimately enable institutional actors (“Brussels”) to manipulate decisions in their favor. Contrary to this conventional view, I propose a functional theory of informal practices in international politics and a new way of thinking about how international institutions work in practice. At its core is the argument that informal norms provide added flexibility in formalized international governance under the condition of uncertainty about future domestic support for cooperation. The empirical analysis strongly supports my theory. The finding that informal norms allow governments retain control over institutional design has important consequences for positive and normative analyses of the EU.

The Puzzle

Scholars and politicians alike agree that the European Union (EU) is the epitome of modern international cooperation and a triumph of formal institutionalism in international relations. Over the past fifty years, European member states have continuously pooled their sovereignty and delegated authority to supranational institutions. The depth of European member states’ formalized cooperation is unparalleled in international politics. Yet, at its very core lies a troubling puzzle: Governmental behavior bears little resemblance to formal rules. Almost all of the time and in most issue-areas, European governments adopt practices that run counter to what we would expect arise on the basis of formal rules. To give but one example: The treaty states that the Commission exclusively sets the agenda. And yet, it is the heads of state and government within the European Council (an institution not provided for in the treaties), who are the principal agenda-setters. The proliferation of such informal practices has consequently turned the European Communities’ core decision-making procedure, the Community Method, entirely upside down. The result is the most astounding, yet neglected puzzle of European integration, namely the mix of formal rules and informal practices varying both over time and across issue-areas.²

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² Exiting studies usually focus on single informal practices and rarely go beyond description. Cases are usually selected on the dependent variable, more often than not without any sensitivity for their importance. In short, a holistic understanding of the mix of formal rules and informal practices is still outstanding.

Table: Formal and Informal Governance in the European Communities³

FORMAL GOVERNANCE		INFORMAL GOVERNANCE	
Agenda-Setting			
Commission is exclusive agenda-setter		European Council is principal agenda-setter	
Commission is the source of policy expertise		Council Presidency refines priorities	
		Commission consults governmental experts	
Voting			
Council votes by QMV		WG and Coreper prepare most decisions	
		Council generally seeks consensus	
		Presidency mediates compromises	
Implementation			
Commission implements decisions		Commission rarely implements decisions	
		Comitology narrows Commission discretion	

Against this background, a recent empirical finding about EC decision-making no longer comes to a surprise: Formal models “based entirely on legal rules in decision-making do not perform well on average. However EU decision-making is carried out, it does not seem to be well described by formal rules. Informal norms and procedures appear to play a more central role.”⁴

The Argument

The observation that governments rarely follow formal rules and adopt informal practices instead initially poses a challenge to functional regime theory, the very cornerstone of our understanding of modern international cooperation. If even in the EU states are not following the rules, are realists correct when they regard international institutions as phony, because states escape their commitments whenever important interests are at stake?⁵ Has the EU become a crazy quilt of unintended erratic institutional practices, as historical-institutionalists would assert, which enable institutional actors to manipulate decisions in their favor?⁶ And have scholars that have analyzed the EU’s formal treaty rules misunderstood how it works for half a century?

I contend that institutions remain functional throughout, even though they are informal and adaptive. Formal rules are inadequate when institutions, designed under the condition of

³ **Informal practices** are, as the name implies, contingent on the design of formal rules. I discriminate between formal and informal practices by taking as my baseline accepted explanations (distributive and informational theories) for the design of the Community Method. On this basis, I deduce several observable implications at the level of behavior that we should expect arise on the basis of formal rules in equilibrium. The difference between what we expect in equilibrium and what we see in reality constitutes informal practices. For explanations of the design of the Community Method see e.g. See e.g. Haas 1963, 65, Moravcsik 1998, Pollack 2003.

⁴ Achen 2006, 295.

⁵ Stone, *Informal Governance. International Organizations and the Limits of Us Influence.*

⁶ Farrell and Héritier, 2007.

uncertainty about the future, face changes in the underlying structure of interdependence.⁷ As a consequence, the precise amount and distribution of the domestic costs of and benefits from cooperation are never entirely predictable at the time of institutional design.⁸ A situation may therefore arise where an unfettered application of formal rules leads to unanticipated concentrated costs at the domestic level and, thus, a sudden loss in income for a domestic group. This problem varies systematically across issue-areas with the extent to which risk in income is internalized across a larger group.⁹ I refer to it as domestic uncertainty.¹⁰

Domestic uncertainty bears the risk of undermining the institution's domestic basis of support in two ways: For one, since in the politics of collective action concentrated interests are better able to mobilize than diffuse ones, it triggers immediate pressure for defection and leads to the obstruction of cooperation.¹¹ In societies with strong preferences for an equitable distribution of income, it moreover leads to general social dissatisfaction with the institution. *All governments therefore prefer institutional norms that tolerate collective defection from formal rules while at the same time maintaining the credible commitment to and benefits of an agreement.* This norm of discretion, a meta-rule on the appropriate application of formal rules, remains informal for three reasons: It provides greater flexibility in the face of genuine uncertainty; it prevents groups from lobbying for discretion in anticipation of discretion where they would otherwise have failed to mobilize; it prevents industries from misallocating resources in anticipation of discretion.¹²

Governments consequently adopt informal practices around formal rules that permit them to resume control over decision outcomes whenever deemed necessary. They resume control over the agenda, accommodate governments facing recalcitrance to an extent as to maintain domestic support, and relax supranational control over implementation. Informal practices are therefore the result of an informal norm of discretion, which allows embedding European integration into domestic social and economic circumstances in such a way that formal rules do not permit.¹³

Empirical Findings

I assessed the causal importance of this two-step process – the design of informal norms around formal rules and decision-making within those norms – as applied to European decision-making from the Rome Treaties in 1958 until today. The theory has two distinct observable implications, which permitted me to distinguish it empirically from its two contenders: First, informal practices should vary systematically with the extent of domestic uncertainty, that is, with the extent to which domestic groups' incomes are subject to unanticipated shifts. Informal practices are therefore not erratic as historical-institutionalists submit. Nor do they emerge in particularly sensitive issue-areas, as realists would expect. I found very strong evidence for this hypothesis: Governments indeed more regularly follow formal rules in the Common Agricultural Policy. This contradicts realist expectations, since CAP is arguably the most sensitive issue-area in the EC. Yet, it is also the issue-area featuring the by far lowest domestic uncertainty: Fixed prices and direct subsidies effectively fix stabilize farmers' incomes more than in any other sector. Certainty about domestic support consequently translates into adherence to formal rules. Where domestic

⁷ This is particularly problematic with regard to economic transactions susceptible to price and demand shocks.

⁸ On the domestic effects of cooperation see more generally Milner and Keohane 1996.

⁹ It may also vary across countries. Governments with low levels of income stability might get more out of Council negotiations, because their domestic basis of support is more uncertain than in other countries.

¹⁰ I thereby draw on an emerging literature in IPE. See e.g. Downs and Rocke 1995, Koremenos, 2005, Rosendorff and Milner, 2001. See also the legal and economic literature on this topic, e.g. Bagwell and Staiger, 1990, Sykes, 1991.

¹¹ See in general Olson 1965.

¹² Feenstra and Lewis, 1991, Goldstein and Martin, 2000.

¹³ It is hence a rational version of what Ruggie coined the norm of embedded liberalism. See Ruggie, 1982.

uncertainty is high, however, as in most other EC issue-areas, and not where issues are sensitive, governments adopt informal practices.

Second, since the circumstances that require discretion are not always perfectly observable to all parties, informal norms will be accompanied with auxiliary institutions that prevent moral hazard. There are several institutional solutions for the problem of moral hazard, not all of which are practical in international politics.¹⁴ I find that over time and across issue-areas, informal practices are always accompanied with a strong role for the Council Presidency. In practice, the Council Presidency establishes close contacts with affected delegations in order to elicit contextual information about a recalcitrant country's true domestic situation.¹⁵ On that basis, it adjudicates on the appropriate application of formal rules.

Empirical and Theoretical Implications

The project provides a holistic explanation for the mix of formal rules and informal practices in the EC. The findings have several implications for positive and normative analyses of (European) governance. I will concentrate on what I think are the two most implications: power in everyday decision-making and the legitimacy of European integration.

Power in everyday decision-making

Informal practices evolving from the norm of discretion have assured governmental control over the EC's institutional development. They enabled governments to collectively retain outlier influence whenever deemed necessary. Given that the EU thus rests in a different equilibrium than is commonly suggested, we should reassess the inter- and intra-institutional balance of power within the EC as well as recent institutional choices. (How powerful are the European Parliament and the Commission really in the face of informal norms in the Council? Is the new phenomenon of agencies to be regarded as a new type of credible commitment? If the chairman is critical for sustaining the norm of discretion in the face of moral hazard, how practical are current proposals for a reform of the Council Presidency?) In short, taking informal norms into account yields numerous questions about institutional effects and choices in everyday decision-making.

Legitimacy of European integration

The finding that governments seek to harmonize international cooperation with its domestic basis of support implies that decision-making is rarely conflict-ridden. As one official expressed it: "There is total transparency in Brussels. Everybody knows everything. The thing is, though, that the final decision is so non-controversial that the media is not interested."¹⁶ Informal practices, in other words, ought not be conflated with secrecy. Information is readily available at low cost. Current debates about improving the accountability of European officials to their national principals by increasing the transparency of decision-making therefore miss the point. If there are informational asymmetries, this is most likely due to the way information is processed at the domestic level.

¹⁴ The two main institutional solutions are co-insurance and observation. Co-insurance mitigates incentives to exploit insurance by making the insured share some of the costs. Downs and Rocke as well as Rosendorff and Milner argued that this has been the institutional solution to moral hazard in the case of the GATT / WTO escape clause. Observation means that the insurer attains information about an actor's behavior.

¹⁵ Governments devised additional rules that ensure that the Presidency reports this information correctly.

¹⁶ Interview with Ambassador Dietrich von Kyaw.

Furthermore, the finding that governments devised European institutions in a way as to restrain themselves from abusing the power formal institutions confer to them means that the EU meets an important procedural requirement for legitimacy: Governments take into account the interests of those (European citizens) who are affected by a decision. Current debates about the legitimacy of European decision-making should be assessed in this light.

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