The Centre for European and Asian Studies

REPORT

4/2011
ISSN 1500-2683

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A publication from:
Centre for European and Asian Studies at
BI Norwegian Business School
0442, Oslo
Norway

Prepared for the SOG 2011 Workshop
The Future of the Regulatory State: Adaptation, Transformation, or Demise?
15/6 September 2011, BI Norwegian Business School

SOG (Structure and Organisation of Government) is a research committee of the International Political Science Association. This workshop is part of the wider SOG-related activities in executive politics.

The Commission's internal conditions for social re-regulation

Market efficiency and wider social goals in setting the rules of financial services in Europe

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7.761 words
(incl. notes and references)

Abstract

With its scarce budgetary resources and institutional logics favouring market-based problem-solving, the European Union (EU) has been considered a prime example of the regulatory state. When and how can we expect the Commission to pursue aims beyond the mere increase of efficiency in private market transactions? Can we expect Brussels to intervene where societal interests demand re-regulation?

We draw up two ideal-type perspectives on market regulation and trace them empirically along two regulatory processes concerning financial services: consumer credit regulation and equal treatment in financial services, selected as recent instruments focussing explicitly on presumably weaker parts in market transactions. Regulatory decisions are reconstructed along semi-structured interviews with Commission officials from different DGs and hierarchical levels conducted 2006-2009.

In both cases the Commission went beyond mere market-efficiency and changed the quality of the financial market by favouring disadvantaged societal groups in its regulatory proposals. Our process analyses suggest that there is a scope for a regulatory equality enhancing policy which depends on pro-active agents within the Commission, the possibility to frame regulatory beneficiaries as market participants, and the re-distribution of rights instead of resources.

1. Introduction

In the European Union (EU) limits for taxation and scarce budgetary resources severely restrict the realisation of wider social goals through redistribution. This is one of the reasons it has been characterized as the prime example of a regulatory state which focuses mainly on the correction of various market failures (Majone 1993). From this view, European regulation first and foremost pursues the goal of increasing the efficiency of the Single European Market. Yet, more recent approaches in the regulation literature stress that the traditional national welfare state may also contain regulatory elements (Mabbett 2009; Leisering 2011; Levi-Faur 2011). A regulatory mode of decision making must thus not necessarily be tied to the (political) goal of liberalization.

Not the least, this is evident in the puzzling observation that particularly the European Commission is perceived as both a promoter of neo-liberal market-making on the one hand and a powerful regulator constraining business activity for wider social goals on the other. The nature of the Single European Market is highly relevant for the distributive outcomes the EU produces and market regulation may be a 'vehicle for attaining distributive goals' (Somek 2006). It is relevant in analytical as well as practical respects to ask under what conditions the regulation of markets at the EU level follows wider social goals.

In this paper, we argue that certain internal conditions create a wider re-regulatory capacity of the European Commission. While it remains limited to the regulatory section of the overall social policy spectrum, the Commission can and does initiate regulation that targets equality enhancement rather than improved competition alone.

We show this along specific financial services regulations. Market efficiency is highly relevant for this policy field as financial service transactions are far from freely floating across national borders in the European Union. But not the least the financial crisis has shown that regulation of financial services strongly affects the pursuit of wider societal goals. Thus, financial services constitute a promising policy area for uncovering the re-regulatory capacity of the Commission and the factors that push it to regulate European markets in the name of wider social concerns.

The article develops two ideal type perspectives on market regulation and situates them in the wider debate on European regulation (section 2). We then proceed by analyzing the preparatory processes of two financial services initiatives which explicitly went beyond the pursuit of more efficient markets. This first concerns legislation on equal treatment policies promoting opportunities for disadvantaged groups in service markets (3.1) and, second, a proposal on EU consumer credit regulation which actively countered asymmetries between buyers and seller in the internal market (3.2). The final section concludes by discussing central explanations for the respective Commission positions in the regulatory output as well as the potential impact on political outcomes (4). Thereby we can present hypotheses on the conditions under which the Commission itself exploits the leeway that is left for a more social European market.

2. Conceptualising market regulation by the European Commission along market efficiency and wider social equality

This article aims to contribute to the debate on whether and under what conditions Europe's markets can be embedded 'within a broader set of social and political rules and cultural understandings that make them work not only more efficiently but also more equitably, with greater security for market and nonmarket participants and in tune with a variety of other social purposes' (Caporaso and Tarrow 2009: 579). Extant research on this question differs along two perspectives. Firstly, the implications of EU decision-making for national welfare state models are focussed. Here lacking social embedment of EU integration is explained along systemic features of supranational decision-making (Scharpf 1999, 2010). Our interest is more limited and rests with the re-regulatory capacity of day-to-day policy making in Brussels. In other words, in this article we accept the premise that the EU is a regulatory state with very limited capabilities for actually redistributive interventions (Majone 1993, 1996).

A second dividing line in the literature runs between arguments about the natural or spontaneous emergence of market embedment and contributions highlighting the necessity of political construction to reach distributive goals. The former perspective is often evoked in relation to ECJ rulings in the area of anti-discrimination policies or cross border health care (Hervey and Trubek 2007; more critical Höpner and Schäfer forthcoming). We rather subscribe to the second perspective and argue that market embedding is no autonomous process but depends on specific conditions linked to decisive political actors such as the European Commission.

Along these analytic decisions, we only cover the middle section on a larger social policy continuum. This continuum spans from completely unfettered markets on the one side to an authoritative distribution of resources along social justice criteria on the other side. Strictly speaking only some section in between these extremes is crowded with regulatory policy where authoritative intervention is based on rules stated in general terms. But also in this section, the regulator will explicitly or implicitly decide on ‘who will be indulged and who deprived’ (Lowi 1964: 690-1). In this view, regulation makes a socially relevant difference (Braithwaite et al. 2007) and already the narrow section should bear crucial insights into the conditions under which a policy outcome will be situated more towards one or the other end of the entire social policy continuum. Even where we only look at regulatory means, the outcome might be markets of very different social quality.

To make this claim empirically tractable, we start from a rough distinction of two ideal-type perspectives on the organisation and purpose of markets as a mode of social interaction: they may be either seen to produce the optimal allocation of resources in an equilibrium of economic supply and demand or as a socially constructed mechanism balancing competing values and demands.

The classical perspective of welfare economics starts from the utility of individual actors in the marketplace. It assumes that the socially optimal allocation of resources is reached, where no individual can be made better off without disadvantaging others. Such a Pareto-efficient outcome is reached through the equilibrium of supply and demand which in turn can only be achieved in a perfectly competitive market where the individual market-participants try to maximize their individual welfare (Stiglitz 1986). Yet, even from this perspective some regulation is required to preserve the market (Weingast 1995), e.g. on property rights or contract certainty. In practice markets are hardly commensurate with a model of perfect competition, for example where information is asymmetrically distributed among the market participants (Akerlof 1970). Thus, classical welfare economics considers market regulation warranted where markets fail, externalities accrue or other imperfections prevail that prevent optimal decisions of individual market participants (see e.g.Majone 1996: esp. 28-30). In this perspective regulation is seen only as a second-best solution to the outcomes a fully competitive and undistorted market would produce.

A second perspective on market regulation criticizes this economic view from normative points of departure (see Prosser 2006 or; McVea 2005). Approaches in this vein argue that market efficiency is qualitatively different from other, equally legitimate purposes of social interaction, such as social justice. Here the purpose of regulation is not to reach perfect competition in the market, but to alter their very quality by changing the rules under which market transactions will be carried out among individuals. Rather than guaranteeing the mere pursuit of individual welfare, regulation is addressing misallocation from a moral point of view and is thus seen as a ‘balancing of competing values setting out the sort of society we wish to live in' (Prosser 2006: 375). This is consistent with the distinction of economic and social regulation that has figured prominently in the US debate on regulatory market interventions (cf. Reagan 1987: esp. ch. 2). In the context of the EU this has also been described as 'market cushioning policies' (Sbragia and Stolfi 2008: 133; Sbragia 2000; similarly 'market shaping' Quaglia 2010). While economic regulation aims at freeing competitive forces, social regulation is primarily motivated by problems that often cannot be solved by an increase in economic competition alone. Rather than targeting the individual pursuit of welfare, social regulation aims at protecting broader societal groups from systematic disadvantages they may encounter in competitive markets (see for example Ramsay 1995 on consumer credit markets).

So both ideal-type perspectives result in different models of regulation. While there might be fuzzy borderlines at times, the discussion yields the following ideal types of regulation:

- In the first perspective – termed 'efficiency enhancing' – regulation is perceived necessary to increase the immediate functioning of markets by countering market-failures or imperfections understood as non-optimal transactions. Regulation should be expected were markets face a lack of competition due to monopolies, negative externalities or informational asymmetries. Beneficiaries of regulation are individual market participants.
- In the second perspective – termed 'equality enhancing' – market-regulation is perceived necessary to deliver broader societal goals and operates with a more long-term perspective on market gains. Such regulation is motivated by other goals beyond increasing competition. Structurally weaker parts in market transactions are the addressed beneficiaries of regulation.

This distinction is at odds with the seminal perspective on the regulatory state that is most often portrayed as the outright opposite of the positive (welfare) state (Majone 1997: 149). In this account the main function of the positive state is the Keynesian macro-economic stabilization and redistribution. Majone's regulatory state in turn puts administrative and economic performance first – it is 'efficiency enhancing'. In between these extremes, the 'equality enhancing' perspective implies that there is a socially and analytically relevant middle ground. But what follows from Majone's distinction for a 'state' model that starts with a clear (re)distributive function, yet is nevertheless not tied to budgetary concerns but operates through regulation?

We argue that if the goals of the state differ as the original distinction of the ideal types suggests, then also the process of rule-making in the Commission should deviate from the typical regulatory state model in at least four respects. First, in his seminal conceptualisation of the regulatory state, Majone argues that re-distributive consequences result from ‘potential policy constraints rather than policy objectives’ for regulators (Majone 1997: 162). In this efficiency enhancing world, actors within the Commission try to avoid costs for any market participant striving for a solution beneficial to all. In contrast, the equality enhancing perspective implies that internal actors will rather focus on the creation of benefits for particular market participants that may or may not imply costs for others – this is in line with taxing and redistribution under the positive state. Rather than a constraint, (re-)distributive consequences should become an objective of regulation in an equality enhancing model.

Beyond, the envisaged structure of the regulation should differ. In an efficiency enhancing world, as many decisions as possible are delegated to the market participants themselves and ‘indirect government’ best describes the mode of regulatory production as well as the regulatory contents (Majone 1997: 146-8). Opposing this, the equality enhancing perspective implies that rule-making by the market results in skewed outcomes so that the regulators will take many decisions themselves and try to set conclusive rules for the issue in question.

Thirdly, both ideal types should differ along the integration of external stakeholders into the regulatory process. In striving for efficiency, Majone’s (1997: 158) regulatory state model implies competition among single issue interest groups. Following pluralist theory (Truman 1951), regulators grant equal access to the different sides of the debate and act as neutral arbiters searching for the equilibrium solution. In contrast in the positive state corporatist patterns grant representational monopolies for some interests – access to the regulator is biased. Structured along the division of business and workers they focus mainly the area of labour (Schmitter and Lehmbruch 1979). Under the equality enhancing model Commission officials should also cease to be neutral without, however, focussing only on the labour market. Where normative imbalances among pluralist contending interests are the starting point of regulation, regulators should rather grant privileged access for those groups whose interest they see specifically at stake. The equality enhancing model is thus more consistent with the neo-pluralist view on interest group integration (cf. Dunleavy and O'Leary 1987) .

Lastly, both possible worlds of regulation should differ along the way actors within the Commission interact. In the seminal conception of the regulatory state, governmental actors ‘usually cast their arguments in the language of 'regulatory science' rather than in the more traditional language of interest or class policies’ (Majone 1997: 157). Arguments should focus on technically ‘best’ solutions and actors should devote to ‘a problem-solving rather than a bargaining style of decision-making' (ibid.: 162). In contrast, the equality enhancing perspective emphasizes normative differences on the quality of markets and should thus be much more prone to political conflict and more fundamental political exchange among actors about the quality of markets in the Commission.

Far from living up to strong hypotheses, this analytical framework guides our analysis of two concrete processes of policy formulation in the EU Commission.

3. Empirical approach

The analysis presented here is part of a broader project studying 'Position formation in the EU Commission' along 48 legal initiatives in different policy areas during the Prodi and the first Barroso Commission. It rests on data from semi-structured interviews with Commission officials from different Directorates-General and hierarchical levels as well as with organized interests conducted in Brussels between 2006 and 2009.[1]

Against the preceding discussion, the dependent variable of interest is the extent to which a policy outcome is equality enhancing while the market failure perspective serves as our baseline expectation. Our endeavour here is an inductive one and the analytical starting point is the regulatory output,[2] i.e. the final position the Commission showing a bias towards the equality enhancing perspective. With the aim to work backwards, we selected two cases from an ongoing broader project on position formation in the EU according to their clearly equality enhancing policy output. The directive on equal treatment in the access to and supply of goods and services between men and women, persons irrespective of religion or belief, disability, age or sexual orientation addresses disadvantages of specific groups in financial markets, e.g. with respect to insurance contributions and benefits or the conditions for loans. In the other case creditor obligations for advertising, concluding and terminating credit agreements are targeted under the view that consumers – e.g. where over-indebted – are the weaker parts that have to be protected when it comes to market interactions on financial services. Tracing the position formation processes we uncover the enabling factors moving the rule-making towards the goal of equality-enhancement. Comparing the two drafting

[1] The multi-annual, collaborative research project on 'Position Formation in the EU Commission' is conducted at the Social Science Research Center Berlin. Funding from the Volkswagen Foundation is gratefully acknowledged and we are indebted to our colleague Julia Metz for fruitful discussions of the matters presented here. In order to preserve the assured interviewee anonymity, we refer to the interviews as "COM1", "NGO2", etc. For more information on the project see http://www.wzb.eu/zkd/peu/default.en.htm

[2] In this paper we focus on the Commission's policy output first and cannot engage in a normative discussion nor can we provide final judgements on whether each and every goal was achieved.

processes – covering the equality of opportunity in service markets on the one hand, and consumer disadvantages in taking credit on the other hand – similarities in the policy formulation patterns can be identified. What pushes the Commission towards the more social end of the policy continuum? Do we find evidence that decision-making in the Commission deviates from the classical regulatory state model by following the logic of political benefits, neo-pluralist and intentionally skewed interest group access, and substantial internal conflict instead of efficiency enhancing problem solving?

Any European market regulation must start with a policy proposal by the Commission which in turn defines the issues as well as the strategic preferences that govern inter-institutional negotiations (e.g. Princen 2009; Tsebelis and Garrett 2000). But while the Commission is thereby able to set the agenda for European market regulation, its proposals themselves are produced by a multi-staged, multi-actor process which requires the internal aggregation of possibly deviating interests (Hartlapp et al. 2010). We thus understand the Commission as a multi-actor and apply a disaggregated view featuring different Directorates Generals as decisive actors. We find portfolios that subscribe to efficiency-enhancing policies such as the DG for competition policy (DG COMP) or for the internal market (DG MARKT), and others that cover regulatory areas typically associated with social policy. In this paper we in particular look at the Directorates-General for Employment, Social Affaires and Equal Opportunities (DG EMPL) and for Health and Consumer Protection (DG SANCO). Thus, if we want to explain the overall Commission position, we need to understand both the interaction of DGs and the formation of policy position within the DGs. The following sections analyses the interplay of the decision-making structure and the *agency* of political actors within the Commission in two specific policy areas.

We start by briefly summarising the main regulatory positions taken by the Commission in relation to the respective status-quo. Thereby we outline whether enhanced efficiency or enhanced equality were pursued and in how reaching these aims was left to market participants or was accomplished by direct rule-setting. From there, we can establish the involvement of external interests as well as the style of interaction among the different Directorates-Generals. In sum we are interested in the factors that were decisive in assuring equality enhancing policies at an early stage of policy making inside the Commission.

3. Empirical cases

A first case bearing insight to the re-regulatory capacity of the EU Commission is the promotion of equality of opportunity for disadvantaged groups in services and especially financial services. Traditionally, at the EU level anti-discrimination regulation had been developed as part of labour law. After the Amsterdam Treaty had introduced a new basis for legal action the Commission proactively sought to extend respective principles to other areas, including the (financial) service market.

Here different life expectancies and varying behaviour and consumption between sexes and age groups had led to unequal treatment in terms of access to the insurance cover provided or in the level of benefits paid out. Such practices – most pronounced in motor, health and life insurance – might be considered efficient from a pure market point of view. Yet, they disadvantage societal groups along factors lying outside individual control. Legislation on actuarial factors differed starkly across Member States. The unisex principle was in place in Scandinavian countries, France and Slovenia. The UK also knew unisex tariffs in private health insurance, while strong differentiations prevailed for car insurance (cf. also Ireland, AE 2004).

Against this background in 2003 the Commission proposed a directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services.[3] In 2008 a more far reaching proposal was drafted by DG°EMPL. Still pending in front of the Council (cf. EUobserver 2010) it would broaden the quest for equal treatment of sexes in services to persons irrespective of religion or belief, disability, age or sexual orientation.[4] .The new regulation renders insurance companies' practice of using sex, age, religion or belief, disability, age or sexual orientation to calculate premiums (in principle) discriminatory. For sure, where 'accurate and up-to-date data' (Commission of the European Communities 2008: 42) can assure that different tariffs are related to the profile of the customers and not to characteristics that are simply taken as a proxy they are still allowed. However, the proposal prescribed that in all other cases insurers and banks will no longer be able to use age, sex or disability in a way that discriminates against groups with these particular characteristics. This will increase costs both for insurers and for those consumers that hitherto benefitted from the unequal market relationship. What is more the very fact that

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3 Proposal for a COUNCIL DIRECTIVE implementing the principle of equal treatment between women and men in the access to and supply of goods and services (COM(2003)657).

4 Proposal for a COUNCIL DIRECTIVE on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Commission proposal COM(2008)426).

the Commission intervenes to explicitly broaden the market to those that were by law or by practice left outside before underlines the goal to create more equal markets.[5]. . Clearly, redistributive consequences for societal groups were considered as an objective rather than as a constraint of regulatory decision-making. It is decisive in this respect that the directives do not only set substantial rules e.g. in view of the actuarial factors used or positive action, but also requires establishing judicial and/ or administrative procedures and penalties as well as enforcement bodies. In comparison to existing practices the regulatory structure of these directives yields greater involvement of the regulator in substance as well as a direct mode of governance in enforcement.

In the run up to the negotiation process, DG°EMPL had very actively used and forged changes in interest group organizations to create a broad front against opposition from those that wanted to keep more expensive discrimination grounds out of the discussed acts. Already prior to the concrete drafting the Commission had incentivized existing and scattered NGOs to join forces in an umbrella organization which was not only consulted but substantially influenced the legislative proposal. 'It was certainly strategic to involve civil society groups more than social partners […] We saw the potential victims of discrimination as being people who were at risk of some sort of social marginalisation as a result of discrimination, and they are the ones that tended not to have a voice in social partnership' (COM151).[6] Industry in contrast was consulted only to provide information that would allow the Commission to follow its goal of greater market equality. To gain a better understanding where technical requirements of risk-based assessments for capital adequacy end and individual business interests begin, the drafting DG°EMPL consulted industry early on (COM42:90 and COM19:306). On the basis of the acquired knowledge the Commission was able to argue that the question whether existing rules and practices had to be changed depends on the product and whether justification can be provided 'on the basis of accurate and up-to-date data' (Commission of the European Communities 2008: 42). The pro-active and selective distribution of access for interests from different societal segments by DG EMPL clearly contradicts the presumed neutral regulator a purely efficiency-enhancing model would imply.

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[5] This contrasts with equal treatment on grounds of nationality article 45 (39/48). It also contrasts with existing EU anti-discrimination policies based on article 157 (ex-article 141/119) requiring equal pay between sexes that addressed the employment relationship by strengthening the position of the weaker employer at work (or workplace related interactions).

[6] Interestingly DG°EMPL therewith departed from its traditional ally the social partners to include groups of a different ambit. They in turn presented parts of society that were not addresses of classical labour law.

Both the descision to have equal treatment legislation on financial services and the more concrete implications this would have for insurers in their actuarial practices were debated among central actors inside and outside the Commission reflecting substantial differences in the underlying understandings of markets. Inside the Commission DG°MARKT defended the positions of industry, ‘various financial sector federations’ (COM42:39) and those Member States were ‘the practice of differentiating insurance costs [...] were very, very strong. UK, Ireland, but also Germany’ (COM21:39) by trying to do ‘a damage limitation exercise’ (COM19:78). DG°ENTR was fundamentally opposed to have a binding act at all and especially a broad directive, because they did not consider this an appropriate issue to be tackled at community level and because they feared costs for enterprises (COM81:32-36, also 44). For both actors inside the Commission the ideal regulatory position was for ‘insurance to be [kept, MH] completely out’ (COM21:75). In contrast, DG°EMPL holding the pen, was strongly in favour of the acts (COM21:30, Commissioner Diamantopoulou in Minder 2003a), but had to overcome opposition from the critical portfolios inside the Commission as well as from opposing Member States and organized interests. The factors that proved crucial for DG°EMPL to put its position through in these internal contentions allude to a political game. The point has been already made for the involvement of external actors (see above). In addition the agenda setting and gate keeping function of the lead DG was strategically used to favour the desired equality enhancing outcome. Knowing that it was difficult to oppose the quest for anti-discrimination policy from a political point of view and that thus the adoption of the far-reaching proposals would be benefiting from a decision at the political level of the Commission rather than from technical debates among desk officers the lead DG channelled the important decisions upwards. Open discussion at the political level could be exploited not least to the personal capacity of the Commissioner to convince the College (Hartlapp 2011). What is more ECJ cases – often triggered by the very interest group organizations DG°EMPL supported financially (COM152) – where used as argumentative support to rebuff opposing views inside and outside the Commission (e.g. Marshall C-152/84 [1986], Beets-Proper C-262/84 [1986] or Schönheit and Becker C-4/02 and C-5/02 [2003]). Finally, interview partners mentioned the entrepreneurial capacity of the Commissioner heading DG°EMPL at the time.

While market inefficiencies were invoked in this internal debate, the core ambition of the drafting DG clearly was to alter the quality of this market along a political reasoning targeting greater equality. Enhancing the efficiency of markets by responding to changing environments and countering unfair practices was on the agenda of the Commission, especially in view of persisting implementation difficulties (COM125:47). When proposing the more recent act Commissioner Spidla is cited to have said that ‘prejudice, a reason for discrimination, is costing us a great deal!’ (AE 2007). However, we also note clearly voiced criticism that the opposite would be the case under the envisaged regulation. Stephen Sklaroff, deputy director general of the association of British insurers, stressed: ‘If you tell an industry that it must behave in a less efficient and less transparent way, which is what this would do, it will have an adverse effect on that industry's competitiveness’ (cited in Minder 2003b). Similarly, the FT claimed that the ‘[a]mbitious move to enshrine 'respect for human dignity' could force up premiums’ (Parker 2003). Besides the fact that re-regulation would not necessarily increase efficiency in a narrow sense, the goal to increase equality in markets was also voiced explicitly by the Commission. The proposal is described in official documents as a necessary ‘signal of solidarity between women and men in European society’ (Secrétariat Général 2003:21) and as the ‘result of a real moral and legal obligation’ (proposal, p.4). Commissioner Diamantopoulou stressed that there were ‘political reasons for not accepting gender as an element justifying a differentiation of the treatment of individuals in the access to the supply of goods and services’ as well as the signalling function of the act for European society (Secrétariat Général 2003:21).

A second case that is particularly insightful for the Commission’s positioning between efficiency- and equality-enhancing regulation is the 2002 inroad to consumer credit regulation.[7] A supranational regulation of consumer credits exited before but it had left European member states with the possibility to enact more stringent rules. National governments had used this extensively so that a myriad of differing regulations of consumer credit persisted in Europe.

For a European market in financial services, these barriers became increasingly relevant. Consumer credit had become the ‘lubricant of economic life’, new financial instruments such as product-related credits, credit cards or overdraft facilities of private accounts spread quickly and fuelled private consumption (COM89:31). At the time the proposal was adopted in the Commission, consumer credit amounted to 7% of the EU-15 GDP and exhibited a growing tendency (COM119:197, Commission of the European Communities 2002: 3). For the internal market Directorate-General of the Commission (DG MARKT), differing national regimes hampered growth (COM119:39) and it had been a ‘long-standing’ intention in the

[7] Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers – COM(2003)443. This proposal was meant to repeal the existing supranational law in the area as entailed in Directive 87/102/EEC.

Commission to enhance the efficiency of the consumer credit markets by removing these trade barriers (COM119:113; COM89:31).

But unlike most other regulations on financial services and unlike earlier publications on consumer credit had indicated,[8] it was not DG MARKT that signed responsible for the policy proposal but rather the newly established consumer policy DG SANCO. And while a lack of market-efficiency provided the basic justification to re-regulate the area (COM111:74), this Commission department pursued aims going way beyond the facilitation of cross-border trade.

In fact, SANCO officials aimed at protecting the 'weak consumer' (COM89:82). Drafting was based on the assumption that the consumer taking a credit was not able to capture the implications of credit agreements fully and thus needs to be protected against the exploitation of that very fact by the banking or retail industry (COM89:86). This position was informed by observing individual cases of immensely overindebted consumers (COM89:110) but also by the 'buzz word' of 'behavioural economics', a line of research that delves into the non-rationality of individual decisions and corresponding disadvantages in free markets (COM89:82). This deviation from a mere efficiency-enhancing perspective was also important for the comparably young DG SANCO in building its own portfolio profile.

The resulting re-distributive 'ambition […] to create a very comprehensive, very exhaustive consumer credit regulation which would be burdensome for industry' was in fact combined with market-making considerations (COM89:46). To this end, the SANCO drafting unit evaluated the extant national regulations and picked the most stringent approaches they could find for each issue. Particularly the highly protective Belgian law served as a role model here (ibid.). In fact, SANCO proposed the highest available level of consumer protection rather than harmonising at the lowest common denominator.

While a detailed analysis of the encompassing proposal would exceed the scope of this article, the results of SANCO's equality-enhancing approach can be highlighted along some of its key provisions. Especially the principle of responsible lending was contested. It fully obliged creditors to assess before the agreement whether the consumer is actually able to bear the credit obligations (Commission of the European Communities 2002: article 9). The banking industry was shocked, feared that this principle would lead to an increase of litigations against credit providers and argued that it is predominantly the prerogative of the consumer to assess whether he or she needs the credit and can bear the respective obligations (ESBG 2003: 7-9).

[8] Both a Green Paper in May 1996 (COM(96)209) and a follow-up paper in June 1997 entitled "Financial Services: Enhancing Consumer Confidence" (COM(97)309) were drafted in MARKT, while DG SANCO merely assisted.

Clearly, the banking sector started from the assumption of a fully rational consumer rather than from the underprivileged, weak market participant SANCO officials had in mind. Consumer associations, in contrast, were very satisfied with the protection offered by the Commission proposal. Along the same lines, the responsible lending principle stirred internal conflict with DG MARKT (COM89:82; COM90:40).

Another heatedly contested issue was the way in which the total cost of credit are communicated to the consumer (COM89:30) which was encapsulated in the proposal's provision on the annual percentage rate (APR). Compared to the extant directive, the SANCO proposal included a range of additional cost elements creditors must consider in the calculation. This involved also third party costs such as notary fees or even insurance premiums meaning that the creditor must disclose a set of cost that go beyond his or her own control. Particularly this rule highlights that SANCO went for a regulatory approach of direct and conclusive rules governing the market. The banking industry defied this as 'unworkable' (ESBG 2003: 10) and also DG MARKT argued for a 'narrow sort of box of cost elements' (COM89:82). Here DG SANCO's strategic pick-and-choose from more stringent national rules became visible. The fact that APR calculation had been subject to minimum harmonisation 'prompted a number of Member States to regulate this area beyond the requirements of the directive.' In contrast, the new directive should include them as well in order to fight market fragmentation (Commission of the European Communities 2002: 5-6). At first sight, this reasoning resembles the typical efficiency-based arguments for full harmonisation. Yet, it differs in an interesting respect. Rather than taking the lowest common denominator or trying to strike a balance between extant national protection regimes, DG°SANCO relied only on those regimes with the highest level of consumer protection as the benchmark for justifying the position taken in the regulatory proposal.

Harmonisation on the highest level of protection is finally underlined by the provision on joint and several liability in credits linked to particular consumer goods. It basically renders any creditor equally liable for defective products purchased on credit (Commission of the European Communities 2002: article 19). The principle was largely a transfer of the so-called Section 75 law of the UK Consumer Credit Act. It was thought as protecting the consumer against the risk of paying debt for faulty products (COM89:37) but was also a valuable advertising tool that boosted the consumer credit market in the UK (COM89:37). Yet, in other European regimes, the idea of creditor liability was 'totally outlandish' (COM89:41) and the banking industry 'strongly opposed' because 'lenders intervene neither in choosing the merchant or seller, nor the product, nor concluding the transaction' and can accordingly not be held responsible (ESBG 2003: 12). Again, SANCO largely ignored these claims and stuck with the most stringent rule it could find among the member state regimes. European consumer associations applauded (EURO COOP 2003; also BEUC 2002: 14-5) while DG MARKT criticized the liability rules as ‘something not very easy to justify and rationalize as to why a credit card provider should do that’ (COM119:62).

Similar logics can be found for other provisions in the proposal. In sum, SANCO proposed a regulation that was geared along equal protection for consumers in the European market. Yet, this regulation could come about only because inefficiencies persisted in that market before. They provided the basic justification for regulation but the intentional focus on weak market participants and SANCO’s need to delineate its competences from the internal market DG resulted in a proposal that clearly aims to re-distribute rights along an equality-enhancing motivation. Not the least, the high level of protection entailed in the regulation was driven by the political clout of protecting consumers in credit markets. Merely enhancing efficiency by removing regulatory barriers would ‘deliver a bad message’ politically and would be ‘a very difficult position for the Commission’ to be in (COM119:61).

The clear focus on only one societal segment was also mirrored in interest group access. It is important to note that stakeholder meetings indicated a ‘clear desire’ from the consumer associations (COM111:80) as well as ‘unanimous’ opposition from the industry side. In response to this outright industry disagreement, ‘further consultation was entirely avoided’ by DG SANCO (ESBG 2003: 2-3) so that ‘the industry felt that it had been very much disregarded in the process’ (COM119:88). This neo-pluralist and intentionally skewed interest group involvement also affected internal interaction with DG MARKT which ‘had more the ear […] to the banking sector’ (COM111:96). MARKT officials felt that banking interests were ‘not being properly consulted’ (COM119:85) which pushed the Directors-General of both DGs to the drafting table early on (COM119:127) and resulted in a blockade of the formal interservice consultation. As was the case for the directive on anti-discrimination these more fundamental questions were subject to exchange among Cabinets and Commissioners about the quality of markets so that ‘in the end it is a political decision’ (COM89:119).

Rather than enhancing market efficiency also this case is more consistent with an equality enhancing perspective. Redistribution of rights among producers and consumers was an aim rather a constraint, detailed rules rather than self-regulation along pre-defined objectives were pre-scribed, and a neo-pluralist style of communicating with external stakeholder contacts coincided with a political bargaining process among the relevant regulatory actors.

4. Conclusions

The empirical cases show that regulatory decision-making in the Commission may follow an equality-enhancing perspective on regulation and thereby take a middle ground in between traditional welfare state models and purely efficiency focussed regulation. Against this view, neither the neo-liberal deregulation of Europe's internal market nor its social embedment can be considered as the automatisms that much of the contemporaneous writing implies. Rather we require a view on the powers of involved actors – across but especially also within European institutions. So what does the comparison of these two policy formulation processes tell us about factors that push the Commission position towards an equality- rather than an efficiency-enhancing perspective?

In both cases, prevailing inefficiencies in the European Single Market were the starting point of policy formulation and it appears to be relevant that the respectively favoured societal group can be framed as an active participant in that market.

Initially, both cases were driven by the *agency* of actors within the Commission. The precondition is that inside the Commission efficiency enhancement is always pursued by some, and not by others. To answer the question whether we can expect Brussels to intervene only where markets fail or also where social interests demand regulation, we accordingly need a disaggregated view on the Commission. On the one hand, this refers to entrepreneurial actors in the drafting DGs. But for both cases it was important for the Directorates-General that they held a decidedly social mandate and could rely on treaty bases justified along equality-enhancing lines. Delineating their own competences from traditionally economic DGs, the former interests within the lead departments explain why they wanted to push for more equality, while the latter institutional resource explains why they could pursue this aim.

Yet, the institutional resources were not enough. In both processes the leading DGs could draw on the support of consumer associations or the broad coalition of anti-discrimination NGOs – thus deviating substantially from both involvement of only economic actors or involvement of corporatist actors as classically the case for EU social regulation or national welfare states. In the two cases this was successfully - yet, the need to frame beneficiaries as market participants may limit the scope of European re-regulation if we compare it to national polities where social policy often specifically targets those not able to participate in markets.

Linked to this, another observation is that equality enhancement means in the Commission context a re-distribution of rights rather than resources. This is interesting and might be worth further pursuing in different regards. In a positive account the fundamental rights agenda is by many seen as completing the political union. Given the institutional difficulties in the EU to conclude positive integration steps further aggravated by the increasing heterogeneity individual rights provide for much better opportunities since they cut across traditional conflict lines. What is more they might be a piece in the puzzle to make the EU loveable (to allude to the famous phrase by Delors that ‘you cannot love a market’). From a more critical perspective the shift towards individual rights might question the traditional logic of welfare provision in the ‘positive’ state which can be characterized as provided through social security, involving corporatist actors and supported by macroeconomic stabilisation (in turn embedded in respective historically rooted beliefs and norms). In a nutshell individual rights aim at increasing the autonomy of citizens in a market setting but they may endanger the notion of solidarity across social groups. In times where most western societies are characterized by ever growing disparities this might be a fatale development - even more so, where individual rights undermine the very institutions that are crucial for their implementation such as trade unions or financial capacity for redistribution (Schmidt 2012, forthcoming).

In sum, our inductive comparison implies the following argument: With distributive roads closed for social policy at EU level, actors interested in pursuing broader societal goals are increasingly forced to a detour via market efficiency. Put differently, while in many member states classical social policy sought to de-commodify individuals from the market, EU regulatory policy reflects interests of actors to change process and outcome of market transactions. In conclusion, there is a scope for a social embedding of the European internal market in principle but it is strictly constrained by its institutional foundation, the existence of pro-active agents within the Commission, a focus on market participants, and by the mere re-distribution of rights rather than resources. Accordingly it remains debateable to which extent the Commission under the Community method can counter-balance the pressures the internal market has put on the distributional agreements in the national markets of EU member states.

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