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Non-documents for Big Decisions: The Commission and the EEC–Japan Automotive Agreement (1991)

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Abstract

This article highlights some material aspects of informal governance by analysing the unsigned confidential documents intended to drive the future of the European automotive sector in 1991. Whilst it was long thought that the EEC–Japan agreement had been unwritten, this study reveals that it was a combination of oral and written statements, bilateral decisions and unilateral interpretations. These ambiguities have been used by the Commission to achieve the impossible: providing for one thing and its opposite in order to satisfy extremely divided opinions. Using public and private archives of several stakeholders, the article underlines the Commission’s power over institutional (Member States and the European Parliament) and private (industry and NGOs) players. Whilst recent studies have pointed to repeated unwritten rules to temper informality leading to a democratic deficit, the 1991 non-consensual consensus eluded any tacit rule because it lay in the grey area of diplomacy, economics and law.

Keywords: automotive sector; European Commission; European governance; informal policy and soft law; voluntary export restraint

Introduction

When representatives of the French car company Peugeot Société Anonyme (PSA) met with the Ministry of Industry in 1997 and criticized the ongoing agreement on Japanese car exports, the French government complained that it was ‘a “non-agreement” which in 1991 had not been formally submitted to the Council’.¹ However, in 1991, Member States and companies had considered the agreement to be vital for their future. Why was there such a discrepancy between the capital importance of the decision and the informality with which it was taken? The case offers an example of ‘formal informality’, ‘as there is the appearance of an EU agreement with a third country, but without the legal protections or transparency of the actions taken under it’ (Cardwell and Dickson, 2023). The EEC–Japan agreement arose from the will of high officials in Brussels to successfully achieve the purposes of the Single European Act signed in 1986, which provided for a European market without fiscal, technical and physical borders on 1 January 1993 (Armstrong and Bulmer, 1998). In this perspective, Member States were to remove the quotas on Japanese cars they had set up to protect their industries. The European Commission, and Commission President Jacques Delors, wanted to ensure their protection through a temporary quota, no longer national but European. The negotiation of this quota between 1986 and 1991 sheds light on the Commission’s strategies (Bussière et al., 2019; Cini, 1996). The reason for focusing here more on the negotiation

¹PSA, DOS2008AD-09675, Minutes of the 8 January lunch at the Ministry of Industry, 15 January 1997.

of the agreement than on its later impact is that ‘the Revolution did not happen’ (Pardi, 2011) in the 1990s. The ‘risk of torrential Japanese imports’² so feared in 1989 did not occur, making the terms of the agreement less strategic than expected. As early as 1994, as the value of the Yen was highly unstable, Japanese sales did not reach the maximum levels authorized by the agreement. Nevertheless, back in 1991, producer countries and manufacturers felt that their survival was at stake in negotiating the opening of the European market to the Japanese. The Commission, for its part, was staking the success of its Single Market Programme and thus also the future of European integration.

The UK, France and Italy had the most to lose: France and Italy had very restrictive quotas to protect their national champions (Renault, PSA and Fiat), whilst the UK, which has also set a quota since 1975, had assured Japanese investors free access to the European market if they set up their factories in the UK. After the Nissan ‘transplant’ opening in 1986 in Sunderland, the British government did not want Toyota and Honda to reconsider their plans for massive investment in the UK (Mason, 1992). The UK was supported by Germany and the German Commissioner for Industry (DG III), Martin Bangemann, who stood firm on the principle of free trade. De Ville and Siles-Brügge (2018) have shown that the period is ruled by a ‘free trade paradigm’ that shapes the actions and words of Commission officials in charge of trade issues. In February 1990, DG I (international relations) sent to the Member States what it called a ‘non-paper’ to define the terms of the agreement to be negotiated with the Japanese. Although it was described as a ‘non-paper’, this document ‘prefigured, in its very precision, what a mandate could be’; it looked like a ‘trap’ according to the French representative in Brussels.³ The Member States were so divided that they were unable to formalize a mandate for the Commission to negotiate with the Japanese Ministry of International Trade and Industry (MITI). The split was so deep that, even before negotiations with the Japanese began, the Commission thought that certain elements could not be included in the agreement, such as the counting of vehicles produced by the Japanese in Europe (called ‘transplants’) within the Japanese export quota. DG I knew that this would be opposed not only by the Japanese but also by the so-called ‘liberal’ Member States – in particular, the UK. In contrast, the absence of these guarantees would lead to an immediate rejection by the ‘protectionist’ countries and most of the car manufacturers, who would see it as a sacrifice of their interests. The Commission’s negotiators therefore had to deal with an impossible agreement, providing for one thing and its opposite. After a year of negotiations, on 31 July 1991, the European Commissioner Frans Andriessen and the Japanese Minister of Industry Eiichi Nakao finally reached an agreement on the gradual opening of the European market until 1999. The decision for the future of the European car industry was set up by a phone call, which was put in writing. It was not, however, the only element of this agreement.

Until very recently, scholars had concluded, as Tomaso Pardi (2011, p. 504) put it, that ‘it was in fact only an oral consensus, which had not given rise to any signature or formal commitment’. Nevertheless, the secret documents of this agreement have now been brought to light (Milor, 2021). They were found in the archives of Jacques Delors’ cabinet. The agreement consisted of a complex set of confidential papers, oscillating between written and oral forms, unilateral decisions and bilateral negotiations – so many elements

²RPUE, 25POI.2.204, SEC(89) 2118 final.

³RPUE, 25POI.2.204, Note from Jean Vidal on the Coreper meeting of February 22, 23 February 1990.

that ultimately confused its nature and clarity. The day after the announcement of the EEC–Japan agreement, Thiébaud Flory (1991, p. 693) explained that ‘the informal agreement, which was neither signed by the parties nor accepted in accordance with their internal procedures, has no binding legal force and belongs to the field of “soft law”’.

Documents called ‘non-papers’ are frequently used in diplomacy to ‘explore new ideas and options. They are informal and unofficial documents, often produced on paper with-out logo or any other official sign’ (Cooper et al., 2008, p. 195). The Commission usually considered that they are, in its own words, ‘a useful basis for discussion’.⁴ The ‘non-paper’ expression had been used in several cases, such as the implementation of the Common Foreign and Security Policy (CFSP) in 1992. Some examples are more ambiguous, such as in 1988, when DG IV (competition) chose the word ‘non-paper’ in the Rover state aid case to mean, in its own terms, ‘Confidential, Commercial in Confidence, DG IV eyes only’.⁵ In the EEC–Japan agreement episode, ‘non-papers’ were issued not only for the formalization of unachieved discussion but also for governance strategy. The French government even evoked a ‘non-agreement’.⁶ The use of the term ‘non-documents’ in this article refers to written documents that did exist, which were strategic and confidential, but about which the Commission acted as if they were not written, as if they were oral, even as if they did not really exist. Why did some high officials use ‘non-documents’ for policy-making? Why did the Commission produce documents whilst denying them the status of documents? The Commission was not bound by a mandate from the Council and secretly negotiated an agreement that was ambiguous in nature and content. It then refused to discuss it not only with the NGOs but also with the Court of Justice and the European Parliament, pretexting it was an oral political commitment. Was the Commission therefore all-powerful? Ultimately, it is a question of who holds the leadership within the EU (Verdun and Tömmel, 2019).

Political science provides valuable insights into the concept of informality in politics – although the very notion is difficult to capture (Helmke and Levitsky, 2004). Early on, scholars emphasized the importance of informal practices of non-governmental actors in diplomatic relations, the so-called Track II diplomacy (Davidson and Montville, 1981; Freymond, 1984; McDonald and Bendahmane, 1987). Scholars identified in the 2010s ‘informal governance’ within major international institutions such as the EU (Christiansen and Neuhold, 2012; Christiansen and Piattoni, 2003; Stone, 2013; van Heumen and Roos, 2019). Research demonstrated that informal rules coexist with formal rules (Kleine, 2013, 2014; Urfalino, 2007). Dorothee Heisenberg (2005) even spoke of an institutionalization of informal decision-making within the EU. This observation led Stéphanie Novak (2017) to deconstruct this idea of informal governance, as the practices are so repetitive.

Informal governance is also based on soft law, a form of regulation that goes beyond formal legal frameworks such as European directives and treaties (Azari and Smith, 2012). In the field of soft law, voluntary export restraints (VERs) have rarely been studied because their negotiation is confidential and informal, supervised by top politicians (Nüesch, 2010; Schuknecht, 1992). The first VER-type agreements with Japan were

⁴HAEU, PLA-1512, Confidential Commission file note on CFSP, Ph. Willaert, ‘Presidency non-paper on CFSP Joint Actions’, 3 March 1992.

⁵HAEU, PSP-298, ‘Rover Groupe: the case for regional selective assistance’, 30 June 1988.

⁶PSA, DOS2008AD-09675, Minutes of the January 8 lunch at the Ministry of Industry, 15 January 1997.

concluded by the United States and covered the steel (1969) and textiles (1972) sectors (Glenn, 2016). It is particularly difficult to establish a precise list of these quotas: the General Agreement on Tariffs and Trade (GATT) counted 125 restrictive measures within the EEC in 1989, and the European Commission counted 2000 in 1990.⁷ Although reluctant, the third country – here Japan – took the lead and was ‘voluntary’ because it thus avoided a formal and unilateral protective measure provided for in Article 19 of the GATT. VERs belonged to the GATT ‘grey area’: they were not subject to GATT discipline or constrained by administrative rules, but they evolved on the margins of law and economic diplomacy. They were banned in 1994. In short, the 1991 EEC–Japan agreement belonged to the triple grey zone of diplomacy, law and economics. This is why it is both difficult and interesting to find and use primary archives on this issue.

Although the EEC–Japan agreement has been the subject of several studies since the 1990s (Jammy, 1994; Mattoo and Mavroidis, 1995; Seidenfuss and Kathawala, 2005), most of them point to a lack of documentation for understanding this episode: ‘With a few exceptions, the comments [on the EEC agreement] are entirely consistent with what was already known, and do not depart from the official language that usually surrounds this type of negotiation’ (Pardi, 2011, p. 504). The recent opening of the Commission’s archives (HAEU) has begun to change the situation (Ballor, 2023; Milor, 2021). To understand the balance of power behind this ‘non-agreement’, the article is also based on other unpublished archives, both French and European: those of the Permanent Representation of France to the EU (RPUE), those of the automotive industry (PSA) and those of the European Bureau of Consumers’ Unions (BEUC).

I. Non-documents at the Heart of the Negotiations

Several non-documents were used by the Commission, first during negotiations with the Member States and then to finalize the agreement with the Japanese.

The ‘Non-paper’ of February 1990: Finding an Informal Mandate?

After months of tough debates, the Commission succeeded in January 1990 in drawing up a fairly consensual roadmap with its communication ‘A large internal market for automobiles’.⁸ According to Gianluigi Giola, right-hand man to Frans Andriessen (DG I), it was actually a ‘sanitized’ framework: ‘principles but no numbers (yet)!’⁹ The end of national export restrictions and its attendant explosive measures were given very limited space in the document. This is why the Member States did not reject it but were cautiously waiting to see what would happen next. The Spanish government recalled that ‘the general character of the communication could not replace a negotiating mandate that remained to be defined’, whilst French representants insisted that it was ‘impossible for

⁷GATT, ‘Developments in the Trading System’, September 1988 to February 1989, Geneva, 1989; Commission Communication, ‘Industrial Policy in an Open and Competitive Environment’, 1990.

⁸RPUE, 25POI.2.204, SEC(89) 2118 final, Communication Commission, ‘A large internal market for automobiles’, 18 January 1990.

⁹HAEU, FL-564, Gianluigi Giola (DG I), ‘Note of personal reflection; Community – Japan – Automobiles’, sent to François Lamoureux, undated (before his visit to Tokyo in July 1990).

¹⁰HAEU, FL-183, Cabinet of Jacques Delors, Minutes of the General Affairs Council of 18 December 1989 for the President, 19 December 1989.

the Commission to negotiate as long as a common position of the EEC has not been established'.¹⁰

The Commissioner for International Relations (DG I), Frans Andriessen, called on governments to be patient, flexible and trusting. According to Jacques Delors' office, he adopted 'a very personal tone, along the lines of "I'm going to ask Japan, trust me, I know how to negotiate"'.¹¹ The French embassy reported that he 'argued that the Commission needed some latitude to negotiate with the Japanese authorities on the appropriate arrangements: Member States would obviously be consulted in the course of these negotiations, but it would be inappropriate to try to fix precise deadlines and figures in advance'.¹² Actually, the Commission was convinced that it would not be able to get a negotiating mandate from the Council as the Member States were too divided. It wanted instead to receive an unofficial mandate. This attempt was embodied in the episode of the 'non-paper' of February 1990.

In February, DG I officials sent the Permanent Representatives of the Member States a 'non-paper' to prepare their next meeting.¹³ The Committee of the Permanent Representatives precedes the work of the Council to reach agreement on the dossiers before they are passed on to the ministers (Badel et al., 2005; Kassim et al., 2001; Saurugger, 2009). As is often the case with 'non-papers', the document appeared at first sight to be, as stated in another 'non-paper', issued on the same date on another topic, 'a list of suggestions to assist Coreper's deliberations'.¹⁴ It detailed specific measures, which contrasted with the vague speeches of recent months: freedom of FDI (no local content), abolition of national quotas between 1991 and 1993, self-limited exports by the Japanese and inclusion in the export quota of vehicles produced by the Japanese in the EEC (but not those produced in the United States). Even if this latest measure was reassuring for protectionist countries, as well as car manufacturers, the rejection was violent on the French side: 'We hope that the "non-paper" can be withdrawn, because, if not, we would be obliged, like no doubt many other delegations, to say that we are opposed to every one of its sentences'.¹⁵ The French government considered that the propositions were still too liberal.

The Coreper meeting of February took place in a particularly tense atmosphere (Chatzistavrou, 2014). The transition from broad principles to their concrete application raised the tension. Spain and Portugal, both protected by national quotas, entered the battle in earnest alongside France and Italy. The Spanish representative 'strongly criticized the document, which he said could have been written by the Japanese themselves'.¹⁶ Portugal 'considered that [the non-paper] did not reflect the concerns of its delegation'.¹⁷ The Commission was trying to change the usual function of non-papers, which was, to quote another non-paper issued in 1992, to summarize 'initial exchanges

¹¹HAEU, FL-183, Cabinet of Jacques Delors, Minutes of the General Affairs Council of 18 December 1989 for the President, 19 December 1989.

¹²RPUE, 25POI.2.204, Telex from the French Delegation in Brussels, 20 December 1989.

¹³RPUE, 25POI.2.204, DG External Relations (DG I), 'Non-paper', 22 February 1990.

¹⁴HAEU, PLA-426, General Secretariat of the Council, 'Non-Paper. The role of the European Parliament with regard to the Intergovernmental Conference', 13 February 1990.

¹⁵RPUE, 25POI.2.204, Handwritten notes for the ambassador on the non-paper, 22 February 1990.

¹⁶RPUE, 25POI.2.204, Note from Jean Vidal on the Coreper meeting of February 22, 23 February 1990.

¹⁷RPUE, 25POI.2.204, Note from Jean Vidal on the Coreper meeting of February 22, 23 February 1990.

¹⁸HAEU, PLA-1511, Non-paper of the General Secretariat of the Council on the implementation of the Treaty on European Union, 3 March 1992.

of views' between the participants.¹⁸ A few days later, France, Italy, Spain and Portugal received the support of Greece and Belgium. These countries had been rather neutral until then. In short, as the French Permanent Representative stated, debates 'once again made it clear that no majority could emerge on a formal mandate. [This was a] tactical error of judgement made by DG I in submitting its "non-paper". [It] crystallized positions again and forced the chair to note the persistence of strong differences between the delegations'.¹⁹ So how to negotiate on behalf of Europeans when no consensus emerges?

Three Documents for One Ambiguous Agreement

The Agreement reached on 31 July 1991 between the Commission and MITI consisted of three ambiguous documents. First, there was a two-page text called 'Elements of Consensus'. This was the core of the agreement, with 14 points on which the Commission and Japan had agreed. It set out the details of the transitional period that was to lead to the full liberalization of the European car market by 31 December 1999. This text was supplemented by two other documents, like annexes, which commented on the implications of the 'Elements of Consensus'. These three documents were kept secret in 1991. The press, like the consumer associations, therefore relied on a fourth document (which was not part of the agreement) to try to understand the situation: the public statement that Frans Andriessen made in Brussels in July 31 and the one Eiichi Nakao made in Tokyo at the same time.

The reason the Commission added two documents was that it felt the main text of the 'Elements of Consensus' was insufficient. First, there was the very brief – just a few lines – 'Internal Declaration by the Commission', also known as the 'Interpretation of point 10 and 11 of the Elements of consensus'.²⁰ These points provided for an adjustment of Japanese exports according to the rise or fall of the European market, so that Europeans could benefit from a dynamic market or not be too weakened by a depressed market. However, these two points did not specify in what proportion Europeans and Japanese should respectively benefit from growth and suffer from decline. This is why the 'Internal Declaration by the Commission' provided a quantified interpretation of Articles 10 and 11. In the event of a market increase, Japanese manufacturers would benefit from two-thirds of the growth, and in the event of a drop in demand, Japanese manufacturers would take on 75% of the gap between the forecast and actual market. What was the value of this document to the Japanese? It was a unilateral statement in which the Commission gave 'its view', 'its interpretation': there was no indication that the Japanese would follow it. In fact, the Japanese did not recognize these unilateral interpretations. When Japanese and British industrialists met in 1992, they said that '[they] were not clear how these articles [10 and 11] would work' concretely.²¹ The 'Internal Declaration by the Commission' that precisely explained how these articles should work was not mentioned, as if it did not exist.

¹⁹HAEU, PLA-1511, Non-paper of the General Secretariat of the Council on the implementation of the Treaty on European Union, 3 March 1992.

²⁰HAEU, FL-713, Internal declaration by the Commission concerning the operation of the monitoring system, undated (31 July 1991 at the latest).

²¹BEUC, SMMT (British automotive lobby), 'Speaking brief for presidential talks at the SMMT-JAMA talks of April 1992', 1992.

The other issue that the Commission intended to influence by adding another non-document was that of transplants: would cars produced by the Japanese in Europe be included in the Japanese export quota, or would they be considered as European products, freely traded? The British and the Japanese were fiercely opposed to any limitation of transplants, supported by other Member States (Germany, Netherlands and, to a lesser extent, Luxembourg, Ireland and Denmark), whilst the bloc led by France and Italy, with strong support from Spain and Portugal, made it a matter of survival. Point 3 of the ‘Elements of Consensus’ was very clear about transplants: there will be ‘no restrictions on Japanese investment or on the free circulation of its products in the Community’.²² The Japanese and the British thus seemed to triumph: ‘Article 3 was an essential protection for UK exports to other Member States’, noted the British automotive industry.²³ However, on the eve of the finalization of the agreement, the so-called protectionist states were convinced that transplants would definitely be taken into account. It was clearly stated in an official communication in January 1990, and the Commission confirmed it again at the Coreper meeting in July – exactly one week before the agreement was fully concluded. How could the Commission’s negotiators have guaranteed that transplants would be taken into account when the ‘Elements of Consensus’ explicitly stated the opposite a few days later? The answer lies in the ‘Concluding Statements’.²⁴

This was the third document that made up the EEC–Japan agreement. It was the last to be put in writing on the morning of 31 July. It transcribed the respective positions that Nakao and Andriessen had stated by telephone during the night and that ‘had made it possible to finalize the conclusions of the arrangement’.²⁵ A note dated 31 July found in the archives of the Delors cabinet explained that ‘at the end of a series of telephone conversations held that night, it appeared that the only possibility of “concluding” lay in the exchange of two oral declarations’.²⁶ At this stage, the EEC and MITI had agreed in the ‘Elements of Consensus’ on the free trade of cars manufactured by transplants and on a forecast of 1.23 million exports in 1999 in order to fix the Japanese quota in the period 1991–1999. The text did not specify that this meant 1.23 million direct exports from Japan, excluding transplants, but both Japan and the Commission knew this. Nevertheless, Andriessen tried to get the transplants taken into account at the last minute in the ‘Concluding Statements’. This was after all what the Commission had promised the Member States. To this end, Andriessen claimed that the Commission had based itself on a projection of sales of 1.2 million cars manufactured in transplants in 1999 to set the figure of 1.23 million direct exports for 1999. The Commission had therefore treated transplants ‘by preterition’ (apophasis), to use the words of DG III, or rather, would it be more accurate to say, by omission.²⁷ A comment from Jacques Delors’ office explains what the European negotiators had in mind: ‘This means in concrete terms that if this limit [of 1.2 million] is exceeded during the transition period, the Commission is entitled to request a corresponding reduction in direct imports in the context of monitoring’.²⁸ In this way,

²²HAEU, FL-713, Letter from Commissioner Frans Andriessen to his ‘colleagues’ (including the cabinet of President Jacques Delors), 1 August 1991.

²³BEUC, SMMT, ‘Speaking brief for presidential talks at the SMMT-JAMA talks of April 1992’, 1992.

²⁴HAEU, FL-713, ‘Concluding Statements (final version)’, 31 July 1991.

²⁵HAEU, FL-713, Letter from Commissioner Frans Andriessen to his ‘colleagues’, 1 August 1991.

²⁶HAEU, FL-713, Confidential note, illegible signature, 31 July 1991.

²⁷HAEU, FL-182, DG III Memo for the October 11 meeting, 10 October 1989.

²⁸HAEU, FL-611, François Lamoureux, Note for Jacques Delors, 31 July 1991.

the Commission could not directly restrict transplants, but it could reduce direct exports in relation to the production of transplants. This was a way of respecting the letter of Point 3 of the ‘Elements of Consensus’, but of circumventing its spirit. MITI’s response to Andriessen clearly rejected this mechanism: ‘the export figure at the end of the transitional period is forecasted taking into account total demand and the EC manufacturers supply capacity as a whole’.²⁹ From the Japanese negotiators’ point of view, this also included Japanese industrialists based in Europe, such as Nissan, Toyota and Honda in the UK. The concept of transplants itself was rejected by Japan. Nakao succeeded in a remarkable twist: he recognized that he had taken transplants into account, but only insofar as they were not transplants, only insofar as they represented a part of the production capacities of the Europeans. In order to remove any ambiguity, Nakao recalled by telephone that the EEC had committed itself not to limit the sales of transplants: ‘Let me call your attention to your commitment in the “Elements of Consensus” that Japanese investment or sales of its products in the Community shall not be restricted’.³⁰ He affirmed this again in public in his press conference in Tokyo.

After these statements, could the Commission really have believed that the Japanese would take the transplants into account? It is clear that Frans Andriessen and Martin Bangemann, the main European negotiators, knew that the two documents attached to the ‘Elements of Consensus’ were ‘non-documents’, inexistent to the Japanese. So why did the Commission resort to these non-documents? Why did the Commission adopt this somewhat odd, rather slippery and completely informal political instrument to deal with issues that could affect the future of European industry? What have been the expected and real effects of these documents? This is in line with the debates on the advantages and disadvantages of soft law (Abbott and Snidal, 2000) – even if the EEC–Japan agreement seems to fall quite outside this already very soft framework.

II. Why Non-documents? How the Commission Used Informality to Increase Its Power

The use of non-documents was a deliberate strategy on the part of the Commission to achieve its aims, that is, an agreement with Japan accepted by the Member States even though they were very divided on the issue. By relying on informal documents, the Commission succeeded in obtaining a consensus that was non-consensual but difficult to challenge.

Limited Risk and Effectiveness of Non-documents

The unofficial nature of non-papers makes it possible to set out a certain number of elements without doing so officially, to take initiatives without committing oneself too much, that is, to do politics without looking like it (Offerlé et al., 2019). If the attempt were to worsen the situation, it could always be minimized by arguing that it was an unimportant matter, a ‘non-problem’. A non-paper can also have a performative effect and be a strategic move: as soon as it is used, exchanged and modified, the non-document can become in practice a document. This was the fear of the French government, which saw the non-paper on Japanese exports as a disguised means of forcing the Member States to

²⁹HAEU, FL-713, ‘Concluding Statements (final version)’, 31 July 1991.

³⁰HAEU, FL-713, ‘Concluding Statements (final version)’, 31 July 1991.

establish a mandate in accordance with the Commission's views. France feared that this non-paper would turn into a real paper, first of all because it could leak: 'It is not by releasing papers, even "non-papers", that one best ensures this discretion [requested by Frans Andriessen], since one knows the fate reserved for any "writing" produced in the "glass house" of the European authorities'.³¹ France also feared that the other Member States would deal with this 'non-paper' as a paper: 'the document on the table by its very nature of "non-paper" does not exist. It is therefore excluded to engage in any drafting exercise with regard to it'.³² Discussing the non-paper in Coreper making it the basis for negotiations. Politicians and lobbies are aware that the first proposal in Brussels is crucial, as it is the one they must then try to influence. Whilst the French representative insisted that 'it was a "non-paper" and should remain so', several delegations commented on the non-paper as a real paper.³³ The French ambassador observed that his 'Italian colleague, by engaging in an exercise of amending the document, paragraph by paragraph, has accredited its status as an unofficial draft of a mandate'. He 'fell into the Commission's trap' even if the Commission had denied having wanted to prefigure the conclusions of the Council.³⁴ So did the Commission want to obtain a compromise or just, as it says, 'to provoke the reactions of delegations on the content' with this non-paper? What is clear is that the 'failure' of the non-paper ultimately worked to its advantage, as the Commission gradually established its legitimacy to negotiate without a mandate because the Member States were unable to reach a consensus. And precisely, the Commission did not want an official mandate that would be too constraining for dealing with the Japanese. Frans Andriessen asked for flexibility, saying a few weeks earlier that 'the Commission did not need a mandate, because this was the grey area, and [that] its task would be made easier if ministers stopped publicly debating figures'.³⁵ In the absence of a mandate (formal agreement) or consensus (informal agreement), automotive governance was thus moved from the manufacturing countries to the European Commission.

Bringing Together Antagonistic Positions by Generating Ambiguity

The non-documents enable the Commission to negotiate on behalf of Europe when Europeans do not agree. A common feature of the non-documents studied was that they attempted to resolve deep-seated oppositions between stakeholders. The 1990 non-paper introduced ambiguity, whereas an official communication had set out the principles for negotiation a month earlier: 'this new paper only served to muddy the waters' according to French representatives.³⁶ The final EEC–Japan agreement is a paradigmatic example of this search for ambiguity in order to overcome the dissensions between the different stakeholders. On the one hand, the Commission had to concede to the Japanese elements that protectionist countries and most of the manufacturers did not want to concede, and, on the other hand, the Commission had to integrate measures that the Japanese and liberal countries could not accept. It had to guarantee both the free circulation of

³¹RPUE, 25POI.2.204, Jean Vidal's note on the Coreper meeting of February 22, 23 February 1990.

³²RPUE, 25POI.2.204, French delegation's note on the Coreper meeting of February 22, 22 February 1990.

³³RPUE, 25POI.2.204, Jean Vidal's note on the Coreper meeting of February 22, 23 February 1990.

³⁴RPUE, 25POI.2.204, French delegation's note on the Coreper meeting of February 22, 22 February 1990.

³⁵HAEU, FL-183, Cabinet of Jacques Delors, Minutes of the General Affairs Council of 18 December 1989 for the President, 19 December 1989.

³⁶RPUE, 25POI.2.204, Handwritten notes for the ambassador on the non-paper, 22 February 1990.

transplants (to meet the expectations of Japan, the UK and other liberal countries) and their inclusion in the export quota (to satisfy the protectionist camp and most of the manufacturers). The Commission had to negotiate an agreement that provided for one thing and its opposite in order to accommodate antagonistic viewpoints. This is why the Commission settled for a hybrid informal agreement, both written and oral, with bilateral and unilateral measures. Several months before the agreement, Gianluigi Giola (DG I) spoke of a ‘subtle combination of written (although probably confidential) norms and oral clarifications between negotiators’.³⁷ The hybrid aspect of the agreement was less the result of negotiations than of a prior and well-considered strategy of the high officials who negotiated on behalf of Europe. At the end, the telephone declarations enabled the Commission to ensure the impossible, that is, that transplants were both taken into account and completely free to be commercialized. The Commission was aware that this was a tinkering to ‘conclude’ without solving the problem.³⁸

It was not so much to protect the European market as to make the ‘Elements of Consensus’ acceptable to the most protectionist countries and manufacturers that the Commission added two documents. These ‘non-documents’ enabled Martin Bangemann to affirm to the European Parliament in February 1992 that, as expected, ‘the Commission had explicitly taken into account the economic weight of the phenomenon of Japanese transplants in Europe’.³⁹ Frans Andriessen did ‘state’ on the phone that the Commission had taken into account the sales of transplants – an assumption of 1.2 million cars in 1999 – when setting the direct export quota. The Commission lied by omission to Parliament: the negotiators played on the various documents in the agreement, which contradicted each other and were not all recognized by Japan. Under the cover of interpreting the ‘Elements of Consensus’, the annexed documents artificially changed their meaning, in order to make governments and manufacturers accept them. In October 1991, a French Senator asked the Ministry of Industry to clarify the situation: ‘The president of the Japanese car manufacturers [reaffirmed], in Frankfurt, that the EEC-Japan agreement of 31 July does not, in his view, provide for any limitation on the number of cars to be produced in Japanese factories in Europe Yet, the day after the Brussels agreement, the Europeans announced that the production of these plants would be limited to 1.2 million units. Where is the truth?’⁴⁰ The French government was convinced that the agreement committed the Commission and Japan to taking transplants into account: ‘The text is not without ambiguity and the Commission will have to work to define and enforce a strict interpretation of this agreement. [...] The limitation [...] was established on the basis of certain elements, the main one being the production of vehicles by Japanese factories in Europe. This production of 1.2 million units, determined by the negotiators, has, in the context of the overall agreement, the value of a commitment by the parties’.⁴¹ This was not, however, the case. Nakao did not approve Andriessen’s statement. The very notion of ‘transplants’ did not exist for the Japanese. If the key European negotiators knew it, some top Commission officials like François Lamoureux, Jacques Delors’ advisor, really thought that the

³⁷ HAEU, FL-564, Gianluigi Giola (DG I), ‘Commentary “off” of the chapter “external aspect” automotive, reading grid of DG I requested by F. Lamoureux to the negotiator of the Commission’, undated (probably early March 1991).

³⁸ HAEU, FL-713, Confidential note, illegible signature, 31 July 1991.

³⁹ HAEU, PE3, M. Bangemann’s answer to a group of MEPs, 21 February 1992.

⁴⁰ *Journal Officiel du Sénat*, 3 October 1991, p. 2122.

⁴¹ *Journal Officiel du Sénat*, 3 October 1991, p. 2122.

transplants would be taken into account: if demand decreased, then ‘Japanese manufacturers (including those already installed in the Community) will assume $\frac{3}{4}$ of this decrease’.⁴² The Commission is far from being a homogeneous and unified whole (Hartlapp et al., 2014). Did President Jacques Delors himself think, like his French advisor, that the transplants would be counted, or was he aware, like Martin Bangemann and Frans Andriessen, that the annexes of the ‘Elements of Consensus’ would certainly not be applied?

Implementing the agreement was going to be particularly tense: the Commission would either succeed in imposing its interpretations on the Japanese or give up and betray the governments and manufacturers who assumed they were protected by its interpretations. The first talks between the Commission and Japan to set the annual export quota were a bitter blow for European manufacturers and the so-called protectionist Member States. Whilst the market collapsed by 16% in 1993, the Commission’s interpretation of Article 10 on decreasing sales was not retained to ensure a sales base for European firms, and the transplants were not counted in Japanese exports. From the end of 1994 onwards, several carmakers – Fiat, Renault, PSA, Volkswagen and Ford – and the French government kept asking for the refund of a ‘carry-forward’ that the Japanese carmakers would have contracted in 1993 – without any success. Studies have focused on the isolation of the CEO Jacques Calvet (PSA) within the European Automobile Manufacturers’ Association (ACEA), as he quit the lobby at the beginning of 1991, judging its positions insufficiently protective of the industry. But several carmakers – such as his Fiat ally Giorgio Garuzzo, who chaired the Brussels automobile lobby in 1994 – soon joined his crusade when they realized that the measures intended to protect them were not being applied. During the meeting between Jacques Calvet, who rejoined ACEA in 1994, and Guy Crauser, Deputy Director General of DG III, on December 1995, the Commission assumed for the first time that these protections were based on non-documents with no legal or even moral value: ‘Mr. Andriessen’s statement is a unilateral statement that has never been accepted by MITI’.⁴³ The Japanese did not consider themselves morally bound by the Commission’s own interpretations. There was therefore no persuasive effect, on which the application of soft law largely depends (Andone and Coman-Kund, 2022). They felt that, to behave ethically, they only had to apply the ‘Elements of Consensus’ to which they had committed themselves. That is why this ‘Internal Declaration’ was mainly an artifice designed to get the most reluctant manufacturers and Member States to accept an agreement they did not want.

This contrasts with studies that emphasize the power of industry in this negotiation. Most of them conclude that the 1991 agreement shows ‘the capacity of the [automotive associations] to lobby the European Commission for external trade protections. It also reveals the Commission’s commitment to consulting and supporting the collective position of the European auto industry’ (Ballor, 2023, p. 319). These analyses are based on European public archives. Cross-referencing those with industry archives and examining the application of the agreement in the 1990s reveal that the victories the firms seemed to have won were in fact very relative and superficial, as they were based on non-documents. The EEC–Japan agreement shows above all the power of the Commission, whilst the

⁴³PSA, DOS2008AD-09675, PSA’s minutes of Jacques Calvet’s meeting with Guy Crauser, Deputy DG of DG III, 15 December 1995.

industrialists, who are divided, struggled to influence the decision-making process (Milor, 2021) and belatedly realized that they had been given very weak guarantees.

Preventing Protests

As the EEC–Japan agreement was particularly ambiguous, no-one was able to challenge it in the 1990s – neither the manufacturers, nor the governments. The use of non-documents limited protests, as it was difficult to challenge something that did not really exist. Denying the materiality of the agreement has helped the Commission to keep its secrets to avoid open criticism from Member States, the European Parliament and the media. It was also a way of remaining discreet with regard to the GATT and escaping the oversight of the Court of Justice. Nevertheless, the Court took a close interest in the affair at the request of BEUC, the European consumer association. In September 1991, BEUC asked the Commission to open an investigation into the cartel between British and Japanese manufacturers, which had set a quota in the UK since 1975. The Commission refused to do so on the grounds that the EEC–Japan agreement concluded a few weeks earlier put an end to the cartel, replacing all national quotas with a European quota. BEUC considered that there was no guarantee that the cartel would end, especially since it only knew about the agreement from the public statements of Andriessen and Nakao: whilst the end of the French, Italian, Spanish and Portuguese quotas was evoked, the British quota was not mentioned – precisely because it was a cartel. In April 1992, the National Consumer Council (NCC), a British member of BEUC, complained to the Department of Trade and Industry ‘about the secrecy surrounding the agreement and the lack of public information on its terms and likely impact’.⁴⁴ NCC and BEUC brought an action against the Commission before the Court of First Instance in May 1992, contesting its decision not to open an investigation into the cartel in the UK. The reason why the Commission refused to open an investigation was not to protect this cartel but to avoid revealing the secret ambiguities of the EEC–Japan agreement: it ‘was obviously anxious not to endanger the fragile consensus reached after long and burdensome discussions with Japanese authorities’, according to the retrospective analysis of the BEUC.⁴⁵ As the Commission was relying on the 1991 EEC–Japan agreement to assert that the cartel was coming to an end, the Court asked to see the agreement. Was the Commission caught in its own trap?

The Commission provided the two public statements of Andriessen and Nakao delivered on 31 July 1991 (as well as the notification to GATT), that is, nothing more than the information given to the press. The Commission representative explained in Court that it was materially impossible to provide other elements because no other documents existed: ‘the commercial consensus concluded between the Community and Japan was not recorded in writing’.⁴⁶ The Commission did not hesitate to intentionally lie to the Court: the agreement had in fact been put in writing. Neither the ‘Elements of Consensus’, nor the ‘Internal Declaration of the Commission’, nor the ‘Concluding Statements’ written during the last phone call were transmitted to the judges. Even if the NGOs and the judges were not fooled, the informality of the documents facilitated the Commission’s refusal to transmit them.

⁴⁴BEUC, Letter from NCC Director to Department of Trade and Industry, 7 April 1992.

⁴⁵BEUC, Monique Goyens, ‘A historical European Court of First Instance decision, the SMMT/JAMA case’, April 1994.

⁴⁶T-37/92 BEUC and NCC v Commission of the European Communities ECLI:EU:T:1994:54, para 59.

Keeping the negotiated elements secret was all the more important for the Commission as the agreement was already being contested. In the protectionist clan, Jacques Calvet (PSA), backed by the French government and increasingly supported by other disillusioned CEOs such as Giorgio Garuzzo (Fiat), had not laid down arms. In the liberal camp, several members of the British government argued that the UK should not wait until 1999 to become a totally free market and, therefore, criticized the ‘Elements of Consensus’, which provided for restrictions on Japanese sales during the transitional phase for those countries that had a quota before 1991 (France, Italy, Spain, Portugal and the UK). To avoid compromising the agreement, ‘the Commission refused to reveal the details of the EEC–Japan Consensus, invoking the confidentiality of the file, although it readily admitted that “the essential content of the consensus was nevertheless well known”’.⁴⁷ But this was not really the case. That is why the Parliament, which had been excluded from the negotiations, was insisting that the Commission report back. And at this time, the Maastricht Treaty signed in 1992 had increased the power and the legitimacy of the Parliament. The extreme right-wing MEP Bruno Gollnisch, a member of the delegation dealing with Japanese issues, confronted the Commission in April 1993: ‘The July 1991 EEC–Japan agreement on motor vehicle imports was only an exchange of letters. The April 1993 agreement is only available in the form of a press release.’⁴⁸ At least this is the only information currently available to a member of the European Parliament delegation responsible for relations with this country. [...] What information will the European Parliament receive on this subject? What role will it have in the conclusion of this agreement?’⁴⁹ The Parliament had no role in it: the Commission had chosen to avoid the Parliament, from the beginning of the negotiations and all along the implementation of the agreement.

The judgement of 18 May 1994 sounded at first glance like a victory for NGOs. The Court reduced the EEC–Japan agreement to ‘an unwritten commitment, purely political in import and not made within the context of the common commercial policy’.⁵⁰ As the EEC–Japan agreement had no legal force, the Court said that the Commission could not guarantee the end of the cartel in the UK by referring to it. Its institutional and material basis was too weak as it was merely an oral compromise. It represented a ‘major victory’ for the consumer associations who managed to attack an agreement described as a ‘sacred cow’.⁵¹ They felt they had won against the Commission like David against Goliath: ‘So much weight has been thrown about the utter importance of this agreement, that it would be iconoclastic to put its superiority in question’.⁵² Above all, the Court went further: ‘The Court of First Instance clearly intended to take the opportunity of this case to call the Commission to order with respect to its role and competencies in international agreements’.⁵³ Although the Commission is authorized to negotiate trade agreements with a third country, Article 113 of the EEC Treaty stipulated that it was exclusively for the Council to conclude them. The Commission had neither received a mandate from the

⁴⁷ BEUC, Report of the public hearing at the Court of First Instance of 8 December 1993, 20 December 1993.

⁴⁸ Reference to the last negotiation between the Commission and MITI for the 1993 quota. A quota was set every year until 1999.

⁴⁹ HAEU, PE3, Question No. 162 (H-0470/93) by Bruno Gollnisch to the Commission, 1 April 1993.

⁵⁰ T-37/92 BEUC and NCC v Commission of the European Communities ECLI:EU:T:1994:54, para 59.

⁵¹ BEUC, ‘Major victories for consumers on cars’, *Newsletter BEUC*, No. 10, July 1994; Monique Goyens, ‘A key ruling from the ECJ’, *Consumer Policy Review*, No. 4, October 1994, pp. 221–225.

⁵² BEUC, Monique Goyens, ‘A historical European Court of First Instance decision, the SMMT/JAMA case’, April 1994.

⁵³ BEUC, Monique Goyens, ‘A key ruling from the ECJ’, *Consumer Policy Review*, No. 4, October 1994, pp. 221–225.

Council nor submitted the agreement to its vote. The Commission justified itself by saying that ‘it was not an official agreement for the purposes of Article 113 of the EEC Treaty, but rather a political commitment’.⁵⁴ Another problem was that the EEC–Japan agreement did not put an end to practices that disrupted the market law: the Commission took over their management for a transitional phase. The Court intended to preserve the supremacy of the law in matters of political decisions: ‘The competition rules contained in the EC Treaty may not be set aside by a secret arrangement of public authorities, otherwise the Community would not be any more a legitimate legal order’.⁵⁵ The Court clearly intended to act as a political force here (Terpan and Saurugger, 2020). Competition law could not be a simple instrument of industrial and commercial policy, only applied when it served the Commission’s political interests and ignored when it interfered with its plans.

Even though the Commission was called to order, it still appeared powerful after the verdict. In many respects, the Commission got away with a somewhat legally questionable double-cross. By acting outside the law and official decision-making processes, it reached a secret agreement without the support of the Member States, refused to report to the Court and MEPs and temporarily suspended competition law in favour of its political agenda (Budzinski and Kuchinke, 2012). The judgement had no concrete impact: despite being forced to investigate the cartel in the UK, the Commission managed to keep the EEC–Japan agreement secret by not revealing it to the Court. Even if the agreement was in many ways a ‘non-agreement’, even if it had no legal value, this did not make it any less powerful. Despite attempts to challenge the ‘Elements of Consensus’, they were implemented and led to the liberalization of the European automotive market at the end of 1999.

Conclusion: Non-Documents and European Governance

This article contributes to increasing debates on informal European governance and the EU’s democratic deficit (Kleine, 2018; Michel, 2008; Reh, 2014). There has been a fundamental discrepancy between the crucial importance of the automotive issues dealt with by the Commission and the informality with which it did so. Through the non-documents, the Commission has pushed for the definition of industrial policies in line with its expectations for the European integration. The ‘non-documents’ have clearly contributed to the political leadership of the Commission (Verdun and Tömmel, 2019). If the existence of an ‘informal governance’ of the European institutions is no longer to be denied, the use of ‘non-documents’ reveals even more ambiguous practices, at the crossroads of the formal – putting things in writing – and the informal – denying the real existence of these writings. Recent studies underline that informal decision-making in the Council is so common that it is almost institutionalized (Heisenberg, 2005; Novak, 2017). The EEC–Japan agreement demonstrates that there are also solutions that have been cobbled together in a highly original way, outside of any written or even tacit rules.

The Commission used non-documents because they had several advantages. First, non-papers are used to formalize proposals whilst avoiding the fixed and formal character of the written document. It gave the Commission the opportunity to try things out without

⁵⁴T-37/92 BEUC and NCC v Commission of the European Communities ECLI:EU:T:1994:54, para 59.

⁵⁵BEUC, Monique Goyens, ‘A historical European Court of First Instance decision, the SMMT/JAMA case’, April 1994.

committing itself too much. It had little to lose (if the non-paper was poorly received, then it would remain a discussion paper) and much to gain as the non-paper could become the basis for negotiation. The non-paper of February 1990 was in a certain way efficient because its ‘failure’ legitimized the absence of a mandate. Moreover, the hybrid character of the EEC–Japan agreement made it possible to negotiate the impossible. By combining documents with ambiguous status, the Commission maintained contradictory positions and gave governments and industry guarantees that were not there. Contrary to appearances and what has been written, the influence of the car lobby in this affair should be considerably relativized. Using private archives in addition to public ones and studying the implementation phase of the agreement reveal the negotiation phase in a very different light. Not only did all documents have no legal value, but some of them had no moral value in the eyes of the Japanese. The Commission was moving away from the field of soft law, which is largely based on the moral persuasive commitment of the parties (Andone and Coman-Kund, 2022). The Commission blurred the lines by mixing unilateral decisions and bilateral negotiations, in order to artificially resolve the dissensions between the Member States, assuring each that its wishes had been respected. In this respect, the non-documents contribute to the debates on the practice of ‘consensus’ as a recurrent mode of informal governance of the EU (Urfalino, 2007). Stephanie Novak (2017) spoke of a ‘paradigm of informal decision-making’ (p. 99) to underline this regular practice and qualified the idea that the so-called ‘informal’ decision escapes the rules and threatens democracy. However, the so-called ‘EEC–Japan consensus’ was not consensual, neither between the European States nor between the Commission and the Japanese. The press ironically referred to the ‘Elements of disagreements’ after the public statements of Andriessen and Nakao.⁵⁶ The objections were deep, multiple and noted by the parties involved for months, right up to the final phone call between Brussels and Tokyo, which clarified the disagreements more than it finalized the agreement. In 1997, the French government affirmed about what it called a ‘non-agreement’ that ‘if it had been submitted [to the Council], it would not have been approved’.⁵⁷ The Commission therefore labelled this informal decision-making as ‘consensus’ even though there was no consensus at all. In this respect, the governance of the EU was truly informal: it fully escaped the unwritten rules brought to light by political science to qualify the informal nature of decision-making and the lack of transparency. The EEC–Japan agreement is not so much a case of soft law that leads to compromise (Abbott and Snidal, 2000), as a case on the margins of soft law, where compromise is forced and artificially obtained.

There are many reasons why the most critical governments, such as France, did not take legal action against this arrangement. Member States have delegated more and more powers to the Commission and the Court of Justice (Pollack, 2003). Japanese exports in the 1990s were substantially lower than governments and industrialists feared at the time of the negotiations. Whether at the time of the agreement or during its deployment in the 1990s, the Member States and industry faced uncertainty and discovered the hidden aspects of the decisions taken by the Commission as and when they were implemented. Even top Commission officials were not entirely sure of the arrangement, such as François Lamoureux, a close adviser to Jacques Delors. All his memos suggest that he believed in

⁵⁶‘Car sales accord light on consensus.’ *Financial Times*, 23 September 1991.

⁵⁷PSA, DOS2008AD-09675, Minutes of the January 8 lunch at the Ministry of Industry, 15 January 1997.

the application of the annexed documents. Manufacturers and governments were also convinced that they were protected by these documents. When they understood that these protections would not be applied, it seemed too late. Besides, how could such an informal agreement be challenged? There was a profound imbalance between the actual importance for Europe of the 1991 agreement and the near nullity of the traces or productions available to the actors to refer to it. This is the last and huge advantage of the non-documents: they were difficult to contest in court, as they were hybrid, informal, unofficial and, above all, unavailable. By making the 1991 agreement a ‘non-agreement’, a ‘political commitment’, a ‘compromise’ and an ‘arrangement’, the Commission achieved two feats: on the one hand, it circumvented the rules of the Treaty by concluding an agreement with Japan in place of the Council, and, on the other hand, it limited disputes by arguing that the consensus was purely oral and that it was therefore incapable of providing it, even to the Court of Justice.

In short, DG III and DG I conducted policies through non-documents because they were a powerful tool to achieve the purposes of the Single European Act and framed a European industrial policy. In order to do this, this agreement on a temporary quota was in contradiction with competition law (Rollings and Warloutzet, 2020). This underlines the imbalance within the Commission between the different DGs: DG III in charge of industry largely dominates automotive issues to the detriment of DG IV in charge of competition. It is a few very high-ranking officials from DG I and DG III who were powerful in this affair and not the whole Commission (Hartlapp et al., 2014). They did everything they could to ensure the success of the Single European Act: erosion of the Council’s power, secret negotiations, false guarantees given to governments and manufacturers, non-consultation of consumer associations and refusal to communicate with other European institutions, namely, the Court of Justice and the Parliament, which represents the citizens. Should it be considered that the non-documents are an illegitimate instrument that allows a few decision-makers to free themselves from the law – that is, a practice that reinforces accusations of democratic deficit and Euroscepticism (Leruth et al., 2017) – or should it be considered rather as an operational tool for developing Europe in a globalized environment, useful to overcome deep paralysing dissensions in the name of a supranational interest? There is no doubt that the EEC–Japan agreement shows that the Commission, which of course does not legally have all the powers, was nevertheless a particularly powerful institution because of its ability to operate on the margins or outside even the softest legal frameworks.

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