The impact of mutual recognition— inbuilt limits and domestic responses to the single market

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ABSTRACT: What were the consequences of integrating the single market via mutual recognition? Did competitive deregulation result on the national level, with insufficient levels of regulation? Or were the implications of opening the market less serious than expected? In this paper I analyse two previously highly regulated service sectors, insurance and road haulage, and study the impact of European policies in Germany and France. I find significant differences in the way mutual recognition and minimum harmonisation was enacted by the Council, limiting its impact on member states. In both sectors, the use of the single-market freedoms has stayed below expectations. In road haulage, the right to do cabotage transports is being used a little. In insurance, market access is achieved via mergers and acquisitions, thus using a means of integration for which no harmonisation of rules would be necessary. Consequently, the implementation of single-market rules has primarily resulted in a liberalisation of the national market order, where this had not been achieved before, like in Germany. The domestic insurance and road haulage markets have become very competitive, instigated by European rules, but they remain largely national markets.

1 Introduction

When the Community was relaunched in the mid-1980s with the Single Market initiative, the former attempt to fully harmonise national regulations was replaced by the principle of mutual recognition. Each good and service that was lawfully produced in one member state should be able to be exported into another, without previous testing or licensing requirements. Only minimum harmonization would be necessary in those areas where member states could otherwise limit the import of goods or services because of health or other reasons relating to the general good. Compared to full harmonisation mutual recognition allows to leave national regulations largely intact. And the requirement to agree on common rules at the European level is reduced to those areas where minimum harmonisation is needed. However, the danger is that national regulations are being undermined, and that the single market is built on competitive deregulation (Streeck 1995). Stricter national regulations inhibit companies not only abroad but also in their domestic markets where companies from other member states can be active under home-country control.

Some years into the official realisation of the Single Market in 1992, the consequences of mutual recognition as an integration principle may be analysed. Interestingly, there

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1 I would like to thank Ricarda Gerlach für research assistance.
have been few empirical analyses of how the single market has affected member states. Thus, while we know that in principle liberalisation is favoured over re-regulation by the European institutional framework (Scharpf 1999), we do not know much about the impact of this institutional bias on member states. Possibly, they find escape routes to keep their markets relatively sheltered, just as there seem to be escape routes on the European level to facilitate agreement on regulations (Héritier 1999; Tömmel 2000). What has happened de facto is interesting not only with view to validating previous expectations. As Eastern enlargement is on the agenda, questions about the importance of a level playing field have a new relevance. In addition, mutual recognition is also discussed outside of the EU, for instance in the GATS (Nicolaïdis 1996; Zampetti 2000). It is therefore not unimportant to know how well market integration through mutual recognition has worked in the EU.

In this paper I examine two service sectors: insurance and road haulage. These sectors were chosen for the following reasons: they were previously highly regulated at the national level so that the European liberalisation of markets can be expected to go along with continued regulatory interests at the national level. Both sectors were integrated on the basis of mutual recognition, which is not the case everywhere as many previously monopolised services, like telecommunications and energy, have been integrated by establishing a common regulatory framework and employing European competition law (Schmidt 1998). Finally, the sectors differ in their skill requirements so that it may be possible to detect cross-sectoral variance in the workings of the single market, as market access conditions differ.

In the following I will firstly expand on mutual recognition as an integration principle. I will then describe the European policies to integrate the road haulage and insurance markets of member states. Following, I study the impact of these policies on two member states, France and Germany. This analysis shows, I conclude, that the impact of mutual recognition escapes easy classification: first of all, there are inbuilt limits because of the way member-state governments go about mutual recognition in the Council; secondly, much depends on the initial regulatory framework of the member states, and the interests of governments to respond to mutual recognition; and thirdly, there are significant sectoral differences as sectors differ in the extent of their institutional embeddedness, and therefore in their harmonisation requirements. Finally, and very significantly, European policies (so far) have their greatest impact on
the level of the member states as markets remain largely national but regulations have been europeanised.

2 Mutual recognition as an integration mechanism

Originally, the European Community attempted to achieve the common market by fully harmonising divergent national regulations. In the early sixties, the Council of Ministers drew up general programmes to realise the freedom of establishment and the freedom to provide services (Eickhoff 1983: 3f). But the six founding members failed to achieve this aim as planned until the end of 1969. Divergent national regulatory traditions made it almost impossible for the Council of Ministers to agree with a unanimous decision rule.

As is well-known, in this situation of deadlock the European Court of Justice took over, and paved the way for further integration through a series of judgements in the 1970s (Alter and Meunier-Aitsahalia 1994; Weiler 1981). Following up on Dassonville (1974), the Court stipulated in the case Cassis de Dijon (1979) that goods legally produced in one member state could be exported into another even if national regulations in that member state prohibited the production of such a good. Thus, Germany could not ban the import of the liqueur Cassis, which did not conform to national requirements of minimum alcoholic content. Only in rare cases would member states be able to block such products under the exemption of Art. 30 (ex 36).

In its White Paper on the Single Market the Commission took up this legal reasoning and abandoned the unsuccessful approach of full harmonisation. Given this case law, and the direct effect and superiority of European law, thus the Commission, there was no more need to fully harmonise divergent national regulations. Member states could no longer bar the import of goods or services with reference to national law, as member states had to mutually recognise goods and services lawfully produced in other member states. Harmonisation was only necessary in those areas, where member states could invoke the exemption of Art. 30, mainly for reasons to protect health. Minimum harmonisation coupled with mutual recognition thus became the new approach to realising the single market (Hauser and Hösl 1991; Majone 1994).
Compared to other integration principles, like the most favoured nation system (MFN) practiced in the GATT, the originality of mutual recognition lies in the fact that a reverse discrimination of nationals can occur. Under MFN the most foreign companies can hope for is to be treated like nationals. Under mutual recognition, they may be better off than nationals should their domestic regulatory system be more favourable. Mutual recognition builds on home-country control; the host country can no longer impose its regulations. Consequently, there is a particular danger that mutual recognition leads to competitive deregulation. Governments may be pressed to enhance the regulatory position of domestic companies not only with view to their international competitiveness, but also their national competitive standing (Streit and Kiwit 1999; Winkler 1999).

Compared to the general pressures of economic globalisation, mutual recognition thus has a more immediate impact. This may be aggravated further by the specificities of its implementation. Because of the integrated European legal system, the rights under mutual recognition, and under European competition law, can be directly claimed by those who can profit from them (Scharpf 1999: 61). The direct effect and superiority of European law mean that private actors interested in liberalisation can address either their national courts or the European Commission.

However, the EU does not only lend greater scope to regulatory competition than the global marketplace. By providing the institutions for common problem-solving and the effective implementation of decisions, the EU may also be capable to come to grips with regulatory problems that cannot be tackled as easily on a global level. Scharpf has convincingly shown that the institutional preconditions of the EU are however very asymmetric: While negative integration, i.e. the lifting of national barriers to trade, can rely on interventions of the Commission and the ECJ, positive integration,

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2 For the freedom to provide goods and services, mutual recognition implies that companies are regulated according to the principle of home-country control. The host country, in contrast, lacks regulatory oversight. With view to the freedom of establishment, it depends which rules apply. Legally dependent entities, i.e. branches, may also fall under the home-country control of their parent company.

3 Thus, the German private banks addressed the Commission about the competitive advantages of German public banks. Since this complaint, there have been discussions especially about the necessary restructuring of WestLB.
i.e. establishing common economic regulations, is largely dependent on agreement in the Council and therefore on a qualified majority of the member states (Scharpf 1999: 45, 70-72).

The consequences of this institutional imbalance of the EU on the European level have been broadly analysed. Thus, we have some ideas which problems may be solved at the European level and which mechanisms exist to help overcome the decision-making problems in the Council (Grande 2000; Héritier 1999; Scharpf 1999: 89-120). Much less is known about the impact of these European policies on the national level. Do we see in fact a competitive deregulation on this level? Is positive integration sufficient that has been agreed on in the Council? What scope do member-state governments have to pursue their own regulatory goals? It is to these issues that I will turn, after having described the European regulatory framework for insurance and road haulage.

3 Integration of road haulage and insurance

The integration of both sectors corresponded largely to the pattern one would expect after the aforementioned. Progress in the 1960s and 70s was slow due to divergent national regulatory traditions. For road haulage, the problem was that the large member states Germany, France and Italy regulated this sector with view to protecting the competitiveness of their railways, which was not an issue in the Benelux countries. In the Council, the question of liberalising road haulage was strictly tied to prior harmonisation. And since the unanimity principle allowed hardly any progress here, the former was very slow (Héritier 1997).

Some regulations emerged in this period dealing with a common tariff system and a contingent of licenses that could be used for transports throughout the Community (Button 1984: 42f, 77-79). But the traditional system of bilateral quotas remained strong. In addition, there were attempts to tackle the different harmonization issues, like the different taxes on vehicles and fuel, social regulations concerning working times and technical issues like the size and weight of vehicles, however, without much success.
In insurance, a first directive in 1964 dealt with re-insurance. This was unproblematic as re-insurance was hardly regulated on the national level. 1973 and 1976 the so-called first coordination directives followed for non-life and life insurance respectively. They realised the freedom of establishment by harmonising solvability and licensing requirements (Badenhoop 1988: 103). Thus, companies were free to establish themselves anywhere in the Community, being regulated by the host country. In 1975 the Commission made a proposal to tackle also the freedom to provide services. This directive, however, stalled in the Council of Ministers.

Further progress in both areas depended on the changes that came in the 1980s – the increased use of the Court to force through negative integration and the switch to qualified majority voting with the Single European Act.

3.1 The integration of road haulage

For the integration of road haulage the impact of the Court was particularly marked. Given the slow progress in European transport policy and the special chapter on transport in the Treaty, the European Parliament addressed the Court about the inactivity of the Council of Ministers. In his inactivity verdict the ECJ emphasised the obligation of the Council to realise the freedom to provide transport services within a reasonable time period. With this ruling, it was no longer possible in the Council to tie concessions of liberalisation to prior agreement on harmonisation issues (Erdmenger 1985: 386f). And in the subsequent political process those actors interested in further liberalisation, namely the Netherlands and the Commission, repeatedly threatened to refer the matter again to the Court, should the Council not lift restrictions quickly.5

In response to the ruling, the Council agreed to liberalise all transit transport from the beginning of 1993.6 At the same time market access was harmonised, focusing only on

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4 Case 13/83, 22.5.1985.

5 Süddeutsche Zeitung 22.12.92

6 Regulation 1841/88.
subjective criteria (Basedow and Dolfen 1998: Nr. 169). It proved more difficult to realise the freedom to provide services within the member states. This so-called cabotage was contentious as different competitive preconditions would become effective in domestic transport markets. Particularly German companies felt disadvantaged by high taxes on vehicles and fuel. In view of the legal pressure, the Council agreed at the end of 1989 on a preliminary liberalisation of cabotage. In mid-1993, the understanding on the final liberalisation from mid-1998 onwards was achieved. This was part of a package deal that included a directive on minimum vehicle taxes and a directive on road pricing through a vignette (Gronemeyer 1994: 271). Particularly Germany had lobbied for these harmonization measures. As we will see, at the beginning of the 1990s it had tried to improve the competitive position of its industry single-handedly by introducing road toll for trucks, which was however stopped by the ECJ.

Thus, under continuous legal pressure road haulage was liberalised while harmonisation remained weak. The integration thus followed exactly the pattern that one would expect under the European institutional framework. However, the principle of mutual recognition was not strictly implemented. Under the cabotage rule the legal and administrative provisions of the host country are relevant, not those of the home country (Gronemeyer 1994). In principle, therefore, Germany could have maintained its fixed tariffs, for example, making them obligatory also to companies operating under cabotage.

3.2 The integration of insurance services

For insurance services there was an important judgement of the ECJ at the end of 1986 (Knudsen 2001: 174-180). At issue was the implementation of the so-called co-insurance directive (dating from 1978) in several member states as well as a case in Germany. The latter dealt with an insurance broker that had placed insurance contracts with mainly British insurers not being licensed in Germany. He had been fined by the German insurance supervisory authority. These cases were important

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7 The criteria are the training, respectability and financial endowments.
since it was the first time that the Commission had transferred the logic of mutual recognition from goods to the realm of services.\textsuperscript{8} In its ruling, the ECJ demanded that the freedom to provide services should be realised for large-risk insurance. For mass-market insurance, in contrast, the Court granted greater regulatory leeway to the member states: In view of the special nature of insurance, member-state governments were free to enact regulations in the interest of the “general good”, as long as the market was not harmonised (Edward 1987). The “general good” being the exemption from the freedom to provide services that the Court had established in view of the fact that the Treaty lacked such an exemption for services, parallel to Art. 30 (Schoubroeck 1995).

On the basis of this judgement the Council agreed on the second coordination directive for large risks in 1988, which had been negotiated since 1975. A matching directive for life insurance followed (Lohéac 1994). In parallel, the Commission prepared further directives to liberalise also the mass market. With these third directives, all insurance could be offered using the freedom to provide services. On the basis of harmonised rules concerning solvability, technical reserves, and investment, insurance companies would be regulated under home-country control.\textsuperscript{9}

Although the ECJ had not put pressure to liberalise the mass market, the Council agreed these far-reaching steps in 1992, to become effective in mid-1994. Because of the underlying British regulatory model of solvability control, member states like Germany following the continental regulatory model had to enact extensive changes to meet the new legal framework. Most interested in the liberalisation – next to the Commission – had been British and Dutch actors who hoped to export insurance services. But the agreement at the European level probably would not have been possible had not Germany changed its position (Knudsen 2001) in the late 1980s (see below).

\textsuperscript{8} FT 20.10.1984: Tugendhat calls to liberalise financial services.

\textsuperscript{9} While financial oversight falls exclusively to the home country, the supervisory authority in the host country shares responsibility over legal oversight of the companies according to their domestic laws. However, in case of a breach of law, it may be that courts in the home country would have to apply these legal principles from other member states (Hohlfeld 1995: 5)(int 7).
Compared to the directives for road haulage, those for insurance left less scope for national discretion. The ex ante authorisation of policy conditions and partly of tariffs that had been common for instance in Germany, France and Italy was prohibited by the third directives. Thus, a regulatory competition between different national regulatory models would not take place. Given the principle of home-country control, theoretically, insurance companies regulated under the British and the German model could have competed under mutual recognition, on the basis of the harmonised minimum financial standards. For comparison, in road haulage the European framework allowed member states to continue their former market orders, for instance by limiting licenses.

While models of regulatory oversight were thus harmonised, in another area significant scope for national regulations remains: for insurance contract law, the third directives specify that the law applies in the country of the policy holder, i.e. the host country. Since insurance contract law has a direct impact on insurance contracts, this is a significant hindrance to entering the markets of other member states. In fact, the Commission had already worked on the harmonisation of insurance contract law in the 1960s, and a proposal for a directive had been discussed in the Council from 1979 onwards. In 1993, the Commission finally withdrew the proposal, in view of the persisting deadlock (Cousy 1994: 303). Thus, as minimum harmonisation failed, an agreement took its place to keep insurance contract law under national oversight, protected by the provision of the “general good”. Also here we find a parallel to road haulage, where the legal and administrative conditions of the host country apply under cabotage.

4 Impact on member states

What have been the implications of these European policies at the level of the member states? Has a competitive deregulation resulted, which can no longer be tamed at the national level (due to European obligations), and which is neither tamed at the European level, due to the decision-making problems in the Council (Scharpf 1999: 117f)? In the following I will firstly review the implications of European road haulage policy on Germany and France and then turn to insurance.
Germany and France were chosen for the following reasons: in both sectoral policies, these countries largely followed the same regulatory approach. At the same time, their polities exhibit significant institutional variety. This concerns first of all the relationship of the executive to the legislative. Because of the rationalised parliamentarism, the French government enjoys quite broad action capabilities, while the German government is often hampered by the need to get the approval of the Bundesrat, which may have another party composition than the Bundestag and/or follow other objectives than the federal government. Secondly, associations play a very different role in both countries. Germany has a neocorporatist tradition which France lacks. Finally, the role of courts is very different and with it possibly the inclination to use the potential that European law provides (Ismayr 1997; Kempf 1997).

In short, the relatively similar sectoral regulation at the outset means that European policies may principally imply the same sort of problems in France and Germany. For instance, both countries had a tradition to regulate road haulage in order to protect their railways (Deregulierungskommission 1991: 40; Feick et al. 1982: 191f). A comparison with the Netherlands, where this was never an issue, would add much more variety at this point. The institutional differences between the French and German polities, in contrast, possibly allow to assess the remaining scope for national action within European policies as different institutional preconditions allow to use this differently. Differences in the impact of European policies could both mean that on the national level liberalisation is enforced more severely – for instance if private actors take active recourse to European law – or that the existing scope for re-regulation at the national level is used to a greater extent. Of course, it could also be that despite different institutional preconditions, European policies leave so little scope that their impact is uniform.

4.1 The implications of road haulage integration

The traditional regulation of road haulage markets in France and Germany showed parallels. In both countries, the protection of the national railways’ competitiveness was the main reason to regulate road haulage. This regulation focused on limited
market access and binding tariffs. The market for road transport was subdivided into shorter and longer distance both being regulated differently. In both countries, the hauliers’ associations held some responsibilities in the supervision of tariffs (Feick et al. 1982: 217, 234-236, 240). Compared to Germany, however, France regulated road haulage more lightly. For instance there were exemptions for rented vehicles and for transports below 200 km.

**Germany**

Because of very high vehicle and fuel taxes, German hauliers were in a disadvantaged position vis-a-vis their European competitors. Opposition to the European liberalisation accordingly was very strong, and hauliers demanded prior harmonisation to create a level playing field.\(^\text{10}\) Road haulage provides a very clear example of the disadvantages of positive over negative integration. At the European level, the inactivity verdict meant that liberalisation could no longer be tied to harmonisation. In consequence, the German government tried to re-regulate at the national level: Here it was not feasible to simply improve the competitiveness of the domestic trade through tax cuts because of countervailing interests to protect the railway and the environment. Instead, a road toll for heavy vehicles was devised, that would also have to be paid by trucks from other member states so that they would contribute to the costs of road building in Germany. The competitiveness of German hauliers would be strengthened at the same time since they were to be compensated for the road toll by cuts in vehicle tax. Only their competitors would therefore pay a net price.\(^\text{11}\)

This plan to institute a road toll was an interesting attempt, but one that failed. The Commission immediately intervened and called upon the ECJ who stopped the toll with an injunction and later ruled it to be illegal under the Treaty.\(^\text{12}\) Under Art. 72 (ex 76) member states could not discriminate against nationals from other member states, and this was what happened here, found the Court. Thus, this is an example where nationally a solution could be found but the competence lay no longer on this level.

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\(^{10}\) Blick durch die Wirtschaft 3.3.93  
\(^{11}\) Süddeutsche Zeitung 30.3.90  
\(^{12}\) FAZ 20.5.1992
Could Germany have proceeded as it wanted, the measure could have let to a sort of “California effect” (Vogel 1995): Since hauliers had to pay already in Germany, the number one transit country, it would have been easier to agree on a European measure, regulating road haulage more environmentally and railway-friendly.13

Concerning the national regulations, the European framework principally left the possibility to leave these intact, just as the idea of mutual recognition prescribes. Germany could have continued to regulate the market access of its hauliers through licenses, differentiating between short- and long-distance. However, this would have led to a reverse discrimination of nationals (Inländerdiskriminierung) as hauliers from other member states would be free to do transports in Germany without any restrictions. Consequently, the number of licenses was gradually extended in the 1990s. When cabotage was fully liberalised in mid-1998, the licensing system was abandoned.14

The tariff system was another matter. In this respect the European policy diverted from the idea of mutual recognition and home-country control. Germany could have obliged hauliers from other member states to apply its tariff system (Gronemeyer 1994). But it was not feasible to use this additional leeway for national regulations as it was impossible to control hauliers from other member states sufficiently. Their home-country authorities would have had to oversee the application of German tariffs in part, and it was not realistic that they would do this seriously (Teutsch 2000: 11). Again, Germans would have been discriminated against.

The German tariff system was abolished, effective from the beginning of 1994 (Héritier 1997: 548). This was agreed in principle by the coalition in 1991.15 One reason

13 After its failed domestic attempt, Germany had to go through the Council for a solution. Here, an agreement was reached for a joint road toll (vignette) for Germany, the Benelux and Denmark, while France and Italy kept their own system. It was tied in a package to the final liberalisation of cabotage. However, because of the difficult agreement, the toll had to be set on a comparatively low level (Süddeutsche Zeitung 9.6.93).

14 Interestingly, this was not clear from the start and for some time it was actually considered to keep the system of market access and tariffs intact. Also the hauliers’ association demanded to keep the old system (Zobel 1991: 192f). Wirtschaftswoche 11.8.89.

15 Die Welt 9.8.91
for lifting the system relatively early was to prepare German hauliers for the coming
times of competition (Teutsch 2000: 11). Since this measure was not uncontentious – as
I mentioned the hauliers resisted it – it was also argued that the lifting of the tariffs
was unavoidable. At the time there was a preliminary proceeding at the ECJ from a
German court about this matter, questioning whether the German tariff commission
was conforming to European cartel law (Basedow 1989: 193ff). In the end, the ECJ
found no fault but at this time the tariffs had already been abolished.16

From the regulatory side, therefore, mutual recognition implied that previous
domestic regulations were abolished. Also re-regulation was hampered at the national
level, while agreement on the European level was of a lowest-common denominator
kind.17 The economic implications are more difficult to assess. With the liberalisation
of trans-border transport at the beginning of 1993, the German share clearly declined.
Before liberalisation in the mid-1980s, German hauliers had a share of 40%.18 In 1999,
German hauliers only had a share of 25% of transborder transports.19 The
liberalisation of cabotage, in contrast, did not have the dramatic consequences one
had feared (CEC 1997: 40f). Although Germany’s share of all EU cabotage was 70%,
this made up less than 1% of all commercial transport in the country.20 Since the tariffs
were lifted in 1994, prices have come down significantly. Hauliers continuously
complain about their disadvantaged competitive position as taxes in Germany remain


17 It is arguable, of course, whether the road toll for heavy-goods vehicles could not have been
introduced, had the tactics been better. In fact, what was attempted here was a switch from a system
relying predominantly on vehicle taxes to one relying partly on road tolls. Principally, one would
expect this to be possible, given that other member states, for instance France, operate such a
system. But by introducing the toll and reducing the vehicle taxes in one law, the discrimination of
hauliers from other member states predominated all assessments (Süddeutsche Zeitung 30.5.90). It
will be now interesting to see how well the German governments fares with its new plans for an
electronic road toll for trucks (FAZ 10.3.01

18 Das Parlament 7.8.92


20 Bundesamt für Güterverkehr: Marktbeobachtung Güterverkehr. Sonderbericht: Die
Auswirkungen der weiteren Liberalisierung des europäischen Verkehrsmarktes im Jahr 1998 auf
high. Cabotage is also being used by German hauliers who simply re-locate their business in a cheaper member state.\textsuperscript{21}

However, it has also to be seen that road haulage was a very lucrative business before liberalisation. Licenses were sold for up to DM 300 000 in the 1980s, and different to the situation in other member states, German hauliers hardly faced difficult economic situations (Monopolkommission 1990: 311). Thus, the German trade was not well prepared for the European liberalisation, the domestic market not having been competitive. Many companies were too small and inefficient as a result of their prolonged shelter from competition and of the licensing system.\textsuperscript{22} Consequently, one cannot distinguish the effects of domestic and European competition. Of course, it is neither possible to take the low share of cabotage among total transport as an indication of a low impact of liberalisation, as this impact would certainly be higher had German hauliers not responded with drastic price cuts.

Nevertheless, low figures of cabotage show that German hauliers have not been swamped by competition and that relocation has not become a dominant strategy. As the reports of the Federal Authority for Goods Transport (Bundesamt für Güterverkehr, BAG) show, also road transport has aspects of a local market where trust and reliability counts. In general, the BAG sees German hauliers competitive position secured as long as they provide not only pure transport services but include logistics in their offer. Interestingly, despite the insufficient European harmonisation, the competitive position of German hauliers has been brought closer into line with their main Dutch competitors. Taxes on fuel are now higher in the Netherlands and also German vehicle taxes are no longer the highest in Europe.\textsuperscript{23} Concerns about competitiveness have now largely shifted to Eastern Europe. Already now hauliers from there take up transports in Germany – partly illegally.\textsuperscript{24} With Eastern

\textsuperscript{21} Die Welt 21.1.94

\textsuperscript{22} The licenses were allocated with special view to small enterprises, although these were generally not the most efficient (Blick durch die Wirtschaft 5.8.92).

\textsuperscript{23} Bernhard Hector: DVZ-Forum “Kabotage frei – was nun?”, DVZ 25.1.97.

enlargement of the Union, competition from Eastern hauliers has become a serious threat. And in view of differences in pay, the harmonisation route is unlikely to be of much help.

To conclude, European integration has impacted German road haulage largely just as one would expect. National re-regulation was hampered while the national regulatory framework could not be maintained. Interestingly, the use of cabotage remains low so that a real European market for road transport cannot be said to have been established. Thus, while leading to a reform of national regulations, mutual recognition has not transformed national markets into a European one.

France

The French regulation of road haulage was similar to the German system with regulated market access and tariffs. However, in contrast to the German situation the French system had been continuously adapted so that European liberalisation did not encounter a sheltered domestic market. Licenses for short distances had already been abolished in the early 1970s. From 1986 onwards the number of licenses for long-distance transports was no longer restricted. From the outset tariffs had been regulated only for transports above 150 km; transports with rented vehicles had always been exempted. In the late 1980s the whole system was eliminated. There was therefore no pressure to liberalise because of European policies (Douillet and Lehmkuhl 2000: 189).

Interestingly, France re-regulated partly in response to the European market. In 1990, 1992, and 1998 professional and capital requirements were augmented. In 1994, an agreement was signed by hauliers’ associations and unions on working time, that was followed up by decrees in late 1996. In addition, laws of 1992 and 1995 combat low tariffs by imposing fines on paying sub-contractors too low and offering services too cheaply (Douillet and Lehmkuhl 2000: 189f). These measures were taken in reaction to the experience gathered with domestic liberalisation, but European liberalisation served to strengthen the request for re-regulation (Douillet and Lehmkuhl 2000: 212).

In the aftermath of the single market for road haulage, France has thus re-regulated while Germany liberalised. These regulations are difficult to be enforced. Nevertheless, France found scope within the European legal framework and the
existing single market to re-regulate in advance of European harmonisation. Certainly, the fact that the take-up of cabotage – and therefore the competitive pressures from the single market – stayed much below expectations facilitated re-regulation.\textsuperscript{25} It is not clear whether re-regulation was also eased because the host-country control allows to apply measures also to hauliers from other member states. Generally, because of the diversion from home-country control European road haulage policy left more scope for national re-regulation, making it possible to avoid an automatic discrimination of nationals.

4.2 The implications of insurance integration

Also the traditional regulation of insurance showed parallels between France and Germany. Both countries adhered to the continental regulatory model that regulated insurance products, and partly prices, rather than focusing exclusively on the solvency of companies like the British model. With the third directives this regulatory model was prohibited, and regulation related now predominantly to financial provisions (like in the British model), with the possibility, however, of an ex post control of insurance conditions. For Germany, the third directives implied far-reaching changes. This was not the case in France, where a new law in 1989 had liberalised the market already (Bellando et al. 1994: 11).

Germany

With the prohibition of an ex ante control of insurance conditions and tariffs in the third directives, the German regulatory model had to undergo far-reaching changes. Interestingly, it was expected from the beginning that these directives would result primarily in a deregulation of the German market while the freedom to provide services would be hardly used by European insurers (Farny 1994: 246). Compared to the original intentions of mutual recognition the directives were thus expected to have the very opposite effect!

\textsuperscript{25} Cabotage made up only 0.1\% of domestic traffic, and French hauliers ranked third after the Netherlands and Belgium in using cabotage (Douillet and Lehmkuhl 2000: 199).
The ECJ, in contrast to the case of road haulage, had not required mass market liberalisation. But under qualified majority voting Germany, by itself, could not have blocked European insurance liberalisation. Different to the case of road haulage, Germany did not attempt such a step. In parallel to the implementation of the large risk directive in 1989, the government changed its position in favor of liberalisation out of several reasons: first of all, the dominant neoliberal ideology of the times has to be noted (Knudsen 2001: 182); with the increasing internationalisation of finance, the “Finanzplatz Deutschland” became an important policy issue, and although this discussion focused on banks and stock exchanges, the highly regulated insurance market was also criticised in its context; the many small and medium-sized German companies were not benefitting from the large-risk liberalisation of the second directives; finally, German unification became imminent and with it pressure from other countries, notably Britain, that this market would also be opened to foreign competitors (int 4, int 5).

With the realisation of home-country control, insurance companies licensed in any member state can now offer their services throughout the Community. They only have to notify their home authority in which countries they plan to operate via the freedom to provide services. The home authority will then notify the relevant national authorities. Branches that are legally dependent also fall under home-country control. Interestingly, this new freedom has hardly been used. In 1997 companies from the whole European Economic Area under home-country control (branches and freedom of services) had a market share of 0.6% of life, and 0.9% of non-life insurance in Germany (BAV 1999: 6). Companies being interested in the markets of other member states generally had already established themselves there before liberalisation. The dominant way of expansion has been to acquire companies in other member states (Swiss Re 2000). The trend to mergers and acquisitions in the European insurance industry started in the 1980s and has continued also after liberalisation.

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26 The monopoly commission had called for a liberalisation of insurance markets shortly before (Monopolkommission 1988), and in addition the deregulation commission had been instituted to analyse the scope for further deregulation, among others in insurance (Deregulierungskommission 1991).

27 See also (CEC 1998: 37-44)
Thus, Allianz has heightened its value on the stock exchange within six years from US$ 34 bn to US$ 89 bn in 2000.  

The disappointing take-up of the freedom to provide services has two major reasons. First of all, harmonization was insufficient. As I mentioned, the insurance contract law of the country of the policy holder applies. Given that insurance contract law directly impacts on the insurance conditions, this is a major impediment. The same is the case with non-harmonised taxes. Taxes on insurance contracts apply where the risk is situated and are not as important for questions of competitiveness. But member states may restrict the deductability of life insurance premia to domestic companies, as the ECJ has ruled 1992 in the Bachmann case (C-204/90) (Hogan 1995: 348).

It is quite possible that the Commission may take up the harmonisation of insurance contract law again while a harmonisation of taxes is unlikely in view of the unanimity requirement (Genschel 2000). But it is questionable whether this would promote the single insurance market significantly. This relates to the second major reason of why the freedom to provide services is hardly used. Insurance markets are local markets (Goodman 1993). For life insurance death tables differ among member states. For risk insurance, detailed knowledge of the local market is necessary, for instance about liability law and the frequency of damages. In addition, insurance contracts are long-term. This is particularly the case in life insurance, but also risk insurance is not like other services, for instance road haulage, where one may try another provider easily. For risk insurance it is also necessary to see an insurance representative for claims settlement. Because of few independent brokers in Germany, the sale of personal insurance also relies on a network of sales representatives. To enter a market thus requires long-term commitment and it is only in rare cases sensible to do this without establishment. This was possibly not seen in all its consequences when the European legislation was drawn up. Thus, at the beginning of the European liberalisation some British life insurers sold insurance in Germany via the freedom to provide services, using British death tables and making a loss (int 1). Even for industrial insurance, the freedom to provide services works less well than expected, although this was the only area where this liberalisation was demand-driven (int 4).

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28 BDI, 2000: Gesunder Wettbewerb im Versicherungsrecht. Ein Beitrag für das Handelsmagazin der Bundesarbeitsgemeinschaft Mittel- und Großbetriebe des Einzelhandels e.V.
With the single market, industry wanted a single insurance cover for all its activities, which were increasingly of a transborder kind. But different legal requirements, for instance with regard to liability, make it difficult to supply this insurance cover using the freedom to provide services.29

The implementation of mutual recognition in insurance services thus had a very different impact on Germany than in the case of road haulage. Mutual recognition resulted in a restructuring of the German regulatory framework for insurance, but the single insurance market is being built via mergers and acquisitions for which home-country control is not a precondition. Principally it would have been feasible to regulate this sector according to domestic preferences. It is highly improbable that companies would have relocated under a more company-friendly regulatory regime and to penetrate markets via home-country control (int 6). However, the European legislation went much further than in the example of road haulage and prohibited core elements of the former regulatory framework.

France

French insurance regulation showed parallels to the German system also focusing on an ex ante control of insurance products. But similar to the case of road haulage France had enacted reforms before European liberalisation. In 1986 the new government under Premierminister Chirac had started a reform, and as a first step the control of tariffs was lifted at the end of the year (Balladur 1987: 421f). With the insurance law of December 1989 a comprehensive reform was enacted that brought insurance regulation also in line with banking regulation (Bellando et al. 1994: 11). Part of this reform was the ending of the ex ante control of insurance conditions; in its stead companies only had to hand in a standardised information sheet. On this basis the Ministry could demand ex post further information (Schedlbauer 1995: 149, 251). With this reform, the French market was very liberal according to European standards. The third directives were implemented in January 1994 (Bellando et al.

29 Financial Times 27.3.96
1994: 206), so that France was one of the few countries having transposed the third directives in time in mid-1994.30

It is interesting that in spite of this basis of a very liberal system, France had much more conflicts about the transposition of the directives with the Commission than Germany. I will shortly resume these conflicts:

- France did not abolish the requirement to hand in a standardised information fact sheet (fiche de commercialisation). The Commission started infringement proceedings, which resulted in an ECJ ruling in May 2000 (C-296/98). In October 2000 the Commission send another letter as France still had not complied to its obligations.31

- The obligatory bonus-malus system in the automobile insurance was maintained. France also required all insurance contracts to be in French language.

- The most drawn-out conflict concerned the French mutuals. On demand of the French government these had been included into the third directives so that they would be able to profit from the single passport. It proved to be however extremely difficult to adapt the Code de la Mutualité and the Code de la Sécurité to European requirements. As a result, it came to a Court ruling in December 1999 (Case C-239/98), but also after this France did not meet its obligations so that the Commission launched new infringement proceedings. At issue was the implementation of technical provisions and the solvency margin; the separation of insurance activities from social activities of the mutuals; the transfer of portfolio which was restricted to other mutuals; and re-insurance which was similarly restricted to other mutuals.32

Thus, France and Germany went through opposite paths with the single insurance market. Germany started out with an old-fashioned regulatory system that was subsequently modernised partly under the pressure of the directives. France had a


32 EC Commission: Insurance: CEC launches new infringement proceedings against France concerning mutual benefit companies. 11.5.00.
recently modernised regulatory framework, that however did not correspond in all details to the European provisions. These – compared to Germany – not very far-reaching changes took much longer to be enacted, despite the comparative strength of the French government. We do not have to ponder here on this question, suffices it to say that also in the French case the European directives mainly resulted in a change of national regulations. As for the insurance market, all that has been said about the German situation applies also to France.

5 Conclusion

What can we conclude about the impact of mutual recognition on the member states, having discussed the examples of road haulage and insurance in Germany and France? First of all, decision-making in the Council deviates from legal doctrine. There are two sides to this point. Firstly, there are quite some differences in the way legal obligations are being translated. European insurance directives proved to be much more intrusive on the national regulatory framework than European regulations for road haulage. Secondly, the difficulties of positive integration also pertain to minimum harmonisation. This cannot surprise, but has not been noted in the discussions. The example of insurance contract law shows that one escape route out of the agreement problem is to simply agree on host-country control. Also in road haulage, the Council included the home-country principle. In this way, member states reconstruct an area of regulatory autonomy for themselves.

How mutual recognition impacts on member states is of course also influenced by these alterations at the level of the Council. The example of German road haulage in many ways met prior expectations. Competition was increased and prices fell, while national re-regulation proved impossible. However, it proved impossible for purely legal reasons. The example of France shows that improved social regulations, that do not violate European law, could be enacted despite the single market. European competitive pressures apparently did not prohibit them. Cabotage has been used much less than was previously feared. Even in the large German market, where most of the European cabotage takes place, it does not amount to a noticeable share of total transport. But prices have come down significantly and there is a restructuring
towards larger companies, offering logistics services next to transport. Questions of competitiveness remain a recurrent issue as some member states give in to lobbying for tax reductions, putting pressures on other member states. But low levels of cabotage show that there have been advances in securing a level-playing field. Possibly, road haulage gives an example of how the single market actually works: in as far as there is a demand for cabotage, it is being used, but in general markets remain largely national (see also Ziltener 2001). With Eastern enlargement, of course, the imbalance in the competitive preconditions becomes much larger, and with it possibly the single market gains in relevance as relocations become more attractive.

The single market for insurance was even more of a failure. Although the Commission engages in further regulatory efforts, it is uncertain whether this will bring any significant alterations. With the exception of large industrial risks, insurance does not lend itself to the freedom to provide services. As an establishment and a long-term commitment is necessary, differing regulations for regulatory oversight do not play a significant role. In contrast to the European policy for road haulage, for insurance oversight European directives did not leave much scope for national rules. The sectoral peculiarities therefore could not be used as a shelter that allows to maintain national diversity. This makes insurance into an example where mutual recognition actually served to restructure domestic markets while the single market is shaped largely by ”traditional” forms of market expansion, namely mergers and acquisitions. For these, a harmonisation of regulations is not a precondition. The effect of the insurance directives have been primarily domestic regulatory changes.

In sum, the single market seems more like a marginal affair. There is little demand for it. Its significant implications stem from the fact that when building it, it was believed to be substituting rather than complementing national markets. Thus, some national regulatory frameworks, as was shown with German road haulage and insurance, were thoroughly changed in preparing for it. Partly European policy demanded such far-reaching adaptations, partly regulations were changed to avoid a reverse discrimination of nationals. With hindsight one could say that given the marginal relevance of the single market, national markets could be shaped predominantly by national concerns. The comparison of road haulage and insurance also shows that

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33 FAZ 13.2.01
there are significant sectoral differences. In road haulage with its low skill requirements, market access is relatively easy, and competitive pressures emanating from differing regulatory requirements are relatively large. In insurance, in contrast, so much specialised information is needed for market entry that different regulatory preconditions do not play a noteworthy role.

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