

Differentiated European Integration

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Differentiated European Integration

Liberalisation of Post, Public Transport and Ports

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Abbreviations

Commission	European Commission
Council	Council of the European Union
CR	Committee of the Regions
ESC	Economic and Social Committee
ESPO	European Sea Ports Organisation
ETF	European Transport Workers' Federation
Parliament	European Parliament

Abstract

Why is liberalisation reform introduced in some areas but not in others? In an introduction and four independent yet interconnected articles, this doctoral thesis aims at making a contribution to answering the above mentioned question. Through detailed case studies and process-tracing, the thesis outlines four key contributions: it uses institutional perspectives to understand why a common policy becomes different in character across sectors; it identifies conditions under which liberalisation reform occurs at both the EU and local level; it contributes to clarifying the scope regarding the assumption that a constitutional bias towards negative integration explains the introduction of liberalisation policy in the EU; finally, it adds insight as to how trade unions, which are generally considered to be weak in EU liberalisation politics, may be influential at the EU level.

There is more focus on sectors rather than the state, thus allowing for focus on policy level variables and not for example on the institutional features of different national political systems. The public service sector has been selected for analysis since differentiated integration remains under-researched in this area. A focus on infrastructures ensures that the selected cases - the Postal Directive, the Public Transport Regulation and the Port Directive - share certain similarities. As several public services are sub-national responsibilities, this thesis also contributes to understanding the appeal of competitive tendering at the local level.

The thesis consists of four chapters (i.e. independent articles) and an introduction that shows how these articles form an integrated set of output. The four independent articles are:

(1) An in-depth analysis of the Postal Directive that fully opened the postal services to competition. This chapter complements theories of institutional change by adding insight as to how layering brings about policy change of liberalisation in the EU.

(2) A case-study of the failed Port Directive. This chapter contributes to the literature of European integration by outlining the forces that create barriers for further integration and tests the widely held assumption that trade unions have limited impact on the EU level decision-making process.

(3) A comparative analysis of the two above mentioned cases (from points one and two), alongside a third case, the Public Transport Regulation. This chapter questions the scope of the widely cited assumption that a bias in the treaties explains the introduction of negative integration in the EU and asks what the limits of EU liberalisation are.

(4) A case study of the organisation of public transport in the Norwegian County of Sør-Trøndelag. This chapter contributes to our understanding of why liberalisation occurs at sub-national level, even when policies endorsed at higher levels remain flexible (i.e. EU policies and the transposition of such legislation at the national level).

Table 1: Overview of the articles

	Chapter 2	Chapter 3	Chapter 4	Chapter 5
Title	Gradual Institutional Change in the EU: How Liberalisation was Achieved in the Postal Services Sector	The Role of Labour and Associated EU Liberalization Challenges: Insights from the Port Sector	The Scope of Negative Integration in Infrastructures: A Comparative Analysis of Post, Public Transport and Port Services	Why Politicians that Aim for Enhanced Political Steering Introduce Competitive Tendering and Agencies: Insights from a Norwegian County
Objectives	<ul style="list-style-type: none"> To explore the ways gradual processes contribute to resolving conflict and inducing policy change in the EU and what role concessions play in such processes 	<ul style="list-style-type: none"> To test the hypothesis that trade unions are weak at the EU level To explore barriers to EU liberalisation reform 	<ul style="list-style-type: none"> To explore the scope conditions of the assumption that a bias towards negative integration in the European treaties drives liberalisation reform in the EU 	<ul style="list-style-type: none"> To explain why legislators that seem to prefer re-integration of public services into public hands introduce competitive tendering and agencification at the local level
Key claim	<ul style="list-style-type: none"> 'Layering' and concessions importantly facilitated for compromise-finding in the EU postal services 	<ul style="list-style-type: none"> Trade unions were effective in limiting EU liberalisation as they were able to exploit the division of industry interests to resoundingly oppose policy change 	<ul style="list-style-type: none"> The mentioned bias does play a role in affecting liberalisation reform in public infrastructures; however, court rulings did not enforce full market-opening in any of the cases 	<ul style="list-style-type: none"> Under certain conditions market-conforming principles may enhance political steering and make it politically desirable
Argument	<ul style="list-style-type: none"> Elements of modification and delay made the proposals less 'dangerous' to opponents Strategic moves of including timetables and expiry dates created reform pressure 	<ul style="list-style-type: none"> Actor constellations played an important role for explaining the policy outcome The gap between the possibility of giving input and how the process was organised politicised the process 	<ul style="list-style-type: none"> Trade unions protests, centralisation (i.e. whether the services are national or sub-national responsibilities) and the Commission's willingness to give concessions contribute to explaining differentiated integration across public services. 	<ul style="list-style-type: none"> Existing structures in national legislation and earlier local decisions make a turn away from market-driven principles difficult even in a situation where supranational legislation allows for re-integration and local legislators under pressure from trade unions favour re-integration
Key contribution	<ul style="list-style-type: none"> Complements theories of gradual insitutional change by adding insights from the EU literature 	<ul style="list-style-type: none"> Provides an analysis of a case in which liberalisation does not occur, thereby showing more clearly forces that are hidden in the majority of contributions on EU liberalisation reform, which explain further integration (not failure) 	<ul style="list-style-type: none"> Makes a contribution to the constitutional bias research, focusing on highly politicised policy areas 	<ul style="list-style-type: none"> Explains why re-integration of public service provision may be difficult and how market-oriented reform, under such conditions, may increase political steering
Methodology	<ul style="list-style-type: none"> The Postal Directive, including two amendments Document studies, interviews, secondary data 	<ul style="list-style-type: none"> The two rejected EU Port Directives Document studies, interviews, secondary data 	<ul style="list-style-type: none"> The Postal Directive, the Public Transport Regulation and the Port Directive Document studies, interviews, secondary data 	<ul style="list-style-type: none"> Organisation of public transport in the Norwegian County of Sør-Trøndelag Document studies, interviews, secondary data
Scope	<ul style="list-style-type: none"> Postal sector 	<ul style="list-style-type: none"> Port sector 	<ul style="list-style-type: none"> EU liberalisation reform of public services from the mid-90s to 2008 	<ul style="list-style-type: none"> Organisation of local public transport in Norway

1 Introduction

1.1 Research Questions and Objectives

This thesis outlines four key contributions: Firstly, it uses institutional theories to explain the phenomenon of differentiated integration to add insight to the question why liberalisation reform is introduced in some areas but not in others. Secondly, it identifies conditions under which liberalisation reform occurs at both the EU and local level. Through placing an emphasis on differentiation, a bridge is created between contributions addressing the EU and local politics. Thirdly, it contributes to exploring the scope of the assumption that a bias towards liberalisation in the EU treaties explains the introduction of such a policy in the EU. Finally, it adds insight as to how trade unions may be influential at the EU level, although they have experienced considerable challenges since the introduction of the single market in the European Union.

In order to endeavour to understand differentiated integration, the area of liberalisation policy has been selected as this is the area where European integration has expanded the most (Cini & McGowan, 2009, p. 1). Simultaneously, there is variation across areas as to how far-reaching such EU reform is - it remains differentiated. Despite an increasing amount of literature addressing differentiated integration, the phenomenon remains under-researched, particularly in relation to EU secondary legislation (Dyson & Sepos, 2010; Holzinger & Schimmelfennig, 2012; Leuffen, Rittberger, & Schimmelfennig, 2013). One aim of this dissertation is therefore to contribute to filling this gap in the literature.

Differentiated integration is defined as a common policy that opens for differences or becomes distinct in character across geographical or functional areas. As differentiated integration is an empirical phenomenon and not a theoretical framework, there is a need to draw on other theoretical perspectives to understand it as an outcome. Institutional theories are well-suited for this purpose, as such approaches are expected to be able to shed light on both stability and change (March & Olsen, 1989, p. 166), thereby contributing to our understanding of why liberalisation reform is introduced in some areas but not in others. The added value of drawing on institutional approaches is also that institutional perspectives highlight the importance of established institutions,

for example how public service provision has been organised in the member states throughout history. However, although institutional theories have gained considerable attention since their profound entrance into EU scholarship in the 1990s (Bulmer, 1994; P. Pierson, 1996; Schneider & Aspinwall, 2001), the focus remains on the European level in a great deal of literature on EU policy-making that uses institutional theories¹.

Liberalisation as a policy area is interesting, as the EU is perhaps first and foremost known as being a liberalisation project². The European Single Market, which was established with the Single European Act in 1992, seeks to guarantee free movement of goods, services, capital and people. Today, this internal market is a ‘consolidated area’ of the EU – it is the area where integration is most extensive and the European Commission and the European Court of Justice have the largest leverage to push for reform (Cini & McGowan, 2009, p. 1). Yet, EU liberalisation reform remains controversial. In the summer of 2012, several newspapers stated that the European transport ministers continued to be divided about establishing a ‘single European railway area’, implying further liberalisation and simplification of rules for the railway sector (EurActiv, 2012b). At about the same time newspaper headlines suggested that EU energy liberalisation might face a backlash because price reduction had not been achieved as expected (EurActiv, 2012a). Later in autumn 2012, dairy farmers from all over the EU descended on Brussels to protest against the planned liberalisation of agriculture in 2015, dousing the EU quarter with thousands of litres of milk (EurActiv, 2012c). These examples show that liberalisation processes are ongoing and disputed - and that they have crucial effects on people’s everyday lives.

¹ Johan P. Olsen (2009, p. 45f) and Stephen Wilks (2010) argue that institutional approaches in the EU literature tend to prioritise supranational institutions. Olsen finds this unusual as institutional perspectives highlight the importance of established institutions, these being domestic institutions.

² Epistemologically, liberalisation corresponds with integration, as liberalisation is a central policy of the EU’s aim to enhance the internal market. As the EU cannot enforce privatisation, liberalisation refers to introducing competition to the market; yet, competition and privatisation tend to complement each other (Vickers & Yarrow, 1991). Another commonly used label for the elimination of barriers to trade and market distortions that is also adopted in this thesis is ‘negative integration’ (Scharpf, 1996).

These instances also highlight that there are barriers to liberalisation, implying that liberalisation does not always get ahead or not as far as the reformers had originally intended. Therefore it is of interest to analyse the conditions under which liberalisation policy succeeds or fails not only in the EU, but also at sub-national level where the effects of liberalisation are really felt. Limiting the focus to decision-making processes in the EU and at the sub-national level, the key question raised in this dissertation is: *Under what conditions does EU liberalisation policy occur?*

Public services defined as ‘the business of supplying a commodity (as electricity or gas) or service (as transportation) to any or all members of a community’³ is a relevant area for analysing this question for three main reasons⁴. Firstly, the extent of liberalisation remains differentiated in public services, thereby facilitating exploration of the processes in both positive and negative cases (i.e. cases where liberalisation occurs and does not occur). Secondly, a focus on infrastructures ensures that the selected areas share certain similarities that make them suitable for comparison⁵. Thirdly, several public services are sub-national responsibilities, a fact which also makes it interesting to study decision-making processes at the local level, where EU policies are implemented.

As such, liberalisation has been prevalent within public services since the early 1990s (Finger & Künneke, 2011b). However, in the literature of European integration, the freedom to provide services in the internal market has been considered to be unexpectedly slow (Stone Sweet, 2010, p. 28) and a ‘leftover area’ (Bulmer, 2009, p. 310). Moreover, the extent of liberalisation of public services varies across sectors. For example, whilst limited in the energy sector, EU liberalisation reform is extensive in telecommunications (Humphreys & Padgett, 2006; Schmidt, 1998). One objective of this thesis is to understand this phenomenon in public service sectors.

³ This definition of *public services* has been taken from the online encyclopaedia Merriam-Webster: <http://www.merriam-webster.com/dictionary/public%20service>

⁴ Attention is paid to sectors rather than the state to ensure a focus on policy level variables and not on the institutional features of different national political systems (Olsen, 2008; Radaelli, Dente, & Dossi, 2012).

⁵ Although each infrastructure sector has its own distinct characteristics, infrastructures share similarities as network industries and are commonly treated together in political science and economics research, for example Edward Elgar's 'International Handbook of Network Industries. The Liberalization of Infrastructure' (Finger & Künneke, 2011a).

The focus is on explaining integration, which used to be a common research goal in the first phase of EU scholarship from the 1950s onwards (see Haas 1958; Rosamond, 2007). Yet whilst this early scholarship is characterised by 'grand theories', the aim of this thesis is to contribute middle-range theories; that is, starting with an empirical phenomenon. Whilst several EU scholars today focus on governance, integration studies are still relevant, as for example shown by the increasing interest in differentiated integration (e.g. Holzinger & Schimmelfennig, 2012).

Although differentiated integration has been an important feature of European integration since the 1990s, it is still insufficiently researched. Since Alexander Stubb's (1996) categorisation, the research interest in this topic has increased, including further classifications (Howarth & Sadeh, 2010; Tuytschaever, 1999); temporal (Goetz, 2010) and spatial dimensions (Keating, 2010); there are questions as to why some policies attract non-EU member states, whilst some member states choose to opt out of other EU policies (Leuffen et al., 2013) and whether being an 'outsider' affects the ability to influence EU policies in general (Naurin & Lindahl, 2010). To contribute to this increasing body of literature, three EU cases that vary with regards to the degree of liberalisation achieved as an outcome have been selected: (1) the Postal Directive, which opened the entire postal services market to competition; (2) the Public Passenger Transport Services Regulation by Road and Rail (hereafter: the Public Transport Regulation) as a case that leaves it to member states to decide whether to produce public transport services in-house or introduce competitive tendering; and (3) the Port Directive, which has been voted down twice⁶. The added value is in the field of secondary legislation and cross-policy areas rather than the more common focus on the choices of different member states.

As several public services are sub-national concerns, it is also of interest to study the effects of differentiated EU policy at the local level (i.e. 'local' refers to both the municipal and regional level). One characteristic of differentiated integration is that it opens up for flexibility as to how the relevant authorities implement EU's secondary legislation. In fact, differentiated integration and flexibility are often used interchangeably (Kölliker, 2001, p. 127). One objective is therefore to understand why

⁶ These cases have been selected for theoretical exploration. However, they also represent crucial cases for testing particular assumptions. In addition, process tracing makes it possible to find the relevant mechanisms that connect the putative causes with the outcome (for further elaboration, see the methods section).

liberalisation occurs at the sub-national level, even when the policies from above (i.e. EU policies and the transposition of such legislation at the national level) do not enforce competition. This is a relevant question, as a large body of literature focusing on local liberalisation reform takes for granted that the EU has influenced such local reform (Kuhlmann, 2008, p. 579; Wollmann, 2012, p. 42). At the same time, this literature suggests that despite being exposed to similar globalisation or Europeanisation pressures, urban or national organisation of economies remains differential (P. A. Hall & Soskice, 2001; Lorrain, 2005). Similarly, it has been argued that partisan differences remain relevant for explaining liberalisation policies at the national level despite global pressures that are expected to diminish the opportunity for different parties to influence such policies (Obinger, Schmitt, & Zohlnhöfer, 2013). Therefore, urban and national organisation is considered relatively resistant to the pressures of policy change. Alkuin Kölliker (2001) argues that this concurrent progress of harmonisation and differentiation is necessary for European integration to occur at all:

'If differentiation is ruled out for legal or political reasons and if neither issue linkage nor equivalent techniques are applied, any unwilling member may block a proposal for further integration. In this case, neither initially willing nor initially unwilling members will integrate their policies in the respective field. As a result, the level of integration remains low across the whole Union while the unity of the EU legal system is preserved. If differentiation is applicable, the conditions for integration become more relaxed, since initially willing countries may integrate their policies even though other countries are initially unwilling' (Kölliker, 2001, p. 134).

Such arguments suggest that the effect of the EU on national and local policies is complex. Due to considerable derogations (even in the area of liberalisation), the extent of EU influence needs to be considered relative to national and local factors, for example, when public authorities that oppose competition surprisingly decide to introduce competition in a market where the EU legal framework is differentiated. Hence, there is a need for gaining further insight into how to understand the prevalence of market-oriented approaches in public services that used to be public monopolies, in particular where pressures from higher political levels seem weak. For such an endeavour, the Norwegian County of Sør-Trøndelag has been selected. Given the highly topical issue of being inside or outside the EU in the context of current debates taking place in the United Kingdom, Norway is an interesting country to study

because of its compliant non-member status⁷. Due to its membership in the European Economic Area, EU rules of the common market apply in Norway. Moreover, the case of Sør-Trøndelag is interesting, as the majority of local politicians were originally opposed to competitive solutions. Still, they decided to introduce competitive tendering. In view of emerging debates of re-municipalisation, this case provides useful insight into the appeal of competitive tendering at a local level.

In the literature, the strand of European integration and that of urban and regional research remain more or less separate. An extensive amount of EU literature puts emphasis on the supranational institutions when explaining wider and deeper integration and could benefit from incorporating insight from the domestic policy arenas (Saurugger & Radaelli, 2008). In contrast, urban and regional research could benefit from analysing the actual effect of the EU on local politics relative to other factors in more detail, rather than taking EU pressures for granted. However, the focus on differentiation is common to both the EU literature and urban and regional research. In both bodies of literature, differentiation is viewed as a consequence of different norms and practices. Therefore, a focus on differentiation may contribute to bridging the strands of EU and local politics. However, as mentioned, differentiated integration is considered a phenomenon and not a theory in itself – it is an outcome rather than a cause. At best, differentiation contributes to understanding how an outcome is reached, i.e. as a compromise-finding mechanism for resolving deadlock (see for example Falkner, 2011a, p. 13; Holzinger, 2011, p. 122f), yet it does not cause policy change by itself. Whilst differentiation is under-researched in the EU literature, urban and regional scholars explain differentiation with institutional theory. Therefore, this chapter aims to show how institutional theory may be useful to understanding both liberalisation outcome at both the local and EU level.

⁷ Ulf I. Sverdrup (2000, p. 75) calls Norway an 'enthusiastic adapter' for its rapid transposition of EU legislation into national law.

1.2 Roadmap of the Dissertation

This dissertation is a paper-based thesis, including four independent - yet interconnected - articles. Whilst each article addresses a unique objective and question, the aim of this first chapter is to show how these four articles form a coherent and integrated set of projects and outputs. This introduction therefore includes a theoretical, methodological and empirical section.

First, a theoretical section presents a shared institutional approach. Second, a methodological section describes the research design and includes a discussion of reliability and validity concerns. Third, an empirical section summarises the key findings. The evidence is then related to the institutional perspectives presented in the theoretical section. Fourth, a findings section provides an answer to the research questions and aims as presented in this introduction. Fifth, a summary of each individual paper follows. Sixth, an outlook section finalises the analysis and offers suggestions for future research.

In Chapter Two to Five, the individual articles are presented as they have been submitted for consideration for publication. Finally, the annexes at the end of this dissertation provide empirical data on the extent of liberalisation in the postal, public transport and port sectors prior to EU reform (Annex 1) and detailed information about the collection of oral data, including examples of interview guides (Annex 2).

1.3 Institutional Perspectives

Whilst the theoretical perspectives vary in the individual articles, the institutional theories create a common thread. To avoid unnecessary repetition, the focus in this chapter is on the institutional approach, leaving other theoretical perspectives to the individual articles (Chapter 2-5).

1.3.1 Ontology

Most researchers strive for ontological purity, usually assuming that behaviour is either driven by cost-benefit calculations ('logic of consequentialism') or based on socialisation into roles ('logic of appropriateness'). However, an increasing number of scholars (Checkel, 2001; March & Olsen, 1989; Murdoch & Geys, 2012; Niemann, 2006; Risse & Wiener, 1999) argue that research should reflect both, as the focus on one of them misses important aspects of human motivation. Yet, whilst a pure ontological approach has its strength in adopting a precise relationship between institutions and behaviour, a combination of both tends to be inconsistent. Despite such concerns, I argue that both forms of logic coexist in the real world; therefore, both should be accounted for. In the following, I present different institutional approaches and elaborate on the ontological assumption of this dissertation, arguing that not only do actors behave purposively and rationally, but they are also socialised to behave in certain ways.

In their ground breaking research, James March and Johan P. Olsen (1984, 1989) criticised the traditional approach of viewing political events as the consequence of calculated decisions by individuals, whose preferences and powers are exogenous to the political system. On the contrary, they argued that political processes are not only to be understood as a sum of such individual behaviour ('aggregative'), but that behaviour also develops within the context of political institutions ('integrative') (March & Olsen, 1989, p. 118). The argument is that actors do not always adopt the most efficient forms and procedures, but base their behaviour on socialisation into roles, adherence to scripts and resonance with collectively held norms. Although criticising ideas based on the rational actor assumption, March and Olsen do not ignore this motivation of behaviour: 'the spirit is to supplement rather than reject alternative approaches' (March & Olsen, 2006, p. 16). Thus, March and Olsen do not place themselves within either of the categories that Peter Hall and Rosemary Taylor (1996) label 'rational choice institutionalism' and 'sociological institutionalism'. Instead,

March and Olsen launch a distinct approach, arguing that both forms of logic coexist. However, briefly stated, the school known as rational choice institutionalism inhibits the various assumptions that March and Olsen criticise; and sociological institutionalism incorporates the practices associated with the social environment introduced by them.

One criticism of assuming that both logics coexist is inconsistency. Attempts to solve this issue include different ways of bridge-building (March & Olsen, 1989). One way is middle-ground theorising, assuming that the various forms of logic are active under different conditions and contexts. For example, agents may enter into a new relationship for reasons of self-interest, yet over time they develop certain norms and identities that alter their preferences (Checkel, 2001, p. 20). Another attempt to solve this issue is to adopt a continuum between rational choice and sociological institutionalism, where actors behave more in line with one form of logic than the other (Aspinwall & Schneider, 2001, p. 2). Similarly, others (Murdoch & Geys, 2012) argue that both forms of logic take place simultaneously as the bounded rationality assumption of more sophisticated rational choice theory (i.e. actors make decisions, but they are constrained) share commonalities with the rule-following habit, where actors still may behave purposively, but such behaviour is socially constituted (i.e. whilst the actors may follow rules, they are actually concerned with purpose).

In contrast, several researchers support a purely rational choice approach (for example Moravcsik & Schimmelfennig, 2009), the strength of which is the ability to pose a precise relationship between actors and structures (Hay & Wincott, 1998). An issue of concern is that ‘just so’ stories arise from assuming that ‘the fit between behaviour and interest explains the behaviour’, when it could be coincidence (Elster, 2000, p. 693; see also Green & Shapiro, 1994). The argument in this dissertation is that such tautology is not fruitful: It does not provide a good fit with the empirical world to assume that no matter how an actor behaves, it is in line with the actor's self-interest. Nor is it a good fit to consider any outcome as a consequence of rule-following, as constructivists may do.

One of the cases examined in this dissertation, the Port Directive (Chapter 3) serves to illustrate this dilemma. The evidence pertaining to the Port Directive suggests that certain member states, although having given assent to the proposal in the Council, continued to lobby against the Port Directive in conversations with parliamentarians and interest groups in order to influence the former to vote it down. This example suggests that a number of member states opposed the Port Directive – it was not in their interest. If the Directive had been in their interest, they would have been satisfied with the Council’s decision to accept the Directive and not continued to lobby against it. Accordingly, the relevant member states did not behave rationally (in the consequentialist understanding of the term) when accepting the proposal in the Council. On the contrary, following the social norm of consensus and demonstrating commitment in the EU, member states were willing to go against their initial preferences. Thus, in this context they accepted the Port Directive as a single proposal, although this was against national interest:

‘Because every single dossier is not important enough for those that have another level of abstraction, to be understood that way. When you face one puzzle it doesn’t fit the picture, but when you have ordered a thousand bottles and there is cork in one of them and only half the content and a bit of carbon dioxide gas has gone out, then it doesn’t matter, when only one bottle is like that [...], as long as the 999 are complete, it doesn’t matter. The system is designed that way’ (interview i).

The empirical example illustrates that socialisation had changed the relevant member states’ preferences and identities, making them accept the proposal in the Council. The example also shows that an actor may adopt both rule-following (i.e. in the Council) and self-interest (i.e. when lobbying the Parliament) during the decision-making process of a directive.

However, as rational choice theory has accommodated non-material interests (Schimmelfennig, 2000), it has also expanded to become more ‘sophisticated’ (Shepsle, 2006) or ‘imperial’ (i.e. it subsumes constructivist elements) (Checkel & Moravcsik, 2001, p. 242). Rational choice institutionalists who incorporate softer elements would argue that the mentioned example of behaviour in the Council was based on cost-benefit calculations. Given the constraints of social consensus norms and the qualified majority voting, it is rational for member states to give assent in the Council, as the alternative would be too costly, for example if the opposing member states were a minority. Given the fact that there are certain costs pertaining to being

outvoted (i.e. embarrassment, reduced chance of ‘pay back’ in the form of future concessions or side-payments), the social norm implies that member states tend to follow the majority (Novak, 2010, p. 93). At the micro level, representatives in the permanent representation feel embarrassed, ‘if a vote revealed them to be in a minority position’ (Novak, 2010, p. 89). A rational choice researcher would therefore argue that in the given example, it was more beneficial for the relevant member states to influence the Parliament to reject the proposal than for them to go against the social norm of consensus in the Council.

The extension of rational choice theory to include broader goals may represent an improvement of the theory. However, despite such advances, rational choice theory is often inadequate to illustrate the empirical world, where actors are subject to different forms of social logic and rationalities. To avoid tautology and imperial assumptions, as James March and Johan P. Olsen highlighted already in the late 1980s, I assume that both forms of logic exist.

1.3.2 Institutional Stability

The schools of rational choice and sociological institutionalism have been mentioned. There is also a third school called ‘historical institutionalism’, which focuses on how institutions develop over time and affect the positions of actors in ways that may have been unintended or undesired by their creators. As institutions reinforce themselves, create path dependencies and lock-ins over time, historical institutionalists argue that it may be difficult to alter certain institutions, as reversals are costly or difficult (P Pierson, 2004). Hence, one virtue of historical institutionalism is the ability to explain stability of political institutions.

An important notion is ‘path dependency’, defined as ‘social processes that exhibit positive feedback and thus generate branching patterns of historical development’ (P Pierson, 2004, p. 21). It implies that institutions over time are characterised by sluggishness or inertia. Past experience guides searches for new actions, and old policies may be chosen when facing new problems (Steinmo & Thelen, 1992). Yet, the literature is not always clear as to how path dependency curtails policy options. Several scholars (North, 1990, p. 94; P. Pierson, 2000, p. 24) clarify how this happens, adopting self-enforcing mechanisms that Brian Arthur (1988) originally developed in economics. There are four such features: (1) large set-up or fixed costs mean that

actors have a strong incentive to stick with the solution that they have already invested resources in; (2) learning effects make the usage of an arrangement more effective and create further invention related to the policy; (3) coordination effects make a policy more attractive, as the benefits increase as others adopt the same policy; and (4) adaptive expectations imply that actors adapt their behaviour based on what they expect to be best practice in future, thereby making those expectations come true. These features contribute to generating ‘increasing returns’ that benefit existing paths more than other solutions.

There is also a cultural approach as to how path dependency restrains policy decisions. Analysing the differentiated ways of organising urban public services, Dominique Lorrain (2005) argues that even when an institutional arrangement is exposed to disruption, there are some general laws and principles that are established over the long term and capable of evolving whilst preserving certain essential properties. In contrast to the economically inspired focus on increasing returns, Lorrain claims that values and political culture are important for explaining institutional stability. Different ‘collective mentalities’ that go back in time have different concepts of how to best handle conflicts of interest. When new problems arise, actors refer to such past references (i.e. higher, unwritten principles). This is the link to differentiation. Lorrain argues, ‘Everywhere, the architecture of an industry reflects higher principles’ (2005, p. 248). As these higher principles differ across countries, organisational differentiation that is widely documented in urban and regional research persists.

Other urban and regional researchers support the claim that there is no convergence, but rather a range of situations where each city or region finds its own solution (Goldsmith, 1992, p. 395; Stoker, 1997, p. 205f). However, their concept of path dependency is broader than Lorrain’s. Gerry Stoker (1997) argues that organisational differentiation is due to pre-existing institutional arrangements as well as political culture and objectives. Path dependency could therefore be understood as including both an economic dimension of increasing returns as well as a cultural dimension. Stoker also mentions that the power balances between affected interests play a role in the differentiated solutions. As shown in the next section, whether or not a political majority is able to fend off pressures by minorities is an important element of preventing policy change.

Further, analyses of national economic and political institutions find that countries have headed down different paths in the unfolding of their liberalisation programs despite being subjected to pressures of convergence. Peter A. Hall and David Soskice (2001) argue that this is due to the governments' interest in ensuring that institutional arrangements are consistent with the needs of their own economies. In line with the mechanism of increasing returns, they argue that companies draw benefits from existing systems of relational contracting. As firms have invested in certain assets and existing institutional arrangements may give firms competitive advantages, firms will gravitate toward the mode of coordination for which there is institutional support.

Up to this point, different concepts of path dependency have been mentioned. For the purpose of analysing whether path dependency contributes to explaining the outcome in the selected cases, the extent of liberalisation policy in the different sectors prior to the reforms or reform attempts in the EU is of interest. This type of 'fit' of EU reform with national reform has been of importance in research focusing on the implementation of EU policy (Héritier, 2001a). However, as this does not seem to differ in any important way in the EU cases (for an overview of the number of member states that had introduced liberalisation policies in the postal, public transport and port sectors, see Appendix 1), path dependency does not seem to be relevant for explaining why liberalisation occurs in the form of an EU directive or regulation in the postal and public transport sectors, but does not occur in the port sector. In contrast, path dependency may be well-suited to explaining what happened in the local case, as the politicians in Sør-Trøndelag had privatised the public service production at an earlier point in time (see Chapter 5). This may have created a path towards introducing competition, as privatisation and competition complement each other (Vickers & Yarrow, 1991, p. 117).

1.3.3 Institutional Change

Despite the stability inherent in path dependency, policy change occurs. There are two distinct perspectives that explain policy change: one highlights triggering events or sudden punctuations such as external shocks, crises or other events that disrupt periods of stability (for example Baumgartner & Jones, 1993; True, 2000); the other perspective emphasises the slow-moving, continuous processes of reforms (J. Mahoney & Thelen, 2010b; Streeck & Thelen, 2005).

The former perspective highlights ‘critical junctures’, defined as ‘brief moments in which opportunities for major institutional reforms appear, followed by long stretches of institutional stability’ (P Pierson, 2004, p. 134f). For instance, within the EU literature, court rulings are considered important formative moments for affecting policy change in favour of liberalisation. In this literature, a dominant claim is that the European Commission and the European Court of Justice are able to enforce liberalisation due to the supremacy of EU law and a bias towards ‘negative integration’⁸ in the treaties (Alter, 1998; Scharpf, 1997, 2006; Schmidt, 2000)⁹. Hence, court rulings or threat of litigation trigger policy change to an otherwise stable institutional arrangement by bypassing reluctant member states or nudging them to compromise. For example, extensive literature claims that influential court rulings such as *Cassis de Dijon* (Alter & Meunier-Aitsahalia, 1994) and the ‘impeachment ruling’ in the transport sector (Brömmelstroet & Nowak, 2008; Giorgi & Schmidt, 2002; Héritier, 1997) have broken existing paths and contributed to new EU policy. Whilst *Cassis de Dijon* contributed to a new harmonisation policy based on ‘mutual recognition’¹⁰, the impeachment ruling resolved years of deadlock by enforcing the member states to agree on a common transport policy. Thus, court rulings are considered triggering events of liberalisation policy. As proposed in Chapter Four, court rulings could be relevant for explaining EU liberalisation reform. Based on a comparative analysis of the three EU cases, Chapter Four contributes to clarifying the

⁸ ‘Negative integration’ means integration that contributes to the elimination of national barriers to trade and distortions of competition. It is studied in more detail in Chapter Four. The structural bias is disputed, as there are other aims than market goals enshrined in the treaties (Héritier, 2001b). It is also questioned whether and to what extent such structural bias actually contributes to policy change. Handley Stevens (2004) puts forth that there must be some other reason for policy change, as the structural bias has always been there. When addressing the transport sector, he argues that it is nothing new that the Directorate-General for Mobility and Transport (DG MOVE) and Directorate-General for Competition (DG COMP) are responsible for transport, thereby representing interests of consumers and carriers in favour of liberalisation. Accordingly, other factors must have been decisive for the change towards liberalisation.

⁹ Such a formal-legal approach is one of the most used frameworks for analysing European political organisations and developments (Olsen, 2009, p. 45f). Whilst Olsen finds this unusual given the emphasis on behavioural approaches in political science in general, Rod Rhodes (2006, p. 96) argues that formal-legal perspectives have always been central in Continental Europe. According to Rhodes, when behaviouralism came as a reaction to such approaches, they still played an important role among French, German, Italian and Spanish researchers and remained alive in both the United Kingdom and United States.

¹⁰ ‘Mutual recognition’ is the principle that a product lawfully marketed in one member state should be allowed on the market in any other member state, even when the commodity does not fully comply with the technical rules of the member state of destination.

scope of Fritz Scharpf's (2006) assumption that a bias towards negative integration in the treaties facilitates for liberalisation reform in the EU.

Next, at the national or local level such 'judicialisation' is also expected to have certain effects. Due to the supremacy of EU law court rulings are effective at lower political levels, whose alternatives are limited by restrictions imposed on them by the supranational level. Moreover, with increasing liberalisation and the entry of new actors in previously protected national markets, the reliance on judicial approaches to regulation has taken over for traditional cooperative approaches between the industry and public authorities at national and sub-national levels (Kelemen, 2011). In the case study of Sør-Trøndelag in Chapter Five, which contributes to our understanding of why liberalisation occurs at the sub-national level in Norway, institutional coercion from 'above' is suggested as a putative explanation. This is relevant, as it is commonly assumed that the EU is the cause of several liberalisation reforms in member states and members of the European Economic Community (Culpepper and Fung 2006, p. 2). Jean-Claude Barbier and Fabrice Colomb (2012, p. 10) argue for example that, 'the fear of local authorities to be seen as trespassing EU law leads them to increase their recourse to cumbersome tenders'.

However, critical moments do not necessarily induce policy change. As in Kingdon's agenda-setting theory (2003) there might be 'windows of opportunities' that are not exploited, thereby resulting in no change at all. Moreover, policy change does not necessarily occur on a large scale or as abrupt as theories of punctuation may suggest. The neglect of policy change occurring through gradual processes and the lack of attention to policy conflict within the existing trajectories of public policy have been the subject of extensive criticism (Kay, 2005; Peters, Pierre, & King, 2005; Thelen, 1999). For example, B. Guy Peters, Jon Pierre and Desmond S. King (2005) argue that political pressures for change are more common than historical institutionalists assume, and the roles played by actors within institutions is crucial for understanding policy change.

Kathleen Thelen and her co-authors (J. Mahoney & Thelen, 2010b; Streeck & Thelen, 2005; Thelen, 2004) have developed a theory of gradual institutional change that accounts for both agency and political conflict. According to these authors, there is an inherent dynamic within institutions themselves, as institutions are 'distributional instruments laden with power implications' (J. Mahoney & Thelen, 2010a, p. 8). The

authors propose four aspects of the relationship between a rule and its interpretation and therefore the inconsistency between norm and practice (J. Mahoney & Thelen, 2010a, pp. 11-13). Firstly, a rule is never accurate enough to cover all situations in a complex reality. Rule application therefore involves creativity and accommodation to create a new reality, for example if a goal is not being attained. Secondly, actors have cognitive limits. Their information of how to apply a rule is limited; therefore, their actions may differ from the rule's intention. Thirdly, there are implicit assumptions that guide a rule, but such shared principles may be lacking, or actors opposing a rule may take advantage of the lack of specification on paper. Fourthly, change may occur when a rule is being implemented or enacted.

As mentioned in Chapter Two, five modes of policy change occur from these aspects (Streeck & Thelen, 2005). One of them is 'conversion', which means that a policy is redirected to new goals or functions, for example due to new power relations. The second mode is 'displacement', which happens as new policies emerge and diffuse, and a growing number of actors go over to the new system. The third is 'drift', which refers to a slippage between existing rules and the real world. The fourth is 'exhaustion', defined as an institutional breakdown. The final mode is 'layering', which sets in motion path-altering dynamics by carefully introducing new voluntary policies or policy at the edges¹¹. Eventually, displacement may occur as a result of such layering.

These modes of displacement and layering are particularly relevant for analysing selected decision-making processes in the EU. The others are not related; although there has been an increasing focus on environmental and climate concerns, it is disputed whether liberalisation is the way to solve such issues. Thus, conversion is not relevant. Moreover, despite the fact that technological innovations have changed the nature of the work and need for workers (in particular in the postal and port sectors), existing rules in these sectors are not likely to simply drift. This is because social concerns and the value-laden conflict inherent in public services make public services salient to the political agenda (see for example Prosser, 2005). Finally, none of the selected cases is about institutional breakdown, but rather policy change. Therefore, exhaustion is not a relevant mode. However, as existing institutions benefit or harm

¹¹ Eric Schickler (2001) describes layering as an accumulative process of change that occurs by adding new institutions rather than dismantling the old ones (see also Hacker, 2004).

different actors, they will have varying interest in sustaining or changing the status quo. Reformers will therefore aim for displacement or, if the opposition to reform is too great, settle for layering.

In the EU, there are strong veto positions; therefore, displacement is not likely unless induced through critical junctures, as mentioned earlier. Several researchers have aimed at understanding how the EU has been able to overcome deadlock or ‘joint decision traps’ in the EU (Falkner, 2011b; Héretier, 1999). One mechanism that such literature highlights is compromise-finding elements like differentiation. As elaborated further in Chapter Two, this element has a lot in common with layering in theories of gradual institutional change. In the EU literature, differentiation is an expression of a common denominator among member states. The aim is to agree on a compromise; and a watered-down policy is as far as the opposing parties are willing to go. In theories of gradual institutional change, differential growth of a policy is considered a strategic way of how reformers are able to circumvent the relatively stable status quo. Such circumvention is considered possible when beginning with smaller changes at the edges (Palier, 2005). What the two perspectives have in common is that change is reached - but only minor change. However, as theories of institutional change highlights, in the long run such minor changes may add up to quite fundamental ones.

If we are to include paying attention to political conflict and agency, theories of gradual institutional change are capable of explaining both stability (e.g. if the opposition is too great and unwilling to compromise) and policy change. This perspective is therefore well-suited to explaining differentiated integration across the three EU cases. As there are more veto positions in the political system of the EU than in the local case, layering - and not displacement - is likely to take place in the EU, whilst displacement may contribute to our understanding of how liberalisation was achieved in the local case.

1.3.4 Access to Institutions

Contrary to pluralist approaches that assume equal access for interest groups to the decision makers (Truman, 1951), institutional theories acknowledge that institutions tend to be biased towards certain interests (Baumgartner, 2007). This means that the possibility of actors (such as interest groups) to influence policy outcome varies. One concept that incorporates the centrality of institutions in understanding when interest groups succeed is political opportunity structures; that is, how easy it is to access a political system and how open the political system is to political actors that seek to influence it (Princen & Kerremans, 2008, p. 1132).

The EU as a multi-level political system offers several opportunities for interest groups that attempt to influence policies. It is usually assumed that interest groups focus on the access points where they have the best opportunities of being successful (Princen & Kerremans, 2008, p. 1131). To understand which access points in the EU make different groups successful, it should be recognised that the relationship between interest groups and the political system is mutual: interest groups need information in order to adapt and influence policies, and the bureaucracies need information about possible effects of different policies. Similarly, politicians need information about support that can be decisive in an election. These are functional resources also labeled as 'exchange goods' (Bouwen, 2002). Such resources are expected to affect the ability of interest groups to influence policy-making.

The Commission, the Parliament and the Council have different roles, a separation which makes them receptive to different types of arguments. Public opinion and interest group demands are considered to be important for Members of the European Parliament, who look for signs of electoral support (Dür, 2008, p. 1216f). Yet, they receive less attention from the electorate compared to national politicians (C. Mahoney, 2007, p. 370). In contrast, the Commission is considered to be primarily interested in expert knowledge. Among the three EU legislators, the Council is the least directly accessible. The General Secretariat of the Council, whose role is to serve the member states, would risk losing its credibility if it was known to speak with interest groups. Instead, interest groups lobby national delegations based in Brussels, members of the Council working groups and, most importantly, directly via national governments (Mazey & Richardson, 2001).

In general, the EU is considered to be an accessible arena with a Commission that has committed itself to taking widely diverse interests into account through open consultation procedures (Kohler-Koch & Quittkat, 2011). However, the Commission mainly seeks support from interests that ‘sing the same tune’ (Dür, 2008, p. 1219). Moreover, while the Commission usually facilitates broad consultations when initiating legislative proposals, during later stages of the decision-making processes, it becomes difficult for these same interests to gain access to the process, whose exchange goods do not correspond to the needs of the Commission (Michalowitz, 2004, p. 166). This bias not only has important consequences for the ability of interest groups to influence the Commission, but it also affects the interest groups’ choice of whom to address and which measures to use (Parks, 2009).

Scholars (Marks & McAdam, 1999; Schattschneider, 1961) that connect mobilisation and political context argue that political systems which are open to interest groups promote lobbying. However, as proposed in Chapter Three addressing the Port Directive, if such opportunities are closed, interest groups will turn to other means, including protest, thereby externalising conflict and making it visible. Recent empirical research supports these claims, finding that exclusion of non-governmental actors in early rounds politicises the decision-making process at the European level, thereby empowering the Parliament (Dølvik & Ødegård, 2012; Loder, 2011; Parks, 2009).

In the selected cases, these perspectives of political opportunity structures are particularly important, as trade unions are considered powerful in public services; yet, the interest group literature addressing the EU finds that trade unions have experienced difficulties in influencing EU policy, especially since the introduction of the single market (Bieler, 2011; Gajewska, 2008; Greenwood, 2011). However, trade unions have not quietly watched the introduction of policies that they oppose (Erne, 2008). On the contrary, along with other societal groups, they have responded with protest actions all over the world (D. Hall, Lobina, & De La Motte, 2005), including in the port sector (Turnbull, 2006). As trade unions in the port sector are considered well organised as a group and the largest European ports are geographically located close to Brussels, decreasing the costs of travel that protest actions implemented in front of the EU institutions require, it is of interest to see how mobilisation by trade unions played out in the case of the Port Directive.

The local case is also interesting to analyse in terms of political opportunity structures, as the political majority was a left-wing coalition. This is of importance, as partisanship usually matters with regard to which policies are decided on (Sørensen & Bay, 2002). It is also a common claim that interest groups tend to lobby 'friends, not foes' (Chalmers, 2011, p. 472). Accordingly, the objective of lobbying 'is *not* to change legislators' minds but to assist natural allies in achieving their own, coincident objectives (italics in original, R. L. Hall & Deardorff, 2006, p. 69). Therefore, it could be expected that trade unions are more likely to influence policy outcomes when the majority political coalition is left-wing than when it is right-wing. In addition, trade unions are considered as having more leverage at the national or sub-national level than in the EU. Interestingly, in the EU interest group literature, they are often considered 'domestic interest groups'.

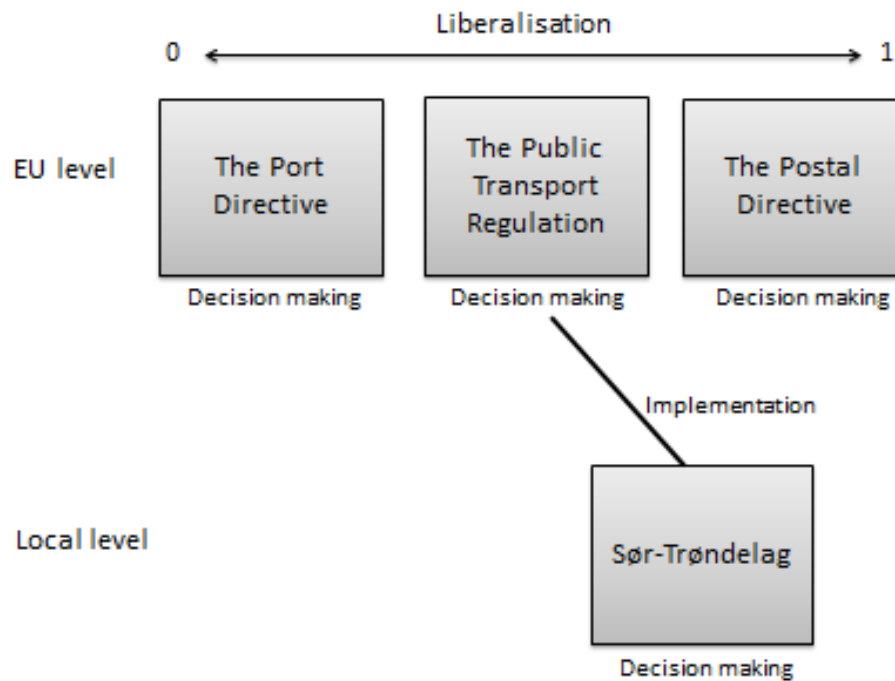
1.4 Methodology

This section includes information about the research design and considerations of how to reach the aims of objectivity and validity. Details about the research techniques and data are included in the individual articles (Chapters 2-5).

1.4.1 Research design

Figure 1 illustrates both the three EU cases and local case included in the dissertation. This section elaborates on why these four cases have been selected.

Figure 1: The four selected cases¹²



As each paper has its own unique research question, there are different reasons why each case has been selected. Firstly, the decision-making process of the Postal Directive represents a slow, incremental process. It has therefore been selected not only to contribute to our understanding of how policy change can be reached in the EU (i.e. a case in which liberalisation reform occurs), but also in order to explore mechanisms that explain how gradual institutional change may contribute to the realisation of liberalisation reform in the EU. Chapter Two represents the single case study of the Port Directive.

Secondly, the twice-rejected Port Directive has been selected in order to explore barriers to European integration. As the EU legislators only seldom reject proposals, this case represents an anomaly – yet it is an important one, as liberalisation was indeed a possibility here¹³. As trade unions claim their victory, the port case is also

¹² Keys: 0 = no EU liberalisation reform has been introduced; 0.5 = competition has been introduced as a main principle in EU secondary law, but there are exceptions; 1 = EU secondary law opens the entire market to competition.

¹³ The Port Directive is an extreme case. Some researchers have expressed doubts with regards to studying negative cases due to the peculiarity of analysing something that has not happened. How fruitful is it, for example, to study revolution in a peaceful country where there has been no revolution is a pointed remark. However, Joshua Klayman and Young-Won Ha (1989) argue that it is crucial to test cases that do not ‘fit’ the hypothesised rules. James Mahoney and Gary Goertz (2004) also recognise the importance of selecting negative

relevant for testing another assumption in the literature of European integration: the assumption that trade unions are weak at the EU level. As such, the Port Directive is a crucial case due to the fact that port workers are considered particularly powerful due to their potential double threat of blocking crucial transport nodes and having well organised workers¹⁴. Chapter Three presents this single case study of the Port Directive.

Thirdly, the public transport case has been selected as a 'middling' case, as the Public Transport Regulation introduces the use of competitive tendering in a voluntary manner. The inclusion of this case aims to meet an issue raised by quantitative researchers, who criticise their qualitative colleagues for only selecting extreme cases – those that get considerable media attention and not the ordinary ones – thereby selecting cases that are not representative. However, in defence of qualitative research, it could be argued that such criticism fails to see the different aims of the two distinctive traditions (see Goertz & Mahoney, 2012). When the number of studied entities is small, as in qualitative research, extreme cases are particularly good at highlighting the effects. This has to do with whether the variables are coded according to dichotomies or following a graded scale. The textbook advice to qualitative researchers is to code cases dichotomously (see Gerring, 2007, p. 132f). One issue with continuous coding in qualitative research is that relative to cases where the explanatory and the outcome variables take on more extreme values, the impact will be small. When the score for the outcome lies in the middle of the range, then the effect size (i.e. the impact of a given change in the independent variable on the dependent variable) is less. This, in turn, means that it may be more difficult to theoretically generalise from the middling case. As such, this case may provide less information about the causal relationship than the two more extreme cases and is therefore less

cases, as long as the selection process follows specific rules. They propose a 'Possibility Principle' that provides theoretically informed guidelines for selecting such cases. According to this principle, cases in which the outcome of interest is impossible are irrelevant. Following along these lines, it is profitable to study cases for which conventional approaches expect liberalisation reform to happen, but does not occur. Moreover, in order to understand the causes of liberalisation, there is also a need to understand why liberalisation does not happen, to see whether they are lacking or weaker in negative or laggard cases. The assumption is that the lack of such causes explains the non-occurrence of liberalisation.

¹⁴ See for example literature addressing the fall of the Dock Labour Scheme in the United Kingdom, where several authors highlight the leverage of port workers and how the government feared national strikes (Finney, 1999, p. 2; Fowler, 2010).

useful. For this reason, there is no individual chapter addressing the Public Transport Regulation in this dissertation¹⁵.

However, the comparative analysis of public services in Chapter Four incorporates the public transport case in order to gather information that may highlight a ‘tipping point’ between the positive and negative case in more detail. This border is unclear, as the EU legislators may reach a compromise (i.e. the outcome is positive), and yet the compromise may be so modified that it is without real political content (i.e. the outcome is almost negative). The growing body of literature on differentiated integration (Dyson & Sepos, 2010; Holzinger & Schimmelfennig, 2012; Leuffen et al., 2013), but also European integration (Pollack, 1994; Tsebelis & Yatahanas, 2002) and EU decision-making (Novak, 2010) in general suggest that this is quite common. Including an ‘ordinary’ case may therefore provide useful information to better understand the real world. It is relevant for understanding why heterogeneity among member states results in differentiation and not rejection of a policy (e.g. due to the joint-decision-trap). Thus, the public transport case may serve as a ‘benchmark’ for the two extreme cases, making it easier to assess them.

The fact that this public transport case is a regulation and not a directive (the postal and the port case are directives) is irrelevant in this analysis, as the regulation and the directives are equally forceful in these cases. In general, regulations have a direct effect once decided upon in the EU¹⁶. In contrast, directives leave member states with some flexibility concerning how to adopt the rules and are therefore legislated by the national parliaments. However, similar to a directive, the Public Transport Regulation gives considerable leeway to the competent authorities in line with the directives. Moreover, all the selected legislative proposals followed the ‘ordinary legislative procedure’ (i.e. co-decision procedure before the Lisbon Treaty).

¹⁵ As the EU public transport case is not a ‘crucial’ case (see Rogowski, 2004), it is difficult to make an argument about how to derive broader lessons from this case as a single case. Regarding more general lessons, its usefulness is primarily in comparison with other cases. This case was therefore included in the comparative article (Chapter 4), but there is no individual article focusing on this case alone (as is done in the postal and the port cases).

¹⁶ In contrast to member states, the Parliament in Norway also ratifies regulations.

Fourthly, a key reason for selecting the three abovementioned cases is that they vary with regards to strictness of services provision in the treaties (see Table 2). Such a case selection provides an opportunity to test the widely adopted assumption that a bias in the treaties contributes to the expansion of negative integration, as proposed by among others Fritz Scharpf (1996). As presented in Chapter Four, the assumed bias towards liberalisation gives the Commission and the Court considerable leverage to enforce liberalisation reform. Introducing variation on the ‘bias variable’, the case selection follows theoretically pre-defined variables in line with the requirements of Alexander L. George and Andrew Bennett’s (2005) approach of ‘process tracing’.

The fact that the cases share commonalities of a ‘most-similar’ design suggests that there is such a relationship between the provisions in the treaties and the outcome of liberalisation. The postal, public transport and port cases are similar, being network and employee intensive sectors that are part of the same political system and the same decision-making rules. Further, in all three sectors, the Commission initiated liberalisation reform about the same time. However, shortcomings of the most-similar analysis make these initial judgements questionable. The benefit of process-tracing is its strength in discovering other explanations of liberalisation reform (see Table 3). The aim of this research is therefore twofold: as Table Two and Three exemplify, the aim includes both theory testing and exploration¹⁷. In addition, process tracing makes it possible to find the relevant mechanisms that connect the putative causes with the outcome (Hedström & Swedberg, 1998).

¹⁷ The coding of the cases in Table Two and Three follows a continuous scale (i.e. strictness of competition rules in Treaty provisions and liberalisation as continuous variables). One issue is that it is not easy to quantify variables in qualitative research continuously, as their values have not been measured statistically. This is a challenge during the explorative phase, when finding explanations that cannot be so easily coded with numbers, as may be done regarding the strictness of competition in the treaties and the extent of liberalisation. Therefore, in the rest of the dissertation, the value of a variable will only be referred to in terms of ‘more’ or ‘less’. In the tables the liberalisation variable has been operationalised as the extent of market opening that the legislations introduced. Keys: The value of zero means that no liberalisation reform has been introduced; whilst the value of one means that the market has been fully opened to competition (i.e. there are no exceptions to the main rule of competition).

Table 2: Hypothesis-testing

	X ₁	y
Post	1	?
Public transport	.5	?
Port	0	?

Keys: x₁ = strictness of competition rules in Treaty provisions; y = liberalisation

Table 3: Hypothesis-generating

	X _{2,3}	y
Post	?	1
Public transport	?	.5
Port	?	0

Keys: x_{2,3} = variables of interest; y = liberalisation

Fifthly, from a multi-level governance perspective, it is also of interest to understand what is going on at the sub-national level. Whilst nation-states are common entities of analysis, the sub-national level is not as often in focus. As differentiation is a common element in EU decision-making, it is relevant to analyse what happens when such policies that include considerable legal discretion are not only transposed at the national level, but actually implemented at the local level. It is towards this aim that a local case in Norway, Sør-Trøndelag, has been selected. It is interesting to analyse this case because the local authorities, given transposition into national legislation, are obliged to implement EU regulations. This also applies to Norway as a member of the European Economic Area. As the EU discussions went on for several years and the Commission was clear in its ambitions to introduce competitive tendering, such aspirations could have affected the decision-making process at the local level, as local politicians decided to follow the Commission’s advice to introduce competitive tendering despite expressing concerns and resistance against doing so. This case therefore provides insight about the appeal of liberalisation at the local level, where such policies are actually experienced; and not only in the EU member states themselves, but also in a country that is obliged to implement EU regulations and directives but does not directly participate in the decision-making processes at the EU level. Chapter Five presents this single case study of the Norwegian County of Sør-Trøndelag.

1.4.2 Reliability

Whilst research can never be completely reliable, through adopting certain procedures, there are ways of approaching objectivity when adopting research techniques for gathering textual and oral data. In this section, I will discuss how I have ensured that my findings are as reliable as possible.

The fact that every researcher is actively involved in her study provides certain challenges to reliability. For example, the researcher influences respondents just by bringing a topic to their mind or phrasing questions in a certain manner. Hence, the state in the actual reality may be different to the empirical domain – a crucial distinction in critical realism. For example, Roy Bhaskar (in Sayer, 2000) separates between the intransitive and transitive domain. Whilst the former refers to things, structures, mechanisms, processes and events of the world that exist independently of our knowledge; the latter implies theories, conceptualisations and interpretations produced by science as a social process.

Robert J. McCoun (1998) gives an interesting account of biases in the interpretation of research results: Even when the researcher strives for accuracy, unintentional and unconscious bias may occur, due to what McCoun labels 'cold cognitive sources of bias'. Mental contamination is one such source, referring to a well-learned theory's tendency to filter a researcher's attention to or interpretation of incoming data. Another source is one of confusion, which implies a disruption in the link between the information and its foundation. Hindsight bias, which refers to a tendency for research to exaggerate how obvious an outcome is in the aftermath of its happening, is also a source of bias, as is the positive test strategy by Klayman and Ha (1989). Based on experiments, they conclude that humans, when testing hypotheses, exclusively search for events that happen in accordance with the hypotheses. In other words, even when a researcher is not motivated by specific goals or values with regard to the outcome she wants to prevail, the formulation of hypotheses in itself may create a confirmatory bias. This draws on a long dispute in philosophy of science between what scientists ought to do (Popper, 1992) and what they do (Kuhn, 1982). Whilst Karl Popper argued that science is about falsification of theories, Thomas Kuhn was of the opinion that no scientific theory satisfies the rigorous demands proposed by Popper. Instead, he emphasised the importance of deep commitment to 'rhetorically induced and professionally shared imperatives,' which may contribute to explaining 'the outcome

of choices that could not have been dictated by logic and experiment alone' (Kuhn, 1982, p. 22).

Fortunately, there are different corrective practices or techniques that contribute to 'debiasing' the gathering and interpretation of data. Strategies adopted in the design of this thesis include multiple hypotheses (see the theoretical section in Chapter 1 and the individual articles), peer reviews (every paper has been submitted for consideration to publication in international journals) and presentation of papers at conferences and workshops with discussants¹⁸. Informants have also been contacted for clarifications (i.e. after completing an early draft of the relevant papers, the drafts were sent to the informants to give them the opportunity to react to the findings and interpretations). Only a few responded, but those that did provided useful corrections and additional insight. Transcriptions of all the interviews were also carried out not only to avoid bias, but also to ensure that oral information would not get lost. Parts of the findings were thereafter discussed with colleagues. Using multiple sources and respondents in different positions has also been a way of achieving a balanced view.

1.4.3 Validity

Given the small number of cases, there are limits to the generalisability of the insight that they provide. However, with the exception of the public transport case, all the selected cases are crucial cases. It means that they pose decisive tests of theory, thereby greatly increasing or decreasing confidence in existing theories (Bennett, 2004; Rogowski, 2004, p. 80f).

Moreover, whilst most case studies within the literature of European integration hardly move beyond a 'unilinear' account, limiting the focus to cases where liberalisation occurs, the inclusion of cases in which liberalisation *only partly* or *does not occur* are important for increasing the validity of the findings.

¹⁸ These conferences and workshops include: Structure and Organisation of Government Workshop in September 2011; European Consortium for Political Research (ECPR) Joint Sessions of Workshops 2012 and 2013; ECPR Graduate Conference 2012, the Norwegian National Political Science Conference 2011 and 2012; Brown Bag Lectures at the University of Agder in April 2011 and September 2012; an internal seminar by the Department for Political Science and Management at the University of Agder in December 2012; Berlin Graduate School of Social Sciences Workshop in November 2011; internal seminar in the DG for Mobility and Transport in December 2012.

In addition, process tracing has been adopted in order to increase validity. This involves looking for a detailed and continuous chain of events in each case. It allows for inference on the basis of few cases, as it forces the researcher to consider alternative explanations (George & Bennett, 2005). Theories, purposeful case selection, comparison across cases and use of detective work and process-tracing have reduced the chances of erroneous conclusions.

1.5 Findings

In this section, relevant findings related to the institutional perspectives presented earlier in this chapter are presented. To avoid excessive repetition, other findings are discussed in the individual articles (Chapters 2-5).

Starting with the EU cases where liberalisation occurs, the evidence from these analyses seems to support layering as an effective mode for achieving liberalisation reform. Layering was existent in the postal case as well as in the public transport case. There were unstable elements, including legal complaints, pressures for policy change from both industry interests and the Commission in both cases. In the postal sector, layering occurred as the proposers of liberalisation strategically began to pressure for competitive reform, starting at the edges, where policy change – although obligatory – would hardly be felt by the relevant actors. Opponents were therefore willing to accept the Directive. Reformers were also able to include timetables that over time created certain lock-in-effects, thus incremental policy change and an element of path dependency went hand-in-hand. This path dependency was not one of increasing returns or of referral to higher principles, but was dependent on social norms in the Council, which implies that a member state does not renege on a decision that it has already more or less agreed to in the recent past. For example, timetables highlighting future reform are effective in producing policy change, as it is politically costly to hamper integration that has already partly been agreed upon. In the public transport sector, the layering mode affected reform by introducing competitive tendering as a voluntary principle. In this case the defenders of status quo were able to exploit the different opinions among those in favour of liberalisation with regard to the subsidiarity principle. Although in favour of introducing competitive tendering in the market, several parliamentarians were of the opinion that this was not a task for the EU to decide, but rather should be done so at the national level. In both the port case and

the public transport case, the Commission was willing to give in to making large concessions.

In contrast, in the port case reformers were not able to work around strong *status quo* interests due to strong mobilisation from the trade unions, which created issue networks with established suppliers of port services, thereby creating a critical mass to convince the parliamentarians to reject the proposal. Although partly excluded from the decision-making process (i.e. they were neglected in consultations), trade unions were able to gain considerable influence on the outcome due to their ability to externalise the conflict by striking and marching in the streets. However, the protests could have had the opposite effect: the fact that protesters threw rocks at EU buildings could well have been met with retaliation from decision-makers. The factor that was more important for the rejection of the Port Directive was the actor constellations with trade unions and maritime interests in the industry.

Another distinction to the two positive cases is that the decision-making process was less incremental and included less consultation and impact assessments. The fact that the second Port Directive was introduced less than a year after the first Directive's failure, although the proposal was not identical to the former text (as agreed on in conciliation between the Council and Parliament) and did not introduce new consultations, also aggravated the industrial interests that were in favour of liberalisation and therefore had originally welcomed the proposal.

Whilst liberalisation failed in the port case, it succeeded in the local public transport case, where it was not expected due to political aspirations to re-integrate the service production back into public hands. Although the Public Transport Regulation allowed for such an in-house solution, and this solution was politically desired by a left-wing majority supported by the trade union, the outcome was competitive tendering. In this case, path dependency referring to obstacles that the national legal framework created against taking back licences that had already been given to private operators created barriers to re-integration. Given these circumstances and the fact that the politicians were unsatisfied with the *status quo* due to the poor level of goal attainment (i.e. quality of the public transport services), the public authority perceived competitive tendering as the better option. The following chapters go more into depth in explaining the different outcomes.

1.6 Summary of the Individual Articles

The thesis includes four articles: Three of them contribute to our understanding of why liberalisation is introduced in some areas in the EU but not in others. The fourth article addresses the appeal of liberalisation policy at the local level. The articles represent the ‘roadmap’ for the following chapters in this dissertation.

Chapter 2: Gradual Institutional Change: How Liberalisation was Achieved in the Postal Services

The first article is an in-depth analysis of the Postal Directive that fully opened the postal services to outside competition. It aims at exploring the ways gradual processes contribute to resolving conflict and fostering reform in the EU, through drawing on theories of institutional change and seeking to complement these theories with elements of differentiated integration. The findings suggest five key mechanisms: instability due to an unclear boundary defining who are allowed to compete where; time rules in existing legislation that ensure future re-negotiations; concessions that constrain resistance; social norms that make it politically costly to create barriers to further integration; and longevity that creates desires to put an end to a process. Theoretically speaking, this contribution complements theories of gradual institutional change by adding insight as to how layering brings about policy change of liberalisation in the EU.

Chapter 3: The Role of Labour and Associated EU Liberalisation Challenges: Insights from the Port Sector

The second article is a case study of the Port Directive that failed twice. It contributes to literature on European integration by outlining the forces that create barriers for further integration and tests the widely held assumption that trade unions have limited impact on the EU level decision-making within liberalisation policy. The findings highlight the fact that trade unions are most influential when they are able to exploit the division of industrial interests to resoundingly oppose policy change. Port authorities and established port operators sided with trade unions against the proposal, thereby creating a critical mass to convince a majority of the Members of Parliament to turn the draft Directive down. Moreover, the analysis highlights the importance of including large interest groups in consultations. The gap between the possibility of giving input and how the process was organised politicised the process. Opportunities

of communicating the purpose and balancing the proposal were lost due to the limited use of consultations and impact assessments.

Chapter 4: The Scope of Negative Integration in Infrastructures: A Comparative Analysis of Post, Public Transport and Port Liberalisation

The third article is a comparative analysis of the Postal Directive, Public Transport Regulation and Port Directive, which vary with regard to how strict the provisions in the treaties are concerning the freedom to provide services. This variation makes it possible to test the widely cited assumption associated with among others Fritz Scharpf's scholarship. Scharpf argues that increasing liberalisation is a result of a bias towards liberalisation in the treaties. Consequently, the European Commission and the European Court of Justice are able to enforce liberalisation reform. However, if such institutions have wide-ranging leverage to push for liberalisation, it remains largely unclear as to why liberalisation attempts in the European Union are at times rejected. It is also unclear why there is a variance in the extent of negative integration amongst industry sectors. The article therefore questions the scope conditions of the assumption that a bias in the treaties explains the introduction of negative integration in the EU and suggests four key explanations as to why such differentiated integration of public services occurs in the EU. They are: organisation of public services; mobilisation by large interests such as trade unions; how willing the European Commission is to give in to concessional demands; and the legal foundation in the treaties.

Chapter 5: Why Politicians that Aim for Political Steering Introduce Competitive Tendering and Agencies: Insights from a Norwegian County

The final article asks the question why market-conforming reform including competitive tendering and the establishment of an agency occurs at the sub-national level, even when policies endorsed at higher political levels include a large degree of discretion (i.e. EU policies and the transposition of such legislation at national level), and the political left-wing majority favours re-integration of services production in public hands. A case study of the organisation of public transport in the Norwegian County of Sør-Trøndelag provides insight regarding the appeal of competitive tendering and agencification at the local level. The case is also an example of implementation of a piece of EU legislation, the Public Transport Regulation (the middling case in Chapter 4) all the way down to the local level. The analysis provides three key reasons for the continuous adoption of competitive tendering on the one hand and agencification on the other. Firstly, existing structures limit available

alternatives for legislators, thereby making reintegration of public services difficult. Secondly, under certain conditions market-conforming principles may even enhance political steering and thus make it politically desirable. Thirdly, the establishment of an agency opens up for the possibility of economies of scale through cooperation with other counties and cities, thereby also improving coordination in the public transport system. The analysis also illustrates how the EU shapes the options available to local authorities; nonetheless, local and national conditions are more important.

1.7 Outlook

Based on the introduction and individual articles, different research questions arise. One advantage of case studies is their usefulness for exploring new hypotheses and research questions. One such contribution is that the analyses seem to suggest that with time, consultations and differentiation of policy, any liberalisation proposal has a chance to be accepted in the EU. As such, the case where liberalisation attempts have failed twice, the Port Directive, is an interesting case to follow. In 2013, the Commission will place the Port Directive on the agenda again. Having become wise from its earlier hasty decisions, the Commission will probably include more interest groups in consultations and give the process more time than on the earlier occasions. Given the current financial crisis and the increasing resistance to imposed EU liberalisation policies that follow from a situation, where citizens ask for social security, there are signs of increasing protest. The future decision-making process of the Port Directive will therefore provide a test of the hypothesis that *over time* the EU is able to enforce liberalisation in any policy area.

Another finding that requires further testing is the hypothesis that centralisation of responsibility affects the extent of liberalisation achieved in the EU. Researchers have found that local authorities are not particularly influential at the EU level. For example, the Committee of the Regions is considered 'a largely symbolic body that suffers from entrenched internal divisions and functional overreach in the absence of any real influence' (Christiansen, 1996, p. 93). Others find that the Committee of the Regions plays an obvious role after all (Warleigh, 1997), and that the Commission responds favourably to requests from this Committee more than a third of the time (Neshkova, 2010). This particularly occurs when the discussed policy is a local responsibility in which politicians representing sub-national authorities play a role (Neshkova, 2010). Similarly, the comparison of the Postal Directive, Public Transport

Regulation and Port Directive suggests that under certain conditions, local authorities and industries may succeed in their aspiration to influence EU policy. Several public services are important local responsibilities. Future research should include analyses of other areas of local importance to strengthen the confidence in such findings and see whether it holds when looking at additional cases and other areas besides liberalisation of public services.

Another lesson from this thesis is that given differentiated integration, urban and regional research should avoid taking EU pressures to introduce liberalisation policies for granted. The analysis of Sør-Trøndelag shows that the EU did not play an important role in the selected decision-making process, but structures inherent in national rules did, as did earlier decisions made at the local level. To establish the true relationship between EU pressures and local decisions, it would be interesting to trace the development of the national legal framework that imposed restrictions on the local alternatives. Perhaps the relevant features in national law are included as a consequence of either learning from or transposing other EU rules.

There is also a need for more studies on the establishment of regulatory agencies and the introduction of competitive tendering at the county and local level. Indeed, EU pressures to introduce competition at the local level is often taken for granted (Kuhlmann, 2008, p. 579; Wollmann, 2012, p. 42). However, as EU directives tend to include considerable legal discretion and opt-out possibilities (Howarth & Sadeh, 2010), the relationship between pressures from the EU and through transposition at the national level on sub-national decisions remains unclear. Chapter Five offers one type of contribution to this field. Whilst the literature on agencification and regulation mainly focuses on agencies at the national level (Egeberg & Trondal, 2009; Verhoest, van Thiel, Bouckaert, & Lægreid, 2012), effects in practice (in particular at the local level) has gained only limited attention (for example Longva & Osland, 2010). Today, we do not know enough about the relationship between EU pressures and policy-making at the local level.

Finally, the thesis has addressed the often-heard claim that the EU is more likely to introduce policies that contribute more to the elimination of national barriers to trade and distortions of competition and less to market-making policies (Kerwer & Teutsch, 2001; Scharpf, 1996). However, the distinction between negative and positive integration is not always as clear cut as commonly assumed. Several fields of EU liberalisation are not restricted to the abolition of market barriers, but 'positively' define harmonised rules for market access and operation to be complied with by the member states (Héritier, 2001b). It is therefore of interest to first analyse the tension and/or balance between competition and market-making elements of EU policies and then study how this affects implementation at the national and local level.

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2 Gradual Institutional Change: How Liberalisation was Achieved in the Postal Services Sector

Abstract

Theories of institutional change are popular in understanding how policies change over time. Similarly, differentiated integration within the EU literature highlights the temporal aspect of policy change. Yet it remains unclear how incremental decision-making processes facilitate EU reform; and differentiated integration remains under-theorised. This contribution therefore seeks to clarify how gradual processes contribute to fostering EU reform, complementing institutional change theory with elements of differentiated integration. For this aim, the decision-making process of the Postal Directive is selected for analysis. The findings add insights as to how ‘layering’ brings about policy change of EU liberalisation, suggesting five key mechanisms: instability due to an unclear line between who is allowed to compete where; time rules in existing legislation that ensure future re-negotiations; concessions that constrain resistance; social norms that make it politically costly to create barriers to further integration; and longevity that creates desires to put an end to a process.

Keywords: Differentiation, European integration, institutional change, liberalisation, postal services

2.1 Introduction

Despite member states' different practices, norms and beliefs that make it difficult to achieve European integration, EU legislators repeatedly reach agreements. Within liberalisation policy, where European integration has been the most extensive, researchers highlight triggering events such as court rulings or the mere threat thereof as important for overcoming reluctance among the EU legislators to change existing policies. The claim is that the European Commission and the European Court of Justice have extensive leverage to eliminate barriers to trade by drawing on a bias towards liberalisation in the treaties (Martinsen & Falkner, 2011; Scharpf, 2006; Schmidt, 2000). However, such critical junctures do not always cause policy change as expected. For example, court rulings about public services may not enforce liberalisation as there are exceptions to competition for services of general interest in the treaties. In such circumstances gradual reform plays a crucial role in understanding policy change. In fact Wolfgang Streeck and Kathleen Thelen (2005b) argue that liberalisation is particularly suited to being introduced gradually. Yet whilst a slow process may facilitate the possibility of reform, it is insufficient for explaining the 'tipping point' as to why policy change occurs. The literature of differentiated integration highlights concessions as important for such a point to be reached. A relevant question is therefore to ask how gradual processes contribute to resolving conflict and induce policy change in the EU and what role concessions play in such processes.

Liberalisation of postal services in the EU is a well-suited field for analysing this question for two reasons. Firstly, the decision-making process of 'fully' opening the postal services to competition has been slow: lasting almost two decades since 1989, when the Postal and Telecommunication Council invited the Commission to prepare measures to develop postal services in the EU, until the final amendment was agreed on in 2008. The process included three sequences consisting of a first directive and two amendments. Secondly, public services in the postal sector remain the most predominant (Finger & Finon, 2011, p. 57), highlighting the major tension between a 'universalist' perspective, which is based on social solidarity and a 'competitive' approach focusing on efficiency and consumer choice (Prosser, 2005). The social aspect inherent in postal services, the difficulty of avoiding the 'whiff of monopoly' in such network services (Spiller, 2011, p. 13) and the high share of employee costs (i.e. 80 percent of the production costs are labour costs) make postal services particularly

difficult to liberalise. Thus, it represents a crucial case for understanding how the EU is able to introduce liberalisation reform.

An in-depth study based on thirteen interviews and document analysis suggests that the incremental process of ‘layering’ (i.e. adding of new rules on top of existing policy) was crucial for the compromise of liberalising postal services in the EU. The reformers started liberalising at the sector’s margins, yet this created instability as the line between the liberalised and the reserved area remained unclear. The inclusion of timetables and ‘expiry’ dates in the early versions of the Directive to ensure that the dossier would be placed on the agenda again in the near future also created pressure for further liberalisation. The opponents could accept such ‘time rules’ (Goetz and Meyer-Sahling, 2009, p. 190) as long as they were guaranteed to have a say in the new round (i.e. any amendment to the earlier Directives would follow the ‘ordinary legislative procedure’ that is a co-decision procedure including both the Council and the Parliament). They also requested extensive impact assessments to see how the markets would develop before making any further decision. However, under the conditions of social norms in the Council, the time properties were effective in producing policy change as it is politically costly to hamper integration that has already partly been agreed upon (i.e. through timetables). Concessions such as delay of enforcement, temporal derogations for eleven of the 27 member states as well as modifications such as giving the member states the right to specify their own license criteria for operators – a concession that could create certain entry barriers to potential operators – were also key for change to occur. On the one hand, such differentiation decelerated the liberalisation process (i.e. member states that had already decided to liberalise postal services, postponed the enforcement of national legislation awaiting EU legislation). On the other hand, it enabled the possibility to eventually open the whole EU postal services market to competition. Together the layers fundamentally changed the approach of service production from a focus on public service to an emphasis on competition.

The remainder of this contribution aims at explaining the decision-making process of the Postal Directive. Section two presents relevant theories of gradual institutional change and in-part, differentiated integration that guide the analysis. The third section describes the data and research techniques adopted. The fourth section gives an account of what happened in the postal case. The fifth section discusses the empirical findings in light of the theoretical aspects and the final section provides a conclusion.

2.2 Gradual Institutional Change and Differentiated Integration

A slow process consisting of a series of amendments characterises the decision-making of the Postal Directive. Theories of gradual institutional change are therefore relevant for explaining the policy change. In this section such theories are presented and complemented by contributions on differentiated integration in the EU. A combination of these two strands adds value to the understanding as to how policy change may occur, as differentiated integration provides useful insights of how policy concessions may contribute to reaching a tipping point (i.e. by lowering the threshold of change) and, thus, further integration.

Starting with gradual change, such theories were developed as a reaction to an exaggerated distinction between long periods of institutional stability and exogenous shocks that sometimes disturb the stability and induce radical change. At the same time, there was a lack of tools to explain modes of continuous processes of reforms the way institutions normally evolve. Therefore, scholars such as Kathleen Thelen (2004) and associated colleagues (Mahoney & Thelen, 2010b; Streeck & Thelen, 2005a) have developed a gradual reform perspective, arguing that there is an inherent dynamic within the institutions themselves that opens up for incremental changes. They argue that even ‘stable’ policies (i.e. formal compromises or relatively durable policies) are still challenged and are therefore exposed to shifts. According to this view, it is sufficient that there is an opening for actors to enact change – there does not have to be a need for change. The authors argue that institutions themselves encourage certain change strategies or invite agents to foster change. Yet there are also possibilities of actors being disadvantaged by one institution to use their privileged status in relation to other institutions to push for change. For example, trade unions that have sometimes been disadvantaged by the Commission, have exploited its contacts with its socialist partners in the European Parliament to resist liberalisation policy or include social policy (Parks, 2008). Researchers of gradual reform view such mobilisation and testing of the boundaries of existing institutions not as radical interruptions of stability as equilibrium scholars tend to do (e.g. True, 2000), but as contributing to the institutions’ persistence. Institutions survive, when they serve the relevant actors’ interests well (Hall & Thelen, 2009, p. 11).

Gradual reform implies different types of policy change. Streeck and Thelen (2005b) mention five modes: ‘conversion’, that is re-direction to new goals; ‘displacement’, which refers to a situation where an increasing number of actors adopt new, emerging policies; ‘drift’, implying that there is a difference between the rules and the real world; ‘exhaustion’, meaning institutional breakdown; and ‘layering’ that carefully introduces new policy at the edges. The fact that the Postal Directive was amended twice, thereby introducing new elements on an existing policy, suggests that layering may explain the introduction of the competitive approach in the postal sector. Thus, this case study’s focus is on layering. In contrast, the Postal Directive is not about conversion as despite an increasing focus on cost efficiency, the ‘old’ solidarity aim of universal services remains in the new Directive. Exhaustion is also not relevant as it is about policy change, not breakdown. However, due to increased competitive pressures from technological innovations such as electronic substitution, it could be expected that drift also contributes to explaining the liberalisation reform. Also displacement could play a role as potential market entrants and other promoters of liberalisation find their interests advanced by the Commission, member states that have already introduced such reform and right-wing parliamentarians. Yet there are strong veto positions in the EU. Hence, total displacement seems impossible. Therefore promoters of displacement may settle for layering instead (Mahoney & Thelen, p. 2010a).

To understand the meaning of layering (for a review of the concept, see van der Heijden, 2011), the notion of path dependency is useful. It implies that earlier courses of action are difficult to reverse, once they have been introduced. Decisions in the past therefore limit future options or enable certain paths more than others. This rigidity of institutions explains why for example, national institutions exposed to similar globalisation or Europeanisation pressures remain diverse (see Hall & Soskice, 2001; Lorrain, 2005). Paul Pierson (2000) clarifies how path dependency works, conceptualising it as grounded in a dynamic of ‘increasing returns’. It means that a social process is path dependent, when it is self-reinforcing or generates positive feedback. Thus, path dependency confines future available options because the benefits of existing practises (i.e. investments have already been made and learning effects make the activities effective) compared to other alternatives increases over time. This is relevant for theories of gradual reform as they aim at explaining why policy change occurs despite such stability of institutional arrangements. Layering occurs as reformers learn to circumvent such unchangeable elements (Streeck & Thelen, 2005b, p. 23). When there is resistance against displacement, promoters of

policy change may avoid such barriers when introducing a voluntary policy on top of an existing policy (Rothstein, 1998) or by introducing changes only at the margin (Palier, 2005, p. 131). Thus, ‘the actual mechanism for change is differential growth’ (Streeck & Thelen, 2005b, p. 24).

A distinct strand of literature, the literature on differentiated integration in the EU, focuses on the ability of heterogeneous member states to come to agreement in processes of EU policy change and contributes with insights as to how differentiation is effective for such agreement (Holzinger & Schimmelfennig, 2012; Howarth & Sadeh, 2010; Stubb, 1996). The assumption is that flexible policy provides for further integration that would otherwise be halted. Such differentiation includes modification of disputed policies through watering-down and vague policy formulation, so that existing policies can be maintained to a larger extent than the reformers originally intended. It comprises opt-out possibilities such as territorial, sectorial or temporal derogations, giving for example exceptions to certain territories or sub-sectors or allowing certain actors more time to adjust to a new policy. That way, for example in the area of liberalisation, actors have the possibility to invest in new institutional arrangements and benefit from learning effects before having to meet competition from other actors. Thus, resistance against a policy decreases.

EU scholars (Moravcsik, 2007; Pollack, 1994; Yataganas & Tsebelis, 2005) suggest that a combination of the high threshold of qualified majority in decision making and the social norm of consensus in the Council influences such differentiation. These conditions allow member states that benefit the most from a new policy to offer greater compromises in order to achieve the policy, whilst poorer member states exploit this situation by requesting concessions. As a result, political content that would encroach on important member state interests are removed. As such, the final outcome may be without ‘real political meaning’ (Novak, 2010, p. 94). In contrast, the theories of gradual reform propose that such incremental steps eventually may contribute to quite fundamental changes. A layering process may eventually become displacement as the new layers over time begin to displace the original institutions (Streeck & Thelen, 2005b, p. 24). Such gradual processes may explain how the EU legislators were able to eventually open the whole postal market to competition and not only parts of it as in the beginning.

2.3 Data and Research Techniques

To trace the process as to what happened in the selected case, the analysis draws on evidence such as policy papers, minutes from hearings in the European Parliament and meetings in the Council, consultancy reports, reports by interest groups, online newspaper articles and thirteen semi-structured in-depth interviews. The aim of the interview sampling was to cover views from the industry and EU institutions, which was based on internet searches and contacting the relevant persons/organisations. These include: a Member of the European Parliament representing the Party of the European Left; a desk officer in the Commission's Directorate-General for Internal Market and Services; a desk officer in the General Secretariat of the Council; three representatives of trade unions including Uni europa and the Norwegian Postkomm; an international correspondent of PostEurop; two representatives of Deutsche Post; a representative of the German Presidency 2007; two representatives of the Portuguese Presidency 2007; and one representative from a national regulator in a large member state. Attempts to speak with each of the two rapporteurs of the Postal Directive in the European Parliament were not successful. The interviewees spoke based on personal experiences rather than taking an official role. Anonymity, which ensured that they could speak freely, was considered more important than the benefits of readers to know the source of each statement. The interviews took place in 2011 and 2012. This oral data has been important for establishing the mechanisms at work and has been crosschecked with the mentioned written documentation. The interview data has been essential for covering gaps and documenting facts, by including questions about for example, conflicts, cooperation and power relations. However, a caveat is the interviewees' lack of memory, as the processes of the early versions of the Postal Directive go more than a decade back in time. In addition, the interviewees were more concerned with the more recent amendment. Therefore the evidence is richer on this last process than the two former. For that reason, earlier studies have been important sources of background information.

2.4 The Decision-Making Process of the Postal Directive

This section presents the results about what happened during the decision-making processes of the Postal Directive and its two amendments – in the following labelled the first, second and third ‘directive’. The third Directive is treated in more detail than the two early Directives, as thorough analyses of the early Directives exist (Schmidt, 1998; Smith, 2005) and because the final step of market-opening as introduced through the third Directive was the most disputed, making it particularly interesting to understand how the EU was able to agree on this last amendment.

In 1989 the Council invited the Commission to prepare measures to develop postal services in the EU. Three years later the Commission (1992) launched the Green Paper that highlighted the aim of liberalising postal services and improving quality standards by introducing minimum requirements with regards to delivery. Using competition law, the Commission had planned to enact liberalisation itself, but due to massive opposition by the member states, it gave in to pressures to include the other legislators in the decision-making process (Schmidt, 1998, p. 281). The policy was controversial as traditionally a protected public postal operator could use its revenues generated in profitable activities to subsidise losses in other activities (Geradin & Humpe, 2002). Social solidarity justifies such subsidisation: the price of an item should be the same for every citizen across a national territory. However, the competitive approach undermines this way of funding postal services. In a competitive situation, a competitor can choose to enter only those markets that are profitable. A consequence of such ‘cream-skimming’ is that it deprives the established public postal operators of the revenue to fund universal services. Given the loss of sources of revenue, ‘universalists’ were concerned that this would endanger the performance of universal services. In contrast, the Commission argued that practices of cross-subsidisation serve to give dominant operators an unfairly protected position and cover inefficiencies. The Commission viewed liberalisation as a means to make state operators become more efficient – to cut the ‘pumping’ of state money into an inefficient sector and improve the quality of postal services as operators would have to pay more attention to customer needs (Interview y).

Member states that had already opened up their domestic markets for competition, or were in the process of doing so, largely supported the Commission's competitive approach partly because they believed competition from foreign companies could improve services at home (Interview j1) and the established postal operators in such countries were looking for markets abroad (Interview h1). The established companies in such countries supported liberalisation of their domestic markets as long as they could enter the markets of foreign operators, i.e. they emphasised the importance of a level playing field. Likewise potential entrants were concerned with potential manipulation by the incumbent. Large postal users dependent on postal services (e.g. Postal Users Group, Free and Fair Post Initiative) embraced liberalisation expecting it to reduce their costs.

In contrast, member states that opposed the Directive were concerned with how to fund and maintain the universal service provision. Such financial worries were particularly wide-ranging in countries with several islands, mountains and a dispersed population and/or poor quality standards. Several member states also struggled with restructuring processes, in particular member states that joined the decision-making process with the enlargement of the EU in 2004. They feared that their established postal operators would be inapt to compete in an open market and therefore sought to postpone liberalisation (Interview j2). Among the interest groups, public postal operators and trade unions opposed liberalisation. Trade unions were concerned with 'social dumping' and unemployment, but also higher prices for small consumers such as households (i.e. the prices of individual mail increases whilst bulk mail prices decreases) (Interview dd).

The dispute went on for almost twenty years and included three 'directives': The first Postal Directive was initiated in 1995 and decided on in 1997. It distinguished between services that may be 'reserved' for the universal service provider and services that were open to competition. Whilst the liberalisation achievements in this legislation were rather small, the quality measures were substantial, obligating the member states to guarantee a minimum of characteristics of the universal service (e.g. at least one delivery and collection five days a week for every EU citizen at affordable prices). It also set a timetable for further liberalisation at a later point in time. Following-up this timeline, the legislators amended the Directive in 2002. This second Directive included further steps of market-opening. In 2008 it was amended again with the third

Postal Directive, which ‘fully’ opened the market by introducing competition to the remaining letter policies.

2.4.1 The First Directive

During the process of the first proposal, only few segments were proposed to be opened up for competition, the most controversial being addressed was advertising mail and cross-country mail. Viewed as important sources of revenue for covering the universal service, most member states were against exposing such services to competition (Geradin & Humpe, 2002, p. 100). In the Parliament a left-wing rapporteur, Brian Simpson, played an important role in modifying the proposal. As a result, the Commission had to make several concessions and include elements that would limit the effect of competition. For example, the Commission granted general authorizations and individual licenses for non-reserved services, thus leaving it in the hands of the member states to decide on requirements that postal operators had to fulfil in order to enter the market, thereby creating substantial entry barriers (Council, 1997). As the effect of liberalisation as set out in this Directive would be minor and it was guaranteed that any future amendment would include all the EU legislators in co-decision, opponents eventually accepted the Directive that had gone all the way to conciliation, before it was accepted at third reading in the Parliament. However, the proponents of liberalisation achieved one important step in the first Directive: although liberalisation would only be enforced at the edges of the postal market, the EU legislators established the competitive approach as a principle and introduced a timetable for future liberalisation. This timetable started a dynamic shift towards further liberalisation of postal services.

2.4.2 The Second Directive

In May 2000, the Commission introduced a second proposal, recommending to liberalise postal services in two further phases: First, by 2003 the weight and price limit for services that may continue to be reserved should be reduced to 50 grams. Second, by 2007 a subsequent reduction of the remaining exclusive rights should be undertaken. There was still no majority for such market opening in neither the Parliament nor the Council, yet the setting had changed. Firstly, the rightwing politicians in the Parliament were of the opinion that it was time for further market opening. One of them was the new rapporteur, Markus Ferber, a German Christian

Democrat. ‘He was assuming the responsibility with a total other intention than Brian Simpson, who was still a Member of Parliament, but he had lost his influence on the issue, so from the left we tried to moderate it’ (Interview r). It made a difference as ‘Simpson was certainly more open to trade unions and to include their demands than Ferber’ (Interview j2; also dd).

Secondly, at the Lisbon Summit (23-24 March 2000) a majority of leftwing governments had agreed that the Council, together with the Commission, would set a strategy to accelerate liberalisation of postal services, as this was considered beneficial for economic growth. The Summit took place a couple of months before the Commission launched the second Directive. The strategy weakened the position of those opposing liberalisation as advocates proposing further liberalisation, argued that the member states had already agreed to introduce competition:

‘So the European Commission could say, “We follow only that what was concluded by the ministers of the national states involved in the European Union”. That made it very difficult to fight against it. It was not occasional that at that moment both the Directive on the postal services, public transport and the energy was made, because they already had the support of the prime ministers of the member states. The European Commission, which only has the formal right to initiate legal texts, could say, “We are only doing those things that the Council of Ministers has asked us”. That made it very difficult [...]. Some at the rightwing side said, “We have already decided to do, so we are only creating a law text to make it continuously irreversible. But it is not a political discussion, we have had it already, the member states agree, we also agree, the European Commission agrees, so don’t make objections”’ (Interview r).

However, there was a perception that ‘status quo has served Europe well’ (Economic and Social Committee, 2001). Therefore both the Council and the Parliament wanted a more restrained approach than the Commission aimed for. At first reading, the Parliament rejected several of the provisions that would contribute to further liberalisation and called for employment and social goals to be included. The Commissioner, Fritz Bolkestein, argued that the amendments went ‘against the grain’ of the Commission’s proposal and would hinder advantageous modernisation (Parliament, 2000). Therefore, the Commission left out the amendments delaying and limiting further liberalisation and excluded amendments concerning social and employment issues, including instead a formulation emphasising the social tasks of the Community. However, the Council moved toward the Parliament’s position

postponing the final step towards full market-opening and including higher weight and price limits for the reserved area in 2003 (100 grams), delaying the 50 grams step from 2003 to 2006 and the subsequent step from 2006 to 2009 (Council, 2001b). The Council insisted that any liberalisation concerning the 50 grams-category would have to be based on a new legislative decision-making process. The common position was adopted by qualified majority with the Dutch delegation voting against and the Finnish abstaining (Council, 2001a). The Parliament approved the proposal at second reading (Parliament, 2002).

As with the first legislation, the second Directive had introduced conditions for level competition (e.g. an independent regulatory authority and the requirement of keeping separate accounts for the universal service and services within the non-reserved area). However, there were claims of national postal operators abusing their dominant position and new entrants encroaching on the reserved area (for examples, see van der Lijn et al, 2005). Court rulings have been initiated, yet based on legal clauses of services of general economic interest, such decisions did not enforce further competition in the postal sector. Instead it has been argued that they strengthened proponents of state intervention (Sauter, 2008, p. 171). Court rulings and potential litigation that has driven EU legislators to accept liberalisation in other sectors (e.g. telecommunications and energy), were not effective for opening the postal services market.

2.4.3 The Third Directive

In October 2006, the Commission tabled another proposal amending the two former directives. A few months later, Germany entered the Presidency, followed by the Portuguese Presidency in the second half of 2007. Although Germany was in favour of the proposal, progress was slow, yet it accelerated under Portugal, although Portugal had been reluctant towards including a final date of market opening in the Directive.

There were several conditions as to why the process was slow-moving. In the beginning, the Commission was not supportive in moving the process along:

‘They came with a kind of dogma that this is our proposal, it is well studied, the impact assessments are complete, [...] you have to read them and you have to agree!’
(Interview z; also cc).

The consultations and assessments had indeed been extensive over recent years¹⁹, yet several member states were not convinced and were unwilling to discuss the key issue: the final date by when the reserved area should be abolished (Interview j1).

Another condition was the unencumbered situation of the German Presidency, as for Germany the situation was clear. Germany had already opened its national markets and foreign competitors had entered. This situation would remain even if there had been no new directive or the Directive would have looked very different (Interview j2). Eventually competition from other sectors constituted a larger threat for public postal operators than competition from other postal operators. However, at the time, this process of stagnation of letter markets due to electronic substitution had taken place much slower than had been anticipated and primarily occurred in Scandinavia and the Netherlands (Wik Consult, 2006, p. 14). Electronic substitution thus did not become an important topic in the negotiations (Interview h2; j1).

However, the second Directive included a deadline that had some effect on the member states' ability to make a decision. Without a further proposal adopted by the 31 December 2008, the sector would primarily be subject to EC Treaty rules (Article 86 TEC), which allow the Commission to address decisions and directives to member states as considered appropriate (Commission, 2006, p. 5). Member states opposing liberalisation wanted to avoid such a 'case by case' approach:

'It was always a potential threat: "If you do not agree, then the second directive will expire and it expires completely". The consequence would be as if there had been no directive in the postal sector. From that it follows that there would be no monopoly for nobody. For the opponents that would be a horror scenario. Something had to happen. Insofar we could work calmly with the details' (Interview j1).

The expiry date therefore created a pressure for reform, yet not necessarily further liberalisation, as the legislators could also have agreed to abolish the deadline and otherwise keep the Directive as it was.

¹⁹ Studies on postal services carried out for the European Commission is listed on the Commission's web page: http://ec.europa.eu/internal_market/post/studies_en.htm

Gradually there were some moves towards a ‘mid-position’ in the negotiations between the member states and the Presidency. The timetable included in the earlier Directive played an important role. Having assented to a timetable at an earlier stage, the member states had quasi agreed to market opening:

‘If you’re from a country and you say that you agree that liberalisation will take place in 2009 [as stated in the second Directive’s timetable], what is your argument to say that I don’t want it. It can happen, but from a political point of view, it’s a risk, you cannot consent [i.e. you may hinder integration]. Maybe you can change it from 2009 to 2010, but still you cannot change the full position saying that no, I don’t want market or liberalisation. So for us it was an argument to convince them, “come on, you cannot change position now. We have been working towards market liberalisation so you cannot say now, that you are not prepared. You knew about this six-seven years ago, so it’s not an argument to say that I’m not prepared, I have too many public servants. You knew that this was going to happen”’ (Interview cc).

In general it is considered negative to be outvoted in the Council or standing in the way of integration.²⁰ This adds to the understanding as to why the argument about the timetable was effective. None of the big member states wanted to be seen as standing in the way for integration:

‘They had noticed that eventually the process was no longer to put back. [...] they did not want to get the image that they were slowing down the process. No, no, they didn’t want that image, they couldn’t permit themselves to do that, they didn’t want that’ (Interview j1; also cc).

Moreover, throughout the process the Commission became more willing to give concessions:

‘They want to get the Directive through and they will give away everything except market opening. [...] that’s why it is so open, because the Commission didn’t dare to oppose anything to the member states’ (Interview cc).

²⁰ Novak (2010) who focuses on social norms in the Council does not differentiate between nationalities. However, it could be that for some member states and/or governments (i.e. the United Kingdom) it is not considered as negative or socially problematic to interfere with integration.

The concessions contributed to solve several issues with the draft: One issue was that it did not solve the concern of how to finance universal services (for an elaboration of such issues, see Oxera, 2007). France acted as a bearer for efforts of clarifying how to calculate universal services and rejected the proposal until the Commission gave admission to use state aid to support universal services (Interview z; j1; cc). The Directive's appendix, which describes how to finance universal services and the methods of calculation, is a result of such negotiations. This had an effect on several reluctant member states.

Another issue was restructuring processes in countries with inefficient public postal operators (Interview j1; z). Due to restructuring problems key academic experts argued that certain countries should be given additional time to adapt (EurActiv, 2007a). Poland was leading the opposition against the proposal due to such concerns. For this opposition's acceptance of the Directive, an option of a long transition period after the adoption of the Directive was crucial. Such member states were willing to accept end of 2012 as the end of transition, receiving two more years to implement the Directive than the majority of countries. In the final Directive this temporal derogation included eleven countries for reasons of joining the postal reform process at a late stage, having a small population and a limited geographical size with a particularly difficult topography or a large number of islands (Parliament & Council, 2008). After the option of a longer transition period was agreed on, such member states became more flexible with regards to other affairs (Interview z). Other member states expressed that the temporal derogation was acceptable as it concerned small markets: 'We were not indifferent, but it was absolutely tolerable, as they are relatively small markets (Interview j1)' – it was acceptable as the exempted countries were not potentially interested in entering other countries and the other way around (Interview h2). However, for reasons of reciprocity the pro-liberalisation camp would not accept derogations for other large member states, as their operators were potential competitors (Interview j1).

A third issue was a group of countries' demand to protect remote areas and vast zones from competition. Italy, which headed the opposition against the Directive for this reason, repeatedly argued,

‘if we open up for liberalisation processes and we have to give licences to three or four operators, then nobody is actually going to operate on the entire territory [...] then we need to keep some reserved areas’ (Interview z).

The Commission excluded this possibility, arguing that member states through licence requirements could monitor the operators and decide what restrictions to impose on them, thereby maintaining the quality of the distribution and setting a benchmark, but having to treat every company in the same manner. As a consequence, there were discussions about whether to adopt a proposal by qualified majority, going against for example Italy or trying to give such member states something, so that they could accept the proposal (Interview z). Eventually Italy abstained from vetoing the proposal, but was never completely convinced:

‘You can never convince them [member states] completely by all means [...] we had already a strong qualified majority, but if we had the Italian delegation on our side of course it would be better’ (Interview z).

In the end only Luxembourg vetoed the Directive and Belgium abstained.

In the Parliament the Social Democrats and the Christian Democrats tried to find a compromise. The struggle was dominated by the Christian Democrats, who also had the rapporteur, yet the compromise between these big groups did not succeed immediately and so the social democrats sought the liberals, which gave some concessions to the social democrats (Interview r). As a result the Christian Democrats did not have a majority and had to make concessions. At first reading on July 2007, the Parliament extended the proposed deadline for full liberalisation and included formulations to safeguard the rights of workers. It was ‘an attempt to soothe detractors of the Commission’s initial proposal, following heavy lobbying by a dozen incumbent operators and protest strikes by trade unions, which see liberalisation as a threat to the sector’s two million jobs’ (EurActiv, 2007b). The inclusion of social provisions was important for the Parliament’s acceptance of the proposal, as they wanted to avoid a ‘race to the bottom’ that would result in dreadful working conditions (EurActiv, 2008). To some extent the lobbying of trade unions had been effective. The final Directive states that basic labour conditions applicable in a member state will not be affected by the Directive. However, there are no strict rules on what or how to implement them. ‘In that sense they [trade unions] were not successful’ (Interview j2).

The trade unions argued that ‘the losers will be citizens, governments and taxpayers, small and medium size enterprises, most national post offices – and postal workers. The only winners will be some big mailers and some big and mostly multinational private operators’ (John Pedersen quoted in EurActiv, 2007b; also Interview dd). Green and leftist parliamentarians supported the unions to a large extent, yet they were in a minority in the Parliament (EurActiv, 2008; Parliament, 2007b).

In addition to concessions and the inclusion of some social provision, the longevity of the process mattered for the achievement of the final compromise:

‘I remember exactly how the question of how to finance the universal service, the quality of the universal service and all the social questions in the end played the decisive role. Again and again it was the question of working conditions and rights in the postal sector [...]. I believe that most delegates realized that it couldn’t be hold back any longer. It was really becoming a never-ending story. At the point in time the story was really ten years old. We’ve had the Directive since 1997, where it has been seriously spoken about the final date. Then most of the delegates realized that time could not be holding it back any longer. Then there were cosmetics in the social area, so that everybody could say that they had embedded this and that’ (Interview j1).

In the end, the reform was more or less broadly backed. Divisions remained mainly regarding the 'when' and the 'how' so that none of the delegates would ‘lose face’ (Interview a).

2.5 How Gradual Reform Affected Market-Opening of Postal Services

Returning to the modes in the theoretical part, layering importantly contributes to explaining the liberalisation outcome. The evidence suggests that there are five elements that play a key role in explaining how proponents of liberalisation through layering were able to get around the status quo that seemed to be unchangeable.

Firstly, the initial reform introduced minor steps at the margin. In practice there was a limiting liberalisation effect at all. Yet an element of instability between the new layer and the core policy created further pressures for reform. This was because the line between conventional and special services remained controversial, encouraging legal complaints as the established operators and the new market entrants disagreed about who were allowed to operate where.

Secondly, it was considered a smart move by promoters of liberalisation to include timetables and deadlines in the early directives. That way, they guaranteed that the issue would remain on the agenda. Opponents accepted such time rules as long as they were guaranteed extensive impact assessments and co-decision in future legislative rounds and because they represented an element of delay of liberalisation pressures.

Thirdly, as the timetables included dates for future liberalisation, the member states had in practice given assent to future market-opening. As there is a consequence pertaining to creating barriers to further integration in the Council (e.g. embarrassment, reduced chance of 'pay back' in the form of future concessions or side-payments) (see Novak, 2010, p. 93), large member states were not willing to prevent a reform that was close to being accepted, once the most critical issues had been resolved.

Fourthly, such solutions included differentiation in terms of modification (e.g. national authorisation criteria) and opt-outs (e.g. temporal derogations). It also included some social properties and new quality standards. These properties eased resistance against the proposal.

Finally, the long duration of the decision-making process itself played a role for the willingness to agree on a compromise. Over the years the legislators had invested a huge amount of resources in impact assessments and work, trying to reach an agreement. In the end it was no longer possible to hold it back. Eventually this process of layering resulted in displacement of the rules in terms of how to organise public service provision in the postal market.

Together these five conditions created a tipping point for opening the whole postal sector to competition. However, the drift that was expected to contribute to policy change due to increasing electronic substitution, did not affect policy change as it never became an important topic in the negotiations.

In the analysis elements of differentiated integration from the EU literature complement theories of institutional change by adding detail to the nature of layering. Yet there is also another value-added of combining these two strands. Whilst EU scholars tend to treat differentiated integration as being without 'real' political content (see for example Falkner, 2011, p. 13), theories of institutional change highlight that differentiation through an incremental process may be quite effective in inducing considerable policy change.

2.6 Conclusion

In summary, although market opening in the postal sector was part of a larger trend and the Commission, market entrants and large consumer groups pushed for liberalisation, radical displacement was not possible due to strong opposition from defenders of the status quo. Instead market opening was achieved through layers of reforms, starting at the margins and moving towards the core. Together this incremental layering fundamentally changed the approach of service production from a focus on public service to an emphasis on competition. In contrast, drift does not explain policy change as the politicians during negotiations hardly discussed electronic substitution that could have had such an effect.

Theoretically, the analysis of the Postal Directive extends the theories of gradual reform by adding insights as to how layering brings about policy change of liberalisation in controversial areas in the EU. The contribution suggests five such key mechanisms: (1) instability due to claims of abuse by incumbents and encroachment by new market entrants when the rules for a reserved area remains different to the rest of the market; (2) time properties such as deadlines and timetables, which ensure future re-negotiations; (3) concessions that prevent mobilisation against a new policy; (4) social norms that make it politically costly to create barriers to further integration; and (5) longevity in terms of draining the process so that the legislators want to put an end to the process of reform. These mechanisms suggest that there was not a singular 'tipping point' but several components that together contributed to the market opening

of postal services over time. However, the defenders of the status quo were to some extent able to preserve original practices through differentiation, including modification of the policy content and ensuring certain member states temporal opt-outs. Therefore and due to decreasing volumes in the letter segment, in practice the traditional monopolies remain to a large extent in the letter segment.

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3 The Role of Labour and Associated EU Liberalisation Challenges: Insights from the Port Sector

Abstract

An influential argument holds that trade unions are not likely to succeed in their objectives through current European decision-making processes. In addition, the European Union has extensive leverage to introduce negative integration due to asymmetries towards liberalisation in the treaties. Given such arguments it is of interest to study a case, where attempts of EU liberalisation reform have failed and trade unions claim this is their victory. An in-depth analysis of the decision-making process of the proposal for a Port Directive highlights that trade unions are most influential when they are able to exploit the division of industry interests to resoundingly oppose policy change. Moreover, the analysis highlights the importance of including large societal groups in consultations.

Keywords: European integration, interest groups, trade unions, liberalisation reform, port policy

3.1 Introduction

Extensive literature focuses on the question how legislators in the European Union have been able to agree on common policies to liberalise sectors such as public services, where liberalisation reform is controversial (e.g. Eberlein 2008; Eising and Jabko 2001; Humphreys and Padgett 2006). Such contributions leave out aspects that are getting in the way for integration. Therefore it is of interest to analyse when initiatives to liberalise public services fail in the EU. One such case is the ‘Directive on market access and financing of maritime ports’ (the Port Directive), which looked to establish common rules for the implementation of the freedom to provide port services. The Port Directive is interesting as it was rejected twice and the trade unions claim that this is their victory. This is surprising given the fact that most proposals go through. Only six other proposals in the ‘ordinary legislative procedure’ have been rejected (correspondence with Eur-Lex). It is also surprising given the several reasons in the literature as to why trade unions are not likely to succeed.

Despite the increasing presence of interest groups at the European level, studies highlight that trade unions use familiar routes at national level where policies tend to be considered more important to such groups (Beyers and Kerremans 2007, 475). Researchers find that trade unions struggle with collective action problems and have difficulties mobilising their members (Greenwood and Aspinwall 1998) and mass protests in Brussels are rare (Della Porta 2007, 199). Moreover, the European Commission, although committed to take civil society interests into account through open consultation procedures, is fairly autonomous in developing its interests (Kohler-Koch and Quittkat 2011) and seeks support from interests that agree with its preferences (Dür 2008, 1219). Therefore interests opposing such preferences are more likely to be neglected in consultations. In addition, extensive literature claims that the European Union has far-reaching leverage to introduce negative integration due to asymmetries towards liberalisation in the treaties (Scharpf 1996; Kerwer and Teutsch 2001). Given such circumstances, trade unions are facing substantial difficulties to succeed in their objectives through current European decision-making processes. These arguments make it interesting to analyse whether the trade unions were successful in influencing the Port Directive and, if so, why.

In the port sector, trade unions are considered typically strong due to the loyalty they have to one another and the capability to be organised as a group. Considering that ports are crucial nodes within logistics and transport, any potential threat of blockage by workers may be effective due to the limited spatial area of ports (i.e. it may be easy to block) and potential economic ramifications. Demonstrations may cause shortage of essential goods in everyday life. This makes the Port Directive a 'crucial case' for testing the hypothesis that trade unions are weak in cases of liberalisation policy at the EU level. If trade unions are not influential in the port case, they are not likely to be influential in any such case.

However, the aim of this analysis is wider than the scope of simply testing the mentioned hypothesis. The advantage of a detailed case study is that it allows for investigating 'causes-of-effects' (Mahoney and Goertz 2006). Thus the analysis aims at exploring the conditions, under which EU liberalisation reform does not occur. Although this seldom happens in the EU, it adds useful information to 'real world' actors who would like to understand how a proposal could be turned down or how to avoid such outcome in future (e.g. a third Port Directive will be put on the agenda in 2013; the maritime sector is one of several areas that face similar challenges).

An in-depth analysis of the decision-making process of the Port Directive suggests that there are two key conclusions as to why the attempt to liberalise port services in the EU failed: The first conclusion is about the influence of actor constellations on the policy outcome. Several maritime interest groups built an 'issue network' against the Port Directive, meaning an alliance of various interests who unite around a common purpose. Issue networks are fragmented, include participants that do not usually come together and quickly dissipate (Greenwood 1997, 15). The issue network against the Port Directive included port authorities, established port operators and trade unions. It also included certain member states that continued to run against the proposal in conversations with interest groups and Members of the European Parliament, although having already agreed on the same proposal in the Council. They had differing reasons for their opposition, but shared the goal of withdrawal. The findings highlight that although trade unions were able to communicate powerful arguments and successfully mobilised their members against the Port Directive, in particular in the later round, their opposition was not a sufficient condition for the failure of the Directive. In order to succeed, trade unions were dependent upon issue networks with other opposing interests.

The second conclusion refers to the importance of how input is organised in relation to output, for example whether the ‘voice’ of interest groups corresponds with their accessibility to the decision-making process. In the port case the European Commission was too self-confident in believing that it would get its way, thereby ignoring the extensive disruption it created by launching an initiative without prior consultation and rejecting modifications as endorsed by the Council and the Parliament.

The findings illustrate an interesting point. The Port Directive represents a case in which liberalisation does not occur. Analyses of such cases are fruitful for the purpose of refining existing theories by showing more clearly forces that are hidden in the majority of contributions on EU liberalisation reform, which explain deeper and wider integration. Therefore to understand European integration, there is a need to also understand lack of integration where such integration could have happened (see Mahoney and Goertz 2004). So far such analyses have not achieved much attention (Stone Sweet 2010).

The following sections test the importance of trade unions in EU decision-making and explore factors that contributed to why the European Union was not able to introduce liberalisation reform in the port sector: The first section presents useful theoretical perspectives that guide the empirical analysis. The second section presents the data and research techniques. Thereafter, the third section gives an account of what happened in the case of the Port Directive, which was rejected twice. Finally, a conclusion follows.

3.2 Theoretical Approaches

To test the hypothesis that trade unions are weak at the EU level, theories that propose the opposite are of interest. In this section mechanisms are presented that explain as to why interest groups that are usually considered weak could be important in influencing EU decision-making. Thus, the ‘test’ includes not only discovering whether the trade unions caused the failure of the EU liberalisation reform, but understanding why they did, if they did.

Interest group literature provides such interesting aspects. Within this literature, there is an increasing interest in understanding the role of groups that aim to counter neoliberal reforms (for example Bieler 2011). Researchers acknowledge that the introduction of neoliberal ideology that has affected the philosophy and process of management and governance, has created challenges for green and social non-governmental organisations and trade unions, also in public services where trade unions traditionally have a strong role. Such groups have had to adjust to the new challenges (Greenwood 2011, 7). However, they are not 'passive victims' (Erne 2008, 199). Globally there are signs of protest against neoliberal reform (Ayres 2004) and in the port sector trade unions have responded with protests on several occasions (Turnbull 2006). In the case of the EU Service Directive the trade unions have been able to gain substantial political impact (Erne 2008).

Scholars suggest that in order to be influential interest groups need to fulfil two conditions: they need to have access to the decision-making institutions (Woll 2007, 59); and they need 'exchange goods', that is functional resources, including information about possible effects of policies and support that could be decisive in an election (Bouwen 2002). Regarding access, institutional perspectives propose that institutions tend to be biased towards certain interests (Baumgartner 2007). For example, interest groups that are generally opposed to the logic of liberal integration tend to be 'frozen out' from EU institutions (Greenwood 2011, 7), similarly in the case of the Services Directive (Parks 2009). Such exclusion may have different incitements. The agenda-setter may wish to ease decision making of a controversial proposal. When excluding opposing interests from consultations, the agenda-setter may try to dismantle opposition against a policy, as the opposition will be taken by surprise to mobilise. This is considered an important reason as to why the trade unions failed to block the abolition of the Dock Labour Scheme in the United Kingdom in 1989 (Dempster 2010), which is interesting as this national policy share similarities with the Port Directive. Relating the approach to the EU, the Commission may choose not to involve all interest groups in tedious consultations. On the one hand, a consequence is that it becomes difficult for those interest groups that are not prepared to mobilise, especially in a multi-level system, where interest groups may struggle with finding a common position.

On the other hand, such a strategy may come at the cost of lack of a comprehensive framework due to absence of sound analysis and consultation. Limiting the possibilities of large societal groups like trade unions to give input to the decision-making process may generate a high level of politicisation (Loder 2011, 578). In general the Commission has contributed to prevent public protest at the EU level through dialogue and apparent openness, but when such lobbying possibilities are removed, interest groups may take advantage of other opportunity structures such as taking to the streets – not only at national level but also in Brussels (Parks 2008, 225). Moreover, a ‘closed’ Commission makes such groups exploit the opportunities offered by the Parliament (Parks 2008, 227) and the politicisation of the process may empower the Parliament in the process (Loder 2011). Several politicians are likely to sympathise with concerns regarding liberalisation; and interest groups with large numbers of members play a role for politicians, who want to be re-elected or find it appropriate to follow the opinion of their constituencies (Bouwen 2002). Even politicians, who ideologically prefer liberalisation, may hesitate to go against public opinion. Accordingly, it could be expected that exclusion of large societal interest groups in consultations politicises the process and makes it more difficult to get a policy decided on. This is one mechanism (“M1”) that contributes to understanding why ‘weak’ interest groups may after all be influential.

Moreover, a comprehensive piece of EU legislation offers several points of disagreement. For example, politicians who are in favour of liberalisation may go against such reform in the EU due to subsidiarity concerns. For this reason advocates sideline with each other to reject a proposal although their beliefs about the effects of a reform differ. Following from this, it could be expected that the several points of disagreement in EU policy-making make advocates with different interests find commonalities to side with each other. This is a second mechanism (“M2”) that may explain influence of interests that are usually considered weak.

Another factor that contributes to explaining when interest groups are successful, is how they ‘frame’ an issue. Whilst all advocates frame issues, what is interesting is whether others pick it up (Baumgartner 2007, 486) – whether they are able to communicate their arguments to society. This discursive element includes the ability to use understandable references and clear pictures of problems (Schmidt 2000, 288). Visibility and salience also help as such factors are likely to spur interest in society and draw media attention, thereby increasing politicians’ awareness of public opinion.

This is the case when, for example, business, labour and non-governmental actors build coalitions against each other (Beyers 2008, 1192) or interest groups organise protests in the streets. This is typical for liberalisation proposals where social solidarity concerns oppose the competition approach. Such conflicts tend to be value-laden and create little room for bargaining (Beyers 2008, 1193). On such occasions, interest groups are likely to be important for the legislators to gain social legitimacy. Hence, it could be expected that if interest groups are able to communicate and make their issue visible, they are more likely to succeed. This is a third mechanism (“M3”) that may contribute to explain how weak interests may become powerful.

Furthermore, in EU policy-making the political content of a proposal is usually watered-down (i.e. legal discretion, opt-outs, vague wording). This is highlighted in the literature on ‘differentiated integration’ (for a review, see Holzinger and Schimmelfennig 2012). Differentiation is usually understood as a facilitator for compromise-finding. However, watering-down may not always result in a successful compromise. It may instead make those actors originally favouring a proposal to go against it, as the original intent has become too vague and is therefore not viable anymore (i.e. the solutions are unsatisfactory or increases legal uncertainty). It could result in actor constellations, where those in favour of a certain policy join interest groups that have always opposed the framework, as none are content with the final proposal. This is a fourth mechanism (“M4”) that explains why marginalised interests may be considered important. If such issue networks are substantial enough they may create sufficient opposition to influence the behaviour of delegates in the Council and/or the Parliament.

Finally, drawing on the claim by Stein Rokkan (1975) that ‘votes count but resources decide’, there should be clear reasons for the trade unions to succeed in the port sector. As highlighted in the introduction, demonstrations in ports could impose ramifications that are of importance to the political system. The ability to hold back important resources (i.e. port services), could empower port workers to become effective negotiators. This is a fifth mechanism (“M5”) that may explain why trade unions may be successful even in EU decision-making. In sum, there are possibilities for trade unions to exacerbate influence in EU decision-making despite the challenges that interest groups that are generally opposed to the logic of liberal integration of markets face.

3.3 Data and Research Techniques

To get a complete picture of what happened in the selected case, different sources of data are necessary. Evidence includes policy papers, minutes from hearings in the European Parliament and meetings in the Council, consultancy reports, annual reports by interest groups, online newspaper articles from EurActiv and eleven semi-structured in-depth interviews. Especially interview statements are crucial to assess whether and which interest groups have been important for the rejection of the proposal. The interviews included questions about who the informant thought was the most influential and why it was difficult to introduce liberalisation reform in this sector. Interview sampling was undertaken with the aim of covering views mainly from relevant interest groups and the EU institutions. These include three Members of the European Parliament representing the Party of European Socialists, Party of the European Left and the European People's Party, among them the rapporteur; two desk officers in the Commission's Directorate-General for Mobility and Transport; three representatives of trade unions including one from the Dockers' Section of the International Transport Workers' Federation and two from the Norwegian Transport Workers' Union; the Secretary General of the European Sea Ports Organisation; the Secretary General of the European Shipowners' Association; and a representative from the relevant German Ministry. The civil servant in charge of the dossier in the General Secretariat of the Council had left office and was not available for an interview. Most interviews took place in Brussels in spring 2011, supplemented by an interview in Bonn and three telephone conversations. The interview data has been essential for covering gaps and documenting facts, establishing the mechanisms at work and has been cross-checked with other evidence. Anonymity, which ensured that the informants could speak freely, was considered more important than the benefits of readers to know 'who said what'. The manuscript has been sent to the informants for clarifications, which resulted in useful elaboration by three individuals.

3.4 The Rejection of the Port Directive

The Commission tabled its initial proposal of the Port Directive on the 13 February 2001. Three years later the Parliament rejected the joint text negotiated in the conciliation committee. A second attempt to initiate the Port Directive was put on ice, when the Parliament rejected the new draft at first reading. This section gives an elaboration of what happened during the decision-making process, explaining why the proposal was rejected twice.

3.4.1 The First Proposal

In 1997 the Commission launched a Green Paper on Seaports and Maritime Infrastructure. Some of the main issues addressed were the importance of port services as an economic sector with investment opportunities and the need for harmonising rules at the European level. At the same time increased competition between ports due to the Single European Act and new technology had created a need for level rules of the game (Commission 1997, 2). The Commission received several complaints from users and potential suppliers of port services about alleged breaches of the Treaty (Commission 1997, 26). Rather than examining such issues on a case by case basis, a port directive was meant to solve such issues by introducing a common framework (Commission 2001a).

Extensive literature shows that the Commission uses such situations to push for liberalisation policies (Martinsen and Falkner 2011; S.K. Schmidt 2000). However, in the port sector the Commission has been reluctant as there is an exemption for maritime services in the Treaty. It leaves the responsibility of port services in the hands of the Council (Article 100). Without the legal means the Commission decided not to introduce any infringement procedures to open up the market of port services. Similarly, actors who would benefit from market access have refrained from initiating law suits.

In later policy documents environmental aspects were emphasised. In the White Paper the Commission (2001b) acknowledges that the congestion on the main road and rail routes as well as harmful environmental and health effects require a shift of the balance between modes towards maritime transport that take up less infrastructure space, is considerably quieter to the public and more energy efficient. A number of bottlenecks could have been solved, if the Mediterranean ports had been more

competitive, as substantial maritime transport coming to Europe passes through the Mediterranean, but is offloaded in ports in northern Europe. Cargo is thereafter transported by road or rail to onward destinations, contributing to congestion. A common framework was supposed to increase the efficiency of ports that were lagging behind, thereby reducing traffic jam. As a means to achieving this goal, the Port Directive aimed at opening up the port services market and creating common rules for (1) competition between ports and (2) competition between providers of a same port service within a port. In this context competition was a mediate goal (i.e. in terms of achieving the ultimate goal of efficiency) as well as a goal in itself (i.e. in terms of establishing the fundamental freedoms and the competition rules in the Treaty within seaports).

Based on such aims the Commission launched a proposal, which looked to open up the port services market. One objective was to increase competition and establish the freedom of companies to operate and employees to work anywhere in the European market, covering pilotage, towing and mooring, stevedoring, stowage and transshipment, cargo and passenger handling. Another objective was to increase the transparency of port finances, in order to prevent distortion of competition due to state aid.

The customers of port services, the shipowners, supported the purpose, as it would reduce their costs and increase efficiency (Interview p). They had a well organised lobby in Brussels and were an influential group, being in contact with the Commission almost on a daily basis during the initial phases (Interview p). In contrast, the involvement of trade unions was limited (Interview l): 'In the beginning there was no influence existent because we were not consulted' (Interview s). As highlighted later in this section, such neglect contributed to the politicisation of the process, as suggested by M1 in the theoretical part. Similarly, the port authorities was a young interest group, which struggled to make a unified position due to the several different models of organisation in ports. The most important organisational divide was between the ports in the northern member states, which had already fulfilled improvements and feared intrusion from the EU and ports in the southern member states, which were lagging behind (Interview n). The 'one size fits all approach' of the Commission was disputed due to such heterogeneity.

According to the Commission (2001a, 4), consultations showed widespread support for establishing a common regulatory framework at the European level. However, the Economic and Social Committee (2002) noted that the reservations on various points came from more groups than the Commission claimed in its communication. Not only did piloting, towing and mooring associations strongly oppose the draft, the port organisations were also reserved towards the form and content and the trade unions in the port handling sector feared serious social problems. In contrast, the Committee of the Regions (2002) endorsed the proposal, supporting to phase out restrictions or monopolies on pilotage, towage, mooring and stevedoring. Liberalisation of such services proved to be highly disputed during the debates in the Council and the Parliament, which – following the ‘ordinary legislative procedure’ – both had to approve of the legal text for the Directive to be adopted.

At first reading in the Parliament the proposal was subject to substantial amendments, which considerably watered down the Commission’s original proposal. Still this amended version was adopted only by a very narrow majority. Given in particular concerns in the Parliament about employment, quality and safety and the fact that when a proposal has arrived the Parliament, the Commission may choose to withdraw the whole draft or not at all, the Commission (2002a) chose to include a considerable number of amendments and clarify points to avoid misunderstanding. Yet the Commission would not accept the exclusion of some of the most controversial points: pilotage and the limitation of self-handling rights nor the extended duration of authorisation.

Arriving in the Council, the proposal’s overall aim was well received by the majority of delegations. Yet all delegations maintained a general scrutiny reservation; the most articulated ones raised by the United Kingdom and Denmark (Council 2002a). The Dutch expressed a general reservation on the mere need for a directive like the one proposed (Council 2002b), a position that was later followed by Belgium and Germany (Council 2002c, 2). Thus, important member states opposed the Directive. Similar to the Parliament, the Council (2002d) emphasised the need for constraints related to capacity, safety, environmental protection and public service obligation. It uttered a concern of undue administrative burdens and feared difficulties of implementing long-term development policy. Having resolved various issues by, for instance, including the right of member states to demand certain criteria when granting authorisations, the member states agreed that the freedom to provide port services

should prevail as a rule. None of the member states vetoed the proposal. As a single, watered-down proposal it was not important enough to block. A representative of a large member state argued, 'no minister vetoes, if she knows that it will be a lost case' (Interview i). However, informally some of these countries continued to run against the proposal in conversations with parliamentarians (Interview i).

According to the Commission (2002b), the Council's common position, respected the key principles of the proposal. Therefore the Commission supported the amended version. However, the Parliament was not convinced and re-instated exceptions for pilotage services and restricting self-handling to cases where shipping companies use their own sea-faring crew and not land-based personnel (Parliament 2003b). Again the Commission (2003, 5) rejected these amendments, but in the conciliation that followed the Parliament and the Council (2003) agreed to put these two controversial points back in as exceptions. The formulations would considerably weaken the Commission's original proposal.

The ILO Dock Work Convention 137 from 1973, which in practice means that there is restricted access to dock work for workers who are members of a union, is a key to understand why pilotage and self-handling was so controversial. Whilst this convention historically had solved several social problems (Dempster 2010), the Commission (1997, 24) expressed apprehension, arguing that the obligation to use exclusively workers who are members of such pools may constitute restrictions to access the port market, thereby limiting competition. However, the consequences of repealing the monopoly of the workers were disputed as the unions played an important role in getting proper rules on safety and environmental aspects. Safety and environmental arguments were very visible. Ship accidents can cause huge environmental disasters and port workers do an important job in avoiding them, steering big ships in ports with limited space, ensuring stability and avoiding cargo shifts (Interview o). In addition, ports are important workplaces and several advocates were concerned with displacement processes, for example from cheap labour from abroad, threatening to undermine well-functioning ports (Interview p, r, i). As highlighted in the next section (the 'second attempt'), such visible arguments contributed to making the opposition successful, as suggested by M3 in the theoretical part.

Having reached a compromise in conciliation, the joint text went back to the Parliament for vote. On 20 November 2003 the Port Directive proposal was overturned by 20 votes in the Parliament. It was a seldom occasion – in ten years it was the third time that the Parliament had overturned an agreement reached in conciliation (Parliament 2003a). Some were surprised by the resistance it had created:

‘If you look at the compromise on the first proposal that was reached at the end of the negotiation process in Parliament and Council, it was rather light touch. The Directive contained a few basic principles that really should not have worried anybody. It would have created more transparency and a more level playing field. Who could be against that? The unions have greatly exaggerated the problems they saw coming from this all’ (Interview n).

Others explain the result arguing that a number of parliamentarians, who had expressed their agreement with the proposal, were absent during the vote (Interview l). Another argument is that the final outcome of conciliation was not well communicated to the political parties (Interview l). Similarly, trade unions suggest that if they had been included in the discursive debates, perhaps they would have taken a different stance: ‘If it was to develop a legal framework, to have legal clarity. Well, if they would have explained that from the beginning, maybe we hadn't been where we were’ (Interview s). This comment suggests that the lack of input possibilities politicised the process, as M1 proposes. The comment is also interesting as most interviewees claim that the unions, although initially hampered by collective action problems²¹, were central in influencing the outcome.

However, the actor constellations with other opposing interests such as established port operators and port property owners were more important. Cities, regions or states fearing to lose control over their own ports joined the unions and the established port operators in their concern of increasing competition (Interview q). In many regions there exist century-long relationships between the established port operators and the cities and in several cities ports are the most important employer. The fact that differential interests found common ground to side with each other, is inline with M2

²¹ Whilst French and Belgian labour unions were strongly against the proposal and early contacted their national governments and socialist partners in the Parliament, the Spanish and Italian labour unions were initially supportive due to the clause that would allow for self-handling – this could facilitate for more maritime transport between the ports of Genoa and Barcelona (interview r).

in the theoretical part. Whilst interests on the ‘supply’ side opposed the Directive, actors on the ‘demand’ side mainly supported the proposal. However, opposers of the Directive were late at realising the potential consequences of the Directive, including member states, port authorities and labour:

'The active force that unfolded with the first Port Package was understood quite late by technical experts and unions. [...] We agreed that if there would be a second chance, we would closely co-operate from the beginning' (Interview i).

The next section shows that especially trade unions, which had organised several national strikes throughout the whole process, strongly mobilised in the second round. Interestingly, in the end, even interest groups supporting the first Directive fought against the second proposal or they expressed some reservations, as the conciliation text that formed the basis for negotiation was neglected.

3.4.1 Second Attempt

Less than a year after the failure of the first proposal, the Commission launched the Port Directive again on 13 October 2004. This second proposal was similar to the original proposal, including revisions that had been made throughout the process. The key principles, objectives and provisions relating to the scope, authorisations, selection procedures, duration and financial transparency remained the same. New elements included reinforcement of social concerns; a stricter and mandatory authorisations regime; shorter maximum durations for authorisations; and a new and broader definition of self-handling.

Given that the member states had approved of an amended version of the first proposal in the Council, the Parliament had agreed on it in conciliation and that the proposal had only been rejected by a margin of 20 votes, the perception in the Commission was that the proposal was close to approval and that a second attempt could get the Directive through. Due to the perceived consensus, the Commission did not identify any demands for assessments, so it decided to give it a second try without doing all the work that further assessments would have required (Interview 1).

The Commission would later regret this decision. To introduce a directive without re-opening consultations with the industry and unions was strategically not a clever move, especially as the proposal was not identical to the text agreed on in conciliation. Although rejected in conciliation, the Commission reintroduced controversial points such as the right of the self-handler to use its own land-based personnel. Also self-handling for pilotage would be possible. As proposed by M1, the lack of consultations politicised the process. The resistance was huge. The shipping industries, which were in favour of liberalisation, now went against the Directive, claiming that the proposal was unworkable:

‘The second Directive was a mistake. In such a short time it was not clever to make a second proposal, which was also for us unworkable. So we then decided jointly, even jointly with the unions, to shoot it down. So we went to the Parliament and said, “This doesn’t work, reject it!” [So what was it about the second proposal that didn’t work for you?] Well, there were a lot of conditions in there on everything more or less, which were not taking into account reality. It was not real. It was for labour, concessions, pilotage, for everything. It was not one specific point, but the whole thing was badly presented and also politically it was not clever strategically to propose a second one so short after the first one (Interview p)’.

Such evidence highlights, as proposed in M4 that the process of watering-down resulted in turning those in favour of the original policy against it. The proposal was criticised for being insentient. Proponents of the Directive criticised the Commission for not taking the time to build consensus and communicate the aims:

‘It first of all came too soon with the second proposal. Secondly, and more importantly, they didn’t respect the compromise that was found on the first proposal [conciliation text]. This upset so many people, both in the sector and the European Parliament, that in the end it went down very quickly. The Commission should have played the second attempt a little bit smarter and then they would have got it through (Interview n)’.

By rushing to launch the second proposal the Commission created turmoil in the sector. Port authorities were provoked by the removal of details of the conciliation agreement that had incorporated a majority of their demands (Pallis and Tsiotsis 2008, 23) and the trade unions organised strikes. The dockers blocked the port in Antwerp for three days just before the vote of the second proposal in January 2006. Similar actions took place in Rotterdam, Marseilles, Le Havre and Thessaloniki (Parks 2008, 49). The economic impact of such demonstrations is huge, directly affecting both port authorities and the shipping industry. Also members of the right-wing in Parliament questioned whether it was worth it, having a conflict on this issue:

'I think everybody was afraid of all the turbulence that the process on the Directive had created. When you have workers on strike, then you have a lot of economic losses. And many ports prefer to have social peace. Even if there are local monopolies and restricted practices, ports can survive with them, but if the ports close, then everybody will suffer' (Interview n, also Interview r).

As a consequence, the unions were very powerful. Together with other opposing interests, they possessed resources that could not be ignored by the legislators, as proposed by M5.

Also other aspects were questioned. The Committee of the Regions (2005) and the Economic and Social Committee (2005) raised issues with regards to lack of consideration of the prevailing market structure in the port structure and argued that the proposal would weaken the capacity for investment in the sector. Likewise, actors from a northern point of view put forth that the need for the Directive was not clarified in the first place, nor was it based on the specific needs of the port sector (see van Hooydonk 2005, p. 204f). Such issues were highlighted in a document assessing the impacts of the proposed Directive that was prepared by the German Federal Ministry (2005) in cooperation with researchers. The document was spread among member states and contributed to increasing resistance against the Directive (Interview i). The stir that was created added fuel to resistance that was already present during the first Directive. In the face of this, the Commission admits that the second attempt was not clever with regards to the actor constellations that joined forces to work against the Directive, as proposed by M2:

‘In today's perspective we should have re-opened the consultation process and carried out an expanded impact assessment, because of course the proposal was controversial. We were proposing a structural reform, removing a lot of established interests. We were removing exclusive rights, we were removing long standing monopolies in many member states and there were many actors affected and, this is my personal view, the Directive was not approved in Parliament because we had so many interest groups against us. Normally we have a balance with some interest groups that support you and some interest groups against you, but in that case we had a situation in which the incumbents – port authorities, terminal operators, technical-nautical services, dockers – had significant bargaining power, including the capacity of shutting down essential facilities [the ports] and creating social unrest. Each one of those groups, for their own particular reasons, were against the proposal (Interview 1)’.

Moreover, it is suggested that the new Commissioner, Jacques Barrot, was more reluctant to push the Directive forward than his active predecessor, Loyola de Palacio, had been (Interview n, p). Events that may have played a role for their different eagerness in gaining a Port Directive are problems experienced in Mediterranean ports and the French rejection of the EU Constitution. On one hand, the belief that the Port Directive would improve Mediterranean ports to the level of northern ports gave a spur to push for this Directive (Interview 1, n). This was an important aim for Palacio, coming from Spain. Therefore, she hurried to introduce the second proposal, before leaving office. On the other hand, fears of excessive economic liberalism were given as one of the reasons for the French ‘no’ to the EU Constitution in May 2005. Under this circumstance it was not popular to push for the Port Directive, which attracted attention as another liberalisation attempt (EurActiv 2006a). In addition the Erika disaster in 1999, which caused one of the greatest environmental disasters in the world and the sinking of Prestige in 2002 highlighted the risks inherent to vessels going on oceans (Beauvallet 2010). As proposed by M3, the visibility of the argument enhanced the position of the opposing interests, when lobbying the parliamentarians.

As a result, the rapporteur, Georg Jarzembowski, who favoured the Directive was left ‘alone’ to fight after the Transport Committee in the Parliament failed to adopt the report prepared by the rapporteur. The divided Committee was unable to amend the Commission’s proposal. In addition, the unions mobilised 6,000 dock workers from 16 countries to demonstrate in Strasbourg on the day of the vote (European Transport Workers' Federation 2006). On this day the unions had organised for a boat with a television team to follow the demonstration. The substantial media visibility to

concerns of trade unions and their partners in the Parliament throughout the process gave them considerable recognition (Beauvallet 2010). On the 18 January 2006 the Parliament resoundingly rejected the proposal with 532 votes against, 120 in favour and 25 abstaining. After the vote the rapporteur described the situation as won by ‘an unholy alliance of rock-throwers and defenders of the status quo (cited in EurActiv 2006b)’. Transport Commissioner Jacques Barrot declared, ‘Today's vote is clear. It leaves no room for doubt as to Parliament's position on this proposal as submitted after the failure of the earlier proposal (cited in EurActiv 2006b)’.

3.5 Conclusion

Resuming the hypothesis about the role of trade unions at the EU level, the Port Directive contributes with interesting findings. The evidence suggests that trade unions do matter, but they are not a sufficient condition for failure of reform even in the port sector where they are considered particularly strong. The mechanisms elaborated on in the theoretical part highlights what conditions had to be present for the failure of the Directive.

The most important condition was the building of an issue network across different interests, as proposed by M2. It was crucial for the decision to turn down the proposal. In the port case trade unions exploited the divisions between port authorities in northern and southern member states and the member states themselves. Established interests on the ‘supply’ side partly sided with trade unions because they were concerned about weakening investment capacities and loosing regional control. Similarly, member states that were critical towards the Directive, informally cooperated with such interests to run against the proposal, although having given assent in the Council. The actor constellations of trade and business interests created a critical mass to convince the parliamentarians to reject the proposal.

In the final round such actor constellations even included the shipping industry. Although being in favour of liberalising port services, the shipowners turned against the proposal because it ended up endorsing ‘everything’ and therefore became ‘unworkable’. This is inline with M4. However, for interests opposing the draft from the beginning, the failure was rather caused by the Commission’s lack of willingness to remove controversial elements. For such advocates the proposal was not modified enough. The Commission provoked both sides by launching a new proposal so quickly

after the first failure without re-opening consultations and impact assessments. In the end the parliamentarians, who endorsed the proposal, gave in due to the conflict it created.

These findings are related to the lack of input possibilities and dialogue to communicate arguments to disagreeing actors in the process, as put forward by M1. Several advocates highlighted the importance of consultations to balance and better explain the proposal. The lack of such elements, for example the neglect of large societal interest groups in consultations, contributed to the failure. Interviews with trade unions highlight this point, as they indicate that a compromise could have been possible, if they had been taken seriously from the beginning.

Finally, as suggested by M3, the opposing interest groups were influential because they were able to frame their arguments in a visible way. They highlighted the environmental and safety risks inherent to vessels at sea and referred to such recent occasions. In addition, the trade unions acted in a visible way, mobilising mass protests and blocking ports. Together with opposing interests among port authorities and port operators, trade unions possessed important resources for the legislators. In the face of such opposition the parliamentarians could not easily accept the proposal, as proposed by M5.

To sum up, the analysis highlights two conclusions: Firstly, actor constellations played an important role for explaining the policy outcome. Interest groups fearing unemployment and social issues sided against the Directive with groups that feared losing control of their ports. Within this constellation the role of the trade unions is interesting. Although the free market principles have created substantial issues for the trade unions and their role during the important agenda-setting phase was minor, they were influential as they were able to exploit divisions between other interests.

Secondly, the gap between the possibility of giving input and how the process was organised politicised the process. The 'war on the waterfront' rose after the Commission initiated the Directive a second time shortly after the first failed attempt, without opening consultations and impact assessments. Opportunities of communicating the purpose and balancing the proposal further were lost.

Although the findings only draw on a single-case study, it is interesting for refining existing theories for the following reasons. Firstly, the port case illustrates the typical dichotomy between the service and the competition perspective, which is prominent in every debate about liberalisation of public services (Prosser 2005). Secondly, lack of inclusion of trade unions has resulted in politicisation and modification of policies also in other sectors (Loder 2011; Parks 2008). Finally, although the trade unions in the port sector seems exceptionally strong, they can claim their victory only because other important interests were divided and partly sided with the trade unions in objecting the proposal. According to both industry and trade unions, the failure of the Port Directive has contributed to increased confidence among trade unions in general. Being one of several sectors that face a similar problem, it is interesting to see whether this confidence has affected the ability of trade unions to mobilise in other attempts of EU liberalisation or other types of policies. It is also relevant to see whether the EU now has to rely more on trade unions in policy-making.

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4 The Scope of Negative Integration in Infrastructures: A Comparative Analysis of Post, Public Transport and Port Services

Abstract

There is extensive literature that explains how liberalisation policy deepens and widens. In the literature of European integration such reform is commonly considered a result of a bias towards liberalisation in the treaties, thereby giving the European Commission and the European Court of Justice wide-ranging leverage to enforce such reform. However, such approaches have been criticised for being de-politicised - for failing to understand the conflicts inherent in controversial policies. It is therefore of interest to explore the scope conditions of the constitutional bias assumption in areas, where liberalisation policy is controversial. Analysing EU decision-making processes across the postal, public transport and port service sectors, this contribution suggests that - in addition to the legal foundation in the treaties - there are three key conditions that are important to consider: organisation of public services; mobilisation by large interests such as trade unions; and how willing the European Commission is to give in to concessional demands.

Keywords: European integration, liberalisation, ports, post, public services, public transport

4.1 Introduction

Liberalisation is the area where European Union policy has expanded most extensively. A common assumption is that asymmetry towards negative integration in the treaties (meaning policies that eliminate national barriers to trade and distortions of competition) explains this development. The claim is that this bias provides the European Commission and the European Court of Justice extensive powers to facilitate for the 'four freedoms' in the internal market (Scharpf, 1997; 2012; Schmidt, 2000). However, recent contributions suggest that European integration has moved into a new 'post-Ricardian' phase, where liberalisation attempts by the Commission and the Court create 'political resistance to an extent that challenges the viability of the European project' (Höpner & Schäfer, 2010, p. 344). In circumstances of high politicisation the constitutional bias argument is not expected to hold. The aim of this paper is therefore to contribute with an analysis of the scope conditions of the assumption that a constitutional bias drives liberalisation in the EU and ask what are the limits of EU liberalisation.

Public services are a relevant field for analysing these questions, as in this area EU liberalisation reform is highly controversial. It is also a field where EU liberalisation reform has moved more slowly than researchers have expected (Stone Sweet, 2010, p. 28). As such, the extent of liberalisation varies across different public services (Finger & Künneke, 2011). If the key assumption holds in this area that a bias towards liberalisation in the treaties drives liberalisation processes, it could then be expected that varying Treaty foundation explains such differentiation. Therefore, a case selection that incorporates variance on the extent as to which there is liberalisation bias in EU law allows for a clarification of this assumption to be possible and an exploration of the scope conditions. For such an endeavour, three infrastructures have been selected for comparison: (1) the Postal Directive as the general rules of competition in the Treaty applies to the postal sector; (2) the Public Passenger Transport Services Regulation by Road and Rail (hereafter: the Public Transport Regulation) as the Treaty requires the Council to lay down common rules for this sector (Article 91 and 100); (3) the Port Directive as the Council 'may' decide to lay down appropriate provisions for maritime transport (Article 100). Thus, the provision of freedom to provide services in the treaties are stricter for postal services than for public transport and they are the least strict for port services.

At first sight, a comparison of these cases seems to confirm the constitutional bias hypothesis: The Postal Directive's final amendment ended a series of directives by liberalising the remaining letter policies; the Public Transport Regulation represents a middling case, as it leaves it to the member states to decide whether to produce the services themselves or introduce competitive tendering; and the two attempts of liberalising port services (i.e. two versions of the Port Directive) have been rejected. However, there might be other explanations that are not accounted for, when focusing on Treaty formulations. An investigation of such alternative or complementary explanations may substantiate the extent to which this putative cause affects EU liberalisation in the selected cases. The primary aim of this analysis is therefore to seek to contribute to explore such conditions. This is particularly important as the Treaty includes exceptions to competition for services of general interest, which may apply to all the three industry sectors.

Based on document analysis and 34 in-depth interviews, a comparison of the selected cases indicates four key insights. Firstly, as well-established in the literature the foundation in the treaties affects the extent of negative integration in public services, but this alone is not sufficient in explaining policy change. Secondly, important for achieving liberalisation reform is the willingness of the Commission to allow for concessions and a gradual process of decision-making. Thirdly, trade unions' ability to externalise conflict and exploit resistance among industrial interests contribute to explain EU liberalisation reform. Fourthly, how public services are organised, i.e. whether the responsibility is national or sub-national, is important in understanding the differentiated integration of public services in the EU. This is because sub-national authorities provide useful expertise for the EU institutions when they are the competent authorities and unlike member states in the Council, they are not affected by social norms and may therefore speak more freely.

These insights are not obvious. The largest opponents to liberalisation (trade unions and social non-governmental groups) have experienced considerable challenges since the introduction of the common market and are considered weak in the interest group literature on policy-making in the EU, also in public services where trade unions traditionally have a strong role (Greenwood, 2011; Bieler, 2011). Similarly, since Thomas Christiansen (1996) argued that the Committee of the Regions is largely a symbolic body without any real influence, local authorities have not been considered important at the EU level, although more recent research finds that they do play an

obvious role after all (Warleigh, 1997; Neshkova, 2010). The findings also provide an important contribution directly related to the literature on negative integration, where such aspects are largely neglected. Hence, they contribute with clarifying the scope conditions of EU liberalisation reform in public infrastructures.

The following sections aim at explaining the differentiated outcome of liberalisation policy in EU decision-making on infrastructures. A theoretical section introduces the constitutional bias assumption. Then follows a section that presents the data and research techniques. An empirical section provides an account as to what happened in the three cases. This is followed by a discussion of the evidence, highlighting the role of trade unions, sub-national authorities and differentiated integration. Finally, the last section summarises the empirical findings.

4.2 A Structural Bias towards Liberalisation

In this section the arguments as to how the assumed bias towards liberalisation facilitates for wider and deeper liberalisation is presented - i.e. the mechanisms that link constitutional bias with EU liberalisation outcome. It is also shown that the effect of the assumption is disputed, as integration has moved into more salient policy areas. The assumption that a constitutional bias drives liberalisation reform in the EU, gained considerable attention in the late 1990s when Fritz Scharpf (1997, p. 527) argued that the difficulty to achieve agreement in the Council can - in the area of liberalisation - be overcome through unilateral action by the Commission and decisions of the Court. This is based on the argument that due to the supremacy of EU law, the Commission is able to extend negative integration through monitoring EU law infringements. According to Karen Alter (1998, p. 127), this supremacy facilitates for negative integration, as the direct effects of treaty rules have made the common market provisions enforceable despite the lack of implementing legislation. The Court plays an important role as the Commission can only bypass the other EU legislators, if the Court upholds the Commission's interpretation (Scharpf, 2006, p. 852). It is also suggested that even a mere threat of litigation is sufficient to 'nudge' the Parliament and the member states in the Council to compromise, as the opportunity structures change (Martinsen & Falkner, 2011; Schmidt, 2000). Assuming that member states prefer to influence future litigation through secondary law rather than getting policies imposed on them by the Court, member states alter their positions in favour of policies they were originally resisting.

Scharpf (1997) did not argue that negative integration had to occur, but rather looked to explain why negative integration seemed to progress further than market-making policies²². He also suggested other ways than the 'supranational-hierarchical mode' as to how to solve barriers against integration. However, within the area of negative integration the leverage of the Commission and the Court seems extensive: Scharpf speaks of an 'imperialism of negative integration' (1996, p. 35) and argues that the Court through its decisions forcefully imposes negative integration against any remaining national barrier to the four freedoms, even characterising the Court as having 'dictatorial power' (Scharpf, 2006, p. 860).

In the literature of European integration the constitutional bias assumption, has remained on the research agenda. According to Johan P. Olsen (2010, p. 45f), it has been dominant in several EU studies. Researchers have used the assumption to explain the expansion of liberalisation in several areas, for example transport (Kerwer & Teutsch, 2001), pharmacy (Permanand & Mossialos, 2005) and social policies (Martinsen and Falkner 2011). Also in a broader theoretical debate the hypothesis receives support. In an 'integration through law' perspective, Susanne Schmidt (2012) argues that legal principles established in earlier jurisprudence influence subsequent cases in a path-dependent way. Moreover, R. Daniel Kelemen (2011) argues that with increasing liberalisation and the entering of new actors in earlier protected national markets, the reliance on judicial approaches to regulation has taken over for traditional cooperative approaches. This means that disadvantaged actors at the national level may initiate infringement procedures at the EU level, in order to achieve a certain policy change. The Commission promotes such enforcement by private actors, as it recognises its own limits as a relatively 'small' administration in enforcing policies and its strengths in the ability to draw on a powerful judicial system (Kelemen, 2011, p. 28).

Whilst there is no doubt that EU law affects integration, it is of interest to explore the scope conditions of the constitutional bias hypothesis, in particular as the focus on integration through law has also been questioned. Martin Höpner and Armin Schäfer

²² The research focus in this paper is on policy-making within negative integration and not on differences between negative and positive integration. Therefore the theoretical reasons for the dominance of negative integration over positive integration are not presented. Although the directives and regulation are primarily examples of negative integration, they include elements of positive integration. However, the market-making elements are not considered important for explaining the differentiation across the selected cases.

(2010, p. 347) argue that such accounts of EU politics is 'amenable to a depoliticised understanding of EU integration', failing to understand the conflicts inherent in controversial policies. Similarly, Lisa Conant (2003), analysing air transport liberalisation, argues that although litigation may have helped speeding up the process, 'politics drove the process further than judicial decisions' (2003, p. 245). According to Hussein Kassim and Kathryn Wright (2009, p. 752), although the Commission has far-reaching powers enshrined in the treaties, its autonomy is relative and its influence exaggerated. Handley Stevens (2004) expresses a similar view, arguing that there must be some other reason for policy change, as the structural bias in the treaties has always existed. Moreover, it has been suggested that with deeper integration, EU law affects increasingly salient issues that increases politicisation and challenges the content as well as the process of decision making in the EU (Hooghe & Marks, 2008). These arguments make it interesting to clarify the conditions in an area where liberalisation is controversial.

Given that the foundation in the treaties varies across sectors as mentioned in the introduction, it could be expected that this difference makes liberalisation go further in the postal sector than in the public transport sector and that policy change is limited in the port sector. To find out whether liberalisation was imposed in line with the hypothesis, the indicator of court rulings is adopted. The indicators of the extent of liberalisation include whether liberalisation reform is introduced at all and how deep such reform goes. On a dimension between zero and one, if a reform introduces competition to the whole market in a sector, the value is one; if it introduces voluntary reform or liberalisation in only half the market, the value is half; if a proposal is rejected, the measure is zero.

4.3 Data and Research Techniques

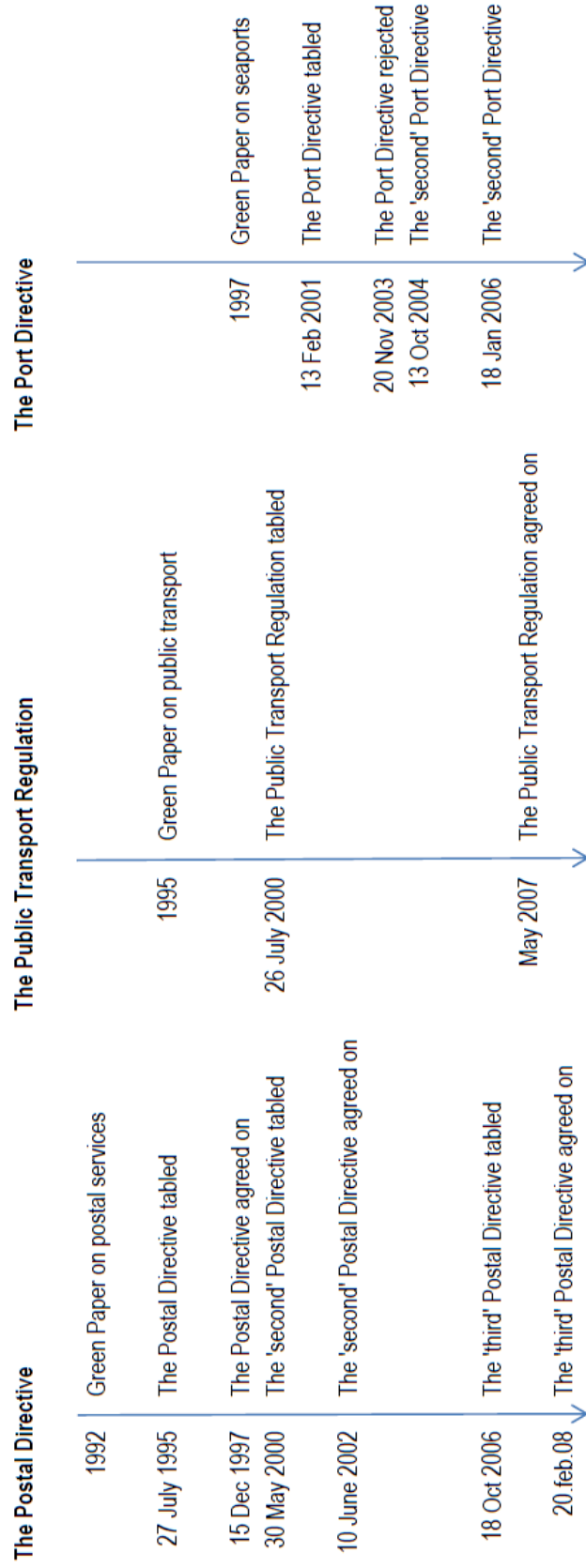
The data have been gathered through document analysis and interviews. Evidence consists of policy papers, minutes from meetings in the Parliament and the Council, specialised consultancy studies, online newspaper articles and 34 semi-structured interviews. The interviews took place between spring 2010 and autumn 2012 and incorporate topics of conflict, cooperation, legal aspects, interest group influence and sector characteristics. They include the likes of five civil servants in the Commission, two in the General Secretariat of the Council, six representatives of member states that were also Presidencies of the Council during the decision-making processes and three

representatives of local authorities, five representatives of business associations, one major company and eight representatives of trade unions. Interviews also included three Members of the Parliament representing the Party of European Socialists, Party of the European Left and the European People's Party – amongst them two rapporteurs. The selection of interviewees was based on internet searches, contacting the relevant persons / organisations. Anonymity was necessary in order to gather the data.

4.4 Comparing the Post, Public Transport and Port Legislation

This empirical section provides an account as to what happened in the decision-making processes of the three selected cases, which took place around the same time (see Figure 1). Similar processes had already taken place or were going on in other sectors such as telecommunications, electricity and road haulage. As decisions and judgements in one area (e.g. 'the impeachment act' in the transport sector was important for reform in the road haulage and railway sectors, Brömmelstroet & Nowak, 2008; Héritier, 1997) may signal developments in other areas, researchers have expected liberalisation to occur at the EU level also in other sectors (e.g. Scharpf, 1997, p. 533; Schmidt, 2012). Although the difference to for example with road haulage, the selected public transport and port cases include public service responsibilities; and in contrast to telecommunications the selected cases involve movement of physical items or persons via transportation. Although the Commission and the Court draw on analogies from other sectors, rules do not transfer by default.

Figure 2: Timelines of the legislations



As this contribution is not limited to testing isolated variables, but also explores the limits of EU liberalisation, the analysis follows policy sectors, tracing the process in each case.

4.4.1 Post

In 1995 the Commission put the Postal Directive on the agenda. It aimed to liberalise postal services and improve quality standards by introducing minimum requirements with regards to delivery (Commission, 1992). On one hand, member states that had already opened up their domestic markets for competition, or were in the process of doing so, largely supported the Commission's competitive approach (Interview j1). The established postal operators in such countries were looking for markets abroad. They therefore supported liberalisation, but conceived unfair the possibility of foreign operators to compete in domestic markets, as long as foreign markets remained closed (Interview h1). Potential entrants wanted to enter the postal market and large postal users embraced liberalisation, expecting it to reduce their costs.

On the other hand, member states that opposed the Directive were concerned with how to fund and maintain the universal service provision. The loss of revenue as a consequence of diverted traffic and lack of cross-subsidisation possibilities created concerns in most countries. Yet financial worries were more wide-ranging in countries with poor quality standards or countries with a difficult topography. Moreover, several new member states sought to postpone liberalisation as they entered the decision-making process late (i.e. with the enlargement in 2004) and were lagging behind in restructuring processes (Interview j2). Similarly, protected public postal operators opposed liberalisation, but were in some member states blocked from lobbying: 'In some member states the owners told the post operators not to lobby, because it's the task of the member states and maybe the task of the MEP [Member of the European Parliament], but not the task of the postal operator' (Interview a). Labour unions opposed the proposal, being concerned with 'social dumping' and unemployment.

With no easy solution, the dispute went on for almost two decades and included a series of three 'directives'. During the process of the first Directive, the Commission had to give several concessions that would limit the effect of competition (Council, 1997). However, the Commission achieved one objective: although the effect of liberalisation as set out in the first Directive would be minor, the competitive approach

as a principle and a timetable for gradual liberalisation was accepted. For proponents of liberalisation, it was a move in the right direction. For opponents, it was crucial that the Directive gave time to see how the markets would develop before any further decisions would be made. Including elements of delay and modification, opposing member states accepted the Directive. After conciliation, it achieved the necessary support in the Parliament.

The timetable in the first Directive gave a spur towards further market-opening. In May 2000, the Commission introduced a second proposal, proposing that the market should be liberalised in two further steps, limiting the weight and price limit for services that may continue to be reserved (by 2003 to 50 grams, by 2007 the remaining exclusive rights). Since the first Directive the setting had changed. Firstly, a new rapporteur from the right-wing, Markus Ferber, had taken over with another intention than his socialist colleague, Brian Simpson. Secondly, a couple of months before the Commission launched the second Directive, the Council had at the Lisbon Summit (23-24 March 2000) agreed that it would set a strategy to expedite liberalisation of postal services, in order to gain economic growth. This strategy strengthened the position of the Commission and advocates proposing further liberalisation (Interview r). However, in both the Council and the Parliament, there was a quest for a more cautious approach than the Commission aimed for. Therefore the compromise that was achieved with the second Directive postponed the final step towards full market-opening.

The early Directives had introduced elements of a level playing field. However, the line between reserved services and those that were open to competition remained controversial (Geradin & Humpe, 2002). There were several claims of national postal operators' abuse of their dominant position or competitors' encroachment on the reserved area. The Commission used such arguments to push for liberalisation, yet the legal category of services of general economic interest provided an exception to the competition rules. Based on such legal clauses, court rulings did not enforce further competition in the postal sector, but instead strengthened the arguments of proponents of state intervention (Sauter, 2008, p. 171). It was more important that the second Directive included an expiry date: 'It meant that if we didn't achieve an agreement it [the Directive] would be revoked. [...] In the internal market in practice it means that you can do whatever you want. [...] you would go back to the beginning' (Interview cc, also j1). Such a situation was considered as a worst case scenario for member states

opposing liberalisation (Interview j1). Therefore the expiry date created a pressure for reform. Yet the legislators could also have agreed to delete the expiry clause and otherwise keep the Directive as it was. However, the timetable included in the early Directives was important: ‘For us it [the timetable] was an argument to convince them, “come on, you cannot change position now. We have been working towards market liberalisation, so you cannot say now that you’re not prepared. [...] You knew that this was going to happen”’ (Interview cc).

The Commission put a third Directive on the agenda. Important for achieving a compromise this time was the fact that the Commission gave admission to use state aid to support universal services and include an option of additional time to adapt (Interview j1, z). ‘They [the Commission] ‘wanted to get the Directive through and they would give away everything except market opening’ (Interview cc). However, the Commission excluded the possibility of giving exemptions from competition to remote areas, as member states could monitor the operators through licence requirements. Eventually only Luxembourg vetoed the Directive and Belgium abstained.

A key element in convincing the parliamentarians was the inclusion of social provisions aimed at avoiding poor working conditions (EurActiv, 2008). However, the unions remained dissatisfied as the social provisions remained open. On the day of the vote, European postal workers organised a demonstration in the United Kingdom and outside the Parliament in Strasbourg, aiming to convince parliamentarians to reject any further market opening (EurActiv, 2007). These were two of only few protests against the Directive (data from: Uba & Ugglä, 2011). Green and leftist parliamentarians supported the unions to a large extent (EurActiv, 2008; Parliament, 2007), yet the majority in the Parliament accepted the Directive.

In summary, court rulings did not enforce competition. Rather, a slow process of gradual policy change characterises the process: timetables, extensive impact assessments, modification of the content in terms of allowing member states to require authorisations of postal operators, temporal exceptions for eleven countries and the inclusion of some social provisions explain how ‘full’ market-opening was achieved in the postal sector.

4.4.2 Public Transport

The Commission set the Public Transport Regulation on the agenda in 2000, aiming to introduce ‘controlled’ competition as a rule for awarding public service contracts. The Regulation was part of a broader strategy to improve European cities and public transport services as well as contribute to economic growth (Commission, 1995). Public transport was a loss-making sector and similar to the postal sector, the Council agreed at the Lisbon Summit in 2000 to speed up liberalisation of public transport. The Regulation was also meant to replace the existing EU regulation addressing public transport, which was no longer applicable for solving issues arising with international operators. As several European countries had moved towards introducing competitive elements into their legislation, operators from one country began to enter the markets in other member states (van de Velde, 2008). This created dissatisfaction, as companies exposed to competition in their home country had to compete with companies located elsewhere without the same restrictions. Such companies could use the possibility to grow in foreign markets whilst being protected at home.

However, the competitive approach as proposed by the Commission was controversial. ‘In-house’ operators were still dominant in urban areas and concessions to private operators were mostly granted without competition. On one hand, the public service group sought to keep as much autonomy as possible with regards to how to organise public transport (Interview aa, v). A strong lobby consisting of associations representing local authorities, regions and their public operators therefore opposed the draft. They influenced the Committee of the Regions to propose exemptions from competition and actively lobbied parliamentarians and the Commission (Interview k): ‘They [the Commission] don’t have to consider it, but when the questions are interesting, they read it and that way we had direct conversations with the General Director of Transport to explain the alternatives A, B and C’ (Interview k). Trade unions, fearing derogation of working conditions, also opposed the proposal. However, they organised only few protests, e.g. in Belgium in 2001 (EIRO, 2001) and in the Netherlands in 2006 (World Socialist Webpage, 2006).

On the other hand, the market-oriented group was concerned with the effects of direct awards, as such awarding could destruct competition, thereby creating market distortions (Interview g). British operators that were specialists in competing in the free market and international companies that focus on competitive tendering processes

shared such concerns. From the beginning, both groups were active lobbyists promoting the market. However, to avoid conflict with their largest customers, the French Public Transport Authorities, large French-based companies which are eminent in the international market, abstained from further lobbying during the later stages of the process (Pflieger, unpublished).

The main conflict in the Council was between member states that had a tradition of producing services themselves and those having introduced competitive elements or were in the process of doing so. There were also several member states with no outspoken position (Interview g, aa). In the Parliament the rightwing had the majority. Therefore, the rapporteur, Erik Meijer, a delegate from the Northern Green, and his side would lose if they simply voted against the competitive approach. Having spoken with several interests opposing the proposal, the rapporteur proposed to make tendering voluntary. Yet if public transport authorities would like to introduce competitive tendering, then the rules as to how to avoid unequal treatment of operators, as set down by the Commission, should be followed. This position received a small majority support including the left-wing and some support from the right-wing, who were in favour of tendering procedures, but were of the opinion that it was not a task of the EU to create such an obligation. At first reading the rapporteur's report received a broad majority of 317 votes, whilst 224 voted in favour of the original proposal of the Commission (Parliament, 2001). Given the broad majority in the Parliament, the Council could not simply follow the Commission's proposal, as the Parliament would be able to defeat it.

Due to the conflict between the Parliament and the Council as well as the dispute within the Council, the proposal was put on hold for several years. With the rotation of the Presidency, there was a new minister leading the process every six months and a number of them opposed the Regulation (van de Velde, 2008, p. 80). Ministers favouring large exceptions to the main rule of competition were reluctant to push a policy forward that they were certain they would lose (Interview r).

Another issue was a legal dispute regarding cross-subsidies and over-compensation, known as *Altmark*, which was tested in the Court. It ‘was kind of hanging over the discussion’ (Interview x), yet the member states did not rush to find a compromise. They would rather wait for the judgement to see what an adequate approach towards state aid control would be (Council, 2006, p. 3). In July 2003 the court ruling was settled. It recognised that it is not always appropriate to ensure a public service through competitive tendering (Schweitzer, 2011). However, the following Presidencies did not put the proposal on the agenda.

Two years after the *Altmark* ruling the Commission launched a revised proposal that removed the most critical points to the member states. In 2006-2007 the Austrian, the Finnish and the German Presidencies began to prepare a possible solution. The alternatives to competitive tendering that the court ruling allowed for, spurred engagement among the Austrian and German Presidencies, which both had a long tradition of internal operators and aimed for maintaining this as an option (Interview t, aa). They wanted to finalise the Regulation, ‘not because they liked it, but because they wanted to bend it in a way that was acceptable to them’ (Interview g). They proposed substantial exceptions to competition as a rule, suggesting that when local public transport authorities produce the services themselves and in cases of small companies it should be allowed to award contracts directly. Finally, the Council agreed to the compromise and a majority in Parliament voted in favour of it.

In summary, given the circumstances that court rulings did not enforce competition, the subsidiarity argument and extensive lobbying by sub-national interests also bypassing their national governments were effective in watering-down of the Commission’s proposal. The process remained in a deadlock until the Commission was willing to give in to extensive modifications (to Presidencies that were eager to get it through), in practice making competitive tendering voluntary.

4.4.3 Ports

The Commission tabled its initial proposal of the Port Directive in 2001. It proposed to open up the port services market and create common rules for competition between the ports as well as between providers of a same port service within a port. The aim was to increase efficiency in ports that were lagging behind and to establish the freedom to provide services in the Treaty within seaports. Also environmental aspects were emphasised as maritime is more energy efficient than other modes of transport (Commission, 2001).

Similar to the Postal Directive and the Public Transport Regulation, the proposal was highly disputed. On the one hand, the customers of port services supported the competitive approach, as it would reduce their costs and increase efficiency (Interview p). Potential suppliers also promoted liberalisation, hoping to gain access to the market. Such interests argued that new technology had changed the nature of certain services and that the ‘demand’ side in ports had to pay unfairly high prices (Interview l, p). The Commission received complaints about purported breaches of the Treaty (Commission, 1997, p. 26). Yet the Commission was reluctant to take advantage of such a situation: ‘we don’t have any measures to make freedom to produce services applicable [...] we don’t have the legal means’ (Interview m). Therefore the Commission and actors that would benefit from market access refrained from introducing any infringement procedures.

On the other hand, established interests on the ‘supply’ side, including port authorities in several countries, terminal operators, piloting, towing and mooring associations as well as dockers opposed the proposal. Whilst the trade unions were clear in their stance against competition, fearing derogation of working conditions and social problems, the port authorities struggled to take a unified position particularly due to the different ways of organising port services (Interview n). Cities, regions or states owning port property feared losing control of their own port, as a port gives important employment and revenues. Several port authorities therefore joined together with the unions and the established port operators that opposed to increasing competition (Interview q). Several member states were concerned about the capacity for investment in the sector and member states with large efficient ports argued that the need for the Directive was not clarified in the first place and that it would lead to excessive administrative costs (van Hooydonk, 2005, p. 204-5).

Both the Council and the Parliament emphasised the need for constraints of competition related to capacity, safety, environmental protection and public service obligation. The Parliament therefore considerably watered-down the proposal. The Council followed-up this process, resolving various concerns (e.g. by including the right of member states to demand specific criteria when granting authorisations) and giving consent to introduce the freedom to provide port services. None of the member states vetoed the proposal, ‘because every single dossier is not important enough [...]. When you face one puzzle it doesn’t fit the picture, but when you have a thousand bottles [...] then it doesn’t matter’ (Interview i). However, some of the member states continued to run against the proposal in conversations with parliamentarians and agreed among each other and with sub-national authorities that if they would get another opportunity, they would coordinate their actions from the beginning (interview i).

The Commission accepted the Council’s common position, yet the Parliament (2003) was not satisfied. It reinstated exceptions (i.e. for pilotage services) and restrictions (i.e. reducing the scope of self-handling). Such issues were among the most controversial during the decision-making process. The Commission rejected these amendments, but in the conciliation that followed, the Parliament and the Council agreed to leave these issues as exceptions. Despite such an agreement in conciliation, when the joint text arrived in the Parliament for a final vote in November 2003, the proposal was overturned by 20 votes. Such an event rarely occurs.

A reason as to why the proposal was unsuccessful was the actor constellations of labour and sub-national interests including port authorities and port operators opposing the Directive. Their lobby activities had paid off. Furthermore, the Erika disaster in 1999 and the sinking of Prestige in 2002 made visible the risk of environmental disasters to vessels at sea. Traditionally, trade unions have played an important role in ensuring environmental and safety rules. The fact that trade unions were barely consulted in the initial phase (Interview s, 1) aggravated them and resulted in massive protests. In autumn 2001 strikes occurred on two occasions in a number of member states. There was a demonstration in Spain in 2002 and in 2003 there were protest actions on five different occasions in several member states (data from Uba & Uggla 2011).

When the Commission introduced the Port Directive again in October 2004, it underestimated the impact of the opposition. It perceived that the proposal was close to approval. Therefore, it launched the Directive without carrying out any further assessments (Interview l). However, the lack of new consultations, the fact that the new text was not identical with the compromise reached in conciliation and that there had been less than a year since the rejection of the former proposal provoked several interest groups and legislators. They blamed the Commission for not taking a democratic decision seriously. Even the shipping industry turned against the Commission, arguing that the proposal was not applicable and fearing the stir that the Commission had created (Interview n, p): ‘In such a short time it was not clever to make a second proposal, which was also for us unworkable. So we then decided jointly, even jointly with the unions, to shoot it down’ (Interview p).

Again, dockers blocked several ports across Europe: In 2004 and 2005 there were demonstrations and strikes in a number of member states (data from Uba & Ugglå, 2011). On the day of the vote the unions mobilised 6,000 dock workers from 16 countries to demonstrate in Strasbourg (ETF, 2006). The substantial media visibility to concerns of labour unions and their partners in the Parliament provided them considerable recognition. The large opposition resulted in avoidance of conflict among the right-wing parliamentarians, who were originally in favour of the competitive approach (Interview r). In January 2006 the Parliament rejected the proposal with 532 votes against, 120 in favour and 25 abstaining.

All in all, whilst the Commission lacked the legal means to enforce liberalisation, the coalition building of sub-national interests (i.e. port authorities and established port operators) and trade unions created a critical mass to convince the parliamentarians to reject the proposal. Demonstrations and strikes across several member states increased the public visibility of the conflict. In addition, the Commission aggravated the legislators by ignoring demands for consultations, impact assessments and concessions.

4.5 Discussion

The evidence suggests that the foundation in the treaties is important for understanding the liberalisation outcome in public infrastructures. However, court rulings did not enforce full market-opening in any of the cases. Instead court rulings strengthened the arguments of the opposition to liberalisation in the postal sector and recognised the appropriateness of alternatives to competitive tendering in the public transport case. There are therefore certain scope conditions that are important to consider to understand EU liberalisation processes. The findings suggest that such conditions include organisation of trade union protests, centralisation (i.e. whether the services are national or sub-national competences) and the Commission's willingness to give concessions. Table One summarises these findings.

Table 4: Comparative table

	Post	Public transport	Port
Strictness of freedom to provide services in the treaties	High	Middle	Low
Court rulings require competition	Low	Low	Low
Differentiation (concessions, impact assessments, longevity)	High	High	Low
Trade-union protests	Low	Low	High
Centralisation of responsibility	High	Low	Low
Liberalisation reform (outcome)	High	Middle	Low

Starting with labour interests, the evidence suggests that trade unions were not very influential in either the postal or the public transport case, but played an important role in the port case together with the traditional public service providers. Whilst trade unions have experienced substantial difficulties to succeed in their objectives since the introduction of the single market (Greenwood, 2011), they have also been able to achieve considerable impact in limiting EU liberalisation reform in service sectors - in particular with the increasing sentiments against EU liberalisation reform as highlighted with the French 'no' to the constitution in 2005 and the protests against the Services Directive (Hooghe & Marks 2008; Parks, 2009). This opportunity of resistance by the trade unions was stronger in the port case than the two other cases.

All three cases relate to employee intensive sectors (approximately 80 percent of production costs are related to labour in the postal and bus sector and certain port services are much dependent on labour); however, in particular port workers are known to be highly organised and loyal towards each other. Thus, the analysis suggests that the ability of trade unions to mobilise protests against a proposal may be important for limiting negative integration.

Another important finding is the role of local and regional authorities. The evidence suggests that they were important in resisting liberalisation in public transport and partly in the port sector, but not in the postal sector. As post is typically a national competence, whilst public transport (at least bus transport, which is in focus in this article) is a local competence and port services are a local, regional or national responsibility, it may imply that centralisation of responsibility is important for the liberalisation outcome. Unlike member states in the Council, sub-national authorities are not bound by a norm of consensus and may therefore speak more freely against a proposal. Local interests may also play a crucial role in limiting policy change in cases of decentralised policies, as the Commission, as a technocratic body that is interested in expert knowledge, is concerned with sub-national interests in particular for policies addressing local responsibilities (Neshkova, 2010). This role may be strengthened when the public is dissatisfied with the democratic process in the EU (e.g. as expressed in the Eurobarometer or through mobilisation), as the Commission is more likely to listen to local and regional interests under such circumstances (Neshkova, 2010). It means that there may be synergies between protests against a policy and sub-national lobbying, as is particularly clear in the port case.

Finally, the evidence draws attention to the Commission's willingness to take time to create a common understanding and give concessions through vague wording, temporary derogations and legal opt-outs for certain member states. The Commission was more willing to accept concessions in the postal and the public transport cases than in the port case. The importance of such elements is well-known in the literature on differentiated integration (e.g. Howarth & Sadeh, 2010) and in contributions addressing how to overcome 'joint decision traps' (Scharpf, 1997, p. 25). However, researchers seldom include cases where compromises are *not* successful and where the Commission's behaviour is considered inept. Thus, the analysis provides an important contribution also in this regard. Moreover, it relates the extent of concessions needed

to get a proposal decided on, with the extent of protest and opposition by the competent authorities (i.e. also local authorities).

4.6 Conclusion

The comparison provides four key insights. Firstly, the cases contribute to clarifying the scope conditions of the constitutional bias assumption, as the Treaty has differing rules about the freedom to provide services in the three sectors. However, the Court did not require competitive procedures in either of these cases – it allowed for exceptions from competition rules. In the public transport case, such exceptions were adopted (i.e. competition was limited). In the postal case ‘politics’ and strategic moves by proponents to include expiry dates in the early directives drove the process further than court rulings required. Thus, the supranational-hierarchical mode is weaker than expected in the ‘positive’ cases. However, the foundation in the Treaty does play a role: if the postal sector had been an exception from the freedom of providing services, the expiry dates in the early directives would have been less ‘threatening’; and if the port sector had not been exempted from such rules, the Commission would probably have played its judicial ‘card’ tougher.

Secondly, the supranational institutions play an important role when it comes to the compromise-finding mechanisms to allow for concessions and carrying out extensive impact assessments, which allows for time to see how markets develop. Given such incremental steps, the legislators, who were interested in ending the long-lasting processes, finally agreed on a common policy in the postal and the public transport case. In the port case the Directive failed as EU legislators and interest groups were aggravated by the Commission’s lack of respect for democracy when ignoring demands for more consultations, assessments and concessions.

Thirdly, although trade unions are considered weak at the EU level, the analysis suggests that when they are able to exploit the division of industry interests to oppose policy change, alongside being able to source media attention through protests, they may be influential in limiting policy change. In the three cases the dockers were by far the most active protesters.

Finally, domestic organisation of public services is important, as where the competent authorities are local or regional as in the public transport and port sector, they may bypass the Council and represent interesting expertise for the Commission and parliamentarians. Such bypassing is crucial as they are not affected by social norms of consensus such as national governments in the Council and thus, may care less about their image vis-à-vis other actors. In addition, such local interests may be powerful counterparts to international business interests, whilst siding with established regional business interests. For example in the bus sector, large international companies abstained from lobbying in order to maintain a good relationship with the local authorities; and in the port sector established port operators joined coalition with port authorities at sub-national level and trade unions. The data suggests that powerful local and regional interests, which favour the status quo, contribute to considerable concessions from the competitive approach in EU secondary legislation.

The findings suggest that in public services there are limits to the assumption that the constitutional bias drives negative integration in public services, due to: the exception of competition for services of general interest; the extent of mobilisation by trade unions and sub-national interests that oppose liberalisation; and whether the Commission is able to relieve opposition through concessions. The analysis also provides some support for the claim that the EU has moved into a phase, where liberalisation attempts create resistance that limits further integration (Höpner & Schäfer, 2010, p. 344) - with the Port Directive clearly illustrating this. In this light, the fact that postal services were fully liberalised (despite the third draft of market-opening being initiated in the atmosphere of protests) is related to the timetable of liberalisation that had already been agreed on prior to the outbreaks of protests. In contrast, the attempt of introducing competitive tendering in the public transport sector was indeed watered-down. However, it remains to be seen whether the opposition is lasting or the current crises contribute to even deeper integration. As one of the informants from a trade union argued, the Commission never gives up; in the port sector a third attempt to liberalise port services will be put on the agenda in 2013.

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5 Why Politicians that Aim for Enhanced Political Steering Introduce Competitive Tendering and Agencies: Insights from a Norwegian County

Abstract

One aim of introducing market-oriented reform of public services has been to increase economic efficiency; however, several studies question the efficiency gains and highlight issues of decline in political steering. As a consequence, there is a growing interest among policymakers and scholars to re-integrate services into the public sector. Nonetheless, competitive tendering and agencification are still prevalent. An in-depth analysis of the re-organisation of public transport in a Norwegian county, Sør-Trøndelag, provides three key reasons for the adoption of competitive tendering and agencification. Firstly, existing structures limit available alternatives for legislators, thereby making re-integration of public services difficult. Secondly, under certain conditions market-conforming principles may even enhance political steering and thus make it politically desirable. Thirdly, the establishment of an agency allows the opportunity for economies of scale through co-operation with other counties and cities, thereby improving co-ordination in the public transport system. The analysis also illustrates that while the EU shapes the options available to local authorities, local and national conditions are more important in the decision-making process.

Keywords: Agencification, competitive tendering, EU regulation, local level, public transport

5.1 Introduction

Since the early 1990s, the use of competitive tendering has been prevalent in the provision of public services. At the same time, there has been an increasing number of quasi-autonomous agencies for regulating public services. This development has been controversial not only for ideological reasons, but also due to the intrinsic characteristics of public services (Prosser, 2005). Whilst the advantages of competitive tendering (such as cost efficiency and improved quality) have been documented in several studies (Cubbin et al., 2005; Pina & Torres, 2006), concerns have been raised relating to problems such as reduced political steering (Longva & Osland, 2010), issues of service level compliance (Hensher & Wallis, 2005), lack of co-ordination (O'Sullivan & Patel, 2004), deficient democratic accountability and legitimacy issues (Prosser, 2010). Given such problems and the controversial nature of the issue, why do local²³ politicians that express dissatisfaction with the way public services are organised adhere to market-conforming principles rather than re-integrating the provision of services (i.e. taking production of services back into public hands)?

This is an important question given the emerging debates of re-municipalisation of public services. One finding in the growing body of literature addressing this topic is that such re-integration is episodic and rhetorical rather than taking place at a large scale (Canneva, 2012; Reichard & Röber, 2012). In light of the above-mentioned issues and increasing scepticism against the savings that outsourcing can deliver (see for example Hall et al 2012), it seems that re-integration is difficult to achieve, even when it is politically desired.

Local public transport represents an interesting field for analysing this question, one reason being that the European Union, which is usually considered an important locomotive for inducing market-conforming reform, allows the opportunity for public authorities to produce the services themselves. The EU Public Passenger Transport Services Regulation, which was agreed on 23 October 2007 and set to be enforced by 3 December 2009, introduces competition as a main rule for operators to gain the right to provide public transport services on rail and roads. Simultaneously, it includes substantial legal discretion from the rule of competition and therefore has spurred

²³ In this paper 'local' includes the regional level.

debates concerning re-integration and increased co-ordination at the local level in several countries²⁴.

There is also another characteristic that makes the local public transport sector well-suited. In this sector, it is well documented that the use of competitive tendering (Gwilliam & van de Velde, 1990; van de Velde, 2001) as well as the number of agencies for purchasing services have risen²⁵. However, the literature addressing such local public transport reform is mainly dominated by economists and has primarily sought to explain the effects of competitive tendering (for example Hensher & Wallis, 2005) rather than aiming at understanding why such reform is being introduced. Moreover, several researchers who aim at explaining market-oriented reform focus on privatisation (for example Bel & Fageda 2007, Bel et al., 2007). In contrast, there is a lack of knowledge as to what explains local institutional design where privatisation has already taken place and re-integration is high on the political agenda.

The Norwegian County of Sør-Trøndelag is a relevant case for providing insight to this situation. In 2002, the public authorities in Sør-Trøndelag sold its bus company to private owners. Five years later, the ‘red-green coalition’ in power was under a great deal of pressure from the local labour union to reintegrate the production of services. At the same time, the politicians were dissatisfied with the quality of the services being provided and aimed for improved political steering of the development of the public transport system. Given such conditions and the fact that theories of steering suggest that increased political and administrative authority are better achieved through hierarchical steering (for elaboration, see Christensen et al., 2007), Sør-Trøndelag represents a least-likely case for the introduction of further market-oriented

²⁴ Debates of re-regulation have been vibrant in several Norwegian counties: Buskerud, Hedmark, Rogaland, Telemark, Sør-Trøndelag and Vestfold have all carried out evaluations or investigations of their organisational models. Debates have also been vibrant in the Netherlands, whose Parliament in 2000 introduced an obligation to gradually introduce competitive tendering. However, as it was clear that the EU opened for exceptions, the issue was brought up again. The Social Democrats initiated a proposal following the exceptions in the EU Regulation and then a proposal with exceptions for big cities only. The rejection of these proposals created turmoil in the major Dutch cities, which have a tradition of producing the local public transport services themselves. Finally, on 2 October 2012, the Senate agreed to change the law, allowing for in-house production in Utrecht, Amsterdam, The Hague and Rotterdam.

²⁵ The number of agencies in the local public transport sector has increased especially in the Scandinavian countries. Didier van de Velde (1999) calls this the ‘Scandinavian’ or ‘London model’. Tom Christensen and Per Læg Reid (2006) call this tendency ‘agencification’.

reform. However, even though the legislative majority was originally against the idea, the politicians in Sør-Trøndelag decided to go for competitive tendering and an agency solution.

The findings highlight four interesting points. Firstly, they illustrate that existing structures in national legislation and earlier local decisions make a turn away from market-driven principles difficult, even in a situation where supranational legislation allows for re-integration and local legislators under pressure from labour unions favour re-integration.

Secondly, the findings suggest that competitive tendering and agencification are not necessarily bad for political steering. This paradox was an important reason why politicians in Sør-Trøndelag decided to introduce market-oriented reform, defined as the adoption of competition and agencies. However, before arriving at this conclusion, the politicians tried to take the production of local public transport services back into public hands; however, existing structures made such re-integration difficult. Therefore, the findings from Sør-Trøndelag do not confirm the common argument that legislators introduce competition because it is simply more efficient than re-integration; the politicians were in fact willing to take on the additional costs of re-integration.

Thirdly, the decision to introduce competition and an agency was not enforced by the EU, as commonly argued in literature on liberalisation of the internal market (CEMR & EPSU, 2008). Although Norway is a non-EU member and does not participate in the EU's decision-making processes, Norway is a member of the European Economic Area. EU rules addressing the common market therefore apply in Norway. As mentioned, the EU Public Passenger Transport Services Regulation included substantial exemptions from the rule of competition, for example for internal operators²⁶, which would be the outcome of re-integration in Sør-Trøndelag. Thus, the findings contribute to understanding how and to what extent European legislation affects member states not only in terms of transposition, but also in actual application of EU legislation (Kaeding, 2007; Sverdrup, 2007), including at the subnational level,

²⁶ The competent authorities can award contracts directly for the railway sector, contracts below a certain threshold (e.g. 1 million Euros annually or, if the enterprise is small or medium-sized, 2 million Euros) and to an internal operator. The Regulation defines 'internal operators' as legally distinct entities over which a competent local authority exercises control similar to that exercised over its own departments.

where such attention has been limited (Fleurke & Willemse, 2006a; Goldsmith, 1993; John, 2000).

Finally, the findings illustrate how local issues drive local politics more than European legislation, which nevertheless crucially affects the options available to local authorities. Although European legislation created certain constraints, this case study suggests that a combination of path dependency at the national and local level provides the insight that market-oriented reform may improve political steering and learning from other counties, leading politicians to go against their ideologies and introduce competitive tendering in addition to delegating public transport competence to an independent agency.

In the remainder of this article, I will firstly present useful theoretical perspectives, delineating five assumptions that guide this explorative analysis. Secondly, I will describe what happened in the selected case in Sør-Trøndelag. After a brief discussion of these points, a final section will provide a conclusion as to why the politicians in Sør-Trøndelag decided to introduce competitive tendering and an agency rather than re-integrating the local public transport production.

5.2 Theoretical Approaches

Several perspectives are useful for understanding why politicians introduce market-conforming reform. In this section, five assumptions delineated from approaches of efficiency, politics, institutions and diffusion are presented. These perspectives have been selected because they are commonly used to explain the introduction of competition and agencification in the literature and are relevant for the selected case. Moreover, as improved political steering of the public transport system was important for the politicians in the selected case - and different organisational solutions may affect political steering differently - the concept of political steering is presented.

Political steering is a central concept in the governance literature, where researchers (for example Kjær, 2004) differentiate between hierarchical steering typical for the traditional, interventionist state and non-hierarchical modes (such as market or networks). Although hierarchy, market and network represent different types of steering, political steering may also be defined on a scale from low to high, being the highest when politicians have hierarchical, direct steering and lower when they

monitor a delegation at arm's length, for example through contracts. Whilst re-integration means making a move towards hierarchical steering, competition and agencification implies political steering of public service provision via contracts.

One important argument for introducing market-conforming reform is to increase cost efficiency. However, the different ways of steering have consequences for the efficiency gains. For instance, in local public transport, it has been argued that the amount of administrative work that competitive tendering rounds requires, including controlling the producer, takes away a considerable part of the cost savings (Yvrande-Billon, 2006). Economists call the costs that arise through such work transaction costs, which refer to factors such as information asymmetries, administrative expenses and opportunistic behaviour and exist *within* a company that produces goods or services as well as *between* companies which exchange goods or products (Williamson, 1973). Transaction cost economics suggests that a company utilises outsourcing services rather than developing its own capabilities to do the same whenever this enhances efficiency (Williamson, 2010). When the transaction costs of internal contracts are higher than external ones, a company will choose outsourcing. In general, the theory favours 'buy' over 'make' unless performance on a contract requires specific investments (Teece, 2010, p. 169). Researchers have used this theory not only to explain the use of competitive tendering in the public transport sector (Alexandersson & Hultén, 2006), but also to understand why market-conforming reforms do not always occur at the local level (Tavares & Camoes, 2007; Hefetz & Warner, 2007). Based on these findings, *the first assumption (A1) reads that the authorities choose to outsource when this is more efficient than internal production of services.*

There is also a political dimension to market-oriented reform. Researchers find that party affiliation and interest group background matter for organisational preferences for competitive tendering or traditional provision (Sørensen & Bay, 2002). However, even leftist politicians may favour market-conforming reform if the expected utility of competition is considerable and the costs of re-integration are very high (Braun & Gilardi, 2006, p. 305f). Alex Cukierman and Mariano Tommasi (1998) even argue that left-wing politicians have a greater ability to actually implement market-oriented policies than do right-wing politicians, as the public has less reason to suspect that the policy is proposed solely on grounds of ideological preferences, but actually necessary to improve welfare gains. To improve such gains, politicians choose to pass responsibility on to specialised agencies and introduce competitive tendering,

believing in the capacity of competition to achieve cost efficiency and improved quality (Domberger & Rimmer, 1994) and the aptitude of agencies to combine professionalism, operational autonomy and flexibility to adapt to changing circumstances (Yeung, 2010, p. 76f).

However, the effects of market-oriented solutions are not clearcut. They may generate new problems (Boyne, 1998), including rising prices, deterioration of quality, problems of service breakdowns in case of a private company's drop-out and decreasing democratic control (Reichard & Röber, 2012). Moreover, such issues have at times resulted in dissatisfaction and increased politicisation. Examples can be cited globally that demonstrate local civil society having mobilised effective political opposition against privatisation of public services, resulting in reversals and reform delays (Hall et al., 2005). Citizens have also opposed the privatisation of utilities in local and national referendums, for example in Germany (Reichard & Röber, 2012, p. 7-10). Authorities that want to avoid being blamed by their constituencies, trade-unions or user-consumer associations have therefore decided to re-integrate the production of services. This is clear, for example, in the public water services in France and Italy, where leftist city councils have sought to withdraw from the privatisation introduced by their rightwing predecessors (Wollmann, 2012, p. 16; Canneva, 2012). When concession contracts have expired, the public authorities have seen an opportunity to re-municipalise public services. It may be expected that particularly in cases of civil society and labour protests, politicians are reluctant to introduce market-oriented reform. Along these lines, *the second assumption (A2) suggests that high politicisation in terms of demonstrations by opposing citizens and labour unions hinders liberalisation reform.*

Another approach that an extensive amount of literature highlights is the path dependency or obduracy inherent in urban service provision (see for example Alexandersson 2010 on path dependency in public transport). Path dependency is a key concept of historical institutionalism, which focuses on how institutions develop over time and affect the position of actors in ways that may have been unintended or undesired by their creators (Hall & Taylor, 1996). As institutions reinforce themselves, creating path dependencies and lock-ins over time, it may be difficult to alter certain institutions, as reversals are costly or difficult (Pierson, 2004). For example, if public authorities have already delegated responsibilities to market actors or separate agencies, path dependency is a likely explanation why legislators do not withdraw

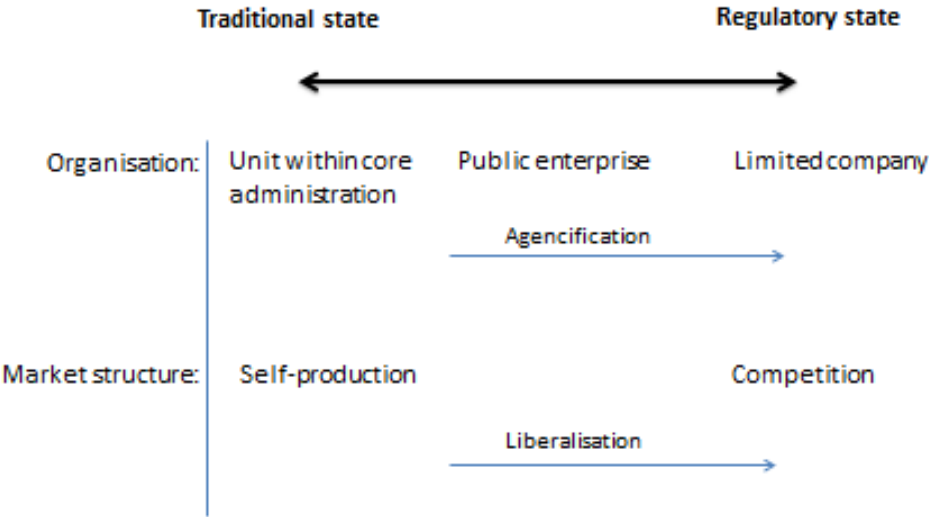
their responsibility, even if their aim is to do so. Dominique Lorrain (2005) convincingly argues that historical imprints have formed the different urban models of how services are organised in Europe. Extensive literature supports this view (Lorrain & Stoker 1997; Wollmann & Marcou, 2010). *The third assumption therefore (A3) expects the introduction of market-conforming reform to be a result of certain structures that benefit such reform.*

There is also another side of the institutional approach that is important to consider. Historical trajectories are considered important to understanding why EU legislation and the common market have not resulted in harmonisation, but instead in differentiated solutions (Lorrain, 2005, p. 233). However, it has also been argued that the effect of historical paths in public service provision correlates with the ‘fit’ with EU law (Kuhlmann, 2008, p. 591). One reason is that where the organisation of services at the national or sub-national level is incompatible with the EU’s policies and structures, this ‘misfit’ translates into pressure from the EU on member states (see Börzel & Risse, 2003). The larger this pressure is, the more the member states have to adapt, thereby decreasing the role of historical paths. An underlying mechanism is ‘institutional compliance’, whereby EU legislation prescribes certain requirements with which affected states have to comply (Knill & Lehmkuhl, 2002). Deeming existing practices of negotiations illegal - when granting exclusive rights or compensating public service operators for costs incurred - pressure to comply is likely to have been present in the Norwegian local public transport sector. Hence, *the fourth assumption (A4) proposes that market-conforming decisions are caused by institutional compliance.*

This pressure for compliance represents what scholars of diffusion theory (Simmons et al., 2008) call coercion, which is another mechanism that researchers commonly use to explain the introduction of market-conforming reform (see for example Henisz et al., 2005). Coercion is the ability of powerful actors to use ‘carrots and sticks’ to encourage others to change their policy (DiMaggio & Powell, 1983, p. 67). On the one hand, this mechanism is relevant, as the European Commission may, for instance, make competition procedures easier or less risky to carry out than production through an internal operator (although allowing different organisational solutions within public transport). On the other hand, as the Public Passenger Transport Services Regulation allows for discretion, such compliance pressure does not account for why politicians adhere to market-conforming principles and not internal operators, which is the

traditional way of producing public transport services in most European cities (Gwilliam & van de Velde, 1990). The Regulation leaves it up to the local public transport authorities to choose between a model similar to that of the traditional state (i.e. internal operator) and a model of the regulatory state (i.e. competition). The following continuum between the traditional and regulatory state provides a useful illustration of the alternatives that acquiescent European public transport authorities currently face. In Figure 1, agencification refers to degree of autonomy of the agency from the competent authorities (i.e. not number of agencies) and liberalisation to degree of competition.

Figure 3: Continuum of the traditional and regulatory state



As market-oriented reform is part of a general trend, diffusion theory is relevant, although the focus is not on a diffusion pattern but the outcome in a single jurisdiction. Diffusion refers to the process by which a policy spreads, and this policy is new to the jurisdictions adopting it, no matter how old the policy actually is (Walker, 1969, p. 881). It is the communication of an innovation in a social system over time (Gray, 1973, p. 1175). The approach suggests that adoption of a policy is interdependent – the behaviour of one government influences the behaviour of another. One way of transferring policy is through learning, which happens when a government purposively draws lessons from the experience of others to better understand a matter’s cause-effect relationship and then apply these lessons when designing their own policies (Meseguer, 2005, p. 73). It differs from emulation (i.e. a non-rational imitation of practice from other jurisdictions), as learning includes a motive to improve and is

driven by the purpose to understand how to achieve certain outcomes (see Meseguer, 2005; Radaelli, 2004). Accordingly, *the fifth assumption (A5) suggests that legislators apply lessons from other counties adjusted to their own local conditions*. As an example, rather than copying the extreme solutions, the hybrid solutions in Figure 1 may be suitable for different local contexts. Such hybrids may also ease resistance against controversial market principles by representing less radical reform.

There are different observable implications of these theories: The transaction cost assumption (A1) receives support if the authorities choose the most efficient solution due to efficiency reasons. The politicisation assumption (A2) necessitates analysis of the connections between the local authority and labour unions and whether demonstrations have taken place. Path dependency (A3) calls for an enquiry into possible organisational solutions as well as existing legal frameworks and market structures. Institutional compliance (A4) requires a mapping of incentives in the EU Public Passenger Transport Services Regulation itself and actors' perceptions of whether it is beneficial or if there is a need to comply with such rules. Finally, if diffusion through learning (A5) has taken place, there will be adaptations of the selected solution to contextual factors. Empirically speaking, it is difficult to distinguish learning from imitation, especially when local adjustments look like copies of organisational forms existing elsewhere. Therefore, information about the reasoning behind the choice of a solution is crucial.

5.3 Data and Research Techniques

Evidence includes the legal framework, minutes from political meetings, consultancy and research reports, newspaper articles as well as eight semi-structured in-depth interviews. The written documentation was used both for interview preparation and documenting the decision-making process. Newspaper articles were considered facts when in line with other written or oral documentation. Interview sampling was undertaken with the aim of covering all relevant perspectives through selecting the most important actors for this purpose. These include politicians in opposition in Sør-Trøndelag, the former County Executive, the Chief Financial Officer, the Head of Department and representatives from the bus drivers' union at the local as well as national level. The bus company was contacted twice for interviews with no response. Except for the interviews with the national labour union, which were undertaken in Oslo in March 2011, all interviews took place in Trondheim in August 2011. In

addition, interviews regarding the decision-making process of the Public Passenger Transport Services Regulation at the EU level have informed the analysis. Telephone interviews have been directly useful for this analysis with the *rapporteur* of the dossier in the European Parliament in September 2011 and Dutch consultant, who has worked extensively with the EU Regulation and organisation of public transport services in several European countries (including Norway), in March 2010. Interview transcription made it possible to study the data in detail. Given the clear number of interviews, coding was not considered necessary. The interviews have been important for establishing the mechanisms at work, whilst data from the counties' websites has been gathered for the purpose of making temporal graphs of diffusion patterns.

5.4 Introducing Competitive Tendering and a Public Transport Agency in Sør-Trøndelag

In this section, an analysis of what happened in Sør-Trøndelag provides insight for better understanding the tendency of establishing public transport agencies and introducing competitive tendering at the subnational level in Norway. As this analysis is not limited to testing isolated variables, but assesses what happened through process-tracing, it presents the case before discussing the proposed expectations.

In 2007, there were three important events that created an opportunity for organisational change of public transport in the County of Sør-Trøndelag. Firstly, the EU Public Passenger Transport Services Regulation, which Norway as a member of the European Economic Area was obliged to apply, deemed current practices of negotiations illegal as soon as the Regulation was transposed. Secondly, Sør-Trøndelag was about to end an experiment of public transport organisation (Norheim et al., 2008). Normally, counties are responsible for local public transport (with the exception of rail), yet from 2004 to 2007 the largest city in the county, Trondheim, was placed in charge of its own public transport. At the end of the experiment, this responsibility, including financial resources, was transferred back to the county. Thirdly, in 2007 all of Sør-Trøndelag's existing compensation contracts and concessions allowing operators to provide public transport services ended. Whilst most of these contracts were extended through negotiations, the county failed to agree with the bus operator providing these city services. As a temporary solution and while awaiting political decisions, the contract was extended for one year.

This difficult negotiation with the bus operators was a key reason as to why the legislators urgently wanted to reform the organisation of their public transport. In 2002, the city sold the bus company producing city services to a private operator (Sandvik, 2008), after which the public transport authorities had to negotiate with a private monopolist. According to civil servants and politicians, it was a tedious process to encourage and enforce the operator to improve their services because for every improvement made the operator claimed more resources were needed. The politicians felt that the operator showed a lack of initiative to improve their services, which media had also consistently criticised (interview st1, st4, st6). The situation was unsatisfactory. The only bargaining chip the County had to 'discipline' the operators was to threaten them with competitive tendering, which was a threat insofar as any company in competition with others risks losing its contracts. However, in order for a threat to work, it needs to be credible and effective (Halfteck, 2008). Given the red-green coalition's dedication to voting against competition and its close ties with the unions, the threat was not very effective. Consequently, the politicians looked for other ways of becoming able to steer the local public transport services in a more efficient manner.

The EU Public Passenger Transport Services Regulation included two main possibilities for solving this problem. Although enforcing competition as a main rule, it made an exception for internal operators. The politicians and civil servants, awaiting national transposition and expecting a long transposition period, were in no hurry to apply the EU Regulation. At the same time, it framed the potential organisational models in a significant manner (interviews st1, st5). Whilst the conservative and liberal politicians argued that competitive tendering would improve the service level, the left-leaning politicians representing the majority were concerned with employment issues and curious about the possibility of establishing an internal operator. On 12 December 2007, the legislative majority decided to investigate the possibility of establishing an internal operator in Sør-Trøndelag (Sør-Trøndelag fylkeskommune, 2007, p. 2) while simultaneously agreeing to work towards creating a 'regional organisation'. The aim of this organisation was to enhance co-ordination of information, route planning, product development, ticketing and fare systems as well as marketing of public transport (Sør-Trøndelag fylkeskommune, 2006). This was an old idea whose intention was to improve the co-operation with the largest city in the region.

In general, the relationship between the county and largest city (i.e. in terms of population) in the county is competitive and likely strained, since both hold important measures for influencing the public transport system and tend to blame one another when things do not work out according to plan (interview st6). This is also because the county, being responsible for the entire region, may prioritise differently than the city does regarding what they consider important, experiencing as they do different transportation challenges than their rural areas. Establishing a common organisation might improve the relationship between them and also the relationship between neighbouring counties. However, the final decision to establish such an agency was postponed, as at that time it was unclear who would be in charge of local public transport services at the end of the transport experiment (interview st2).

Subsequently, the County administration asked an external consultant to provide an analysis of the possibility for establishing both an internal operator and a public transport agency. In early 2008, the consultant published two reports and gave an account of four alternative organisational models (Asplan Viak, 2008a; 2008b). These are (1) an internal operator producing services for the entire county; (2) a mix of internal operation within the city limits of Trondheim and procurement in the rest of the County; (3) status quo, i.e. continued negotiations with operators, at least until the EU Regulation is transposed into national law; and (4) a public transport agency whose main responsibility is to purchase services through competitive tendering.

Investigating the opportunity to establish an internal operator in Sør-Trøndelag (and also in Hedmark), the consultant suggests two ways of establishing an internal operator: The County buys an already existing company *or* it establishes a new one. Whilst voluntary compliance and agreeing on the premises create the main obstacles for purchasing an existing company, the lack of concessions provides the main barrier to establishing a new company. Strict concession rules require the County to take existing concession holders' opinions into consideration when considering further concessions (Asplan Viak, 2008a, p. 4). This empowers existing companies – in practice, there are hardly any new concessions given for local public transport. Transfers of concession holders happen in circumstances of fusions or transfer of enterprise ownership and occasionally when operators compete for concessions at the end of a lengthy concession period. Furthermore, national law stipulates that the only possibility for the public transport authorities to retract a concession from a law-abiding company is to introduce competitive tendering. Thus, competitive tendering is

the safest route to draw back a concession from a company (Asplan Viak, 2008a, p. 5). In the Trondheim case, any other ‘unfair’ attempt to award a new internal operator a concession is likely to raise the conflict level in the bus industry, increasing the risk of litigation (Asplan Viak, 2008a, p. 7).

However, introducing competition and establishing a new internal operator does not guarantee that the new public company will win such competition, as the County could hardly admit to giving preference to its own company when evaluating the differing bids. On this basis, the County Executive strongly recommended competitive tendering. The civil servants saw an advantage in competitive tendering, as the County would then be in charge of deciding defined criteria in advance of entering into a contract and avoiding the risk of having a business. However, on 17 June 2008 the political majority decided to initiate negotiations about purchasing Team Trafikk, the company operating the city routes in Trondheim (Sør-Trøndelag fylkeskommune, 2008e). At the same time, they decided to introduce competitive tendering in the remaining transportation areas and confirmed the establishment of a public transport agency. Such ‘mixed solutions’ are costly (Longva & Osland, 2010, p. 121): Not only would the County potentially employ around 600 bus drivers, it would also have to construct an administrative procurement body with planning competence for the route areas set out for competitive tendering. The alternative plan of trying to buy all the existing companies, not only Team Trafikk, was never a realistic option. There were five existing concessions and four operators in the area of Sør-Trøndelag. To buy them all would not be feasible.

The decision to allow for competitive tendering was difficult to accept for several politicians. Nevertheless, the Labour party was divided on the issue and played an important role in getting the needed majority in favour of introducing some competitive tendering. One reason was their growing insight that competitive tendering would imply a transfer of competence from the operator to the public authorities, thereby improving political steering. Another reason was processes going on at the national level. Additionally, at the national level, the red-green coalition in government aimed at strengthening employees’ rights in competitive bidding. In 2008, the Norwegian Ministry of Transportation submitted a proposal to enforce employees’ rights in the event of transfer of an undertaking - also in situations of competitive

tendering²⁷. At the same time, a sectoral agreement between the trade union and industry equalised tariffs nationwide (Longva & Osland, 2008, p. 4). These two processes eased the resistance against procurement among left-wing politicians. The opposition of national transport unions also decreased, but the local labour union still put pressure on the legislators to reject competition (interview st3). Although 100 bus drivers gathered holding protest banners in the County Council on the day of voting, the majority actually did vote in favour of competition (Sør-Trøndelag fylkeskommune, 2008a). The most important push for this daring vote came from the frustration with the status quo – the lack of political steering and exhausting negotiations with the operators:

‘My party was against, but I realised quickly that it is a waste to negotiate with a private monopoly. They [the private monopoly] are the agenda setters. [...] They used it [their position] to the maximum and played the politicians against the administration. So I made up my mind that they would not get a single penny from me. [...] I understood that the Labour party, as large as the group was, was of different opinions, so in the end I threw in my cards. [...] I got a great bloody bollocking from my own party obviously (interview st1).’

Initially, the owner of Team Trafikk seemed willing to sell the company. In an ‘intention agreement’ signed on 1 July 2008, both parties assented to negotiate about transferring the bus company to the County, which then hired a consultant to estimate the value of the operator. Intensive negotiations followed. Three months later, the owner and the County agreed on both a price and the condition that the County would take over 80 percent of the company’s shares. On 30 September 2008, the County decided to buy the shares (Sør-Trøndelag fylkeskommune, 2008d). At that point, politicians and civil servants were convinced that they would become the majority owner of the bus company. Surprisingly, on 17 October 2008, the owner withdrew from the offer (Sør-Trøndelag fylkeskommune, 2008b). Whilst civil servants and politicians favouring competitive tendering had feared the burdens of operating a bus company and been concerned about inefficiencies, those proposing re-integration felt that they had been tricked. Consequently, politicians who were originally against competition now voted in favour of procurement (Sør-Trøndelag fylkeskommune, 2008c). Only one representative from the Red Party voted against competitive

²⁷ The Norwegian Parliament accepted the proposal in June 2009. The EU Regulation allows national governments to impose such rules.

tendering, opting for continued negotiations with the company. Due to the long transposition period, this was still a possibility.

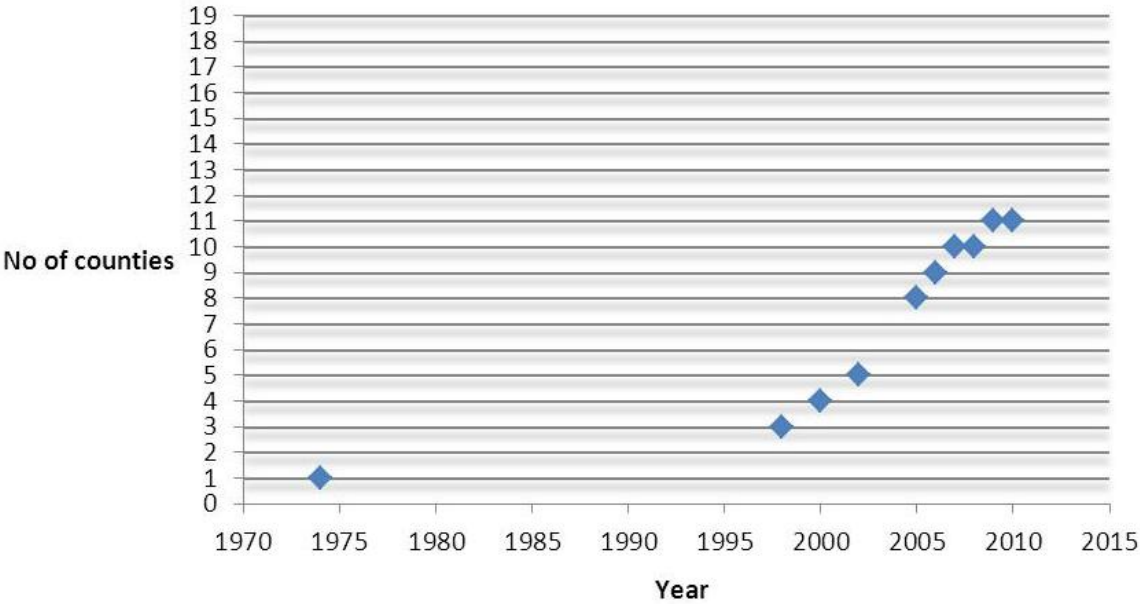
At the same time, the authority decided to introduce an agency. The rationale behind this agency was to improve the services through enhanced co-operation and co-ordination of different modes (interview st1). Limited corporation would open the possibility for co-ownership with the largest city and the neighbouring county, thereby enabling benefits of scale and improved integration of land use and transport planning. However, at that point in time, neither the city nor the county had chosen to join as shareholders.

Concerns about the ability to ensure competence also played a role. As the following quote vividly illustrates, competence versus budget cuts (which threaten the continuity of the administration) was a reason for establishing an autonomous agency:

‘To build a county administration is completely impossible. Every budget resolution is about downsizing the administration. In all municipalities and counties the administration is rubbish, because you want to prioritise the production. So, from my point of view, if we were to get decent competence on this, we had to make it external to ensure that it’s possible to build up a company, whose competence would be permanent (interview st6).’

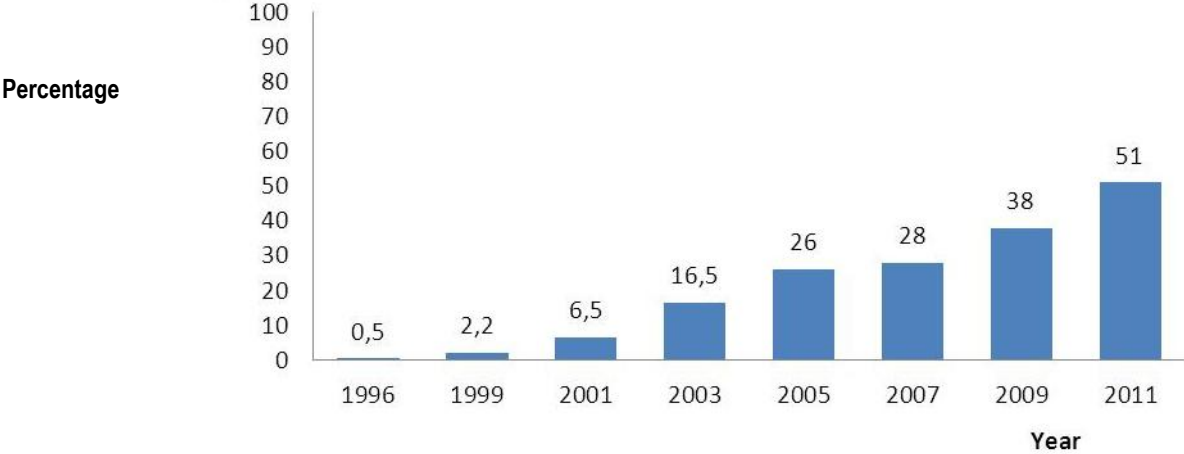
Moreover, civil servants were concerned with what other counties had implemented (interview st2). A diffusion pattern suggests that a transfer of policy has taken place. As Figure 4 highlights, since the second half of the 1990s Norwegian counties have increasingly introduced separate public transport agencies.

Figure 4: Counties with a separate public transport agency



Today, eleven of the 19 Norwegian counties have delegated public transport responsibilities to a separate agency. Figure 3 shows that there is a similar pattern of diffusion for competitive tendering.

Figure 5: Competitive tendering in the local bus sector



This pattern is interesting, as civil servants, politicians, a consultant and union representatives from Sør-Trøndelag travelled to other Norwegian and Swedish counties that had created agencies and introduced competitive tendering in order to study them. The exchange of experiences during such trips contributed to forming the decisions. There was especially one county that informants remember well:

‘Rogaland is the worst case example. Here the politicians on the board micromanaged the company to such an extent that the director was emasculated. We also visited Bergen and they have got Skyss [an agency governed by the county authority], but the aim was to do it [establish an agency] together with the City of Trondheim (interview st6).’

In Rogaland, issues such as route changes and technical problems with ticketing systems damaged the relationship between the politicians and the agency (Vista Analyse, 2008). These problems resulted in a serious lack of trust. As compensation, the politicians began to manage the agency in a detailed manner (Vista Analyse, 2008). Accordingly, the agency’s scope of action became limited, thereby causing employee frustration and neglect of duties.

In Sør-Trøndelag, these problems were perceived as specific for the hybrid solution adopted in Rogaland, a public enterprise with a political board. In their opinion, both Swedish and Norwegian agencies organised as limited companies with professional boards seemed to perform better than their hybrid counterparts. This action was decisive for their own choice of creating a limited company with a professional board. It also convinced them that, given the tendency of politicians to get involved in the details of everyday life, gaining distance from the agency would be beneficial (interview st5).

In addition to these learning dividends, there were elements of coercion not for the introduction of an agency, but rather for competitive tendering. Since the late 1990s, advocates of competition had argued that the EU would eventually enforce procurement: ‘It was called the EU directive. It was always used as an argument that it will come anyway – we cannot get away from it. [...] A lot of people use such directives very cynically. The EU has decided this, so we have to implement it. [...] But if there is political will, there are possibilities (interview st3).’

However, at the time of decision making in Sør-Trøndelag, the Public Passenger Transport Services Regulation had already introduced exceptions from competition, and the national government had signalled that it would transpose all these exemptions into national law. It was clear that compliance required making organisational changes at some point in the future, but not necessarily introducing competition. Therefore, the public transport authority in Sør-Trøndelag perceived itself as free to choose between

alternatives. ‘First and foremost local conditions [were decisive in the debates]. So what Brussels really said was that “now you are allowed to do it this way” (interview st5).’

5.5 Explaining the Market-Oriented Reform

Returning to theoretical approaches, the local reform in Sør-Trøndelag contributes interesting findings as to why local politicians adhere to market-oriented principles. Starting with the transaction cost theory (A1), this does not hold for either the introduction of competitive tendering or the establishment of an agency. Despite the expected benefits of competitive tendering, the evidence rejects an assumption suggesting the selection of the most efficient solution as perceived by the relevant actors, as the political majority was actually willing to assume the costs of re-integration of the service production feared by opposition and civil servants. The public transport authority was also willing to assume the extra costs of establishing a separate agency that required new staff, expecting such an agency to ensure competence and co-ordination with other transport authorities.

The evidence also contradicts the politicisation assumption (A2). This approach is relevant for the introduction of competitive tendering (around which the conflict evolved), and not to the same degree for the less disputed establishment of the agency. To begin with, the red-green coalition was dedicated to voting against competition and had close ties with the local union, which organised protests against competition. However, the difficulty of reversing earlier decisions to give transport services to private companies blocked the re-integration possibility. Under such conditions the politicians, who were dissatisfied with the quality of the public transport system, sought other ways of increasing political steering. This in turn explains the weak effect of labour unions. Concerns regarding the quality of public transport were more important and, given the difficulty of re-integration, competitive tendering offered a greater capacity for steering.

The difficulty of reversal highlights path dependency (A3) as the main explanation as to why the politicians decided to introduce competitive tendering despite their ideological commitment to do otherwise. Existing structures, including the legal framework and prior privatisation, decreased the options available to the public transport authority. Competitive tendering was quite simply the less risky, less costly and, ultimately, easiest thing to do.

However, institutional compliance with EU legislation (A4) was of less importance in explaining the outcome. Whilst there are no relevant incentives or requirements in the national or European legal framework favouring a public transport agency model, there are elements of coercion for competitive tendering, as advocates of competition had argued that the EU would eventually enforce procurement. However, at the time of decision-making in Sør-Trøndelag, the EU Public Passenger Transport Services Regulation had already introduced exceptions from competition, and the national government had signalled that it would transpose all these exemptions into national law. It was clear that compliance required organisational changes at some point in the future, but not necessarily competition. Therefore, the public transport authority in Sør-Trøndelag perceived itself as free to choose between alternatives.

Concerning diffusion, civil servants were concerned with other counties' experiences. However, this type of interdependence was not important for the choice of competitive tendering in Sør-Trøndelag, as the political majority was initially willing to go against this pattern in Figure 3. Therefore, diffusion does not explain the choice of competitive tendering in Sør-Trøndelag. Nevertheless, the agency design was decisively influenced by experience in other counties, which confirms the last assumption (A5). While the decision to establish an agency was merely functional (done in order to increase co-ordination and competence), the design was influenced by learning from experience in other counties. As the legislators did more than just copy other counties' solutions, learning contributes to explaining the choice of the agency model.

The evidence suggests that the decision to establish an agency differs from that of competitive tendering, yet the diffusion patterns in Figure 2 and 3 indicate that competitive tendering and agencification tend to go hand-in-hand. The question as to why this is so remains unanswered. This is a relevant question because although Scandinavian counties tend to establish public transport agencies when introducing competitive procedures, there are successful examples of public transport administrations dealing with competitive tendering procedures from within the county administration.

One reason is that competitive procedures require specific purchasing and planning competence, increasing the administrative burden. Whether a county awards contracts to operators directly through negotiations or uses competitive tenders, it implies different roles for the county administration and politicians. Typically, the operators are in charge of route planning and ticketing when their contracts are directly awarded (Longva & Osland, 2010, p. 122). Conversely, these responsibilities are in the hands of the public transport authorities in cases of competitive tendering. Therefore, it may be wise for a county to strengthen its public transport competence, especially if it chooses to adopt competitive procedures (Vista Analyse, 2009).

Moreover, the counterpart may no longer be a small, local operator, but rather a company with strong, 'movable', economic and legal competence, due to their frequent involvement in competitions (Vista Analyse, 2009, p. 6). The competitive environment has generated larger and stronger bus operators (Mathisen & Solvoll, 2008). Generally speaking, bus operators across Europe have become international, the legal framework more complex, and actors expect court rulings to settle future disputes (Leiren, 2010). In Norway there have already been a few infringements regarding competitive tendering procedures of local public transport, corresponding well with what R. Daniel Kelemen (2011) calls a shifting 'legal landscape' in Europe. He argues that there has been a growth of litigation and that business leaders are expecting an increase in litigation - and its associated costs - in the near future.

Whilst none of the informants in Sør-Trøndelag expressed fears of litigation, the administration expressed a need for strengthening its own staff members. Indeed, these individuals were quite concerned about how they were to increase their levels of expertise. Consultants (Vista Analyse, 2009, p. 7) have also advised buyers to strengthen their knowledge and skills in a separate agency (and not internally in the

administration), pointing to difficult recruitment of new staff members. Arguing that organisations that give individuals performance responsibility combined with a high level of personal freedom how to perform work tasks more easily attract skilled personnel, the consultant recommends 'autonomous' public transport agencies. According to this view, the establishment of an agency is necessary in order to attract and keep crucial skills for market development. However, in Sør-Trøndelag the establishment of an agency was a way of securing a certain administration size when faced with budget cuts rather than of ensuring recruitment

5.6 Conclusion

The analysis makes four important points. Firstly, it illustrates why it is difficult to reintegrate public transport services. By limiting the available alternatives, paths created by existing national legislation and previous privatisation crucially shaped the organisation of public transport services in Sør-Trøndelag. Although the local red-green government was under a great deal of pressure from the local labour union and made a serious attempt to reintegrate the production of services, the local government failed to do so. This was mainly due to the difficulty of placing private enterprises back into public hands: Buying an existing company depends on the owners' willingness to sell; and the chances to succeed when establishing a new company are small due to concession rules, which serve to empower existing operators. Amendments in national legislation were also an important factor here. In addition, at the national level there was a red-green government very concerned with employees' rights. Strengthening employees' rights in the legal framework decreased the 'dangers' of introducing market-oriented reform, thereby modifying the resistance at the local level. However, the reason why the legislators decided to establish an agency in Sør-Trøndelag has a different explanation. The motivation of improving co-ordination in the public transport system was the main reason in addition to learning from other counties as well as the possibility of co-operating with other jurisdictions influenced the agency design.

Secondly, the findings suggest that competitive tendering and agencification are not necessarily bad for political steering. The reason is that competitive tendering usually implies a change of contract type, transferring planning competence from operators to the public authorities. Consequently, public authorities need to strengthen their competence, which they tend to do by establishing an agency. Such considerations also played an important role as to why the legislators in Sør-Trøndelag decided to introduce market-oriented reform.

Thirdly, the findings contribute to our understanding of the actual application of EU legislation. In domestic discourses, the EU tends to be blamed for enforcing disputed market-oriented reform (Culpepper & Fung, 2006, p. 2). Even in cases in which competent authorities are free to choose, there seems to be an understanding that Brussels is to blame. For example, actors in favour of liberalisation have used initial, far-going proposals by the Commission to push for market-oriented reform, arguing that the EU will enforce such reform anyway. This may influence the outcome of domestic decision-making. It could also be argued that the application of procurement rules imposed on member states by the EU has made tendering processes familiar and 'safe' (Lidström, 2010). Therefore, the European Union is important in order to create a complete picture of what happens in a state that is obliged to implement EU legislation.

Finally, the case study illustrates the application of an EU Regulation at the subnational level. However, the impact of the EU should not be exaggerated (see also Fleurke & Willemse, 2006b), a statement which leads to the final point of this analysis: Findings from Sør-Trøndelag suggest that local and national factors have been dominant when it comes to introducing competitive tendering in this least-likely case.

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Appendices

Appendix 1: Extent of Liberalisation in European Post, Public Transport and Ports²⁸

This appendix describes the extent of liberalisation in the postal, public transport and port sector prior to the proposed EU directives and regulation. The aim is to contribute with evidence to see whether path dependency, as mentioned in Chapter One, is a possible explanation for the differentiated integration across the three selected sectors. For this aim, an overview of the number of member states that had introduced liberalisation policies prior to initiation of the relevant draft proposals is presented. The expectation is that if liberalisation reform has been introduced to a larger extent at national level in one sector than in another sector, then liberalisation is more likely to be introduced at the EU level in this sector than the other.

Due to sector differences (i.e. whether it is about competition *for* the market, as in competitive tendering, or *in* the market) 'liberalisation' has been operationalised differently for each sector. In the postal sector the extent of areas that are reserved for the established operator is an indicator for competition. In the public transport sector whether competitive tendering has been introduced in the market is an indicator. In the port sector, the number of subsectors where operators can compete about delivering port services indicates competition.

The evidence, as presented for each sector below, suggests that the extent of competition introduced in member states prior to the draft proposals does not differ in any important way in the postal, public transport and port sectors. Thus, the extent of competition in national sector legislation prior to EU reform does not explain differentiated integration across these sectors.

²⁸ References are included in the reference section of Chapter One.

Postal Services

Synthesising the data provided in van der Lijn et al's (2005) overview of the European postal market, several European countries had at the time opened the postal market for other operators than the national postal operator, but not in the area that the third Postal Directive aimed to open. The third Postal Directive, which was decided on the 27 February 2008, abolished the reserved area by imposing competition for the delivery of letters weighing less than 50 grams. The first and second Postal Directive, which was introduced in 1997 and 2002, had already introduced competition in other parts of the postal market²⁹. However, the established operator's market share remained in a dominating position in all the areas that these directives addressed, particularly for addressed mail.

Figure Six shows the percentage of member states, whose postal services were reserved for the public incumbent or open for competitors in 2005. Domestic items of correspondence smaller than 50 grams, domestic items of correspondence between 50 and 100 grams, and inbound cross border mail remained in the reserved area in a prevailing majority of the countries. In most countries addressed direct mail was also reserved for the incumbent. However, all the member states at the time had opened up the unaddressed direct mail market as did all member states for newspapers. This was also prevailing for domestic items larger than 100 grams as well as periodicals and magazines; only one country (Poland) had reserved such areas for the incumbent. As for outbound cross border mail, there were more countries, which have introduced competition than not having done so, but for this area the share is not as dominant. Only three countries (Estonia, Finland and Sweden) had introduced competition in all the mentioned postal submarkets.

²⁹ In 1997 the Parliament and the Council decided in favour of introducing common rules for postal services in the internal market, defining the minimum characteristics of the universal service to be guaranteed and limits for services, which may be reserved for the universal service provider as well as a timetable for further gradual liberalisation. This is the first Postal Directive. In 2002 the legislators introduced further steps of market opening and limitations for reserved service sectors. According to this second Postal Directive, member states were free to exempt from competition items of correspondence weighing less than 100 gram and costing less than three times the basic tariff as from 1 January 2003 as well as less than 50 gram and costing less than two-and-a-half times the basic tariff as from 1 January 2006. In addition, the second Postal Directive opened up all outgoing cross-border mail to competition, yet with possibilities for exceptions. In light of the history of these two former 'directives', it is of interest to include also information about submarkets of items larger than 50 grams, newspapers and periodicals – and not only letter policies.

Figure 6. Percentage of European countries whose postal areas were reserved for the established operator or open to competition (N=25) (data from Lijn et al, 2005)

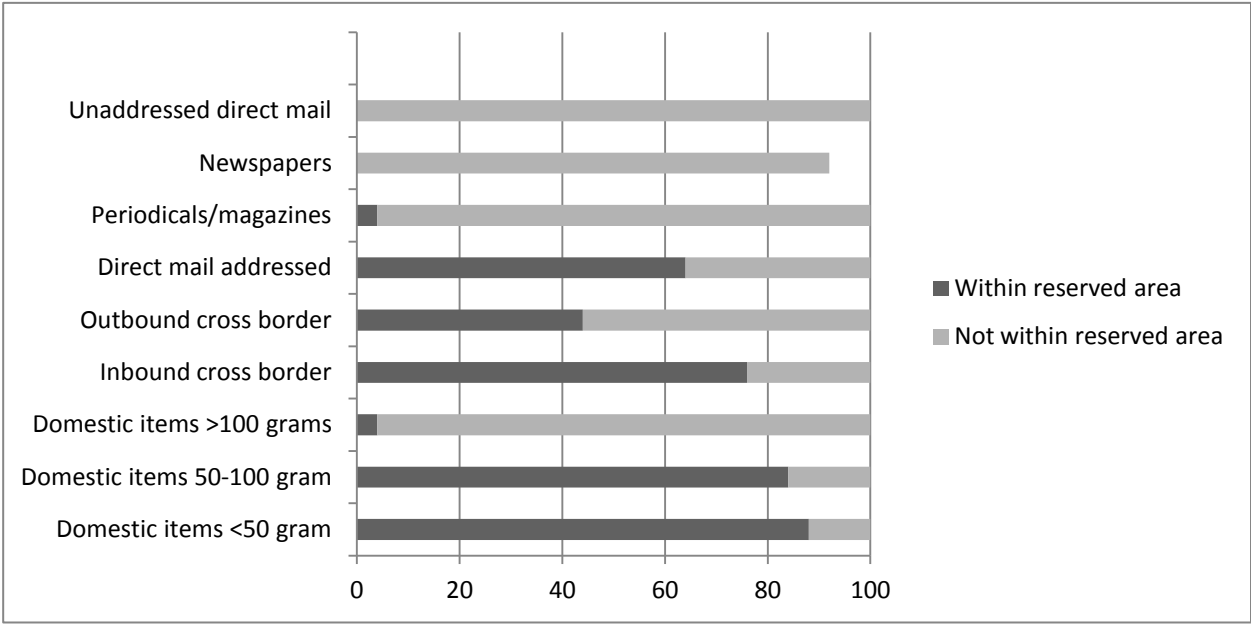


Figure Six does not indicate whether competition actually takes place in the market. The number of competitors that have entered the postal market, as provided in Table Five, which highlights such information. It shows that in European countries in 2005 there were typically no competitors in the market for addressed direct mail and only very few competitors for the other submarkets. In general the postal market with the most competitors is international mail. This assessment is based on the median that is considered a more useful measure than the average due to outliers such as Germany with an unusually high number of small providers.

Table 5: Number of competitors in postal submarkets (N=25) (data from Lijn et al, 2005)

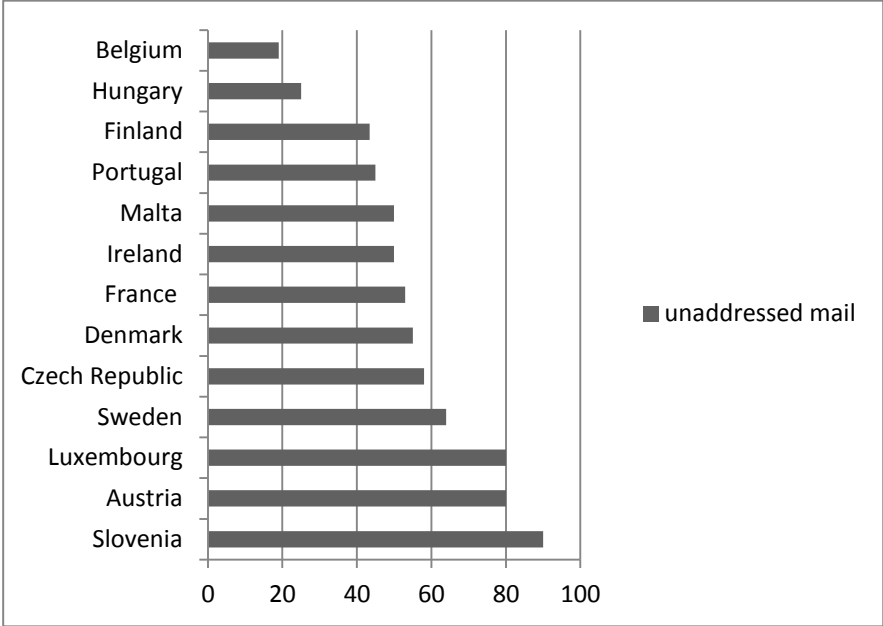
Area	Domestic items	International mail	Addressed direct mail	Periodicals, magazines	Newspapers	Unaddressed mail
Median	1	5	0	0,5	2	3
Average	43,8	16	11,7	1	2,5	4,7

The market share of the incumbent is also interesting for assessing whether competition actually takes place. Figure Seven shows that despite the presence of competitors in a number of countries, the established operator was dominant within the addressed mail segment. The incumbent's share was the lowest in Spain, which at the time had not opened the whole market for competition. The incumbent's share in Finland, which deregulated the whole market in 1994, was relatively larger than in Sweden and Estonia, which had carried out similar reforms. This is probably due to Finland's restrictive license regime, high quality standards, requirement of daily delivery, short license periods and payment of compensation fees for entering the market (van der Lijn et al., 2005). However, for unaddressed mail the established operator's position is weaker than for addressed mail (see Figure 8).

Figure 7: Incumbent's market share (volume) of addressed mail in 25 EU member states (N=25) (data from Lijn et al, 2005)



Figure 8: Incumbent’s market share (volume) of unaddressed mail (N=25) (data from Lijn et al, 2005)



Public Transport

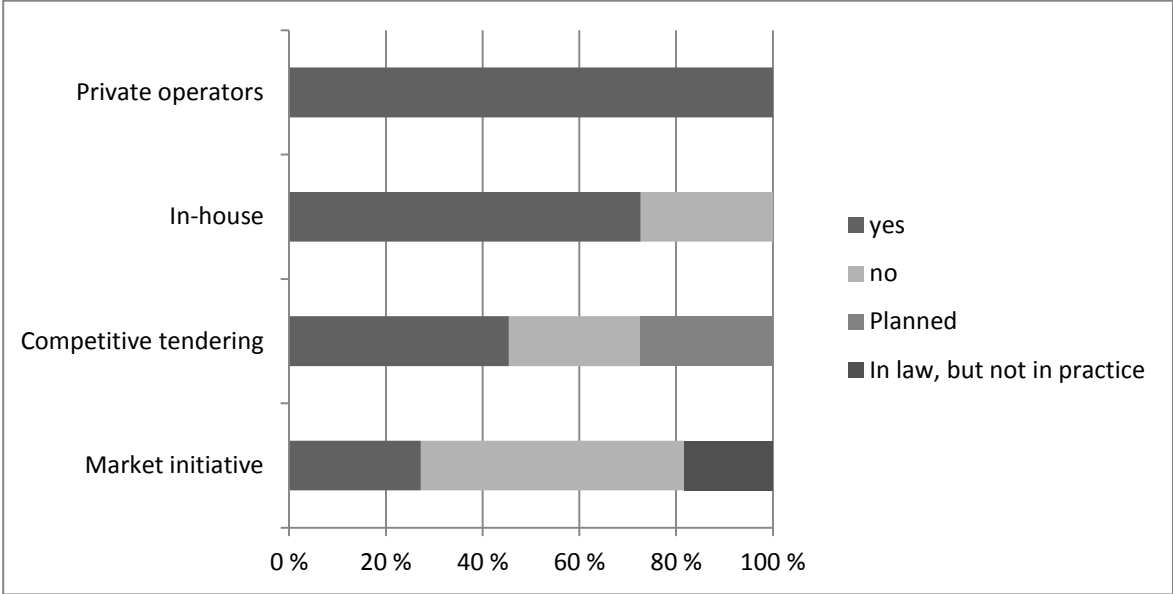
In the 1990s there was already a development towards introducing competitive tendering in a number of European countries. The findings suggest that the European Commission reacted upon developments that were already taking place, when initiating the first proposal of the Public Transport Regulation on the 27 of July 2000, suggesting to introduce competitive tendering of public transport services. After seven years of negotiations the legislative decision makers reached a “watered down” compromise on the 23 of October 2007. The Regulation introduced competitive tendering as a main rule with exceptions from competition for the railway sector, contracts below a certain threshold and 'internal operators', defined as legally distinct entities over which a competent local authority exercises control similar to that exercised over its own departments.

Since 1990 the development in the local public transport market has been towards more competitive tendering. In two countries (Denmark and Sweden) and in the British capital city, London, competitive tendering was already a common practice at the time³⁰. In 2001 competitive tendering had been introduced or were in the pipeline also in seven other countries (Belgium, France, Germany, Italy, Spain, the Netherlands

³⁰ See Gwilliam and Van de Velde (1990) for developments prior to 1990.

and Dublin, the capital city of Ireland) (van de Velde, 2001). Portugal was an exception, although this country’s legal framework shared similarities with that of the United Kingdom, i.e. it allows for competition *in* the market outside the largest cities (Porto and Lisbon in Portugal; London in the United Kingdom). However, in Portugal this framework had not been followed-up in practice, as concessions were granted without competition (van de Velde, 2001, p. 7).

Figure 9. Percentage of European countries, which in 2001 were planning to or had introduced competitive tendering (N=11) (data from van de Velde, 2001)

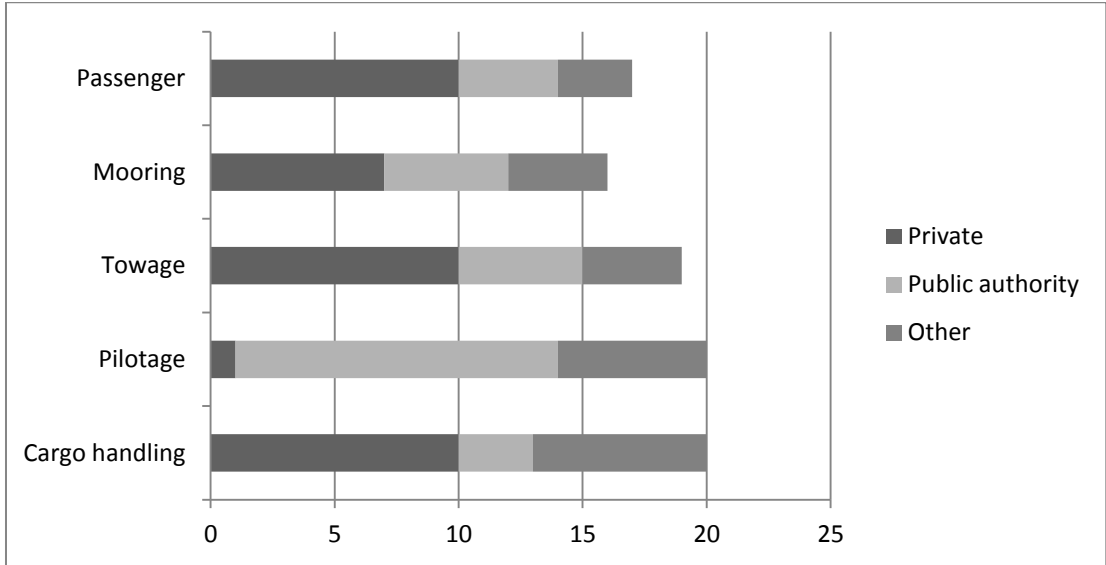


To varying extents all the countries had at the time private operators in the market. Yet internal operators were common in most Western European countries, particularly in urban areas. In all the countries private operators complemented service production in rural areas. Concessions to such private operators were usually granted without competitive tendering, yet as argued, competitive procedures were increasing.

Port Services

Traditionally a centralised public agent has been in charge of the port management and the provision of most port services (Tovar, Trujillo, & Jara-Díaz, 2004)³¹. However, evidence from 2006 shows that the private sector is an active participant, not only in producing port services, but also in constructing and developing port facilities. Figure Ten shows whether the public authority, private operators or others are in charge of different port service activities. The information is based on the European Seaports Organisation’s (ESPO) Factual Report (2005).

Figure 10: Share of provision by private, public or other operators for different port services (N=23) (data from ESPO, 2005)



³¹ Ports are organised in various ways in different countries, especially with regards to whether and to what degree the public authority is involved in the provision of services. A number of different categorisations exist (Baird, 2002; Brooks, 2004). For a European context a continuum of, on one hand, a 'landlord model' and, on the other hand, a 'comprehensive port authority model' is useful. In a landlord model, the port authority, which owns the facilities, leaves most activities to the private sector (Tovar et al., 2004, p. 2). In contrast, in the comprehensive port authority model, the port authority is directly in charge of all or nearly all responsibilities for the activities within a port area. Such ports may be public (“service ports”), which are typically state owned, or private (“tool ports”) (Juhel, 1997). However, there are a number of administrative arrangements and contracts that lay between the two mentioned models (Tovar et al., 2004, p. 9). The landlord model dominates in Europe.

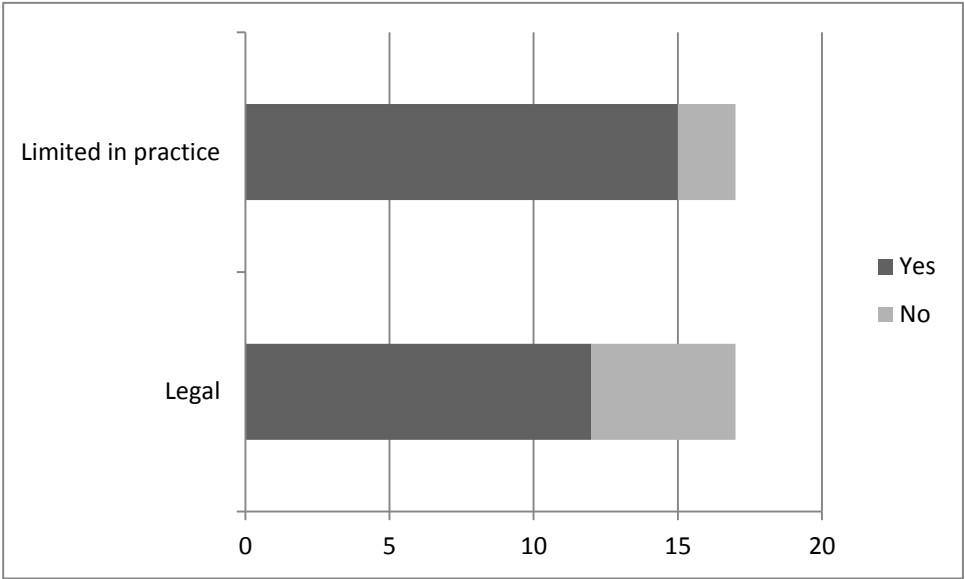
Only services that were part of the proposed Port Directive are included in the illustration. The legislative proposal aimed at opening the market of port services like cargo handling (including loading and unloading, stevedoring, stowage, transshipment and other intra-terminal transport), passenger services (including embarkation and disembarkation) and technical-nautical services such as pilotage, towage and mooring. The member states would be free to choose management models and ownership.

At the time, the private sector carried out cargo handling in a majority of the countries (Cyprus, Spain and Sweden are exceptions). For passenger services, it varied whether the service provider was the public authority (at local, regional or state level) or private operators (e.g. the carriers themselves). As Figure Ten shows, there were slightly more countries with private sector provision than public.

The picture is more diverse for technical-nautical services. For pilotage the public authorities are the responsible provider in a majority of the countries. The share is the opposite of that of cargo handling. In addition, in four countries (Germany, Italy, Malta and the Netherlands) there are central pilot associations that take care of pilotage. In two of those countries, the pilot association is also responsible for mooring. Compared to that of pilotage, port authorities are only half as often responsible for towage and mooring. Pilotage was also one of the most disputed areas in the Port Directive.

Another contested issue was the proposed deregulation of self-handling, meaning a situation, in which an undertaking (a self-handler) which normally could buy port services, provides for itself, using its own land-based personnel or personnel onboard and its own equipment (depending on definition). Figure Eleven illustrates that at the time, self-handling was legal in about a dozen countries, but whether it actually took place varied. In some countries self-handling was dependent on the size of the ports, being more common in small ports. In a few countries it is up to the port authority itself to decide the rules of self-handling. In two countries (Sweden and Italy) self-handling is restricted through agreements with unions.

Figure 11: Number of countries, which has opened up for self-handling (N=23) (data from ESPO, 2005)



In order to gain access to the port market in general in the countries, eleven countries required some kind of authorisation prior to access. However, whether access was possible at all varies depending on the services. For example, some countries had restrictions for pilotage but not for other services.

In general, there was a trend towards more 'landlord' ports, which implies an increasing involvement of private participation. A number of countries had decided to deregulate or privatise the main ports before the proposed Port Directive was rejected. For Europe seen as a whole, private providers were involved in most services. In a few countries, especially the United Kingdom, but also to some extent in Denmark and Finland, they were also involved in the management of ports.

Appendix 2: Examples of Interview Guides

Due to the different roles of the informants, the interview guides have been tailored to each interview and therefore vary, although covering similar issues. Four different examples of interview guides are included on the next pages. These are:

- A general interview guide for all three sectors in English
- An interview guide addressing the Port Directive in German
- An interview guide addressing the Postal Directive in German
- An interview guide about the organisational solution in Sør-Trøndelag in Norwegian

EU Liberalisation Policy: A Comparison of Three Infrastructure Sectors

Today, the tendency towards deregulatory reform in the European common market is well documented. A number of sectors are influenced by competition rules. Comparing three public service cases that have differing outcomes with regards to deregulation of the European Single Market, I intend to investigate what aspects are considered decisive when it comes to under what conditions liberalisation reform occurs.

The three cases are:

- The third Postal Services Directive, which ended a series of directives by liberalising the remaining letter policies
- The Public Passenger Transport Services Regulation as a middling case, in which the responsible public authorities can choose to produce services by an internal operator or use competitive tendering
- The Port Package, in which the liberalisation reform has been rejected

This research project is part of a PhD dissertation on liberalisation of public services in the European Union. Explorative interviews with stakeholders who were involved in the process with the mentioned directives/regulations will form a central part of the data-gathering for the dissertation. Each interview is designed to maintain confidentiality and anonymity of interviewees with approximately 40 minutes set aside for each interview.

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There are five key topics that I intend to address during the interview. These are:

1. Delegation to the European level

Of interest are perceptions about the rationale behind delegating postal, port and public transport responsibilities to the EU. This topic will include economic aspects, benefits and downfalls of the dossiers and the need for problem solving.

2. Patterns of conflict

This topic addresses insights as to what patterns of conflicts arose during the decision-making process in the EU. Conflicts internally in your association as well as with other organisations will be covered.

3. Coordination with other actors

This issue covers questions as to what networks with the European Commission, member states, politicians and interest groups that your association established/used during the policy process.

4. Legal issues

This topic will address perceptions about whether there have been any legal issues that have influenced decision making in the EU, including relevant court rulings by the European Court of Justice and complaints from your association or other actors to EU institutions.

5. Sector characteristics

This topic raises the question as to whether there are certain sector characteristics that make liberalisation reform in the three sectors more or less likely at the European level. This topic will also identify differences between sectors with regards to experience with liberalisation prior to the proposals, how the sector is organised, employment and universal service.

Europäische Liberalisierungspolitik: Drei Infrastrukturbereiche im Vergleich

Kleine Projektbeschreibung: Die Tendenz zur Deregulierung im europäischen Binnenmarkt ist unübersehbar. Die Entscheidungen und Maßnahmen der EU-Wettbewerbshüter wirken sich dabei auf viele Bereiche aus. In diesem Zusammenhang ist jedoch insbesondere die Liberalisierung von traditionellen öffentlichen Dienstleistungen umstritten.

Im Rahmen eines Vergleichs von drei Dienstleistungs- und Infrastrukturbereichen werden in diesem Projekt die entscheidenden Bedingungen für Liberalisierungsreformen in der Europäischen Union analysiert. Im Mittelpunkt der Falluntersuchung stehen die folgenden drei Richtlinien bzw. Verordnungen, die aufgrund ihrer unterschiedlichen Ergebnisse von besonderem Interesse sind:

- Der ‚erfolgreiche Fall‘: Die dritte Post-Richtlinie, die auf die Vollendung des Binnenmarktes der Postdienste abzielt;
- Der ‚mittlere Fall‘: Die EG-Verordnung über öffentliche Personenverkehrsdienste auf Schiene und Straße, nach der die zuständigen Behörden wählen können, ob sie Dienste selbst anbieten oder ausschreiben wollen;
- Der ‚erfolglose Fall‘: Der Vorschlag für eine Richtlinie über den Zugang zum Markt für Hafendienste. Dieser wurde zweimal abgelehnt.

Dieses Forschungsprojekt ist integraler Bestandteil meiner Doktorarbeit zur Marktliberalisierung in der Europäischen Union. Leitfadeninterviews mit den am Zustandekommen der genannten Richtlinien/Verordnungen beteiligten Akteure bilden einen zentralen Bestandteil der Datenerfassung für die Dissertation. **Grundsätzlich bleibt jedes Interview vertraulich und anonym.**

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Interviewfragen zum Vorschlag für eine Richtlinie über den Zugang zum Markt für Hafendienste

Das Interview ist in den folgenden Themen gegliedert:

1. **Bedeutung der Richtlinie:** War/ist die Marktöffnung der Hafendienste und die Übertragung einer entsprechenden Vollmacht auf die europäische Ebene wichtig? Zur Lösung welcher Probleme sollte die Richtlinie beitragen? Welche Aspekte an dem Vorschlag zur Öffnung des Hafenmarktes und der Ablehnung davon finden Sie positiv oder negativ?
2. **Konfliktlinien:** Welche Konfliktlinien waren während des Entscheidungsprozesses zur genannten Richtlinie zwischen Deutschland und anderen Akteuren (z.B. den EU-Institutionen, den nationalen politischen Institutionen, unterschiedlichen Interessengruppen) zentral? Waren die Konflikte ideologischer oder sektorspezifischer Natur? Aus welchen Gründen waren die Ziele des genannten Vorschlags zur Richtlinie umstritten?
3. **Machtverhältnisse, Abstimmung mit anderen Akteuren und Ergebnis:** Welche Rolle hat Ihre Organisation für das Ergebnis gehabt? Mit welchen anderen Organisationen/Mitgliedsstaaten/Parteien haben Sie sich verbündet? Welche Bedeutung kamen unterschiedlichen Interessengruppen zu? Wann wurde Ihnen klar, dass der Vorschlag für eine Richtlinie über den Zugang zum Markt für Hafendienste scheitern würde? Entspricht das Ergebnis Ihren Erwartungen?
4. **Verhältnis zur Europäischen Kommission:** Wie beurteilen Sie die Zusammenarbeit mit der Kommission in diesem Fall? Wie beurteilen Sie die Arbeitsweise der Kommission im Hinblick auf die Richtlinie? Welche Rolle hat die Kommissarin/der Kommissar gespielt? Hat die Kommission bei der Aushandlung der Richtlinie mit der Einleitung eines Rechtsverletzungsverfahrens gedroht? Falls ja, hat die Kommission damit die Einstellung anderer Akteure zur Vorlage beeinflusst?
5. **Nationaler Ebene.** Wie ähnlich oder unterschiedlich war/ist die nationale Hafenpolitik oder Organisierung der Produktion von Hafendiensten zur genannten Richtlinie? Welche Konsequenzen hätte eine solche Richtlinie in den Mitgliedstaaten gehabt?
6. **Vergleich zu anderen Bereichen:** Falls die beiden anderen genannten Fälle (die dritte Post-Richtlinie und die EG-Verordnung über öffentliche Personenverkehrsdienste auf Schiene und Straße) bekannt sind, welche Aspekte waren für die unterschiedlichen Ergebnisse von entscheidender Bedeutung? Inwiefern sind Unterschiede der Sektoren wichtig für die unterschiedlichen Ergebnisse?
7. **Weitere Informationen und Hinweise:** Gibt es aus Ihrer Sicht noch weitere Aspekte, die Sie im Rahmen des Entstehungs- und Entscheidungsprozesses zur Hafenrichtlinie für besonders bedeutsam erachten?

Gerade im Hinblick auf Ihre zeitliche Beanspruchung schätze ich Ihre Bereitschaft sehr, mit der Beantwortung meiner Fragen zum Erfolg dieses Projektes beizutragen. **Herzlichen Dank!**

Interviewfragen zum Werdegang der Dritten Post-Richtlinie

Das Interview ist in den folgenden Themen gegliedert:

8. **Bedeutung der Richtlinie:** War/ist die Marktöffnung der Postdienste und die Übertragung einer entsprechenden Vollmacht auf die europäische Ebene wichtig für Ihre Organisation? Zur Lösung welcher Probleme soll(te) die Richtlinie beitragen? Welche Aspekte an der Öffnung des Postmarktes finden Sie positiv oder negativ?
9. **Konfliktlinien:** Welche Konfliktlinien waren während des Entscheidungsprozesses zur Dritten Post-Richtlinie zwischen Ihrer Organisation und anderen Akteuren (z.B. den EU-Institutionen, den nationalen politischen Institutionen, unterschiedlichen Interessengruppen) zentral? Waren die Konflikte ideologischer oder sektorspezifischer Natur? Aus welchen Gründen waren die Ziele des genannten Vorschlags zur Richtlinie umstritten?
10. **Machtverhältnisse, Abstimmung mit anderen Akteuren und Ergebnis:** Welche Rolle hat Ihre Organisation für das Ergebnis gehabt? Mit welchen anderen Organisationen/Mitgliedsstaaten /Parteien haben Sie sich verbündet? Welche Bedeutung kamen unterschiedlichen Interessengruppen zu? Wann wurde Ihnen klar, dass ein Vorschlag zur Dritten Post-Richtlinie nicht scheitern würde? Entspricht das Ergebnis Ihren Erwartungen?
11. **Verhältnis zur Europäischen Kommission:** Wie beurteilen Sie die Zusammenarbeit mit der Kommission in diesem Fall? Wie beurteilen Sie die Arbeitsweise der Kommission im Hinblick auf die Dritte Post-Richtlinie? Welche Rolle hat der Kommissar gespielt? Hat die Kommission bei der Aushandlung der Richtlinie mit der Einleitung eines Rechtsverletzungsverfahrens gedroht? Falls ja, hat die Kommission damit die Einstellung anderer Akteure zur Vorlage beeinflusst?
12. **Nationaler Ebene.** Wie ähnlich oder unterschiedlich war/ist die Organisierung von Postdiensten in Ihrem Land zur genannten Richtlinie? Welche Konsequenzen hat die genannte Richtlinie in Ihrem Land und für Ihre Organisation gehabt?
13. **Vergleich zu anderen Bereichen:** Falls die beiden anderen genannten Fälle (die EG-Verordnung über öffentliche Personenverkehrsdienste auf Schiene und Straße und der Vorschlag für eine Richtlinie über den Zugang zum Markt für Hafendienste) bekannt sind, welche Aspekte waren für die unterschiedlichen Ergebnisse von entscheidender Bedeutung? Inwiefern sind Unterschiede der Sektoren wichtig für die unterschiedlichen Ergebnisse?
14. **Weitere Informationen und Hinweise:** Gibt es aus Ihrer Sicht noch weitere Aspekte, die Sie im Rahmen des Entstehungs- und Entscheidungsprozesses zur Postrichtlinie für besonders bedeutsam erachten?

Gerade im Hinblick auf Ihre zeitliche Beanspruchung schätze ich Ihre Bereitschaft sehr, mit der Beantwortung meiner Fragen zum Erfolg dieses Projektes beizutragen. **Herzlichen Dank!**

Intervjuguide

Intervjupersonens bakgrunn, stilling og oppgaver

1. Hvordan var du involvert i forsøket på oppkjøp av Team Trafikk, innføringen av anbud og opprettelsen av administrasjonsselskapet AtB?
2. Endret din rolle seg fra da fylkeskommunen hadde forhandlinger om nettokontrakter?

Forslag om å innføre anbud

3. Hvis vi går litt tilbake i tid, når var det forslaget om å innføre anbud først dukket opp og hva var bakgrunnen for dette?
4. Hadde nasjonale føringer eller signaler noe å si for dette?
5. Spilte lovgivning i EU eller forventninger til hva EU ville komme til å kreve, noen rolle i dette?
6. Spilte det noen rolle hva andre fylkeskommuner gjorde?
7. Hva var hovedargumentene for og imot?

Forhandlingsregime

8. Hvordan opplevde du forhandlingene med operatørene?
9. Hadde fylkeskommunen noen forhandlingskort?
10. Hadde operatørene noen forhandlingskort?
11. Hvorfor valgte dere å avslå partnerskapsavtalen, som Team Trafikk foreslo?

Eget busselskap – opprinnelse

12. Hvem var det som først foreslo å opprette et eget busselskap og hva var grunnen for dette?
13. Hva syntes du om dette?

Forhandlinger om oppkjøp av Team Trafikk

14. Hvordan opplevde du prosessen rundt bestemmelsen om at dere skulle inngå forhandlinger med Nettbuss om oppkjøp av Team Trafikk?
15. Hva skjedde da Nettbuss plutselig snudde om?

Anbud

16. Hvordan var diskusjonen rundt etableringen av et nytt produksjonsselskap versus innføringen av anbud etter at Nettbuss trakk seg?
17. Var det noen forhold som gjorde innføringen av anbud mindre kontroversiell
 - a. Reglene om ansattes rettigheter ved virksomhetsoverdragelse?
 - b. Argument om effektivitet og oppnåelse av bedre kvalitet?

Opprettelse av AtB

18. Hvorfor valgte dere å opprette et administrasjonsselskap?
19. Var det kontroversielt å innføre et eget administrasjonsselskap eller var det stor enighet?
20. Var det en sammenheng med innføringen av anbud og opprettelsen av AtB?
21. Hvilke konsekvenser forventet dere at opprettelsen ville ha?
22. Hvilken rolle spilte politiske styring i avgjørelsen om å opprette AtB?
23. Hadde erfaringer fra andre fylkeskommuner noe å si?
24. Hva med råd fra eksperter, konsulenter, forskningsrapporter osv?
25. Var det noe annet som spilte en rolle?

EUs rolle

26. Hvilken rolle spilte EU i det hele?

27. Ville noe av dette ha skjedd, hvis det ikke hadde vært for EU og kollektivtransportforordningen?
28. Hadde dere forventninger i forhold til hvilke føringer forordningen fra EU ville gi?
29. Var EU-forordningen viktig i diskusjoner osv? Ble den ofte nevnt?

Nasjonalt nivå

30. Hvilken rolle spilte nasjonale lover og regler for utfallet?
31. Hvilke signaler fikk dere fra nasjonalt nivå (politisk og teknokratisk)?

Andre mekanismer

32. Hvilke frihetsgrader hadde dere til å velge løsning på hvordan kollektivtransporten skulle organiseres?
33. Endte dere opp med en løsning som var nærmere det dere var vant til å gjøre?
34. Var det en "greiere" løsning enn alternativene?

Spredning fra andre fylkeskommuner

35. Hadde det noe å si hva andre fylkeskommuner har valgt å gjøre?
 - a. Læringseffekter?
 - b. Kopiering?
 - c. Ønske om å være bedre enn andre fylkeskommuner?

Annet

36. Er det noe vi ikke har snakket om, som du vil legge til?

Tusen takk!

Appendix 3: Interviews

All interviews have been carried out by the author and their date and location are highlighted below, along with a list of the interviewees' organizations.

- a: Interest group (post industry), 13 April 2011, telephone
- aa: Member state, 27 January 2012, Berlin
- b: Trade union (post), 4 May 2011, Oslo
- b1: Trade union (post), 4 May 2011, Oslo
- bb: Consultant (local public transport), 29 March 2010, telephone
- c: Commission, 8 June 2010, Brussels
- cc: Member state, 12 December 2012, Brussels
- cc1: Member state, 12 December 2012, Brussels
- d: Interest group (transport industry), 9 June 2010, Brussels
- dd: Trade union (post), 12 December 2012, Brussels
- e: Interest group (transport industry), 7 June 2010, Paris
- f: Interest group (transport industry), 9 June 2010, Brussels
- g: Council, 11 June 2010, Brussels
- h: Interest group (post industry), 30 January 2012, Bonn
- i: Member state, 1 February 2012, Bonn
- j1: Member state, 30 January 2012, Bonn
- j2: Member state, 30 January 2012, Bonn
- k: Local public transport authorities, 20 January 2012, telephone
- l: Commission, 30 March 2011, Brussels
- m: Commission, 30 March 2011, Brussels
- n: Interest group (port industry), 28 March 2011, Brussels
- o: Trade union (transport), 7 March 2011, Oslo
- o1: Trade union (transport), 7 March 2011, Oslo
- p: Interest group (port industry), 29 March 2011, Brussels
- q: MEP, 2 March 2011, telephone
- r: MEP, 8 September 2011, telephone
- st1: Local politician, 15 August 2011, Trondheim
- st2: County administration, 16 August 2011, Trondheim
- st3: Local interest group, 16 August 2011, Trondheim
- st4: County administration, 17 August 2011, Trondheim
- st5: Local politician, 17 August 2011, Trondheim

st6: County Council, 22 August 2011, telephone
s: Trade union (port), 6 June 2011, telephone
t: MEP, 2 June 2010, telephone
u: Trade union (transport), 13 May 2010, telephone
v: Expert (local public transport), 19 April 2010, Oslo
w: Trade union (transport), 18 June 2010, Oslo
x: Commission, 31 March 2011, Brussels
y: Commission, 30 March 2011, Brussels
z: Council, March 2011, Brussels

