

Agenda-Dynamics in the European Politics of Land: Explaining the Soil

Protection Gap

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ABSTRACT:

Soil is a non-renewable and increasingly deteriorating resource, yet it is barely protected by European Union (EU) legislation. This constitutes a puzzling gap within the otherwise encompassing and progressive environmental policy of the EU. To explain the integration resistance of soil protection, I draw on insights from rationalist and sociological institutionalist theory. The institutional rigidity of the community method of environmental decision-making limits policy change to favourable interest constellations, but this constraint is usually compensated by agenda-competition among the national environmental pioneers. However, successful agenda-setting depends on the skilful combination of political venues and issue frames. Matters of land politics, such as soil protection, are difficult to frame in terms that make them suitable for European policy venues. The theoretical argument is illustrated using an in-depth case study of the agenda-setting, negotiation, and eventual withdrawal of the ill-fated proposal for a EU soil framework directive, with a focus on the changing role of Germany. Reframing of soil politics as locally bound and as essentially national affair, subnational actors extended the conflict to include the German federal chamber as policy venue. As a result, Germany turned from “pusher by example” and first mover to “defensive front-runner”, successfully pursuing a blocking strategy.

KEYWORDS:

1. land politics
2. environmental policy
3. joint-decision making
4. agenda-setting
5. framing
6. European Union

Introduction

Next to the single market, environmental policy is arguably the most dynamic policy-area in the European Union. Starting out from a mere annex to the single market, it quickly moved beyond harmonized product standards to entire production processes and issues without any market rationale (Knill & Liefferink, 2013). Today, the environmental resources air, water, and biodiversity are protected by a dense web of regulation. The only exception is soil.

Since its formation is so slow, soil can be considered a non-renewable resource. It delivers crucial services to humans and ecosystems, as water buffer and carbon sink, biological habitat, archive of the cultural and geological past, and for food and biomass production. Yet more and more soils are degrading due to erosion, contamination, sealing, and other soil threats (Stolte et al., 2015). Despite soil's important functions, there is still no EU policy that directly mitigates the problem. This contribution examines why, despite the EU's strong environmental policy record and increasing soil degradation, there is no European soil protection policy. Is the proclivity for regulation of soil systematically different from that of other environmental resources? Does the European politics of land follow a different logic than the politics of the environment in general? These questions are at the center of my analysis.

In the late 1990s, soil protection became an issue on the European agenda, when Germany sought to Europeanize its new federal soil protection act. In 2006, this eventually resulted in a formal proposal by the European Commission for a comprehensive soil framework directive (European Commission, 2006a). The idea was first met with acclaim by a majority in the Council of Ministers. The pioneer states, those with existing soil protection laws, cooperated in this endeavour, while striving to amend the proposal according to their national policy styles. Within less than a year, however, the situation changed completely. The pioneers, including Germany, voted against the draft, ironically leaving only the environmental latecomers in favour of it. In 2013, the Commission formally withdrew the proposal, which is an exceedingly rare event. Next to the puzzling soil gap in

EU environmental policy, the soil saga therefore raises at least two more interesting questions: Why did the Commission withdraw its own proposal instead of accommodating the preferences of the pivotal member states, as it usually does (Tsebelis & Garrett, 2000)? And why did the environmental pacemakers among the member states adopt a defensive role (cf. Liefferink & Wurzel, 2017)?

I argue that the soil protection gap results from a confluence of two factors: The institutional rigidity of policy-making in the European Union, and the fact that soil protection is land politics, which, despite its many transboundary implications, is easily framed as a locally bound, national affair. For this reason, mechanisms that helped environmental politics to escape the institutional rigidities of EU decision-making (cf. Falkner, 2011) are blocked in the case of soil. Among these mechanisms, I highlight the role of the pioneer states, and especially Germany. Pioneer states have contributed to the EU's green dynamism by acting as strategic first-movers, promoting EU legislation that is compatible with their national policy styles (Börzel, 2002; Liefferink & Wurzel, 2017). In doing so, they promoted European issue frames that underline the need for supranational coordination. In the case of soil protection, however, subnational institutions have successfully reframed the issue as essentially local. This allowed them to invoke the subsidiarity principle, and provided them with a foothold in the decision. Partly in response to these subnational actors, the pioneers, rather than acting as pacemakers, ended up adopting a defensive strategy that aimed at maximizing national autonomy at the expense of a European solution.

The paper is structured as follows. Below, I briefly review the scope and level of ambition of European environmental policy, contrasting it with the extent of the "soil protection gap". The next section details my theoretical framework, which combines mechanisms from rationalist and sociological institutionalism. I explain how joint-decision making limits environmental policy to favorable interest constellations, how this constraint is frequently overcome through agenda-competition among national environmental pioneers, and how successful agenda-setting depends on skillfully linking venues and frames. I argue, and will demonstrate empirically, that soil is difficult

to frame in terms that make it suitable for European policy venues. The next section illustrates these dynamics using the agenda-setting, negotiation, and withdrawal of the soil framework directive as empirical case study. Emphasis is put on the changing role of Germany, which started out as constructive pusher but eventually blocked the directive. I demonstrate that this about-turn was caused by subnational actors who successfully reframed the soil protection issue, thereby extending the conflict to include the constituent states (*Länder*) of the federal republic as policy venue. The final part summarizes the structural causes that created the soil protection gap, reflects on the specific features of soil within this explanation, and draws some implications for the politics of land and for the future of European soil protection.

A soil protection gap

Although the European Commission has of late dialled down its legislative zeal (Steinebach & Knill, 2017), it can still be argued that the EU has the most progressive environmental policy of any state without being one (Jordan & Adelle, 2013, p. 1). In spite of its heterogeneity and reliance on intergovernmental negotiation, the EU steadily exceeds the “lowest common denominator” of national policies (Holzinger, Knill & Sommerer, 2008; Tosun, 2013; Deters, 2018, Chapter 1). European environmental policy began to develop in the late 1970s, largely as spill-over from regulating the single market (Weale, 1999). Early policy-making proceeded in a slow, piecemeal, and sector-specific fashion, and it often relied on detailed harmonization of emission and immission values. Starting in the late 1990s, this at once scattered and hierarchical approach was consolidated and integrated into complex and encompassing framework legislation with more leeway for national technical specifications and instruments (Hey, 2005, p. 25). Today, the resources air, water, biodiversity, and climate, as well as hazards such as waste, chemicals, and industrial emissions are covered by such encompassing legislative frameworks (Jordan & Adelle, 2013).

The EU's general dynamism in environmental policy contrasts with the lack of soil protection. Until this date, there is no comprehensive legislation protecting soil. Certain aspects of soil protection are, however, dispersed across other European legislation, especially in the areas of environment and agriculture (Heuser, 2006; Paleari, 2017): The 1986 Sewage Sludge Directive limits the use of untreated sludge on farmland; the EU chemicals policy covers substances with soil-damaging effects; air and water policy prevent soil pollution via these media; and under the industrial emissions directive (IED) industrial plant authorizations depend on the overall balance-sheet of environmental impacts, including soil impacts. Finally, European agricultural policy links some financial support for farmers to soil-friendly practices under so-called cross-compliance.

Despite these indirect contributions, soil protection "remains fragmentary and incomplete" (Heuser, 2006, p. 200) compared to other environmental resources. To begin with, there is no EU-wide legal definition of "soil" and its threats. Apart from the IED, not even the individual pieces of legislation define the term, thereby allowing inconsistent and negligent implementation. Without specific legislation, soil protection is neither comprehensive nor coherent. Among the main soil threats, there is little attention for compaction, landslides, floods, sealing, and salinization (Paleari, 2017, p. 170). While contamination is frequently mentioned, European law is silent on how to identify and remediate existing brownfields, especially where no liable party can be found (Ecologic, 2017, p. 116). Legislation moreover applies only to some soils and soil-related activities. For example, cross-compliance only matters for agricultural soils, and again only for those covered by support payments. It is questionable whether soil-related provisions are effective when they are secondary or means to different ends (Paleari, 2017, p. 171). Moreover, there is a lack of binding, quantitative targets that could be used as reference points when implementing cross-compliance and the IED (Ecologic, 2017, p. 116). These shortcomings are a consequence of there being no legislation specifically dedicated to soil protection. The ill-fated soil framework directive proposal was meant to mitigate them.

Joint Decision-Making, Agenda-Competition, and the Politics of Scale

To explain the soil protection gap, I draw on insights from both “rational choice” and “sociological” institutionalist frameworks (cf. Hall & Taylor, 1996). My argument combines three theoretical modules: (1) The “joint-decision trap” (Scharpf, 1988; 2011) explains the general institutional rigidity of policy-making in the EU and its dependence on favorable preference constellations among member state governments. (2) This tendency is mitigated through the leadership of pioneer states that rely on first-mover strategies in order to “Europeanize” (Börzel & Risse, 2000) their national policy choices. (3) But successful agenda-shaping by pioneer states depends on the chance to frame a given issue as essentially European (Princen, 2009), and issues related to land are prone to be (re)framed as locally contained. This places a powerful constraint on European soil policy, especially when combined with the institutional self-interests of subnational actors and a one-sided interpretation of the subsidiarity principle.

Joint-Decision Making and Actor Constellations in Environmental Policy

Environmental policy-making in the EU relies on the agreement of numerous governments with diverse preferences. Barring few exceptions, environmental policy-making applies the community method: The Commission proposes legislation (directives and regulations), and the Council (by qualified majority) and European Parliament (by simple majority) can reject, amend, or adopt the proposal (Beson & Jordan, 2016). Assuming that the European Parliament (EP) sides with the Commission or submits “green” amendments, as it usually does (Burns 2013), the decision hinges on a blocking minority of the least enthusiastic governments. Under the Lisbon rules, a qualified Council majority consists of 55 percent of the member states representing 65 percent of the population. In practice, this means that out of 28 member states, three large states plus Malta can block legislation. Combined with Europe’s enormous diversity in terms of economic development, ideological orientations, and policy styles (Höpner & Schäfer, 2012), this institutional setting gives rise to joint-decision traps (Scharpf, 1988; 2011): Situations, in which the dependence of central

decisions on the agreement of lower-level governments produces political stalemate and weak compromises.

Under the conditions of joint decision-making, policy-choices depend on the constellation of governmental preferences and bargaining power. However, preferences are neither always in conflict; nor are the laggard governments, those without progressive national policies, always in a superior bargaining position. This may indeed explain a great deal of the actual extent of environmental policy-change in the EU (Eichener, 1997; Holzinger, 2011). For example, member states generally agree on the harmonization of product regulations that would otherwise restrict the free movement of goods, with differences about the rule content becoming secondary to the expected coordination gains. Absent harmonization, member states are moreover allowed to apply national environmental product standards to foreign goods, thereby increasing the bargaining leverage of the pioneers (Holzinger, 2011). By contrast, governmental preferences approach pure conflict with respect to regulating production processes. These impose costs on industry and may imply a competitive disadvantage vis-à-vis less regulated locations. Harmonization is therefore resisted by the poorer states, while it is in the interest of the richer, high-regulating countries to ensure a “level playing field”. Distributive conflicts about process regulations are also fed by incompatible policy styles that make national adaptation tricky and expensive. Since member states must treat foreign and national goods alike even if they are made under different production conditions, the effective veto rests with the latecomers rather than the pioneers (ibid.). The negotiation of the soil framework directive showed features typical for process regulation. These were further aggravated by a debate about the allocation of competences, and they proved hard to overcome through interest accommodation.

Pioneer States and Agenda-Competition

Although indeed biased toward product regulation (Gehring, 1997), the environmental acquis includes a wealth of process regulations.¹ It has been argued forcefully that this unexpected dynamism is driven by environmental pioneer states, which compete over the European policy agenda (Héritier et al., 1996; Liefferink & Andersen, 1998; Börzel, 2002). Member states have to implement European policy within their domestic institutional setting. Some European approaches are compatible with these practices and institutions; but those that are not require cumbersome and expensive adaptation. Governments seek to reduce implementation costs, *inter alia* by bringing EU policy in line with domestic practices and institutions beforehand. Each member state therefore tries to “upload” (Börzel, 2002, p. 194) a national blueprint to the EU level before another member has a chance. This agenda competition mitigates the joint-decision trap. It encourages activism among the environmental pioneers, because the first mover enjoys an advantage in shaping the policy agenda (Héritier, 1996, p. 151). And it forces the latecomers into a reactive mode. Lacking domestic best practices and incentives to encourage stringent regulation, they do not engage in agenda competition. In fact, latecomers have sometimes shown an interest in “downloading” best practice models (Börzel, 2002, p. 207).

National pioneers do not always adopt an active agenda-shaping strategy, however. Liefferink and Andersen (1998) argue that pioneer states choose from a set of strategies. The “pusher by example” strategy actively promotes domestic policies on the EU agenda, but the “defensive front-runner” strategy seeks to contain the agenda and instead promotes safeguards for national autonomy against EU regulation. Little is known about the rationale behind choosing a strategy (Liefferink & Wurzel, 2017). The sudden about-turn of the German government from pusher-by-example to defensive front-runner, alluded to above, is a unique opportunity to explore this question.

Although the formal monopoly of initiative rests with the Commission, pioneer states can act as “informal agenda-setters” (Pollack, 1997, p. 101) in the way explained above. In general, they can

¹ In addition to many that have no direct relation to market activities whatsoever.

count on a receptive Commission, given its institutional interest in task-expansion, and the shortage of its staff and resources (Majone, 1996). Persuading the other member states is more challenging, due to the aforementioned structural conflicts. In order to garner support, a skilled agenda-setter will therefore present the problem in a light that makes the suggested policy seem like an adequate solution, thereby linking policies to problems (Kingdon, 1984). It is an important insight from the classical study of agenda-setting that already defining the problem is an inherently political activity, as it affects who will be involved in decision-making later on (Schattschneider, 1957).

Venues, Frames, and the Politics of Scale

More specifically, participation depends on the formal institutional “venues” (Baumgartner & Jones, 1991) or “arenas” (Fligstein, 2001, p. 262; van Kersbergen & Verbeek, 2004) in which issues and corresponding policies are negotiated and decided. Prospective agenda-setters will seek out or even create venues that are receptive to their cause. This is what Baumgartner and Jones (1991) famously call “venue shopping”. Princen (2009, p. 27–28) refers to venue shopping between the EU institutions and their subunits (e.g. DG Environment vs DG Agriculture) as “horizontal” and to venue shopping between the different levels of governance (e.g. subnational, national, European) as “vertical”. My analysis is mostly concerned with the latter, since I examine the obstacles to anchoring soil policy on the EU agenda.

Which venue deals with an issue and consequently which actors, under which rules, participate in decision-making is determined by how the issue is framed (Baumgartner and Jones 1991). Frames are collectively shared “schemata of interpretation” that shape how actors perceive the situations and problems they encounter (Goffman, 1974, p. 21). As a venue, the EU is not equally receptive to all types of issues, and member state governments or subnational policy actors may resist ceding authority over certain issues (Princen, 2012, p. 36). To move an issue on the EU agenda, prospective agenda-setters must therefore promote a frame that emphasizes the issue’s “Europeanness”.

Europeanness is quite often a matter of framing rather than an objective fact. It is a question of “the political construction of scale” (Delaney & Leitner, 1997; see also Princen & Kerremans, 2008, p. 1139-1140). Proponents of EU policy can draw on various framing strategies (Princen, 2011, p. 936-938). First, they may frame the issue as *common concern* that affects all member states and therefore can be dealt with more efficiently on a European level. Second, the proponents may emphasize *the trans-border nature* of the issue, for instance when British air pollution kills German forests and acidifies Swedish lakes. This example seems commonsensical today, but interestingly “acid rain” did not become a relevant frame for air pollution before the 1980s, as it was until then discussed in terms of localized “urban smog” (Hajer, 2005, p. 303). Third, the issue may be framed as *implied* in existing European policies or treaty provisions, thus establishing precedence for the EU’s jurisdiction. In particular, conflicts and inconsistencies with other parts of the *acquis* may be pointed out, which are then argued to prevent the EU from fulfilling its agreed-upon mission. According to Fligstein (2001, p. 264), for example “the ‘Completion of the Single Market’ was the rhetorical frame that justified [the] increased cooperation among member state governments” that led to the introduction of qualified majority voting. Trade barriers and distortions of competition resulting from unequal regulations have been invoked as a European frame to institutionalize a European environmental policy (Weale, 1999; Holzinger, 2011).

Research has focused on agenda-setting but so far paid less attention to agenda-containment.

Opponents of European involvement can be expected to challenge the European frame by inverse strategies: Negating the existence of a shared concern, emphasizing instead the diversity of local context; downplaying externalities; questioning the EU’s jurisdiction and instead pointing to long-standing national or local regulatory traditions (Princen, 2011, p. 939). This reframing was successful in the instance of soil. Although a case can and has been made for its European scale, the transboundary implications of soil degradation are inconspicuous; thus Europe is not “the obvious place to seek solutions” (Jordan & Jeppesen, 2000, p. 64), unlike for issues such as marine and air pollution. In Germany and Austria, both federal systems, attempts to reframe soil as locally bound

originated in subnational venues, where decision-makers sought to defend their autonomy over soil policy. Reframing soil protection as local issue provided them with a foothold in the decision, and led to a reversal of the German role from “constructive pusher” and first mover to “defensive front-runner” (cf. Liefferink & Andersen, 1998). It moreover turned the debate into a distributional conflict about competences, which is especially hard to accommodate in joint-decision settings (Scharpf, 1997, p. 126-130).

Subsidiarity, Policy Styles, and Experimentalist Governance

In reframing soil as local issue, the opponents of EU legislation can moreover point to the subsidiarity principle, which holds that decisions should be taken at the lowest level consistent with effective problem-solving. In all but name, the subsidiarity principle was introduced into primary law with the 1987 Single European Act, as part of a formal EU competence for environmental policy-making. The Maastricht Treaty extended the principle to all policy-areas (Jordan, 2000, p. 1313). Today, it is enshrined in Article 5(3) of the 2009 Treaty of Lisbon and its Protocol No 2, which also contains an “early warning” procedure that equips national parliaments, including regional chambers, with a formal veto. Prohibitive voting thresholds make this a blunt instrument, however (Kiiver, 2008). As the soil case illustrates, national parliaments have institutionalized their own subsidiarity checks already before the Lisbon treaty.

In its “negative” form, subsidiarity demands that the EU should defer to national action unless it is better placed to deal with the issue. At first sight, subsidiarity therefore seems to provide “a strong presumption in favour of decentralisation” (Jordan, 2000, p. 1311, emphasis removed) and thus to support the view that soil should be regulated at the lowest possible level. However, subsidiarity is a blurry concept that illustrates rather than settles the forever ongoing debate about the delineation of competences in European multilevel governance (Golub, 1996, p. 686; van Kersbergen & Verbeek, 2004). The subsidiarity principle was supported by the United Kingdom (UK) and by the German *Länder* to curb European authority, and by continental Christian democrats among national

governments and in the European Parliament to *justify* it in line with Catholic social theory (van Kersbergen & Verbeek, 1994, p. 217-219). In this latter, “positive” form, subsidiarity “counsels state intervention where it is efficient” (Jordan & Jeppesen, 2000, p. 66).

Even if, ideologically, the negative interpretation became dominant (Collier, 1997), this did not prevent the EU from maintaining and even extending the environmental *acquis* in the decades after 1987 (Deters, 2018, Chapter 1). Many environmental issues that are locally contained are still regulated at the EU level, including bathing and drinking waters, noise, waste disposal, and natural habitats. Thus, subsidiarity does not *per se* explain why some issues make it on the EU agenda and others do not. However, subsidiarity “has had a profound effect on the way in which proposals for new policy competences are framed, debated, and presented”, as Jordan (2000, p. 1314) observes. He cites the example of the 2000 water framework directive, the first proposal of which was “abandoned because it did not pay sufficient attention to the principle of subsidiarity”. The second draft largely gave up on harmonizing standards and instead chose to leave the choice of standards and even policy instruments to the member states, demanding instead that national authorities draw up plans in order to bring ground and surface waters to a “good status”. This “experimentalist governance” (Sabel & Zeitlin, 2010) approach became the paradigm for much subsequent legislation, including the soil framework directive proposal.

Agenda-Setting and Agenda-Containment in EU Soil Protection Policy

Applying the theoretical argument described above, the following case study examines the ill-fated European soil protection policy. My aim is to understand the reasons behind the soil protection gap, using the concepts of joint-decision making, framing, and agenda competition. The case was chosen as an outlier from the nowadays encompassing and usually quite ambitious EU environmental policy. As data sources, the case-study draws on official documents produced by EU and member state institutions, on interviews with national and EU officials conducted in two rounds in 2011 and 2017,

on secondary literature, and, where appropriate, on newspaper reports. I analyse the (non-) decision through the phases of agenda-setting, negotiation, and removal from the agenda, using systematic process tracing (Hall, 2008) to relate the explanatory categories to the historical narrative.

Framing and Agenda-setting: Germany as Pusher-by-example

The recognition of the need to protect soils dates back to the early 1970s. The first Environmental Action Programme (OJ C 112/52) discussed soil in the wider context of agriculture and its impact on the environment. The fourth Environmental Action Programme (OJ C 328/31), adopted in 1987, considered soil as an environmental resource in its own right and identified several soil threats and causes of degradation. However, binding EU legislation fully dedicated to soil protection was not prepared before the late 1990s.

The eventual arrival of soil protection on the legislative agenda was triggered by the German federal government, which sought to Europeanize a new domestic soil protection law. The German Bundestag adopted the Federal Soil Protection Act in March 1998, during the last weeks of the liberal-conservative Kohl government, when the future Chancellor Merkel was still environment minister. The act had an encompassing scope, and it was considered highly ambitious at the time. It imposed costly obligations on land-owners, particularly on the industry, but to a lesser extent also on farmers and real estate developers. Concerned about the level playing field within the EU, the federal government began to promote soil protection on a European scale (Broll, 2010; Straßburger, 2011). For its agenda-setting activities, the German government chose the most promising venues. First, it organized workshops and conferences (see Kraemer, Hollerbuhl & Labes, 1998). In the wake of these events, it established a new venue, the European Soil Forum, “to further soil protection activities at the Community level” (Preface in Kraemer, Hollerbuhl & Labes, 1998, p. 3). Composed exclusively of environment ministries, the Forum could be expected to favour rather ambitious policy. Second, the German government also lobbied the Commission’s DG Environment (Interview with a German Official, 18 March 2011; Interview with an Official of the European Commission, 1

June 2017), thus targeting an established venue inclined to regard soil as appropriate subject for European environmental protection.

The Commission indeed welcomed the opportunity to finally close the soil protection gap. Germany and the Commission framed the issue as having an inherently European scale (Ruchay, 1998, p. 37; European Commission, 2002). Painting the image of a *common and urgent concern*, they cited evidence for soil degradation taking place all over Europe at an increasing rate: “The threats are complex and although unevenly spread across regions in the EU and accession countries, their dimension is continental” (European Commission, 2002, p. 9). The Commission’s “thematic strategy” (European Commission, 2006b) and its impact assessment (European Commission, 2006c) are exemplary for how the proponents of EU intervention asserted the European scale. First, they pointed to *distortions of the internal market* arising from diverging national regulations and legal uncertainty. Second, they emphasized the *intrinsically transboundary* nature of soil degradation, for example when groundwater is polluted in border regions, or when sediments from upstream erosion cause damage in another country downstream. The Commission thus claimed “extensive evidence ... that most of the costs of soil degradation are ... borne by ... players far from the location of the problem” (European Commission, 2006b, p. 3). Third, they stressed *extrinsically transboundary* causes and impacts of soil degradation in areas for which EU legislation exists. While earlier contributions had cited the then prominent example of (soil) acidification caused by air pollution (Ruchay, 1998, p. 37), the go-to illustration later became the impaired carbon sequestration by damaged soils, which interferes with climate protection, a global issue *par excellence*. The link to existing legislation (while asserting its deficiency) also supported the claim that the EU had sufficient authority and was well-placed to regulate the matter. The uptake of soil contamination by feed crops and in food products exemplifies all three dimensions of the European scale: Food is traded in the internal market, pollution in one member state can harm consumers in another, and food safety is already regulated at EU level.

Encouraged by the German initiative and building on the European frame, the Commission began the spadework. A number of technical working groups consisting of stakeholders and member state experts were launched (European Commission, 2006). The Commission did not immediately leap at the German template but trod rather carefully, suggesting at first to only broaden existing policies and to harmonize soil monitoring (European Commission, 2002). The rationale was to replicate the piecemeal approach that had been successful for the other environmental media. However, during the working group consultations, DG Environment realized that the harmonization of monitoring criteria could lock the negotiations at a technical stage before the debate of protection measures had actually begun. The Commission therefore dismissed the piecemeal strategy and aimed for a comprehensive framework directive at once (Interview with an Official of the European Commission, 1 June 2017, 2017b).

In designing the proposal, the Commission drew on national examples in line with the agenda competition hypothesis. Germany had successfully brought soil protection on the agenda. Other pioneer states reacted to its initiative by “saddling” (Héritier, 1996, p. 157) the nascent proposal with suggestions derived from their respective domestic laws. As a result, different parts of the text had different “handwritings”, as an observer remarked (Interview with a German Official, 18 March 2011). One example is the part on contamination. In particular Germany and the Netherlands, with their advanced national soil policies, were “very keen that the EU legislation would look as similar to their legislation as possible” (Interview with an Official of the European Commission, 1 June 2017). Another example is the soil status report. Large parts of the provision were “copied entirely from the Flemish legislation” (ibid.). The 1995 Flemish Soil Decree introduced soil status reports to create registers of problematic soils and inform land buyers about soil quality, with ample praise from soil experts (Steinweg et al. 2013, p. 14–15). The Commission was convinced that using the market to investigate soil quality would serve consumer interests, while unburdening public administrations from conducting expensive soil assessments (Interview with an Official of the European Commission, 1 June 2017).

To some extent, the resulting draft directive was therefore an ambitious patchwork, the euro-cream, as it were, of the national crop. However, the Commission also weaved a genuine European approach to environmental policy into the fabric. This largely procedural approach only emerged in the 2000s and has received scant attention in previous studies of Europeanization in environmental policy. The genuinely European policy style, which analysts have called “experimentalist governance” (Sabel & Zeitlin, 2010) and “mandated participatory planning” (Newig & Koontz, 2014), largely abstains from prescribing policy *measures*, and in the case of the proposed soil framework directive (SFD) it even abstained from defining specific *targets*. Instead, the approach obliges member state authorities to (1) assess the problems and establish objectives, to (2) devise “plans of measures” on a national or regional level in order to attain the policy objectives (often involving stakeholders and the public), and to (3) periodically monitor the outcomes and to adjust the plans and measures accordingly. Plans, measures, and monitoring results must be reported to the Commission, but otherwise the approach is tailored to preserve national and local regulatory autonomy, promoting flexible adaptation of goals and measures in line with local needs and capabilities. Regulatory decisions are thus largely deferred to the implementation stage, which “comes closer to mandated self-governance than to classical policy implementation” as such (Newig & Koontz, 2014, p. 250).

In practice, the SFD proposal used slightly different approaches for (industrial) contamination, which is part of many national policies, and for other threats, which are less regulated on the member state level and more likely to impact on agriculture (Landgrebe-Trinkunaite et al., 2005). First, for contaminated sites (articles 10 to 14 of the proposal), often associated with industrial brownfields, member states were asked to draw up an inventory, using a common definition and a list of potentially polluting activities set out in the directive’s annex. Following the inventory, member states were required to establish national remediation strategies, and mechanisms to fund the remediation of brownfields for which no responsible polluter can be identified (orphan sites). Moreover, for each transaction of a site mentioned in the annex, the seller was obliged to provide a soil status report to the other party and the administration. Second, for erosion, organic matter

decline, salinization, compaction, and landslides, member states were required to identify “risk areas” on the basis of common criteria and nationally-established levels of risk acceptability. These areas should be made public, and again governments were required to draw up “risk reduction targets and programmes of measures” (articles 6 to 8). In spite of its inbuilt flexibility, the risk area approach later became a major bone of contention.

Most pioneer states contributed to the proposal, but they were not equally happy about the prospect of a European soil policy. In fact, their initially constructive approach should be seen as a strategy to limit the directive’s impact by moulding it into a national shape. While Germany and Belgium seemed to genuinely support the proposal, the Netherlands, Austria, and most of all the UK expressed reservations about its value-added over the existing national laws (Council Document 381/07). Among the soil pioneers, the UK was the least progressive. Its policy was very light, largely limited to contamination, based on case-by-case risk-assessments, and emphasized voluntary remediation (Bell, 2006; Sozonova, 2011, p. 9). By contrast, the Netherlands have the oldest and arguably most progressive soil protection laws in Europe. Dutch experts anticipated a smooth implementation, since “in principle, the SFD has the same structure as the recently renewed soil policy in the Netherlands” (Wesselink, Notenboom & Tiktak, 2006, p. 20). But Dutch farmers called the proposal “a schoolbook example of Brussels over-regulation”, and industry even claimed it would become “the most expensive regulation ever” (Heck, 2006). In Austria, criticism originated mainly from the federal states (see next section).

In contrast to these calls for flexibility, Italy and Spain pushed for a more hierarchical and prescriptive approach, the latter calling the proposal “too flexible” as it “does not have clear targets and timetables” (Council Document 6381/2007 ADD 1, 9; for Italy see ADD 4).² Also more generally, the latecomers’ behaviour does not corroborate the concern that joint-decision making implies a

² According to some interviewees, there were concerns whether a directive following the mandated planning/experimentalist approach would include obligations that could actually be enforced in Court.

“law of the least ambitious programme” (Underdal, 1980). In fact, the latecomers strongly welcomed the proposal. Throughout the entire agenda-setting and negotiation process, their attitude can be best described as that of “friendly onlooker(s)” (Héritier, Mingers, and Knill, 1996, p. 262), neither engaging in blocking and delaying strategies, nor actively contributing domestic policy templates. Most of these predominantly eastern and southern European states suffered from high problem pressure, with contaminated sites posing major hazards in the east, and erosion and desertification in the south (Council Documents 6381/2007, 6381/2007 ADD 1, 6381/2007 ADD 3). Problem awareness and expertise were strong especially in Eastern Europe, because agronomic and soil science enjoyed high status in the former Soviet bloc (Interview with an Official of the European Commission, 2 June 2017). The southern and eastern delegations hoped that the SFD would compensate for the lack of national soil protection, and perhaps also that it could be used as political leverage to change the domestic status quo (Interview with a German Official, 18 March 2011; Interview with an Austrian Official, 12 May 2017). In that sense, environment ministers from these countries engaged in vertical venue shopping to circumvent domestic opposition.

Funding was another motivation of the new member states to support the directive. They pointed out the costs of remediating the vast brownfields left behind by the Red Army and the formerly state-run heavy industry. The central and eastern European countries hoped that regional development funds could be tapped to facilitate the directive’s implementation. This was met with strong resistance among the EU-15 (Interview with a German Official, 18 March 2011, Interview with Austrian Officials, 17 May 2017). Orphan sites were a lesser concern in the western states, where most problematic lands are privately owned. The opponents of regulation claimed that private ownership made regulation redundant, because landowners cared about their property; but the opposite is at least as plausible. When the federal soil protection law was adopted, German farmers fought hard to ensure that agricultural law would take precedence over the new legislation (Hey & Baron, 2008, p. 285). In the UK, which lacked a central inventory of contaminated sites (Wolf & Stanley, 2013, p. 308), landowners feared that the EU would create economic blight by “digging up

skeletons” (Interview with an Official of the European Commission, 1 June 2017; Sozonova, 2011, p. 36).

So far, the case largely confirms the notion of agenda competition. The agenda-setting process is dominated by environmental pioneer states, seeking to upload their domestic solutions. Rather than obstructing, the latecomers were passive but not obstructive. Moreover, Germany, being the first mover, and the European Commission promoted a frame that emphasized the European scale of soil protection as an environmental policy problem. The German federal ministry of the environment also sought out and even created policy venues attuned to this frame. More surprisingly, however, the Commission submitted a proposal that exceeded a simple patchwork of national approaches, in that it used major elements of a genuinely European, experimentalist policy style. The following sections examine how this progressive dynamic came to a halt.

Reframing and Agenda-containment: Soil Protection as Local Issue

First debates on the working group level took place in fall 2006. The pioneer states and the UK still had scrutiny reservations, but the prospects for a quick adoption seemed favorable, given the otherwise high level of support. However, subnational actors now began to scrutinize the Commission proposal and challenged the problem’s European scale. They reframed soil degradation as a locally contained problem. Building on this frame and invoking the subsidiarity principle, they claimed “ownership” of the issue and argued that the proposed directive interfered with their jurisdiction. This led to more and more defensive attitudes among the pioneers, and in the case of the German federal government, even to a complete about-turn. After having acted as strategic first mover and “pusher-by example” during the agenda-setting stage, Germany now adopted a “defensive frontrunner” strategy.

In November 2006, just two months after the Commission had presented the formal draft, the Austrian *Länder* adopted a so-called “unitary position” that formally bound the Austrian delegation. The unitary position expressed concerns regarding the subsidiarity and proportionality of the

directive and mandated the central government to ensure that “no implementation requirements – neither on the legislative nor on the executive level – will result from the directive” (Österreichische Bundesländer, 2006).³ In the federal republic of Austria the central government is responsible only for certain soil issues, such as contaminated sites. The implementation of federal soil protection law and legislation on agricultural soils are exclusive *Länder* competences (Interview with Austrian Officials, 17 May 2017). Five of the nine *Länder* had encompassing soil protection laws in place (Umweltbundesamt, 2017).

Also the Dutch parliament immediately undertook a subsidiarity check. It accepted the European frame with respect to transboundary impacts on water and food safety, as well as the need for a level playing field, but it also claimed that “soil administration is a policy area par excellence that must be filled on a national, regional, or local scale” (Staten-Generaal, 2006, p. 3). Similar to the Austrian *Länder*, the Dutch Parliament thus urged the government to ensure that any decision should be compatible with the longstanding Dutch soil legislation and not interfere with the distribution of competences among national authorities; in particular any binding criteria for risk area designation should be avoided (ibid.). Agreeing with Parliament, but in contrast to its own sectoral experts (Wesselink, Notenboom & Tiktak, 2006), the Dutch government also envisaged that “profound adaptations to Dutch soil law” (Ministerie van Buitenlandse Zaken, 2006, p. 6), would follow from the risk areas and status reports.

These contributions merely confirmed the already defensive front-runner strategy of the Dutch and Austrian delegations. But invoking subsidiarity, and pointing to their long-standing traditions, they also challenged the issue’s European scale and promoted subnational venues as more adequate sites for soil policy. Although the preferred outcome of the Netherlands and Austria was to kill the directive, it was far from clear whether a blocking minority could be put in place. Together with the UK, they therefore tried to water down the proposal in order to make the worse outcome at least

³ This and the following translations from German and Dutch are mine.

palatable (Interview with an Official of the European Commission, 1 June 2017; Interview with Austrian Officials, 17 May 2017).

Also the German *Länder* closely observed what was happening at the EU level. Already before the proposal was out, the conference of *Länder* environmental ministers adopted a declaration against the European soil policy that the federal government was actively promoting. Shortly before and again after Germany assumed the Council Presidency in the first half of 2007, the *Bundesrat* (federal chamber) adopted resolutions against the proposed directive on grounds of subsidiarity and administrative burden (Bundesrat, 2006; 2007). The Bundesrat asked the federal government to work toward blocking the directive, but added a number of substantive amendments just in case the adoption “could not be stopped in the face of clear majorities in the European Parliament and Council” (Bundesrat, 2006, p. 3).

The German *Länder* attempted to reframe soil policy as an issue with strictly local scale, using air and water as contrasting examples. They downplayed externalities, arguing that soil was “immobile” and therefore its transboundary impacts were “marginal” (Bundesrat, 2007, p. 3). They also negated the existence of a shared concern by pointing out the “very large diversity” of soils and the “regionally different problem-situations” (ibid.). In conclusion, the Bundesrat questioned the EU’s jurisdiction of what it regarded as essentially a “local and regional matter”, because the proposal in the Bundestag’s view ran afoul of the subsidiarity principle (ibid.). These arguments were strikingly similar to those advanced by the Netherlands and Austria.

In contrast to the Austrian unitary *Länder* position, the statement of the German federal chamber did not legally bind the federal government, but the large majority in the chamber that was dominated by Christian Democrats could not simply be ignored.⁴ Industry and farmers associations had begun to mobilize against the Commission proposal and lobbied the ministries of agriculture and

⁴ Detailed voting information exists only for the minister conference, indicating that except Bremen only *Länder* with conservative governments voted against the Directive (Lee & Bückmann, 2008, note 92).

economics, which were headed by members of the CSU, the conservative Bavarian sister of chancellor Merkel's Christian Democrats (Interview with a German Official, 18 March 2011; Interview with an Official of the European Commission, 1 June 2017). Within the coalition government, a split thus emerged with socialist environment minister Gabriel on one side, and the conservative ministers for agriculture, Seehofer, and economics, Glos, on the other. Glos and Seehofer were both members of the Bavarian CSU, and Bavaria was among the staunchest opponents in the Bundesrat (Lee & Bückmann, 2008, p. 424).⁵

Given the opposition from the Bundesrat, Gabriel's support dwindled, while Seehofer and Glos gained additional backing. Chancellor Merkel seems to have instructed the environment minister to abandon Germany's earlier pusher strategy and to oppose the draft directive from now on. In inter-departmental conflicts, one side cannot always win, and Gabriel enjoyed Merkel's salient support in promoting the first EU-wide CO₂ emission standards for cars in spite of fierce resistance from the German automobile industry and the economics ministry. First-hand insight on how the conflict within the coalition government was settled is not available,⁶ but it is clear that Gabriel's support crumbled, and that, when the federal government handed over the Presidency to Portugal in the second half of 2007, its position began to change markedly.

In July 2007, Gabriel still tried to counter the pressure for reversing Germany's official stance with a paper that summarized the ongoing discussions, revised certain provisions in line with German law, and watered down others (Lee & Bückmann, 2008, p. 424). But toward the end of the year, the German delegation switched to an unconditional blocking strategy, much to the dismay of the Commission: "The guys who had been discussing with us and helped us to write the text came to the Council, took the floor, said 'Germany is against discussing this in any form today,' and sat there for

⁵ More recently, Seehofer, now federal interior minister and leader of the Bavarian CSU, threatened to quit the coalition government in protest over Chancellor Merkel's more liberal stance on European migration policy, another land politics issue (see EU Observer 2 July 2018, <https://euobserver.com/migration/142253>).

⁶ Several interviewees have put forward this explanation without, however, being able to report first-hand information (see also Lee & Bückmann, 2008, p. 425).

eight hours without being able to take part in the discussion” (Interview with an Official of the European Commission, 1 June 2017). Gabriel also perfectly applied the frame of the *Länder*. To the press he said “if anything belongs to the member states, it’s their soil,” and went on to explain that the debate no longer revolved around “how much” regulation but about “who regulates” (Agrarzeitung, 22.12.2007).

Agenda-purging: Soil Protection in the Joint-decision Trap

After the reversal of the German position, it became reasonable to expect a blocking minority to emerge. The compromise tabled by the Portuguese Presidency in December 2007 was therefore watered down significantly and made more flexible (Council Document 16157/07). Risk areas (now called “priority areas” at the UK’s instigation) needed to be identified only for degradation processes deemed relevant in the respective member state, taking into account different levels of risk acceptability. National programs now included pre-existing national measures, which could be voluntary (as the UK had demanded), and would not crowd out support for farmers under cross-compliance (an Austrian priority). The draft clarified that member states only needed to inventory contaminated sites if they had not already done so, and site assessments became subject to future use and exemptions. A large part of the annex of polluting activities was declared indicative. Status reports no longer needed to be as thorough as before, and in line with the British “buyer beware” principle, obtaining them could be the buyer’s rather than seller’s responsibility. Finally, remediation was linked to a cost-benefit analysis and could include change of approved land use, restriction of access, and natural recovery. In sum, joint-decision making resulted in a lowest-common-denominator bargain, in which the proponents of a strict policy obtained almost nothing.

In keeping with its traditional role in EU environmental policy (Börzel, 2002), France had so far remained “on the fence”, not giving many clues about its stance (Interview with a German Official, 18 March 2011; Interview with Austrian Officials, 17 May 2017; Interview with an Official of the European Commission, 1 June 2017). The French position now became pivotal, as it would tip the

scale either toward or against a blocking minority. When the Portuguese Presidency on 20 December 2007 called a test vote in the Environment Council, France sided with the blocking minority by abstaining. The proposal fell through, 18 votes short of the 260 required under the pre-Lisbon rules (Council Document 16183/07). As pivotal actor, France was able to influence the compromise draft more than any other government. Only the UK was in a similarly powerful position. Neither Austria nor the Netherlands were able to change the voting outcome, and Germany had already declared that it could not be swayed as a matter of principle. Accordingly, the Commission and the Council presidencies intensely wooed the French delegation: “Every Presidency would ask France: What do you want? Because the five countries exactly constituted a blocking minority and the moment France would leave, [the directive] would go through” (Interview with an Official of the European Commission, 1 June 2017).

Most observers were at a loss to explain which substantive reservation made the proposal unacceptable to France (Interview with a German Official, 18 March 2011; Interview with Austrian Officials, 17 May 2017). Different interviewees suggested that the French abstention therefore has to be seen in the context of a Franco-German bargain concluded at the head of state level in spite of large concessions brokered by the Portuguese Presidency in bilateral last-minute consultations (Interview with a German Official, 18 March 2011; Interview with a Spanish Official, 1 June 2017; Interview with an Official of the European Commission, 1 June 2017).⁷ For France, the European soil policy was of low salience, but in Germany it was intensely politicized, making it amenable to logrolling. The parallel Franco-German agreement on CO₂ emission standards for cars may have provided the complementary part of the package, since the decision was initially welcomed by France and opposed by Germany due to the German car industry’s focus on large, CO₂-intensive cars (Gulbrandsen & Christensen, 2014). While this explanation seems plausible, it is important to realize that it remains hypothetical.

⁷ Informal logrolling agreements are by their very nature not public, and unfortunately I cannot claim privileged access to the French or German cabinet.

The EP formally debated the draft only once the blocking minority was constituted. Within the EP, the leading environment committee discussed no less than 686 amendments. Subsidiarity played an important role in the parliamentary debate. The Legal Affairs committee, by a narrow margin, even motioned to reject the directive on grounds of subsidiarity (EP Document PE388.531), but the plenary supported the amended directive with 496 votes in favor, 161 against, and 22 abstentions. MEP's explanatory statements suggest that the decision was contested among national lines, corresponding to those in the Council. The amendments, by and large, watered down the draft in the name of flexibility (Council Document 1479/07, 12-13).

The blocking minority remained stable under the subsequent presidencies. After a six month gap, negotiations continued under the French Presidency. Having put the dossier on its agenda but *de facto* vetoed the previous compromise, France was now in an awkward position. "They had to pretend to move the dossier forward but they didn't. They reopened and closed some things" (Interview with an Official of the European Commission, 1 June 2017). "France made some lukewarm attempts. One could see that they were actually not interested, so they just worked it off in a lackluster way" (Interview with a German Official, 18 March 2011).

However, the French delegation reworked quite considerably the contamination part of the proposal, where France also had main reservations (Interview with a French Official, 2 June 2017). A number of delegations preferred the more flexible draft over the Portuguese version, and these threatened to vote against the proposal, should the following Czech Presidency revert to the previous text (Interview with a French Official, 2 June 2017). Yet neither the French nor the Czech succeeded in garnering a majority. The Swedish Presidency did not put the text on the agenda, but the following Spanish Presidency took another stab, reverting to the Portuguese text. When the Commission asked for a vote, the original five again rejected the proposal, now joined also by Malta. As announced, Romania, Sweden, Finland, and Poland abstained (Interview with a French Official, 2 June 2017). Subsequent presidencies refrained from opening the file again.

In October 2013, the Commission decided to withdraw the proposal. In September, the German federal elections had confirmed the current government. The Commission saw the new coalition agreement as final opportunity, but the socialist party did not achieve a position change on the matter (Interview with an Official of the European Commission, 1 June 2017). Incidentally, REFIT, a deregulation initiative launched by the new Juncker Commission, provided an opportunity for the withdrawal (see OJ 2014/C 153/03). The Commission described the deadlocked soil proposal as “the elephant in the room that was constantly dividing the Council” (Interview with an Official of the European Commission, 1 June 2017). While other EU-level decisions were not directly affected by it, the Council presidencies felt uneasy about handling a file that could only be lost. Moreover, the proposal in the meantime prevented some member states from pursuing domestic legislation in order to compensate for the stalemate in European negotiations (Interview with an Official of the European Commission, 1 June 2017). The deadlock had thus created a full-fledged joint-decision trap, which the withdrawal sought to at least mitigate.

Discussion

Soil protection remains the most glaring gap in the otherwise encompassing environmental policy of the European Union, in spite of the widespread and increasing deterioration of this important environmental resource. While it is true that soil protection also arrived with some delay on national agendas, I have demonstrated that the EU soil protection gap is foremost a case of structural integration resistance for a combination of reasons. First, escaping the institutional rigidity of the EU’s joint-decision system depends on competitive agenda-shaping by the EU’s national environmental pioneers. Germany played such a constructive role for some time, but it eventually became what Liefferink and Andersen (1998, p. 256) call a “defensive forerunner”.

Second, successful agenda-setting consists in linking frames to venues. Germany and the Commission framed the issue as having a European scale, and in this way won the attention of the

Council of Ministers. But since soil's transboundary features – important as they may be – are anything but salient, subnational actors in Germany, Austria and the Netherlands had an easy job of challenging this frame, and of instead promoting a view of soil protection as a locally contained and essentially national issue. We may not think of air as Dutch or of seawater as Italian, but British soil is not an unheard-of expression. For soil, the “political construction of scale” is therefore predisposed to the national and regional level. Reframing soil in this way put subnational venues like the *Länder* center stage. It was their resistance that finally turned around the German position and strategy, leading to the fall of the soil framework directive.

Third, however, the German about-turn alone would not have been enough to kill the proposal. The EU's joint-decision system that allows a small number of member states to block policy-change played a crucial part. The requisite blocking minority was completed by France, arguably as part of a larger bargain. Joint-decision traps are easy to overcome if member state interests converge at least partly, for example in regulating the single market. But the soil framework directive is not a product regulation, and debates over the allocation of competences are particularly hard to resolve in negotiations, because they are purely distributional and if, like in this case, debated in categorical terms, leave scarce common ground. The Commission had already chosen an extremely flexible, “experimentalist” (Sabel & Zeitlin, 2010) approach that ceded most substantive decisions to national authorities, yet Germany did not budge in its fundamental opposition. Compromise may still be achievable by linking conflicts with inverse payoffs (Scharpf, 1997, p. 128) but in Austria and Germany subnational governments saw themselves at the losing end. It is hard to see how they could have been included in a package-deal across multiple levels of governance. This is true also for the Dutch Parliament, which strongly constrained the leeway of the Dutch delegation when negotiating in Brussels.

On a theoretical level, this three-pronged explanation underscores the value of assembling social-constructionist and rationalist concepts within an overall institutionalist analytical framework. The

institutional constraints imposed by the joint-decision system explain why the turn-around of a single member state can lead an ambitious policy-proposal into deadlock. But an additional analysis of frames is necessary to understand how this turn-around came about, and why, in contrast to the general pace and scope of European integration in environmental policy, soil protection has remained firmly in the hands of member states as a result.

In the short to medium term, the soil protection gap will remain. Against the backdrop of Brexit, the Commission is wary of any discussion that could reinforce existing divisions, especially on matters that are perceived as shifting more powers to Brussels. There are, moreover, no signs that the German government will reverse its position, although the *Länder* chamber, in the meantime briefly dominated by red-green coalitions, has again taken a more positive view of an EU-wide approach (Bundesrat, 2013). Few issues are ever removed completely from the informal policy agenda, however. While there are no concrete plans for a new legislative proposal, the Commission has launched a new expert group in October 2015 to discuss the future of soil policies in Europe on a clean sheet. This time, all national experts are equipped with explicitly political mandates so the Commission can better anticipate obstacles arising from the political level (Interview with an Official of the European Commission, 1 June 2017). In the long term, a new policy window may finally arise when the UK's departure and a change of government in Berlin have reshuffled the majority in the Environment Council.

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