Efficient and Democratic Governance in the European Union

Beate Kohler-Koch and Fabrice Larat (eds.)

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CONNEX – Network of Excellence
University of Mannheim
Mannheim Centre for European Social Research (MZES)
68131 Mannheim, Germany
Tel: ++49 621 181 2840
Fax: ++49 621 181 2845
http://www.connex-network.org
http://www.mzes.uni-mannheim.de

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Editors

Beate Kohler-Koch is Professor em., former Chair for International Relations and European Affairs at The University of Mannheim, project director at the MZES, Mannheim and since 2008 ‘Bremen Distinguished Professor’ at the Bremen International Graduate School of Social Sciences. She was coordinator of the Network of Excellence ‘CONNEX’ on ‘Efficient and Democratic Governance in a Multi-level Europe’. She has published widely on European integration and EU governance. Her most recent publications include Debating the Democratic Legitimacy of the European Union, Lanham: Rowman&Littlefield 2007, (with B. Rittberger); Changing Images of Civil Society. From Protest to Governance, London: Routledge 2008, (with B. Jobert)

Fabrice Larat was Network Manager of CONNEX and is now director of the Centre of Expertise and Research of Public Administration (CERA), École Nationale d’Administration, Strasbourg. His recent publications include Interkulturelles Forschungsmanagement. Ein Wegweiser für die internationale Projektarbeit, Karlsruhe: Steinbeis-Europazentrum 2009 (with S. Cullmann and J. Loeffler); ‘Squaring the circle: the intricate participation of the research community into the development of the European research area’ in D. Jansen (ed.), Towards a European Research Area?, Baden-Baden, Nomos Verlag 2009; ‘Aufarbeitung der Vergangenheit und Zivilisierung Europas’ in C. Joerges, M. Mahlmann & U. Preuß (eds), ‘Schmerzliche Erfahrungen’ der Vergangenheit und der Prozess der Konstitutionalisierung Europas, Wiesbaden, VS Verlag 2008.

They jointly edited European Multi-level Governance: Contrasting Images in National Research, which will be published by Edward Elgar in 2009.
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Introduction

Beate Kohler-Koch and Fabrice Larat
MZES, University of Mannheim

“Efficient and Democratic Governance in the European Union” was the topic investigated by the international research project CONNEX during the four years (2004-2008) of its life time. Multi-level governance stands for the high interdependence of political responsibilities executed at regional, national and European levels in close collaboration of public and private actors. Efficiency and democratic legitimacy are not easily attained since multi-level governance incites complexity. Furthermore, governance with stakeholders and civil society by-passes established mechanisms of representation and blurs responsibility. Democratic representation and accountability, however, are the very foundation of legitimate governance.

The papers contained in this volume were presented at the network’s Final Conference which took place at the University of Mannheim on March 6-8, 2008. The plenary sessions were dedicated to the core issues of the CONNEX governance research: (1) Institutions and instruments for efficient EU governance, (2) Accountability and representation in a multi-level system and (3) Civil society involvement, social capital and interest intermediation.
The aim of the conference was to provide a synthetic picture of the accumulated knowledge arrived at in the many network projects. The papers are the result of a long process of research collaboration and reflect the intellectual stimulus scholars gained from integrating research in small work-packages, the larger ‘Research Groups’, and last, not least in cross-cutting workshops, ‘Thematic Conferences’ and ‘Wrapping-up Conferences’.

Consequently, the present volume can be read as a summary of the CONNEX findings. It assembles longer essays on selected subjects together with shorter contributions which report on research accomplished in the different fields and summarise core publications. The first chapter presents the multi-facet aspects of EU governance which have been on the research agenda of CONNEX scholars and highlights the main findings of the six Research Groups. This report and the subsequent chapters give a taste of the size – and as we see it – the quality of the research output of CONNEX.

The structure of the book

Part I of the volume is dedicated to the institutional architecture of multi-level governance and to the scope and channels of transformation dealt with by Research Group 1. Morten Egeberg argues that European history has never experienced such a sudden and deep transformation of the ‘executive order’ as in recent years of EU integration. The Commission has emerged as a separate executive centre. Increasingly it engages national bodies responsible for the application of EU legislation as ‘partners’ and thus induces them to act in a ‘double-hatted’ manner, i.e. “as parts of national administrations and as parts of a multilevel Union administration”. Resulting frictions have provoked national governments to respond with administrative reforms to safeguard coherence and control so that trans-national administrative integration is not a one-way street. Rather, as Egeberg notes, the emergence of a new executive order does not seem to have replaced the former order and
executive orders co-exist in Europe. Hussein Kassim highlights the many contributions of Research Group 1 scholars that have enriched our knowledge on the diverse institutional and organisational factors which support the centrality of the Commission. Research has focused on the important but mostly neglected inner workings of the organization: the availability and mobilization of organizational resources, the extent of the Commission’s organizational independence; the exercise of leadership, management, and coordination both within the Commission’s own administration and in relation to other organisations; the identity of officials and their socialisation experiences and last, not least the processes by which the Commission defines its preferences. Another central focus of Research Group 1 was on the domestic impact of EU level institutions on respective structures, political processes and policies in the member states. Christoph Knill gives a critical account of the well known deficits of the concept of ‘Europeanization’ and suggests being more specific about the channels through which the EU impacts on domestic policies.

In Part II, three authors put the flexibility of governance through new instruments, which were a core issue in Research Group 6, under scrutiny. Renaud Dehousse reviews empirical evidence based on the data generated by the Observatory of European Institutions at Sciences-Po and concludes that the alleged end of the ‘Community Method’ may be “a death too early foretold”. The EU has adjusted smoothly to the new challenges of an enlarged membership and a widening of competence by experimenting with a mix of different modes of governance so that the alleged demise of the Community Method and the opposition between old and new modes of governance is not to the point. Charlotte Halpern critically examines the co-existence of ‘old’ and ‘new’ policy instruments with specific attention to the political dimension. She argues that “every policy instrument entails a condensed and finalised form of knowledge about social control and ways of exercising it”. Consequently, the choice of policy instruments is not just
determined by functional efficiency but always has a political component so we should be aware of effects such as avoiding public debate and obscuring political accountability. Based on empirical evidence from environmental and urban policies she demonstrates how the choice of instruments is not neutral but affects the openness and inclusiveness of the policy process and presumably also the policy output. Thomas Conzelmann gives a systematic review of the emergence of co– and self- regulation at EU level and explores the conditions under which private actors agree to engage in these new forms of EU governance and under what conditions the Commission resorts to regulatory threats and when it rather entrusts private actors with attaining Community goals. He draws the theory based contours of a likely ‘new public private divide’ and of the potential gains and draw-backs in terms of efficiency and political legitimacy. Mark A. Pollack not only comments these three papers but adds additional insight from data he and his colleague recently collected from the Commission’s Eur-Lex database on the growth of the *aquis communautaire* adopted through the traditional Community Method. His findings confirm Dehousse in so far as their data also suggest that the EU remains an active regulator with a continuous though varying growth of legislative output in distinct policy fields and a co-existence of the Community Method with new forms of governance. From his perspective this co-existence is a promising area for future research since selected case studies already suggest an incorporation of both modes of governance.

Papers presented in Part III of the volume take up the main issues discussed in Research Group 2. Deirdre Curtin highlights conceptual achievements and research findings. Multi-level governance brings a challenge to democracy not just at the EU level but also at the national level and in the inter-actions between the two. Since competing normative theories of democracy and the experience with divergent democratic constitutions make it difficult to arrive at a common understanding of ‘democracy’, the group decided to focus on accountability as a key
Introduction

‘organizing principle’ of democracy. The conceptual debate between law and political science generated a working definition, elaborated by Marc Bovens, which did not only help to operationalise empirical studies but also to capture the problems of accountability in comparative perspective. Empirical investigations put the practices of accountability of the comitology committees under scrutiny and also explored the balance between autonomy and control of the ‘non-majoritarian agencies’ in the EU system. In her contribution Carol Harlow forcefully makes the point that in order to achieve accountability in the EU, “we need to replace the model of levels with a network concept of accountability that can match and outstrip the apparatus of network governance”. Yannis Papadopoulos takes up the issue and calls for the ‘complexification’ of controlling institutions to match the complexity of the EU decision making system. He argues that a “cartography” of all possible accountability relations and mechanisms would be necessary to adequately deal with the problem of accountability in Europe’s multi-level governance. In his view the EU is an ideal laboratory to analyse the diversity of accountability relations and their change over time. However, a better understanding of the processes and the mechanisms of accountability will only help to assess the democratic legitimacy of EU governance when we conceptually link accountability and democracy. Antje Wiener presents a theoretically elaborate and empirically validated argument that runs counter to widespread assumptions concerning the spread of global norms and the internationalisation of norm oriented behaviour through socialisation and learning. In her approach cultural validation is a key element in dealing with norm conflict in inter-national encounters. Consequently, norm contestation increases when practices and principles of governance as it is the case in the EU move out of the nation-state context because it implies a decline in „overlapping cultural validation of the interpreters”.

Contributions in Part IV present some core findings of Research Group 3 aimed at assessing the political legitimacy of the EU. Jacques Thomassen takes
up the issue of representation and how the enlargement in 2004 has affected patterns of voting behaviour, the policy congruence between the electorate and Party Groups in the European Parliament and the composition of the EU party system. The empirical findings give evidence of continuity rather than change. It still holds that the process of political representation is deficient but produces an outcome that mirrors fairly well the left-right divide of the electorate on main policy issues. What's more, the existing party system incorporated the parties from the new member states without difficulties and the distinctiveness of the party groups was not seriously affected. From these findings Thomassen concludes that the 2004 enlargement did not have the detrimental effect on the system of political representation as often assumed which, however, constitutes only one dimension of the political legitimacy of the EU. Michael Marsh examines the continuing relevance of the depiction of the European Parliament elections as ‘second-order national elections’ in spite of the grown influence of the EP, the impressive range of EU competence and the enlarged membership. The empirical findings are telling: EP elections give support to parties not in national governments. From the data we can conclude that neither electoral turnout nor a change in party preference is a function of attitudes on or experience with the EU or the EP. Media coverage of EP elections support the second-order phenomenon since EU issues attract little attention and the elections are depicted as unimportant, ‘boring’ and producing only low turn-outs.

Part V on “Civil Society, Social Capital and Interest Intermediation” includes contributions emanating from two research groups. Whereas Research Group 4 concentrated on the changing nature of interest representation and the promises of civil society involvement in EU governance, Research Group 5 set out to explore the alleged unequal distribution of social capital across Europe and the likely consequence for the active participation of citizens in the multi-level EU system. William Maloney reports on key questions and main findings some of which are running
counter to conventional expectations. For example, the social capital model would predict that members of voluntary associations would be far more inclined to engage with and have confidence in the EU but this is exactly the group of citizens which fare below average. It also turns out that civil society organisations are hardly a place of European social interaction; they are heavily influenced by national elites who are living under the tension that exists between acting as an efficient partner in governance and a responsive and accountable representative of grass-roots interests. An equally sobering view is presented by Jan van Deth in his search of the “good European citizen”. He argues that a certain level of congruence on what constitutes a “good citizen” between policy-makers, civil society associations and citizens is indispensable to further the improvement of democracy. The analysis brings to light a factual gap in actors’ expectations. Above all, the EU policymakers’ desire to integrate citizens more intensively in democratic decision-making processes and to see civil society organizations as an activator of citizens’ engagement does not match with the political preferences of citizens. In her contribution on participatory governance Beate Kohler-Koch investigates the alleged democratic virtues of civil society involvement in EU policy-making. Under the pressure of providing more in-put legitimacy the Commission has developed a consultation regime that explicitly invites the participation of civil society organisations. The pledge to the principle of participatory democracy and the introduction of new norms, rules and instruments of consultation has lowered the threshold of access and voice, but the new approach has not changed the fundamental character of EU governance. It remains a Brussels based elite system though the widening scope of pluralism helps to avoid the domination of singular interests. In his comments Dario Castiglione raises a number of pertinent questions that encourage further conceptual debate and empirical research on the appropriate role ascription of civil society in the context of multi-level governance. Carlo Ruzza on his turn draws attention to the ideology of civil society and the many reasons
why it finds so much political currency in Brussels. Furthermore, he argues in favour of not just looking at civil society from the perspective of providing legitimacy for European governance but also as element in the social regulation of European societies.

The Final Conference was not just meant to synthesize and present research findings from the preceding four years but also to take a look ahead and put the governance debate in a broader perspective. In Part VI Sverker Gustavsson presents his ideas that paved the ground for the Panel Discussion at the Final Conference on the future options of “The Living Constitution of the EU”. He confronted the panellists with the hypothesis that, first, the tension between capitalism and socialism and, second, the tension between supranationalism and nation-state autonomy give life to the real constitution of the Union. This raises a factual and a normative question: What is the actual constellation and are we willing to accept it or do we strive to restructure the living constitution of the EU? The debate was lively thanks to the participation of prominent proponents of the three main positions which Gustavsson defined as follows: (1) “Our founding fathers made a historical mistake, which can be gradually repaired through deliberate politicisation in terms of left and right” (Simon Hix), (2) “our founding fathers created something historically admirable, and there is nothing to worry about” (Brigid Laffan), “our founding fathers made a historical mistake; the appropriate response, however, is extreme constitutional caution, which is necessary if devastating outbreaks of right-wing populism are to be avoided (Stefano Bartolini; Fritz W. Scharpf).

In her keynote speech at the Final Conference Alberta M. Sbragia drew attention to the tension between government and governance. She argues that the transformation of public administration in many of the old EU member states may have been a structural precondition for the emergence of public-private governance as we see it today and for the dissemination of the governance concept within the EU. Since the emergence of a system of
“distributed public governance” has quite evidently implications for the interaction with private actors, she advocates studying more closely the intersection of government and governance.

Conclusion

Instead of presenting our own conclusion we would like to refer to the summing-up statement of Brigid Laffan at the Final Conference. She applauded the maturity of the discussion and the achievements of the different research groups in developing further concepts and issues and generating new empirical knowledge. She also reminded the audience of the many still unresolved puzzles. In this sense we agree with Deirdre Curtin (in this volume): “We are at the end of the beginning, not the beginning of the end in terms both of the conversation, the concepts and the empirical focus.”

The current volume is the last of a series of nine in total. We would like to close this online CONNEX Report Series with expressing our gratitude to all those who have contributed to make it a success. Above all we want to thank the editors and the authors who have enriched the CONNEX publications and helped to disseminate rapidly research results to a broad public. Last, not least our thanks go to Stefanie Edler-Wollstein, Thomas Schneider and Oliver Schommer for unflagging support in language editing and the technical production of the volumes.
Notes

1 The full programme is available at http://www.connex-network.org/final-conference/

2 Research was organised in 6 Research Groups: RG1 “Institutional Dynamics and the Transformation of European Politics” (Morten Egeberg, University of Oslo), RG2 “Democratic Governance and Multi-level accountability” (Deirdre Curtin, University of Utrecht); RG3 “The Citizens’ Perception of Accountability” (Michael Marsh, Trinity College Dublin); RG4 “Civil Society and Interest Group Representation in EU Governance” (Beate Kohler-Koch, University of Mannheim); RG5 “Social Capital as Catalyst of Civic Engagement and Quality of Governance” (Frane Adam, University of Ljubljana); RG6 “The Transformation of the European Policy Space” (Renaud Dehousse, FNSP, Paris).

3 For more information on the Thematic Conferences and the Wrapping-up Conferences see http://www.connex-network.org/final-report/
In order to do justice to the complexity of EU governance, research was organised in six Research Groups each approaching the ‘problematique’ of efficient and democratic multi-level governance from a different perspective. Researchers addressed the institutional architecture of the EU system as well as the nature and effects of old and new instruments of governance. They put the ways and means of enhancing democracy in the EU system under scrutiny and examined the gains and challenges of civil society participation. By bringing together a multi-disciplinary and multi-national group of scholars the diversity of approaches came to the fore and added to a highly differentiated picture of the European governance system. The productivity of CONNEX is manifest in an impressive publication output. The richness of research findings is visible in the summary reports of the individual Research Groups which are documented in the second part of this chapter.
The CONNEX contribution to the academic debate

Even though leading scholars in the field have attested CONNEX to already have an imprint on the academic debate, it is still too early for a validated “impact assessment”. Only in the long run it will become manifest whether new insights have spread beyond the network or even have become common knowledge and whether shifts in methodology and theoretical conceptions emanating from CONNEX inspired subsequent research. For instance we have to wait and see if scholars will expand on the de-mystification of the New Modes of Governance and heed the advise to engage in a regular dialogue between policy studies specialists and scholars working on issues of politics and accountability to better assess the efficiency and democratic legitimacy of different modes of EU governance.

Furthermore, we have to look for the spreading of research questions and concepts. For example, will the academic community take up on the ‘normalisation’ of the Commission as a core executive and further investigate how the sectorisation of executive politics transcends levels of governance? Will they operate with the concept of ‘double-hatted agency’ to better grasp the role of national agencies in the emergent European administrative space? Will they follow the proposition that we should not be content with proxies such as ‘access’ and ‘inclusion’ to measure influence but aim at scrutinizing the capacity of different actors to have an impact on policy outcomes? And will the suggested methodological approach stand hold against critical evaluations? CONNEX was very much occupied with the normative implications of EU governance. Accountability in multi-level, network governance was a core issue and sustainability would suggest that the consensus definition arrived at in Research Group 2 would spread beyond the community of CONNEX researchers. It can also be expected that the pragmatic research strategy developed in CONNEX will be followed that is to transform the different conceptions of democracy into a number of
empirically identifiable "yardsticks" that can be used for assessing the
democratic credentials of EU governance.

Apart from conceptual input CONNEX has added to our empirical
knowledge and paved the ground for a review of some conventional wisdom
concerning the EU. CONNEX research has displayed that the development
of new modes of governance does not announce a demise of the Community
method. It is applied today in a larger number of areas than fifteen years ago
and there has been no substantial decline of the volume of legislative
initiatives, even after the enlargement. Legal integration has not stopped,
even in areas where the need for diversity is acutely felt, such as social policy.
Furthermore, for the assessment of democratic representation it is important
to know that many worries set off by the accession of the twelve new
member states are unfounded. It is well documented now that enlargement
did not markedly increase the heterogeneity of the European electorate nor
did it undermine the functioning of EP elections or the operation of party
groups in the EP. It also did not affect the cohesiveness and distinctiveness of
the EP groups on either the left-right or the EU dimension. Even where old
and new member states differ as it is the case in accepting the consequences
of European citizenship, the support of European unification or with respect
to mutual trust such differences may not be long-lasting since attitudes can
well be explained by utilitarian considerations and, consequently, will change
with benefits gained from the EU.

Whereas on balance the conditions for elections, parties and the
working of parliaments look brighter than expected, CONNEX dampened
the hope that civil society and NGO involvement in EU governance may
redress the democratic deficit of the EU. Notwithstanding all the efforts to
widen participation by lowering the threshold of access, by increased
transparency and support given to weak interests, the Commission’s new
‘consultation regime’ did not level out unequal representation, neither in
terms of types of interests nor in relation to territorial origin. All in all, the
prospects for a more effective engagement of civil society in EU governance are bleak. Empirical evidence underscores that civil society organisations have a very limited capacity to enhance meaningful political linkages between the EU and its citizens. The readiness to engage with the EU is relatively weak exactly among the group of citizens that the social capital model predicts would be highest – members of voluntary associations. Consequently, bottom-up engagement that reaches up to the EU level is unlikely to emerge. The professionalization and bureaucratization of NGOs appears to be inevitable if general interests are to be voiced effectively and thus the ‘iron law of oligarchy’ may be confirmed once more. Sustainability would be achieved if future research would engage in comparative studies to scrutinise the transformation of NGOs when operating in the multi-level system of the EU.

A more detailed picture of the research resulting from the six Research Groups is presented in the following paragraphs.

**Main findings by Research Groups**

For the Final Conference each Research Group Coordinator produced a synthesis of the research results emanating from the many joint activities.

**Institutional Dynamics and the Transformation of European Politics**

*(Morten Egeberg, ARENA, University of Oslo)*

RG1 research has centred on the question how the executive branch of government actually works in a multi-level system like the European Union. Against this background, one team has examined how institutional and organisational features of EU executive bodies and their inter-institutional arrangements might impact on politico-administrative behaviour (policy-making and -implementation). A key concern was to understand the
institutional/organisational conditions under which executive behaviour might transcend an intergovernmental logic, so that a multi-dimensional pattern of cooperation and conflict emerges. Furthermore, researchers looked at how institutional and organisational features of EU executive bodies themselves change. What are the scope conditions for purposeful reform? Which role does crises, contingent events, path dependence, imitation and intergovernmental bargaining play in processes of change?

Another team has dealt with implementation of EU policies at the national level. In addition, the team has concentrated on the particular conditions created by the EU enlargement. In order to explain adaptation and implementation, it has looked at the role of national administrative traditions/culture, external incentives, administrative capabilities, bureaucratic qualities and attention and motivation among executives.

Executive centre formation at the European level

In dealing with administrative bodies and networks within the EU it turned out to be wise to differentiate more clearly between at least two separate roles that national executives play: When they contribute to the Commission’s policy preparation work and are held responsible for the implementation of EU policies, they, arguably, can be seen primarily as ‘partners’ in the ‘Community (or Union) administration’. When national administrations, on the other hand, participate in the Council’s legislative activities, they are not part of what we reasonably can denote as the ‘Community (or Union) administration’.

We think we see a kind of ‘normalisation’ of the Commission as a core executive over time: the college has clearly become a genuinely political, rather than technocratic body, something which is reflected in its composition, its ever closer relationship to the European Parliament and the recognition of commissioners’ right to also play a party political role (Egeberg 2006; Kassim and Dimitrakopoulos 2006; Cini 2007; Wille 2007). The
services, on the other hand, have been increasingly based on permanent positions filled by persons recruited by the services themselves on a merit basis. *Inter alia*, less interference from the political level in appointment processes and officials’ careers means that the Commission administration has moved closer to the Scandinavian or British model, in contrast to in the past when its continental origin was more visible (Balint, Bauer and Knill 2008; Egeberg 2006; Wille 2007). As in national governments, politics at the Commission seems to be very much politics among departments arranged by sector or function, rather than by geography (Egeberg 2006). Nationality does not seem to explain very much about the Commission officials’ information networks or loyalties (Suvarierol 2008; Trondal 2006; 2007). ‘Normalised’ patterns of executive politics might at least partly be accounted for by organisational factors (such as sectoral and functional specialisation) and inter-institutional dynamics (such as the relationship to the European Parliament), although more research is certainly needed to substantiate the findings.

*Challenges faced by the Commission*

The Commission, however, has to compete with the Council over some executive functions, particularly in the areas of CFSP and ESDP. The part of the Council secretariat dealing with these areas has developed into a more typical executive body than the rest of the secretariat, a development which was partly triggered by external events (Christiansen and Vanhoonacker 2008; Vanhoonacker and Duke 2006). By integrating and coupling policy fields, the Commission might be more capable of ‘keeping its competences’ (Lenschow and Reiter 2007). Contrary to what has often been argued, the Open Method of Coordination (OMC) does not necessarily side-track the Commission: our studies indicate that aspects of the Community Method may invade the OMC, so that in general we cannot speak of an ‘OECDisation’ of the EU in this respect (Gornitzka 2007). On the other
hand, extensive management reforms in the Commission services may lead to less attention available for policy innovation in the institution (Bauer 2008).

“Double-hatted” national agencies – Towards a multi-level Union administration

The peculiar division of labour (at the international level) between the Council of Ministers and the Commission is expected to trigger centrifugal forces within national executives, since the Commission, being in charge of policy preparation and implementation but not having its own agencies at the sub-territorial level, looks out for partners in these respects. Suitable partners may be found among national regulatory authorities organised at arm’s length from ministerial departments rather than among ministries which in a sense belong to the ‘Council pillar’. We, therefore, operate with the concept ‘double-hatted agency’ in order to denote national agencies that may in a sense serve both, national ministries and the Commission (Egeberg 2006). The extent to which ministries or the Commission play a significant role in steering the implementation activities of national agencies depends on several factors; for example, ministries’ and the Commission’s organisational capacity and competencies have been shown to be important (Bulmer et al. 2007; Gornitzka 2008; Martens 2006; 2008; Sverdrup 2006). Agencies in new member states seem to be more receptive to Commission influence, probably due to their novelty in the EU arena (Martens 2008). Also, national agencies, when practising EU legislation, cooperate and coordinate with ‘sister agencies’ in other countries, often in networks. In that sense they are more ‘multi-hatted’ than ‘double-hatted’, although horizontal networks are probably not as important as the vertical relationships with the respective ‘parent ministries’ or the Commission (Egeberg and Trondal 2007). In a similar vein, direct relationships between the Commission and regional authorities, partly by-passing national governments, are observable, not least in regionalised states like Spain (Morata 2007).
Explaining variation in implementation practices

Most students of the implementation of EU policies at the national level do not seem to have taken into consideration the extent to which networks or other ways of organising executive functions across levels of governance make a difference as regards actual implementation. Instead, the centre of attention has been on the role of national administrative traditions. Concerning new member states, the crucial role of external incentives has also been strongly emphasised. Contributions from our group confirm such findings but, they have added new insights on the important role that Commission competences, national administrative capabilities, bureaucratic qualities and attention and motivation among the executives at the national, regional and local level play for implementation outcomes (Bulmer and Burch 2005; Esmark 2008; Fernandez 2006; Knill and Hille 2006; Knill and Winkler 2006; Schimmelfennig and Sedelmeier 2006; Sverdrup 2006). It has also been shown that concerns about one’s international reputation might affect the willingness of governments to comply (Knill and Tosun 2008). Studies of ‘twinning projects’, the practice of seconding experts from experienced member state administrations to new member states, indicate a potential learning effect as regards implementation practices (Tomalova and Tulmets 2007). Thus, twinning can be seen as one of many instruments used in building a European administrative space.

Theoretical lessons

On the theoretical level, Research Group 1 has contributed to our knowledge about how institutional/organisational features, such as the forms of specialisation and organisational capacity, might affect politics and policies. For example, the sectoral and functional structuring of the Commission tends to bring sectoral and functional conflicts to the fore, thus complementing and partly displacing the inherited intergovernmental (territorial) pattern of
executive politics. This is important, since relocating lines of conflict in a political space redistributes power and, thus, eventually affects policy outputs. The sectorisation of executive politics within the Commission also transcends levels of governance by linking up sectoral and functional counterparts of national administrations, as well as of interest groups. In addition, the existence of the Commission as a separate executive body outside the Council (i.e. functional specialisation between institutions) brings in inter-institutional conflicts not found in IGOs, particularly in relation to the Council. Such conflicts do not remain contained at the EU level, either. It has been shown that, due to institutional change at the national level (“agencification”), new patterns of cooperation and conflict among executive bodies across levels of governance take place: thus, while the Council basically “links up” national ministries, the Commission tends to deal with national agencies that are key actors as regards policy implementation and, to a certain extent, also as regards policy preparation.

Democratic Governance and Multilevel Accountability

(Deirdre Curtin, University of Utrecht)

RG2 focused on an enhanced understanding of the nature of the European Union. A pertinent question was if we better compare the EU and its various rule-making processes with what happens in the national contexts and their constitutional and political systems or if it would be more appropriate to analyse the EU as a highly sophisticated international organisation that can be compared to other international organisations. From this comparative perspective the problems of analysing accountability and democracy in the EU multi-level context has been scrutinised. In the beginning it was open to debate if it would be possible to agree on a common definition that would cut across strong national democratic traditions both institutionally and in terms of underlying values. The Research Group was just as engaged in
clearing theoretical concepts and as in advancing our knowledge by empirical analysis: Are notions of democracy and accountability contested when moved beyond the realm of territorial states? How can we best conceptualise ‘accountability’ in order to study it empirically? Is a restricted meaning of accountability helpful in elucidating accountability practices in the EU multi-level governance context? What do we find in terms of accountability practices in the EU multi-level governance context? How does accountability operate in a complex system such as that of the EU? What mechanisms enforce accountability and in what areas are accountability mechanisms problematic?

Understanding the nature of the European Union

The issue of the nature of the European Union is a fundamental question with important implications for the study of these concepts. After all if one views the EU as simply another international organisation (albeit more institutionalised and more inclusive in terms of the scope of the issue areas dealt with) then the discussion on democracy and accountability can be quite different to viewing it in terms of an evolving and autonomous political system. In the international organisation perspective then ultimately democracy is assured through the national political process, supplemented by some weaker forms of politicisation at the European level. Legal and administrative accountability could then be considered ample in terms of this perspective.

The further call for more democracy and accountability stems from the EU’s development into a political union, whose policies go far beyond the original aims of eliminating barriers to cross border economic activities. The EU has evolved over the years from an atypical international organisation to a polity with many state-like features. The EU polity has expanded almost to the point that there is virtually no area of political or social life that is potentially not within its remit. This includes the purely regulatory to the redistributive to almost everything in between. The EU has built up a considerable body of
The Richness of CONNEX Research in a Nutshell

independent policy and regulation in fields like environmental protection, consumer protection, occupational health and safety. In addition, the EU has branched out to include issues such as immigration policies, justice and home affairs and a common foreign and defence policy. The proliferation of activities has strengthened the call for democratic decision-making and democratic accountability of European policy makers.

If the EU is viewed as a political system in its own right, albeit of a special kind, then the issues of democracy, representation, accountability etc. must be discussed and fleshed out at that level as well in relationship with the national level. Yet when we look at the EU and compare it to other political systems in the post-industrial world the most striking point is the absence of politics in the sense of responsiveness in terms of elections, parties and the conventional procedures of popular democracy (Mair, 2007). There are therefore different levels to the so-called democratic challenge: one at the level of the EU political system itself; secondly at the level of the national political system and thirdly the often intricate inter-actions between the two. This description already indicates that there is unlikely to be a single solution for Europe’s democratic challenge at any level since national democracies are not only different but have been affected in critically different ways by ongoing processes of European integration.

Problems of analysing accountability, democracy and legitimacy in the EU multi-level context

Much of the work that has taken place in the context of RG2 seems to implicitly depart from the view that the EU can be analysed in terms of its own political system albeit one that is both multi-level and not fully developed. Issues of democracy and accountability, representation and legitimacy have firmly established themselves at the centre of the debate on the future evolution of the EU. The problem is that in practice concepts such as democracy, democratic accountability, representation etc. are not only
contested at that level but have in practice been filled in a manner that only compares very weakly with national counterparts and national traditions (Wiener 2007). The study of accountability, democracy, representation and legitimacy in the EU context is complicated by the fact that the EU’s member states present an enormous diversity in democratic traditions, both institutionally and in terms of underlying values. This diversity has only increased with the accession of the new member states. Therefore, it is not possible simply to transpose existing democratic institutions to the European level.

In order for a sense of democratic legitimacy to exist it is argued that there must be a basic system of electoral accountability with a match between the level decisions are being taken and the level to which the electorate can in the final analysis hold the decision makers to account (Mair, 2007). This does not exist in the EU. The absence of a real electoral contest fought out on European issues hampers the opportunities of citizens to hold MEPs accountable for their actions. In the evolving political system of the EU it is clear that it lacks the kind of integrated public sphere and civil society that sustain democracy and accountability in the nation states. On the other level, the EU’s institutions fall short of standards of democracy and accountability: popular representation play only a minor role in many policy areas and mechanisms of accountability are not always well-developed. In addition, the EU’s policy making system as well as its political system is not transparent which prevents effective democratic control and accountability.

Solutions to these perceived problems are compounded by the multilevel character of the EU and the diversity of the member states. The EU no longer undertakes activities or attempts problem solving within the formal remit of its formal institutions but also in a host of other looser, often less institutionalised forums, especially (policy) networks (Benz 2007; Papadopoulos 2007; Harlow and Rawlings 2007). In many ways, the EU presents a distinct type of polity when compared to nation states,
characterised as it is by multiple, partly overlapping layers of policy making and multiple points of political access. Moreover political participation in political processes, both at the European level and within the member states is not limited to governments, but also includes non-state actors in civil society and among private firms. This development toward vertical and horizontal networks in EU policy making has given rise to notions of a ‘multilevel’ polity when discussing the EU. The multi-levelness and interconnections between not only formal institutions but also individual actors and networks is an intrinsic part of the manner in which the EU conducts its business. Actors are not nested within one level but cross over into other levels or arenas without there necessarily being any clarity as to their authority or links back to their original level. In other words the degree to which we can sustain our analysis in terms of distinct levels may be open to question.

**How can we best conceptualise ‘accountability’ in order to study it empirically?**

Accountability is a broad term that reflects a range of understandings rather than a single paradigm. Until recently, accountability was not a term in common use, nor did it figure as a term of art outside the financial contexts of accountancy and audit. What can be designated the original or ‘core’ sense of accountability is that associated with the process of being called “to account” to some authority for one’s actions. In the context of a democratic state, the key accountability relationships in this core sense are those between citizens and the holders of public office, and within the ranks of office holders, between elected politicians and bureaucrats. In a delegation model of accountability, relationships are established as a means of carrying out the delegation of tasks and the communication of expectations.

Accountability can be construed as an important organizing principle of democracy resting upon specific standardized procedures. It is as a concept relatively uncontested in the sense that everyone intuitively agrees that public institutions or authorities should render account publicly for the use of their
mandates and the manner in which public money is spent. Accountability forces power to speak the truth, at least in ideal terms. However, its evocative powers make it also a very elusive concept because it can mean many different things to different people, as anyone studying accountability will soon discover (Bovens 2006). Bovens (2006) has defined accountability as a social relationship between an actor and a forum, in which the actor explains his conduct and gives information to the forum, in which the forum can reach a judgment or render an assessment of that conduct, and on which it may be possible for some form of sanction (formal or informal) to be imposed on the actor. The attractiveness of this definition for many of those working on accountability related issues is that it provides a clear procedural and organizational framework with a focus on the relationship between the actor, potentially any actor (including for example actors that can never be understood as agents, such as networks) and an accountability forum, potentially any kind of accountability forum (it can be legal, administrative, financial as well as the more obviously political). In addition it limits the focus of accountability to the ex post and to those mechanisms that provide in some manner for the imposition of sanctions or consequences in a looser, not strictly legal, sense.

The more limited understanding of accountability as a social relationship between an actor and a forum is an excellent way of linking actors, any actors and accountability forums, irrespective of the grand constitutional design. Moreover the fact that accountability is given a precise definition makes it possible to operationalise it in very specific institutional contexts and to study empirically the practices of accountability with regard to various forums (courts, parliaments, auditors, ombudsmen, etc.). Quite a number of those working on accountability in the EU context take the Bovens definition as their point of departure precisely because it enables them to take account of actors and forums that are not necessarily in any delegation relationship (Benz 2007; Papadopoulos 2007; Harlow and Rawlings 2007).
This has been a useful way forward, making it possible to focus how accountability practices are actually institutionalised in practice in the European multilevel polity.

**Accountability practices in the EU multi-level governance context**

The most interesting finding from our work on EU multi-level governance systems relates to the wide variety of actors that can be studied in terms of their relationship as a matter of legal, institutional and empirical practice with a wide variety of accountability forums. They vary from very formal and institutionalised actors to much less institutionalised forums (for example networks). One finding that arose out of the study of the practices of accountability in the context of various EU level actors was that we must not only focus on accountability practices of European level institutions at the level of the EU political system itself but also at the level of the national political systems. National representatives or ‘agents’ are still embedded in hierarchical chains of accountability in the national context although empirical work shows that as a matter of practice national civil servants may enjoy considerable autonomy in organizing their own work and input at the EU level (Brandsma 2007).

But national principal-agent relationships are still in place in a number of national systems and that this part of the accountability equation can in any event not be discounted. As a matter of fact, governments must negotiate on their mandates with parliaments and this is usually done under discretion at the expense of transparency (Auel 2007). Carol Harlow and Richard Rawlings (2007) show that not only courts and ombudsmen institutions play today an important role in ensuring the accountability of rules in multi-level systems, but also that for accountability to operate efficiently this requires the establishment of networks of accountability (enabling exchange of information and cooperation between the EU and the national levels). In addition work carried out in the context of the legal dimension of
accountability highlighted the fact that the concept can also be usefully applied in the context of the international legal order and its multilevel interactions with both the legal order of the EU and national legal orders (Curtin and Nollkaemper 2007; Wessel and Wouters 2008). In addition it is emerging that the EU is developing an autonomous role in defending the rule of law where the international legal order fails to do so, in the interests of individuals whose rights and interests have been affected (as for example is the case with regard to freezing of assets of terrorists legislation adopted by the UN Security Council in the aftermath of 11 September 2001). Our experience has highlighted the need for – and the interest in – even more intense inter-disciplinary collaboration between political scientists and public lawyers of all levels.

Without being able here to systematically review all the interesting results from the work of RG2, the innovative empirical research that was conducted indicated the empirical limits of the classic concept of (democratic) accountability and led the group to a more refined approach on the way accountability operates in what is a complex and multi-level system of governance.

The Citizens’ Perception of Accountability

(Michael Marsh, Trinity College Dublin)

RG3 dealt with key issues of democratic legitimacy in a representative system: political parties and party groups in parliament, elections, political identity and support. Researchers concentrated on data based analyses to explore the effects of enlargement on the cohesion and distinctiveness of European parties and party groups in the European Parliament and also on electoral participation in EP elections. They investigated if the European public sphere meets the necessary conditions for competitive EP elections and to what extend the EP electoral process is structured by EU issues. Another
concern was the identification of European citizens with the EU as a political community and the readiness of citizens to accept the citizens of other EU states as their fellow citizens. Do levels of mutual trust vary over time and across countries? Do they differ significantly different between ‘old’ member states and the ‘new’ member states? And how can one explain variation in citizens’ perceptions of the benefits in the EU?

The effects of enlargement on cohesion and distinctiveness of European parties/EP groups

European Parliament (EP) groups are remarkably distinct and cohesive. They are more distinct than national parties and equally cohesive. The major dimension on which EP party groups are distinct is the left-right dimension, although there are also systematic differences in how party groups position themselves on the integration-independence dimension. Enlargement did not affect cohesiveness and distinctiveness of EP groups on either the left-right or the EU dimension, but big differences exist on libertarian issues. These findings are supported by data pertaining to different political actors (Schmitt/Thomassen 2006).

The impact of enlargement on the heterogeneity of the European electorate

When looking at the distributions of electoral participation, the diversity of the European electorate seems to have increased with the 2004 enlargement of the EU. As a case in point: for the ‘old’ 15 member states in 2004 turnout ranges between 38% and 91%, while the addition of the 10 new member states increases this range to 17%-91% (Franklin 2007). Such a straightforward comparison cannot be made for party choice, as the set of competing parties is unique for each of the member states. Yet, when looking at choices in terms of European Parliament party groups, there are also distinct differences between the ‘old’ 15 and the 10 ‘new’ member states. Voters in the new
member states supported the European Socialists in much smaller proportions than elsewhere.

Similarly, we also find strong differences in terms of other characteristics that are known to be important for electoral participation and party choice: citizens in new member states identify much less frequently with a political party than those in the older member states, etc. (Schmitt 2005). At first sight, then, one might be inclined to say that the 2004 enlargement has increased the heterogeneity of the European electorate (Schmitt 2005). Yet, such a conclusion would be misleading for two reasons. First, such a comparison would –incorrectly – suggest that the ‘old’ 15 and the ‘new’ 10 member-states themselves are homogeneous. In terms of turnout, for example, Cyprus and Malta look more similar to Belgium, Italy and Luxembourg than that they resemble, e.g., Latvia or Hungary, which themselves are more similar to Portugal and France. In all kinds of ways the ‘old’ and the ‘new’ member states are quite diverse groupings which happen to differ on average, but where the internal heterogeneity of each group is so large as to render such averages to be more misleading than informative.

The second reason why we should not conclude that the 2004 enlargement has increased the heterogeneity of the European electorate is that the determinants of electoral participation and of party choice are exceedingly similar across all member states of the Union, old and new ones alike (Van der Brug/Franklin/Tóka 2006). In other words, when comparing citizens in new member-states with counterparts in older member-states we see very little differences between them, if any (van der Brug/Franklin/Tóka 2006). The apparent differences in citizens' behaviour and orientations that are manifest at the surface are the consequence of different historical legacies, of different stages of economic development, and of different forms of political organisation in their respective countries. But they do not indicate that these citizens are of a different nature, or that the factors that determine their behaviours and choices are different.
European public sphere and the conditions for competitive EP elections

The good news is that elections are gaining in visibility in the news, there are more European actors in the news stories about the EP than before. Eurosceptic political parties seem to drive some of this increase so in a sense the conditions for a competitive election are emerging. But it has to be noted that the political cleavages that show up are ‘Europe pro-con’ rather than policy cleavages (De Vreese 2006).

To what extent is the EP electoral process structured by EU issue concerns?

The traditional answer to the first part of this question, embodied in the concept of EP elections as ‘second order national elections’, is ‘not much’. Furthermore, in most EU countries there has been broad consensus about integration between the main parties. There are significant exceptions to the general conclusion, most notably in the case of Denmark. It is also true that in 2004 Euro-sceptic and even outright anti-EU parties won their best results ever. Even so, it was as clear in 2004 as it was in 1979 that the results of EP elections could be predicted very effectively from the national circumstances of the contending national parties (Schmitt 2005). Yet there are ways in which it can be said ‘Europe matters’. First, and most notably, in as much as national competition is, perhaps increasingly, influenced by EU issues then there is an EU influenced structure to national competition which will be reflected in EP elections. There are ways in which EU issues generate conflict which overlap with traditional cleavages: the immigration issue is a case in point. There are also EU issues which may cut across old left right divides, but they, too, can be part of national level competition (Schmitt 2007). Secondly, there is evidence that EU concerns have motivated a minority of voters to switch allegiances between national and EP elections. Finally, it has always been the case that many issues discussed in the EP fall on a more
traditional left right scale and so are reflected in the make-up of parties in the EP (Schmitt/Thomassen 2006).

Enlargement has had some impact on the answer to this question in as much as the parameters of a second order election model seem to be different in the new accession countries, at least taken as a whole. It also seems clear that in at least some of them, the EU issue is a highly salient one for electoral competition. Even so, EP election results can still be predicted reasonably well from national ones (Marsh 2007).

The citizens' identification with EU as a political community

Three indicators were used for European identity. First, the willingness of EU citizens to accept all other citizens of the (enlarged) Union as their fellow citizens and to accept that all EU-citizens are therefore entitled to all rights that come with the citizenship of the Union. A second indicator of an emerging political community is the extent to which people do consider themselves as citizens of the European Union. A third indicator is mutual trust.

In general people from the older member states are more inclined to accept the consequences of European citizenship, i.e. to accept that European citizenship implies equal rights across national borders. However, it is unlikely that this is a direct consequence of the duration of membership. The findings of RG3 suggest that the higher level of economic development and the longer tradition of liberal democracy in Western Europe are a better explanation for these differences (Scheuer/Schmitt 2007). In general the people from the new member states in Central and Eastern Europe are less inclined to see themselves as European citizens than people in the older member states, but this is not a uniform pattern. The differences between some of the founding member states are as large as between any other pair of countries (Thomassen 2007). In Western Europe mutual trust in general is high and has increased over the years but there is little evidence that this is
due to European Union membership. Among the citizens of the older member states trust in the people of at least some of the accession countries, not to speak of (then) candidate countries like Bulgaria, Romania and Turkey is extremely low (Scheuer/Schmitt 2007).

**Citizens’ support of EU institutions**

In contrast to general expectations, trust in European governmental institutions and, in particular, the European Parliament, is higher in the present decade than in the 1990s. Whereas the European Commission and the Council of Ministers faced declining trust between 1993 and 1999, but recovered fast, the European Parliament continuously gained support. However, there is a dramatic drop in trust between the Spring and Autumn of 2004. This development coincided with the Eastern enlargement and the signing of the Constitutional Treaty in Rome in October of that year. In the period from 1993 to Spring 2004, trust in national institutions was higher than in European ones in no more than four of the fifteen member states. From the Autumn of 2004 trust in both national parliaments and the European Parliament increased somewhat whereas trust in national governments increased tremendously. This revival of trust in national institutions is probably due to enlargement and the discussion about the European Constitution.

It seems to be a stable pattern that citizens in the new member states trust European institutions more than do citizens in the old member states. In contrast, trust in national institutions is considerably lower in new than in older member states. Also, since 2004 trust in national governments in the new member states has dramatically declined, making the gap between new and old member states even wider (Thomassen 2007).
The citizens' satisfaction with EU policies

Over time, citizens’ perceptions of benefits from the EU have first risen, then fallen, and now seem to be rising again. This is not simply a consequence of the changing composition of EU or the latest accession wave. In fact, this sort of pattern is characteristic of most waves of accession. There is also no sign of growing diversity in national reactions to the EU (Marsh/Mikhaylov 2008).

In looking to explain these variations we find that utilitarian considerations matter. Direct utilitarian benefits in terms of trade and transfer payments are associated with variation, as are changes in national economic performance, with the EU seemingly rewarded for good times. A very simple, purely utilitarian, model is quite good at explaining the cyclical pattern at an aggregate level. Such an explanation is also consistent across different accession waves (and not only the latest enlargement round). Only two countries prove to be major exceptions to the utilitarian model of support for EU policies. One is the Netherlands, where the gradual disenchantment with the benefits of membership since the early 1990s is not reflected in the underlying material changes. A more striking exception, and the most striking negative result, is the case of the UK. There, support has fallen since the early 1980s, and fallen sharply from the relative heights achieved in the early 1990s. Predictions from the model suggest support should have risen steadily, rather than fallen steadily from around 1993.

Civil Society and Interest Representation in EU-Governance

(Beate Kohler-Koch, University of Mannheim)

The transformation of the European nation state is said to go along with the decline of electoral and party politics and the migration of the ‘authoritative allocation of values’ into policy networks and negotiation systems in which
interest groups and civil society organisations assume prominent positions. Consequently, interest groups and civil society are well established on the social science research agenda but dealt with by different research communities. Furthermore, empirical research was for a long time scattered across disciplinary and policy specific research fields with little cross-cutting intellectual exchange. Therefore, RG4 engaged in a concerted effort to link the debate on the alleged biased representation of interest groups in the EU with research on the promised benefits of civil society involvement in EU governance. RG4 did not shy away from methodological challenges but took up the thorny issue of measuring influence and aimed at making sense of the divergent concepts of civil society and the diverse functional roles attributed to civil society in EU governance. Empirical research concentrated on the Commission’s efforts to enhance democracy by empowering civil society both within the EU and abroad.

Biased representation in the EU

It is a common criticism that the EU is plagued by biased representation and that economic interests enjoy privileged influence on EU policies. But on closer scrutiny there is little agreement on the kind of empirical data that is needed to support or refute the common supposition. If empirical evidence supports the assumption, how do we explain the persistence of biased representation?

A state of the art evaluation of interest groups in EU policy-making (Eising 2008) went together with comparative research on interest group influence (Dür/DeBièvre 2007). The challenge of trying to measure influence was deliberately taken up (Dür 2008). ‘Access’ and ‘inclusion’ are mostly taken as proxies but this approach provides little information on ‘effective participation’ which – according to Dahl – is the relevant criterion for assessing the democratic nature of decision making. ‘Biased representation’
only makes sense when linked to the capacity of having an impact on policy outcomes.

Empirical research on European trade policy gives evidence that civil society organisations of all different kinds have gained access to policymakers. However, these representatives of general interests have largely failed to shift policy outcomes in their favour. This does not result from the overwhelming presence of focused producer interests since numbers do not necessarily count in international negotiations. The explanatory factor is neither the lack of expert knowledge but a lack of resources in terms of not being able to diminish or enhance the chances of political actors to be re-elected or re-appointed.

In order to draw a full picture of interest representation and influence, researchers further have to take into account that interest groups aim not only at policy influence but also at maintaining their organization. The participation in consultations may be attractive for gathering information and expertise, for cultivating political networks, and for enhancing public visibility vis-à-vis key constituencies. Thus, while much lobbying could easily be viewed as ineffective in terms of shaping policy outcomes, this may underestimate the usefulness of the lobbying effort from the perspective of maintaining the organisation.

*Is civil society a remedy to the perceived legitimacy crisis of the EU?*

The positive image of civil society has many roots: the legacy of civil society in the peaceful transformation to democracy in Central and Eastern Europe, the recourse to NGOs as active representatives of general values and of rights based interests in global governance, the dissemination in academia of theories which attribute to civil society a key role in rejuvenating democracy such as public sphere and deliberate democracy theories and comparative associationalism.
Comparative research (Jobert/Kohler-Koch 2008) scrutinised the varieties of civil society concepts and supports the hypothesis that the recourse to civil society is more often than not a response to profound legitimacy crisis while also having an instrumental value (Edler-Wollstein/Kohler-Koch 2008). The EU is no exception (Michel 2008): The discourse on civil society draws, mostly implicitly, on many divergent concepts and, consequently, promises the cure of all kind of deficiencies. Thus, the involvement of civil society as propagated by EU institutions, above all by the Commission, is meant to foster both input and output legitimacy (Finke 2007; Kohler-Koch/Finke 2007). However, institutional factors and the reality of associational life in Europe channel how these ideas are put into practise.

It is widely acknowledged that the diversity in political cultures, languages and national allegiances in Europe are obstacles to the emergence of a trans-national civil society. Less noticed are the effects of civil society changes at member state level. Even in Scandinavia, which used to be a model of association based democracy, the organisation of civil society has converted from mass member based associations which served as transmission belts of collective interests to government into a more pluralist associational life serving individual interests (Wollebæk/Selle 2008). As the Scandinavian model is even in decline in the countries of origin, we can hardly expect its re-invigoration in the EU. Rather, the EU is faced by a pluralist system of highly professional organisations in which value and rights based civil society organisations compete with a wide range of social and economic interests groups (Kohler-Koch 2008a).

When trying to assess the democratic value of civil society engagement, we have to take into account that normative benchmarks vary with theoretical approaches. The discourse on EU-civil society relations was heavily influenced by normative theories advocating deliberative democracy and the value of a European public sphere. Following this approach,
empirical research explored the contribution of civil society to greater reciprocity and publicity in EU decision making (Hüller/Kohler-Koch 2008).

Involving civil society: A contribution to participatory democracy?

The European Commission has pledged to bring the EU closer to the people by redesigning EU governance. How did it translate the high principles of European governance - openness, participation, transparency, and accountability – in strategies and instruments? And did the new ‘consultation regime’ effectively support weak interests and enhance the democratic input to European governance?

Since the turn of the century, EU institutions, above all the Commission, have been active to provide citizens with more opportunities to participate effectively in policy-making. In close cooperation with NGOs and the Commission researchers investigated the variety of approaches, the different uses of instruments and the divergent effects at different levels of government. The Commission has introduced a new ‘consultation regime’ that has effectively widened participation by lowering the threshold of access; it has increased transparency and has lent support to the representation of weak interests (Quittkat/Finke 2008). Notwithstanding all these efforts, equal representation has not been achieved, neither in terms of types of interests nor in relation to territorial origin (Persson 2007). Representativeness and accountability are truncated due to the multi-level character of EU governance (Hüller/Kohler-Koch 2008) and due to the organisational features of concerted civil society representation, which is a response to growing interest group competition (Kohler-Koch 2008a). Furthermore, the commitment of the Commission to evidence based decision-making gives preference to expert knowledge and puts political, value oriented debates second.

However, the participatory discourse has clearly raised the awareness for the need of input legitimacy. Though the out-spoken commitment to ‘the
principle of participatory democracy’ in the Constitutional Treaty is not part of the Reform Treaty, procedural reforms have been introduced that provide for more transparency and responsiveness. Comparing the first with the second pillar of the EU, it is evident that civil society involvement in foreign and security policies is less in the spotlight but research reveals that it is still very present. Although the institutions and governance styles in the two pillars make a difference, variations in policy issues and types of conflicts have shown more discernible impacts on the kind and degree of civil society involvement (Dembowski/Joachim 2008).

The Europeanisation of national civil societies

In line with the pledge ‘to bring Europe closer to the people’ the Commission has reached out to national civil society organisations and decreed their inclusion in the formulation and implementation of sectoral policies. The way in which the demands and arguments of civic groups are taken into account evolves in the course of this interaction. It is heavily influenced by the regulatory object and by the regulatory public (O’Mahony/Coffey 2007). Furthermore, detailed case studies reveal a two way effect: civil society involvement changes the perception of the responsible General Directorate of its own role in such public participation exercises and it contributes to the Europeanisation of involved interest groups. Europeanisation, however, does not result from the ‘teaching exercise’ of the Commission’s communication policy, nor does it follow the functional logic of shifting loyalties; it rather comes about as a ‘banal Europeanism’ caused by the ‘enhabitation’ of the EU at an every day level (Cram 2006).

The EU as ‘external democratizer’

The promotion of ‘good governance’ and democracy is a prime objective of the EU’s foreign policy. The strengthening of civil society is considered both
as an end in itself and as a device to bring about political reform. Empirical research reveals that the EU has not a clear conception of civil society when it sets out to promote democracy in third states by empowering civil society. A comparative investigation of the choice of instruments and partners documents that the EU is often trapped by the dilemma of having to choose between societal organisations which are closely associated with government and organisations in opposition to the (authoritarian) government. Apparently, this is a choice between, on the one hand, short term political stability and a possibly long-term transition to democracy and, on the other hand, a more conflict prone process that may bring about change more rapidly but with the risk of instability and political turmoil. Irrespective of all the differences that accrue from different national situations, democracy promotion through civil society support turned out to be a fly-by-night instrument that was used with ever greater hesitation over time.

Social Capital as Catalyst of Civic Engagement and Quality of Governance

*(Frane Adam, University of Ljubljana)*

RG5 comprised three research teams. The first group addressed the topic of social capital and governance in old and new EU-member states, paying special attention to national elites and their (trans-European) networks. The second examined the question of civil society and multi-level governance focussing on a possible move from national toward international linkages, and the third investigated the EU contributions to civil society development in Central and Eastern Europe.

*To what extent has there been an Europeanization of Civil Society?*

One of the major aims of Research Group 5 was to integrate top-down approaches for the study of relationships within the developing EU-multilevel
system (i.e. the consequences of Europeanisation for civil society at the local level) and bottom-up approaches (i.e. the consequences of civil society for the process of European integration and democracy in the EU). The combination of various research perspectives and approaches demonstrated that the linkages in the European multi-level system are characterised by national features and developments and that voluntary associations have a very limited capacity to enhance meaningful political linkages between the EU and its citizens. The linkages are heavily influenced by national elites who play a key gatekeeper role to exert top-down control.

The Europeanisation process in terms of civil society actors adapting to the European political space has been somewhat uneven. Engagement with, and confidence in, the EU (compared to national institutions) is relatively weak exactly among the group of citizens that the social capital model predicts would be highest – members of voluntary associations. (Attitudes towards Europe and European institutions among activists are not much more positive than those found among the general populations.) Consequently, because support for the EU is weak among citizens active at the local level bottom-up engagement at the EU level is unlikely to emerge. Thus, the social capital being generated in EU democracies is nation-centred: i.e. values and trust are heavily oriented to national societies and political systems. Consequently, there appears to be a deficit in the stock of social capital required that could contribute to ‘good’ EU governance and enhance political legitimation. Combining various perspectives made clear that linkages in the European multi-level system are: (i) evidently characterised by national features and developments, (ii) only, in rather restricted ways, ascertained by voluntary associations, and (iii) heavily influenced by national elites who are able to control top-down linkages. (Maloney/van Deth 2008). In contrast to the empirical findings on the local level, other RG5 research indicated an increasing interest in European affairs among civic organizations organised on trans-national (trans-European) level. It seems that the capacity of national civic organizations as well as citizens of the EU to get engaged in trans-
national civic organizations on the EU level varies greatly among EU members. (Adam 2007).

_The transformation of civil society organizations on the European level into advocacy groups_

Research findings in Research Group 5 (and other CONNEX groups) chart the apparently inexorable trend towards the professionalization of representation. The professionalization of European NGOs and associations have been characterised by a shift to service provision with management and expertise increasing in importance leading to a strengthening of the leadership vis-à-vis the membership: i.e. leading to a weakening of political linkage. While the ‘power balance’ may be tipping towards leaders there remains a necessity for an active core of members who can be mobilized when required. For some scholars these changes may signal a shift away from democratic aspirations and/or expectations. However, from the group perspective it is a necessary response to trans-nationalisation processes and the multi-level policy-making system of the EU. Professionalization and bureaucratization appear to be inevitable if NGOs are to effectively represent their interests and influence outcomes. These developments may ultimately result in a segmented and hierarchically structured civil society offering decreasing levels of political linkage and leading to the development of new civil society elite. The discussion concerning the transformation of NGOs’ – especially when active on the European level – into advocacy groups in which managerial, lobbyist, communication and cognitive competencies are more important than grass-root activism was a recurring topic in joint discussions. A new market niche has been opened for such organisations - providing practical expertise and knowledge. It was agreed that comparative European studies would benefit from bringing the activities of trans-national NGOs more into focus.
The impact of EU’s democratization strategies on civil society organizations in “third” states

Research on democratization promotion by the EU challenged the ‘one size fits all’ approach. Different strategies for the promotion of civil society in external states can be observed and the EU akin to other external actors faced significant problems in adequately taking the local contexts into account. There were problems with regard to the funding programmes and democratization instruments. EU funding of civil society tended to privilege a few large and well-connected NGOs and smaller and geographically dispersed organizations became the poorer relatives. The EU also tended to draw on large resource rich NGOs as ‘administrative partners’ and the increasingly complexity of policy-making and funding acts as a further barrier to the development of resource poor and smaller NGOs. These developments are likely to lead to greater hierarchy and stratification within civil society (Susan Stewart 2009).

The Transformation of the European Policy Space

(Renaud Dehousse, Sciences-Po, Paris)

RG6 concentrated research on four core questions: Are New Modes of Governance (NMG) an alternative to the ‘Community method’? How can one assess the crucial role of experts of all kinds in EU policy making? How democratically legitimate are soft modes of governance? To what extent are new modes of governance EU-specific? Concerning the significance of the emergence and development of NMG it has been open to debate whether they suggest the demise of the old system or whether they simply represent a first step of a new era of EU governance. Closely related is the question whether the emergence of NMG is a response to specific problems faced by the EU or rather the innovative response of the EU to problems common to
New Modes of Governance and the ‘Community method’

New modes of governance, which were at the heart of RG6 reflections, are traditionally defined in opposition to the traditional “Community Method”. Although in-depth analyses concerning the concrete operation of the Community Method have been lacking, the basic principles are clearly identified. They include: the transfer of legislative powers to the EU, the creation of the European Commission as a “supranational” executive, the possibility of voting in order to adopt binding legislation, and enforcement powers are vested in the European Court of Justice. One of the most remarkable elements of this international regime has been its stability: 50 years on, despite a significant enlargement of the number of member countries and several treaty revisions, it may be argued that the key features of the system have remained unchanged. New modes of governance provide a near-perfect mirror-image of all of these elements. Centralization is deliberately avoided (particularly if it entails a strengthening of the Commission’s powers). Uniformity is perceived as unduly burdensome: flexibility is the new buzzword. For the same reason, non-binding instruments are preferred. The development of NMG could, therefore, easily be seen (and is often presented) as a sign of the obsolescence of the Community method.

However, the study of EU policies conducted in the framework of RG6 suggests that the opposition of these two models is somewhat artificial. Similarities are about as manifold as the differences. As a rule, EU policies are less centralised than those conducted in many Member States. Being the product of a consensus, they are often bound to be fairly flexible – hence the frequent resort to techniques such as minimum harmonization or opt outs. Moreover, the emergence of new modes of governance has not been
accompanied by a decline of the Community method. It is applied today in a larger number of areas than fifteen years ago and there has been no substantial decline of the volume of legislative initiatives, even after the enlargement (Dehousse, 2008). Legal integration has not stopped, even in areas where the need for diversity is acutely felt, such as social policy (Pochet 2007). NMGs can even be used by EU institutions in order to enhance their own influence (Cram, 2007). In other words, the development of new modes of governance does not announce a demise of the Community method.

Assessing the crucial role of experts in EU policy-making

Another recurrent theme in various workshops organized by RG 6 has been the limited role of political actors in most day-to-day decisions taken at the EU level. While classical international relations theory insists on the crucial part of ‘governments’ in EU policy-making, recent work has shed light on the role of two types of actors: bureaucrats and experts. Scientific experts are crucial actors in risk governance, whether at the level of the regulatory decision-making process or at the level of the courts, and the powers of the EU in this field have been growing steadily (Vos, 2008). Also, the problems linked to the tendency of law-makers to delegate part of their powers to different actors (whether these be administrative agencies or private bodies) have been addressed in several research teams. It has been shown that a ‘one size fits all’ approach was inconclusive: in monetary policy, for instance, the independence of central banks is widely regarded as indispensable, even though there is a lively debate on how they can be made to account for their decisions (Laurent/ Le Cacheux, 2006).

Clearly, this increasing polycentricism is not specific to EU policy-making. At the domestic level as well, policy-making is characterized by an ever-wider array of decision structures. Yet this trend is most likely reinforced by the multi-level character of the EU, which creates the need for coordination between all the actors in charge of a given problem, thereby
making it more difficult to achieve a coherent ‘national’ viewpoint on all issues. This trend has been partly described in the existing literature on policy networks. The web of EU committees has also been analyzed along these lines.

It is evident that the role of non-political actors (experts and bureaucrats) in EU policy-making has implications on the way Europe is perceived by its citizens. Given the weakness of partisan cleavages at the European level, decision-making appears to be dominated by technocratic elements. The complex lines of command that exist in the EU makes it often nearly impossible for ordinary citizens to identify who is responsible for a given decision. Given the prevalence of the parliamentary model in the European political culture, it is not surprising to find that even technocrats may feel uncomfortable with this (Borras, 2008). Moreover, the depoliticization of EU policy-making may create incentives for shifting responsibility for sensitive decisions to the European level in order to avoid political tensions at the domestic level (Palier, 2008). Clearly, discussions within RG6 have shown the need for a regular dialogue between policy studies specialists and scholars working on accountability issues or on national and European politics.

The democratic legitimacy of New Modes of Governance

While the normative qualities of soft governance arrangements are usually seen in their alleged higher effectiveness in attaining policy goals, serious concerns remain regarding their democratic legitimacy. Soft modes of governance may be able to shape what is perceived as “sound” policy at EU and domestic level, and may be used to implement Community legislation, thus privileging some societal interests over others. Therefore, they may imply, entail or legitimise an authoritative allocation of values, which makes their democratic legitimacy a valid concern.
The research group identified the need to take into account the diverse nature of soft modes of governance, as well as the necessity to assess the democratic legitimacy of these governance arrangements against different theoretical concepts of democracy: On the one hand, new modes of governance might be considered as problematic from a liberal standpoint since they often bypass parliamentarian procedures and lack in transparency and accountability. On the other hand, the participatory nature of many soft governance arrangements can be an important source of democratic renewal since they might constitute alternative sources of legitimacy for the EU from the standpoint of deliberative conceptions of democracy. Thus, the discussion of the democratic legitimacy of soft modes of governance depends both, on the particular policy instrument at hand and the conception of democracy that is employed.

A pragmatic research strategy that is considered promising in this context is to transform the different conceptions of democracy into a number of empirically identifiable “yardsticks” that can be used for assessing the democratic legitimacy of specific examples of soft modes of governance.

Is the EU still unique?

Finally, discussions within RG6 quite often stumbled upon the same question: to what extent are new modes of governance EU-specific? Comparisons between developments within EU public policies and those occurring at the domestic or international level have frequently been conducted as part of the group’s work. For instance, while one research team analyzed the politics of reforms of continental European welfare states”, another group systematically compared the EU with other international organizations and with the US administrative model. Such studies inevitably lead to the well-known \( n=1 \) problem of European studies. While many policy developments within the EU are similar to the changes taking place in other arenas (whether domestic or international), the EU itself is not a state,
nor a ‘classical’ international organization; it has several characteristics that are rarely found in other settings. Nonetheless, in the social sciences, comparisons are often indispensable to draw conclusions of a general nature. Is the development of the new modes of governance addressed in this working group a response to specific problems faced by the EU, or rather the EU’s response to problems common to most public actors of our time?

The responses to this question were somewhat mixed. Clearly, from a governance perspective, the EU is not unique since, in terms of policy-making, agenda-setting, decision-making, and evaluation, it looks like a political system like any other. The issues it has to address, and the instruments it uses, are similar to those that one may come across in other systems (Kassim and Le Galès, 2010). It may be affected by trends existing worldwide in the functioning of public administration (Boussaguet and Dehousse, 2008b), such as the emergence of “New Public Management”.

However, the EU undoubtedly has some original features. Like all federal systems, it attempts to strike a balance between unity and diversity, even if the areas in which uniformity is sought are not always the same. But in contrast to most federal systems, member states’ governments play a central role in its functioning: in the words of Beate Kohler-Koch, it is a system of governance with governments – that is to say a system centred on steering those who are responsible for steering. Moreover, politics do not play the same role: though it has an elected Parliament, the latter is not seen as effective in representing the citizens’ views, and party politics do not play the same role as in domestic politics. All this may explain why in governance debates so much importance has been attached to the accountability of EU institutions.
Notes

1 See the list of CONNEX publications http://www.mzes.uni-mannheim.de/projekte/typo3/site/index.php?id=37

2 Apart from the short introductory paragraph the presentation of the findings was drafted by the Research Group Coordinators.

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A key focus of the CONNEX Research Group 1 (RG1) has been the relationship between institutional forms and patterns of executive politics. As regards newer history, we may say that bilateral diplomacy constituted the *first* executive order at the European level: After the Thirty Years War, diplomacy became more regularised, with resident ambassadors among the smaller states. This order’s organisational components; embassies and foreign ministries, reflect very well that executive politics are primarily politics among states.

The Napoleonic Wars brought another institutional innovation at the European level; namely the coming about of multilateral diplomacy. Together with the growth of sectoral and functional international governmental organisations (IGOs) from the second part of the 19. century on, this formed a *second* executive order in Europe. In particular, the increasing number of specialised IGOs with a permanent secretariat and a fixed location came to involve a huge number of non-diplomatic personnel from national sectoral ministries and agencies that made the European administrative space considerably more dense, multi-faceted and routinised. Although more subtle, sophisticated and with more capacity for collective
problem-solving than before, the second executive order did not seriously challenge the basic characteristics of the inherited intergovernmental order. States remained the primary building blocks of the order, and the principle of territorial organisation survived as the basic way of structuring IGOs, as reflected in the superior role of the Council of Ministers.

The Second World War may have triggered an additional institutional innovation at the European level. In organisational terms, the invention of the High Authority of the European Coal and Steel Community was indeed remarkable, since for the first time at this level a separate executive body with its own leadership and mandate had been erected outside the Council of Ministers. Arguably, this was the first step in a process that placed the development of the executive order in Europe on a radically different trajectory than before. This route can be seen as leading to a third executive order, characterised by institutions that are able to partly reframe executive politics at the European level, so that a multi-dimensional pattern of conflict and cooperation is discernible. The critical juncture represented by WWII might have been a necessary condition for decision-makers to accept what they under normal circumstances would not have accepted. However, neither the Council of Europe nor the Organisation for European Economic Cooperation (OEEC) had a separately organised executive. So, inter alia, the availability of entrepreneurs, like Jean Monnet, and the narrowness of the mandate (coal and steel) have to be taken into consideration. The broad agenda of the 1957 Commission triggered more critical voices as regards the status of such a body, however, at this time the “model” (the High Authority) was already in place.

It might be worthwhile to notice that establishing a separate executive centre (outside the council of ministers) of a confederation or of a nascent federation of states seems to be the “hard case”. The reason for this may be that it creates capacity for action and execution and not just for talk and formal decision-making, and that such independent action might be
perceived as particularly threatening by constituent governments less eager to transfer power upwards. It seems to have been easier to form (parliamentary) assemblies and courts of justice. Not only in the history of European-level cooperation are executive bodies obviously the “hard case”, but also as regards the way other regions of the world organise their common activities. If we take a quick glance on how federal states were forged, the same pattern is discernable: In the United States of America, the Congress and the Court were both well established in Washington before a federal executive attained adequate capacity to act on a broader scale. Such administrative capacity did not emerge automatically, but had to be extorted from already established institutional structures, in particular from the constituent states. In Germany in 1871, the body of the constituent states (“Bundesrat”) was thought to be both the second legislative chamber and the federal government. A new and separate executive centre at the federal level emerged only gradually during the following years.

In its early history the Commission faced challenges of an almost existential character, for example during the “empty chair” crisis. Two quite general research questions can be raised in relation to institutions such as the Commission: 1) Under what circumstances will an institution that is thought to challenge the existing power structure be established? 2) If established, under what conditions will such an institution be able to actually transform politics and policies? RG1 has focused on the second question in this respect. It seems as if the Commission over time and in many respects has become more independent of those who erected it in the first place: the national governments. There are several organisational factors that might have been conducive to such a development. Most important has been perhaps the sectoral and functional division of labour at the very top of the institution, which means that politics at the Commission to a considerable degree tends to be politics among sectoral portfolios rather than among nation-states. Other key factors are procedures ensuring the institution itself keeps control
over the portfolio distribution and the appointment of top officials, the replacement of seconded officials from the member states with mainly permanent posts and a life-long career system within the services and, finally, multinational staffing of all administrative units and cabinets. Also contributing to the Commission’s enhanced independence from national governments is the institution’s growing dependence on the European Parliament as regards the composition of the college of commissioners and the formulation of EU policies. Considering how organisation and decision-making have developed at the political as well as the administrative level of the Commission, it might be concluded that we see a more “normalised” political-administrative executive at the EU level.

Even though EU legislation is adopted by the “community method”, implementation in the context of the EU has most commonly been perceived as indirect: Transposition and application of EU legislation have been seen on the whole as part of the “administrative sovereignty” that the member states enjoy. The fact that the Commission has a monitoring role in this respect does not in itself change this division of labour between levels of governance. Indirect implementation portrays the Union as a system in which the constituent states are integrated into a larger whole as coherent entities. Not surprisingly then, indirect implementation exposes common policies to considerable influence from national politics and administrative traditions and capabilities. However, a new pattern of executive politics across levels of governance seems to emerge due to two features of the institutional development: First, the “emancipation” and consolidation of the Commission as a new executive centre outside the Council of Ministers, and second, the fragmentation of national governments, vertically (cf. “agencification”) as well as horizontally. These two developments have triggered quite peculiar centrifugal forces within national governments; forces that could probably not have occurred if there was simply a combination of a classical IGO and internally integrated governments. Since the Commission does not possess its
own agencies at the member state level, it seems to establish a kind of partnership with those national bodies responsible for the application of EU legislation, as well as (to some extent) preparation of EU policies. Such bodies may be found among national agencies that are already somewhat detached from their respective ministerial departments. Thus, national agencies might come to act in a “double-hatted” manner - as parts of national administrations and as parts of a multilevel Union administration. Not surprisingly then, in this situation agencies may face competing policy expectations from their two “masters” that occasionally may be hard to reconcile. The relative importance of the two “masters” varies, however, dependent on their organisational capacity in the area and the expertise and experience of the respective national agencies themselves. Also, “post-New Public Management” reforms, or so-called “joined-up” government reforms, aiming at more coordination and political control of the governmental apparatus, may create less favourable conditions for national agencies’ “double-hattedness”, and thus for a multilevel Union administration. Arguably, profound integration at a higher system level presupposes some disintegration at the lower level, and vice versa.

Within the historical period covered in this paper, the emergence of a new executive order does not seem to have replaced the former order. Bilateral diplomacy among EU countries has not declined over the last couple of decades and it has been strengthened in relation to new member states. And, in general, IGOs seem to flourish more than ever. Thus, executive orders are co-existing in Europe. This accumulated executive order consists of qualitatively new elements that transcend the inherited intergovernmental order. The persistence of diplomacy and IGOs represents at the same time recognition and reproduction of a system of states. Due to its complexity, such an order may be rather robust and sustainable; “a vehicle for a highly variable terrain”. On the other hand, such a compound order of partly inconsistent components that have emerged at different points in time also
contains a considerable potential for future changes due to continuous friction and collisions between the various parts – making also the future quite exciting!

Notes

1 This paper is to a considerable degree based on D. Curtin and M. Egeberg: ‘Tradition and Innovation: Europe’s Accumulated Executive Order’, *West European Politics*, 31 (4) (June), 2008. Special Issue *Towards a New Executive Order in Europe?* (eds. D. Curtin and M. Egeberg). Thus, more elaborated arguments and literature references might be found there.
Chapter 3
Perspectives on the European Commission

Hussein Kassim
University of East Anglia

It was not that long ago that each new publication about the European Commission began with the ritual observation that, despite the organization’s centrality to integration and its uniqueness, little scholarship existed beyond the classics by Coombes (1970) and Michelmann (1978), which were becoming rapidly out-of-date. That changed in the late 1980s and early 1990s with the relaunch of ‘Europe’ through the single internal market project and then the Maastricht negotiations and the Treaty of European Union. However, the new literature tended to focus principally on the Commission as a political actor. It was concerned with the Commission’s ability to exert an independent influence on policy (see, e.g., Pollack 1997, 2003), at the extent to which and under what conditions it could act as a policy entrepreneur (Schmidt 2000), and how autonomous it was from national governments (Pierson 1996). Scholars were interested mainly in the Commission’s powers, formal and informal. Though these analyses became more rigorous and more sophisticated, and the literature moved beyond traditional debates between intergovernmentalism and neofunctionalism to
draw on more mainstream political science approaches and methodologies (see, e.g. Pollack 2003, Franchino 2007), there was little change in its principal concerns.

Although these were, and remain, important questions, they reflect a research agenda directed almost exclusively towards the Commission’s outward action. The central preoccupation was with the Commission’s behaviour in relation to other institutions and other actors. There was little attempt to investigate the inner workings of the organization, still less was it considered that opening the black box may hold the key to explaining the Commission’s action in particular policy fields, at different levels of decision making and in regard to specific interventions. As a consequence, a series of important questions remained unanswered. First, how the Commission defines its preferences tended to be disregarded. In the spirit of Wildavsky’s observation (cited by Dimitrakopoulos 2006 in another context) that political scientists have been preoccupied by how actors seek to get what they want, but had not paid sufficient attention to how they develop those preferences, scholars of the EU had not sought to investigate the processes by which they arose. How the availability and mobilization of the organizational resources at the disposal of the Commission offers possibilities for, but also imposed constraints upon Commission action, was a second question that was left unaddressed. A third was the extent to which the Commission is organizationally independent. The degree to which it has a free hand in recruiting and promoting its staff, but beyond that its influence over the rules and procedures that govern its use of human and financial resources, as well as the shape of its internal structures, was unexplored. A fourth concerned the identity of officials and their socialisation experiences within a multinational organization. The significance of national identity, the extent to which officials consider that their primary loyalty lies with the Commission, and the content and shaping of their beliefs are three important aspects. A fifth related to management, leadership and coordination within the organization, and
how its proficiency in regard to each shapes not only its own capacities, but, given the Commission’s responsibilities in implementation and enforcement, those of the EU as a political system. A final unaddressed question concerned how the Commission manages its relations with other organizations in the performance of its functions in Brussels and beyond. In short, preoccupation with the Commission as a political actor led to a neglect of the Commission as an organization and administration.

These themes have attracted considerably more interest in the recent past. Indeed, much of the research in which the participants of the CONNEX Research Group 1 (RG1) have been engaged and which they have presented in workshops over the past four years has addressed exactly these themes. They have considerably advanced our knowledge and understanding of the Commission and more broadly of the EU as a political system in significant ways. First, members of RG1 have worked on aspects of the Commission’s organizational independence. With respect to personnel and recruitment, Egeberg (2003) has examined the internalisation of recruitment and appointment processes concerning top officials, Wille (2007a, 2007b) the end of national flags, and Balint et al. (2008) the declining politicisation of higher management and degree of openness of career system. In relation to nationality, Egeberg (2006a) has examined the role perception of Commissioners and the primary importance of their portfolio responsibilities in College decision making. Trondal (2006) has found that detached national experts do not receive instructions from their capitals, while Suvarierol (2008) reported that individual official’s task-related formal, task-related informal and leisure networks were not overwhelming national.

Second, Dimitrakopoulos and Kassim (2005), and Kassim and Dimitrakopoulos (2006, 2007) used the Convention on the Future of Europe and the two intergovernmental conferences that followed as cases to investigate processes of preference formation within the Commission. They found an internally differentiated organization that struggled to develop and
present a coherent vision. Third, organizational change has been a concern of several researchers within the group, especially in the wake of the Kinnock reforms undertaken between 1999 and 2005. Kassim (2004a, 2004b, 2008) has focused on the reform process, Cini (2007a, 2007b) on the ethics of reform, Bauer (2008) on the impact of the reform on middle management on whom heaviest burden has fallen, and Bauer and Knill (2007) on the Commission’s experience as compared to other international organizations undergoing management reform.


Whilst the group through the aforementioned publications has made an important contribution to scholarship, several elements of a new research agenda and new possibilities for future research have come into view. First, there are areas where knowledge of the Commission is still limited and which remain relatively unexplored. These included the role conception of officials in different parts of the Commission, especially at the level of the cabinet, the impact of enlargement, and the wider impact of the Kinnock reforms on the Commission’s management, administration, culture and performance. Second, there is a need for large-scale studies. Much of the existing work has been based on relatively small numbers. The next step is to undertake work
of considerably larger scope, creating primary data based on experience of
greater number of respondents. Third, new conceptualizations have been
introduced that need to be tested and explored. These include the notion of
the Commission as the ‘internally differentiated institution’ (Kassim and
Dimitrakopoulos 2007) and the administrative infrastructure of the EU as an
‘integrated administration’ (Hofmann 2008, Hofmann and Turk 2006). While
the former needs to be further refined and linked to theoretical perspectives
in the existing literature, the latter is an important achievement, but needs to
be empirically validated by the charting of links and interconnections, to
examine extent to which the administration is differentiated vertically and
horizontally, and to explaining differences across policy domains. Finally,
there are benefits to be gained from approaching the Commission in
comparative perspective. Egeberg (2006b) and Curtin and Egeberg (2008)
have demonstrated the value of such an approach in regard to
implementation and accountability. Bauer and Knill (2007) have done the
same in relation to administrative reform, while Trondal (2007) has reflected
on the study of the Commission from a public administration perspective.
However, there is still surprising little research on the Commission as an
international administration, the extent to which it embodies and exemplifies
the ideal as set out in the international relations literature, and how it
responds to challenges comparable to those faced by other international
organizations. Comparisons with national administrative bodies are also
relatively scarce, leaving broad scope for the possibility of generating new
insights from the comparative bureaucracies literature. There is limited
empirical knowledge about individual Commission officials, how they work,
and what, if anything, is distinctive about them. In all four areas, there are
considerable research opportunities.
Notes

'Though, of course, there were some exceptions. See, for example, Metcalfe (1992), Cram (1994), Ross (1994) and Endo (1999)

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In addition to the analysis of executive institutions in the EU, a central focus of Research Group 1 was on the domestic impact of EU level institutions on respective structures, political processes and policies in the member states. Studies associated with this latter perspective generally refer to what has been called Europeanization of domestic structures. Notwithstanding an ever-growing number of studies in this area, the analysis of Europeanization effects still suffers from far-reaching weaknesses. Although most these problems are well-known, they have not been sufficiently addressed so far. In view of this constellation, it is the central purpose of this short paper to develop modest suggestions for overcoming the most important research deficits in this field of inquiry and hence to advance our understanding of Europeanization.

The first weakness inherent to the concept of Europeanization is that the term is "over-stretched". There exist almost as many definitions of the concept as there are authors publishing in this research field, which implies that Europeanization refers to highly different phenomena. Some use the term as a synonym for European integration, that is, the development and
emergence of institutions, governance structures and policies at the supranational level (Risse et al. 2001, 2). This definition is certainly not very useful, as it simply reinvents the wheel, creating terminological confusion (Lenschow 2006, 58). Others refer to the role of the EU in facilitating horizontal policy transfer across member states (Bomberg and Peterson 2000; Radaelli 2004). A third definition is linked to a top-down perspective, focusing on the domestic impact of developments at the European level. And finally, there is a group of scholars who refer to Europeanization in order to describe both, developments at the European level as well as the domestic effects of these developments (Ladrech 1994, 69; Héritier et al. 2001, 3). In addition to the confusion about the analytical scope of the concept, further complexities emerge from different definitions with regard to its geographical scope (Eising 2003, 407). Should Europeanization be restricted to the domestic impact of the EU on member states or future member states only or should the term also cover all other countries that are potentially affected by the activities of the EU?

The second problem of Europeanization research emerges from the fact that not only the phenomenon as such is conceptualized rather vaguely, but also the independent and dependent variables that are typically identified in Europeanization studies. On the one hand, the most prominent and also most heatedly debated independent variable – the fit or misfit of European and domestic arrangements – is operationalized in very different and rather inconsistent ways. Some scholars measure misfit at the institutional level (Knill 2001); others refer to the policy level (Börzel and Risse 2000). Looking at the concrete indicators for operationalization, we again find almost as many different approaches as scholars in the field. Against this backdrop, it is hardly surprising that there is not much common theoretical ground so far. On the other hand, similar problems apply to the specification of the dependent variables. There are big differences across various studies how domestic policy or institutional change is measured. Some authors look at policy instruments,
others analyze changes in domestic discourses, and others look at regulatory styles or administrative traditions, and so on. Basically, this variety as such constitutes a strength rather than a weakness. This holds only true, however, as long as differences in the operationalization of independent and dependent variables are explicitly acknowledged – which is unfortunately rarely the case.

A final problem refers to the fact that Europeanization studies typically suffer from a selection bias. Mostly, the focus is exclusively on EU member or applicant states. As long as countries outside the EU are excluded from the country sample under investigation, it is hardly possible to control for potential effects that cannot be attributed to EU membership or conditionality.

Of course some of the above-mentioned problems can also be found in other areas of political science and hence are not unique features of Europeanization studies. Moreover, these problems are hardly new and have long been named by various scholars in the field. Nevertheless, not so much progress has been made so far to overcome them. In the following, I will hence develop some ideas that might constitute promising ways for future research on Europeanization.

In this context, my basic suggestion might sound not only provocative, but also paradoxical: To improve our understanding of Europeanization, we should give up the concept. In view of the vague and contradictory definitions of Europeanization, the concept has lost its analytical grip. Instead, it is a more promising approach to be more specific about the channels through which Europeanization operates. In which ways or mechanisms does European integration trigger domestic changes? It makes a big difference, whether Europeanization effects emerge from legal harmonization, from political imposition or conditionality, from regulatory competition in the Common market, or from learning processes triggered by intensified communication and information exchange in supranational policy networks.
Being more precise about the causal chains or mechanisms of Europeanization offers several advantages. First, theoretical explanations of Europeanization processes can be more precise and focused. It makes a big difference whether we look for theories that seek to explain Europeanization processes of every kind or whether we are looking for explanations that account for different domestic effects of legal harmonization, regulatory competition or transnational communication. It is obvious that each of these Europeanization channels (and the list of channels is certainly not complete or exclusive) might operate differently, implying that there are different factors that account for potential variance in domestic impacts. Looking at legal harmonization, for instance, effects might vary with the degree of legal specification of European law. Competition effects, by contrast, might vary with the extent to which domestic markets are actually exposed to international or European competition. For communication effects again different variables might play a role, such as the interaction density in European policy networks or the mere number of states that have already adopted a certain policy. Space does not allow me to go into detail with regard to these factors. But the examples should be sufficient to underline the central point of my argument: The explanation of Europeanization effects varies with the concrete channel through which European integration might trigger domestic change. Rather than analyzing Europeanization as such it is hence theoretically more promising to focus on the specific mechanisms of Europeanization or modes of European governance.

This more precise analytical focus implies a second advantage. It is easier to avoid the selective focus on EU member states and to link Europeanization studies to the broader scientific debate, in particular to the analysis of domestic effects of internationalization and globalization or studies on the international diffusion and convergence of policies. Also in this debate, emphasis is placed on effects of international harmonization or regulatory cooperation, regulatory competition, and transnational communication. In
other words, the mechanisms assumed to trigger domestic change are more or less identical. From this perspective, it would hence be possible to analyze whether and to what extent the EU makes a difference compared to, for instance, effects of other international organizations or regimes and the growing integration of international markets. This way, not only the selection bias inherent to many Europeanization studies could be overcome. It would also be possible to strengthen the development of general theories to explain the varying effects of the external environment (be it European or global) on national policies and institutions.

Finally, a more differentiated analytical focus on distinctive causes or channels of Europeanization would also help to reduce the high degree of ambiguity that currently exists with regard to specification and operationalization of dependent and independent variables.

Although the mentioned perspectives for future research on Europeanization research will certainly not avoid all problems and research deficits encountered, they nevertheless might help to move some modest steps ahead in order to improve our understanding of this phenomenon.

References


The 50th anniversary of the Treaty of Rome has been an occasion for many celebrations. On this occasion, many of the EU’s accomplishments were attributed to the invention by the Founding Fathers of an original institutional setting, often referred to as the “Community Method”. The basic elements of the model are well-known: the transfer of legislative powers to the EU, the creation of a “supranational” executive, the European Commission, the possibility of voting in order to adopt binding legislation, and the enforcement powers vested in the European Court of Justice. One of the most remarkable elements of that international regime has been its stability. Fifty years on, despite a significant enlargement of the number of member countries and several treaty revisions, it may be argued that the key features of the system have largely remained unchanged. The European Parliament has gradually acquired significant prerogatives, but there has been an attempt to prevent this evolution from altering the initial balance of power. Indeed, the need to preserve the essence of the Community Method is often used as an argument against proposed changes: during the drafting of the constitutional
treaty, for instance, a group of members of the European convention chose to present themselves as “friends of the Community Method”.

Since the Maastricht Treaty, that model has come under increasing pressure. Its legitimacy has been the subject of heated discussion, in academic circles as well as in the populace, for instance on the occasion of the referenda organised on the draft constitution establishing the European Constitution. Governments have appeared increasingly reluctant to delegate powers to the European level. The Commission itself has attempted to explore new approaches to policy-making, which were later summarised in its 2001 White Paper on European Governance (Commission, 2001). Countless works, often in the framework of EU-funded research projects, have been devoted to “New Modes of Governance”. More or less implicitly, these works often regard the Community Method as “an idea whose time has passed”, to use the words of former British Prime Minister John Major, echoed by many British think-tanks in the years that followed (see e.g. Leonard, 1999), or even as an instrument of “integration by stealth”, in those of Giandomenico Majone (Majone, 2004).

This notwithstanding, our understanding of that model remains at best fragmentary. The formal rules are known, but their actual impact is not. How effective is the Commission as an agenda-setter? What is the actual impact of qualified majority voting? Are the Commission’s surveillance power and the Court’s adjudication role sufficient to ensure a correct implementation of EU law? There is no shortage of interesting hypotheses in relation to the overall efficiency of the Community Method, but empirical research is still scarce. The purpose of this chapter is to review recent evidence on the operation of European institutions, and to suggest that despite repeated allegations that the Community Method had had its day, and that new ways to conduct European policies are to be found, the effectiveness of the EU system may actually be greater than is often thought. The chapter is structured in the following manner. Part I starts by sketching out the basic elements of the
The “Community Method”: Chronicle of a Death too Early Foretold

Community Method. Part II reviews briefly the elements that have prompted many observers to diagnose a crisis of the Community model. Part III discusses the trends that emerge from an analysis of EU policy-making, and purports to show that despite fears to the contrary, the EU machinery seems to have adjusted rather smoothly to the pressures caused by the 2004 enlargement. In a similar fashion, we will see the Commission can at times make use of new modes of governance to enhance its own influence. This will lead me to question the relevance of the standard opposition between old and new modes of governance in EU policies.

Understanding the model

Since those distant days that saw the launching of the European Coal and Steel Community, European integration has had its own particular *modus operandi*, the “Community Method”. In spite of fifty years of debate on how to construct Europe, so great is its originality that it is still much misunderstood, even by its most zealous supporters – including those within the European Commission.

The role of supranational actors

The Schuman declaration of 9 May 1950 sets out certain essential features of the Community Method; others have emerged out of the daily interactions among the main players in European construction. The Commission described it in the following manner in its White Paper on European Governance presented in July 2001:

“The Community Method guarantees both the diversity and effectiveness of the Union. It ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive
filters: the general interest at the level of the Commission, and
democratic representation, European and national, at the level of the
Council and European Parliament, together the Union’s legislature.
– The European Commission alone makes legislative and policy
proposals. Its independence strengthens its ability to execute policy, act
as the guardian of the Treaty and represent the Community in
international negotiations.
– Legislative and budgetary acts are adopted by the Council of
Ministers (representing Member States) and the European Parliament
(representing citizens). The use of qualified majority voting in the
Council is an essential element in ensuring the effectiveness of this
method. Execution of policy is entrusted to the Commission and
national authorities.
– The European Court of Justice guarantees respect for the rule of
law” (Commission 2001, pp. 9-10).

This definition rightly emphasizes the essential role played by the two
“supranational” institutions, the European Commission and the Court of
Justice. There is nothing surprising about the fact that they are non-elected
bodies if we bear in mind that they were created by the member states to
regulate relations between the states: at the time the problem of the EU’s
democratic legitimacy was not the burning issue it is today. Quite rightly, the
Commission stresses that the Community Method is also based on the
possibility, for the Council, of taking majority decisions. This detail is
important, as it highlights an essential feature of the political system created by
the European treaties, namely the fact that the states – and more precisely
their governments – hold a central place in the system, which sets the
European Union apart from a federal model, for example, where the links
between the constituent parts and the central power are more tenuous.
Taken as a whole, the elements listed above also emphasise the original nature of European construction compared to more traditional forms of international cooperation. The difference lies not so much in the scope of the competences transferred to the European institutions – the Council of Europe also has very wide-ranging powers – as in the way they are exercised. Not only does the European Commission play a central role in drawing up Community policies, it is also extremely rare to find a combination of majority voting and binding decisions in an international body. When a binding decision has to be adopted, unanimity, or at least consensus, is required in most international structures. The United Nations General Assembly votes, of course, but on resolutions, texts “of a political nature”, a nice euphemism that boils down to saying that states are not bound to apply them. Conversely, accepting the possibility of being bound to execute decisions one is opposed to, as the member states did when they joined the European Union, amounts to nothing more or less than a transfer of sovereignty, be it partial or temporary.

In the institutional system established by the Treaty of Rome, the Commission’s role is of an altogether different nature to that traditionally played by the secretariat of international organisations. It is a source of impetus that, through its proposals, must lead the other institutions to achieve the objectives defined in the treaties. To do this, it has considerable tools at its disposal. For a start, it has an almost complete monopoly on legislative initiative, since most of the decisions taken in this area require a proposal from the Commission that it can then amend throughout the legislative procedure. Unlike what happens in most national democracies, the European Parliament and the Council of Ministers, where representatives of the member states sit, cannot, in principle, take any initiative at this level. If they feel that a European law is necessary, they must ask the Commission to put forward a proposal in due form. Moreover, these proposals may only be amended with the unanimous agreement of the member states, which gives the Commission
an instrument to encourage the formation of a majority within the Council or Parliament by amending its proposals. In short, the Commission is, *de facto* if not *de jure*, the third branch of European legislative power, alongside the Parliament and the Council. Finally, as guardian of the Treaties, it must ensure that the member states comply with their obligations. It has quasi-judicial powers in matters of competition policy and acts as prosecutor in the cases it chooses to bring before the Court of Justice.

**Whose interests does the Community Method serve?**

The “supranational” power thus created is in fact often perceived as being quite different to the more familiar structure of a federal state or confederation. Why did the member states of the European Union chose to confer powers of an unprecedented scope, both on a national and an international level, on a non-elected body? The question is all the more pertinent as the powers in question are not simply the result of a bold interpretation of the treaties: most of them are expressly provided for in the documents signed by the European foreign ministers.

Contrary to what might be thought, this decision was not necessarily the fruit of ideological commitment. Certainly, the Schuman declaration clearly describes the creation of the ECSC as “the first step in the Federation of Europe”, but the signatories were far from being won over to the federalist cause (Milward, 1992). Even from the perspective of governments jealously guarding their prerogatives, the Community Method presented many advantages (Moravcsik, 1998, pp. 67-77).

The Treaty of Rome can indeed be described as an imperfect contract, as it only defines in general terms the objectives to be reached and the institutions and procedures put in place to achieve them. Having in an institution such as the European Commission experts who are in charge of monitoring technical and legal developments on a daily basis can facilitate
decision-making in technically complex areas. Moreover, being a neutral body, it is easier for the Commission to find a synthesis between the different national and sectoral interests concerned, which is likely to facilitate a compromise. Last but not least, this centralisation ensured that the legislative programme of the Community was not simply dictated by the power relations between the member states or by electoral contingencies. This point was the subject of bitter debate at the Val Duchesse talks, when the Treaty of Rome was drawn up (Küsters, 1990). Fearing that they might systematically be put in a minority by the weight of the “big countries” in the Council, the less populated countries insisted that all legislative procedure should start with a proposal from the Commission. The fact that unanimity was required to make any amendment to its proposals also prevented the majority from putting their particular interests above those of the minority. Thus, this obligatory passage through the Commission was the key that made the use of majority voting possible.

As for implementing Community decisions, entrusting the task of supervision to an institution whose plurinational nature protects it from direct political pressures helped establish the system’s credibility, making it more likely that each state would comply with jointly-taken decisions (Majone, 1996, pp. 70-71). Competition policy is a case in point. Contrary to the rule applied to other European policies, which are implemented by national bodies, it was in fact the Commission that was entrusted with applying the general principles defined by the Treaty of Rome in matters of competition. This choice is easily explained: not only would the alternative (leaving it to the member states to implement EU competition policies) have threatened the equality of conditions of competition within the Community – each state interpreting the rules according to their own practices – it would above all have been less credible, given the tradition of economic interventionism of some governments and the complete lack of competition rules in some countries.
This lack of credibility would have been bound to create an atmosphere of mutual distrust. Why should the Bundeskartellamt (the German anti-trust authority) be overzealous in applying European regulations and penalise German firms, if the same regulations were applied more loosely in other countries? In other words, in an international system where there is a lack of mutual trust between the member states, centralising supervision has the advantage of making the commitments undertaken at the Community level more credible, thereby facilitating the development of a logic of cooperation between the member states.

The use of voting, another form of relinquishing sovereignty, stems from considerations of a different order. In a system where the treaties often only define the objectives to be reached in general terms, the institutions are called upon to make a large number of common decisions. In this context, unanimity is penalising, as each participant has a right of veto. Majority decision, on the other hand, facilitates decision-making... even when nobody votes! Studies of the decision-making process show that actual votes only represent 20 per cent of the decisions for which a vote would have been allowed by the treaty (Hayes-Renshaw and Wallace, 1997, pp. 48-58; Dehousse, Deloche-Gaudez and Duhamel, 2006). Yet, the mere possibility of majority decision-making encourages the different protagonists to look for a compromise. Of course, this decision-making efficiency comes at a price, as there is a possibility that a government may be put into a minority by its peers. But as long as no one is in the minority too often, the advantages gained from decisions taken in other areas make this a small price to pay. Besides, a certain number of guarantees have been put in place to win over the most wary states. Even today, unanimity is still required in sensitive areas: to wit, the famous “red lines” laid down by the British government in recent intergovernmental conferences and in the Convention to ensure that Britain would not be forced to accept what it might consider to be unacceptable choices in tax or social policy.
What can we learn from this rapid overview of the so-called Community Method? Two elements that give the lie to some commonly held perceptions. First, the method in question must not be seen as the product of a hidden commitment to federalism: it owes a great deal to the utilitarian calculations of governments that are aware that, in the context of interdependence in which they operate, it is necessary for them to define rules that will allow them to take a large number of collective decisions, at the same time as reducing the risk of free riding. Secondly, it is not only the small states that need the Community Method. It owes its existence above all to a basic fact of international relations: states – big and small – neither have an innate trust in their partners, nor a spontaneous tendency to cooperate; it is often only when necessity dictates that they choose the path of cooperation – hence the need for institutions that can facilitate a convergence of views and ensure that common decisions are correctly applied. This was nicely captured by former Commissioner Pascal Lamy (Lamy, 2002), who described the Commission as a “distrust reduction mechanism”.

At the same time, for this to be possible, the Commission must be organised appropriately so as to guarantee its independence. This is why member countries’ executives have insist on retaining a role in the appointment of commissioners, despite the growing grip of the European Parliament on that procedure (Hix and Lord, 1996). Similarly, the rule of collegiality – according to which all decisions are in principle taken by or in the name of the college rather than by individual commissioners – is meant to ensure an esprit de corps among Commission members. At the very least, it makes ‘capture’ of the Commission more difficult, since a substantial share of the time of commissioners’ collaborators is spent following dossiers handled by other members of the Commission (Joana and Smith, 2002).

These well-known structural elements are recalled here as they are essential to understanding the dynamics of European integration. Relationships between the EU institutions are in fact often analysed from the
angle of a tension between institutions that embody two distinct types of interests: Community interests for the Commission and national interests for the Council, with growing rights of interference being attributed to the directly elected Parliament. But this tension can be seen in a more positive light, as the result of an attempt to devise a cooperation scheme in which interstate cooperation would develop without leading to the emergence of a strong central government or of a hegemonic regime dominated by a few countries.3

The Community Method as a mode of governance

The absence of a powerful executive, able to assign clear programmatic goals to the Union and to see to it that action is undertaken to reach them, and imposing its views on other actors if needed, makes it difficult to regard the Community Method as the way a would-be ‘government of Europe’ would act. As has often been observed, despite EU law’s claim to supremacy, the Union lacks several of the classical features of the state, such as the monopoly of coercive power, hierarchical control over lower levels and the ability to enforce its law. In contrast, several of the elements generally used to classify modes of governance may help us to make sense of its main features.

Thus, using the classification offered by Treib, Bähr and Falkner (2005), one could say that the Community Method rests on legally binding and enforceable actions, taken according to institutionalised procedures, in a system characterised by a high dispersion of authority. Beyond those basic elements, it may lead to a broader variety of outputs than is commonly acknowledged: decisions adopted according to the Community Method do not necessarily result in the adoption of rigid approaches to implementation; if directives are adopted or opt out clauses accepted, they may result in a fair degree of diversity. Similarly, may include material or procedural regulations (e.g. forcing national governments to notify measures that may hamper free
movement to the Commission or other member states before they are adopted). Moreover, even though they are formally adopted by public bodies, EU decision-making processes may (and often do) provide ample space for private interests: witness the important role attributed to social partners in social policy or to industry representatives in standardisation procedures. In other words, contrary to a widespread view, what is characteristic of the Community Method is the process whereby decisions are taken, rather than the outcomes they lead to. Though processes and outcomes may of course be related, the point needs to be made that the Community Method does not necessarily lead to a centralisation of authority in the hands of bureaucrats eager to impose an inflexible solution to any problem. Indeed, as has just been hinted at, there are many examples to the contrary.

A model in crisis?

Since the beginning of the 1990s, however, European integration seems to have entered a new phase. The environment in which European issues are tackled changed considerably and this has not been without effect on how the European political system works. Without going into detail, we will touch on a few points here that seem essential to understanding the difficulties that Europe is faced with today.

A crisis of legitimacy

The difficulties that surrounded the ratification of the Maastricht Treaty have brought to light that academic debates on the so-called “democracy deficit” of the EU found an echo in the populace. Opinion polls have unanimously confirmed the fact that the ‘permissive consensus’ that enabled the European venture to be launched (Haas, 1958) is now nothing but a memory. Waning support for integration dates back to the early 1990s, when public opinion
began to grow uneasy about the increased influence of Europe in a range of areas and express fears over economic recession and rising unemployment. Even if on the whole the public are still pro-Europe, they are now very wary of a political system they do not really understand and that sometimes appears to threaten their way of life. This is above all reflected in declining support for integration, documented in the European Commission’s Eurobarometer polls: the level of positive opinion went down from 65 per cent in 1992 to an average of about 50 per cent in the late 1990s. This disaffection with Europe is also expressed in low turnout at the European elections. It reached an all-time low in 2004 with an EU average below 50 per cent. True, a similar decline has been recorded in domestic elections, but there is usually a 20 per cent gap between national and European elections.

A growing reluctance towards delegation of powers to the European Union

Around the same time, national governments began to show signs of growing impatience with what they saw as an unlimited increase in the powers of the EU, and therefore of the Commission. It is for this reason that recent years have seen an increasing number of counterweights to this power. The ‘pillar structure’ of the Maastricht treaty is undoubtedly the first expression of this new tendency. While the member states accepted the necessity of common action in areas such as foreign policy, security and justice, areas that are traditionally the preserve of the state, they refused to see the supranational institutions of the EU take a role commensurate to the one they enjoy in the first (economic) pillar: in these areas, the only forms of action envisaged fall within the more traditional intergovernmental framework, the leadership being in principle exercised by the European Council.
Typically, when the need for more steady steering was felt, it was met by setting up *ad hoc* structures. When European foreign policy was seen to be suffering from a severe lack of analytical and planning structures capable of inspiring a common vision of international issues, defining potential joint action and piloting its implementation, it was decided to set up a special policy unit placed under the authority of an autonomous individual, the High Representative for the Common Foreign and Security Policy (CFSP), whose powers were limited. A similar scenario has unfolded in matters of economic policy. Once again, the compromises of Maastricht proved unstable. To avoid any threat to the independence of the European Central Bank, merely an informal discussion forum (the ‘Eurogroup’) was set up for the finance ministers of the countries participating in the single currency, later strengthened by the creation of a more stable presidency. Once again, there was a clear desire to define a viable intergovernmental alternative to the transfer of powers to the Commission, characteristic of the Community Method.

The same phenomenon can be observed at the level of policy instruments. The wave of harmonisation that marked the completion of the internal market has been succeeded by a new phase characterised by working methods that impose fewer constraints on national administrations: benchmarking, peer review and mutual monitoring. This approach, first adopted for monetary union, was applied afterwards to employment policy in what became known as the European Employment Strategy, defined at the Luxembourg ‘Jobs Summit’ of 1997. Three years later, a similar approach was sketched out for all the structural reforms destined to improve economic competitiveness and modernise welfare systems. The ambitions of the ‘Lisbon Strategy’ were broad — to make Europe “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion” — but any transfer of additional powers to the European level was deliberately avoided.
The ‘open method of coordination’ defined on that occasion consists above all in establishing procedural routines – the definition of guidelines and indicators, periodic monitoring of national policies, exchange of best practices – intended to promote mutual emulation and learning. Mutual emulation rather than Community control mechanisms is the key to success under this new strategy. The Commission is relegated to a secondary role and the heads of state and government assume an overall role of guidance and control (Rodriguez, 2002; De la Porte and Pochet, 2002; Dehousse, 2004). This approach epitomises the new modes of governance at the EU level, which make extensive use of networks of various types and profess greater openness to civil society in public policy-making (Kohler-Koch and Rittberger, 2006; Hix, 1998).

Taken together, these moves reflect a desire to break with the broad delegation of powers that is distinctive of the Community Method. The Commission, which for many symbolises the evils of the classical approach, has rapidly perceived that the wind has been changing. Already under the presidency of Jacques Delors, the Forward Studies Unit launched a research programme on “governance”, and shortly after his arrival in Brussels, Romano made of the reform of European governance one of its main strategic priorities. The final product of this initiative, the Commission White Paper of July 2001, was however to show the institution’s basic ambiguity in relation to this issue, since it championed the use of new instruments, while at the same time strenuously defending the Community Method (Commission, 2001; Georgakakis, de Lasalle, 2007).

The Rise of the European Parliament

Over the last two decades, a strong dose of parliamentarianism has been injected at the European level. At each Treaty reform, the European Parliament’s financial, legislative and supervisory powers have been
strengthened. As a result, the Parliament has evolved from being a consultative assembly to a co-legislator in a growing number of areas. Equally importantly, it has also acquired considerable influence in the appointment of the Commission. Although this ‘vote of approval’ concerns the college as a whole and not any individual Commissioner in particular, the Parliament has succeeded in influencing the distribution of portfolios within the Commission and even its composition. The difficulties surrounding the nomination of the Barroso Commission in October 2004 marked an important stage in this development: for the first time, the Parliament managed to oust two of the governments’ nominees.

The European Parliament’s rise in power has been achieved largely to the detriment of the Commission. A weakened Commission has been forced to accept a number of new demands in the exercise of its duties: when Romano Prodi took up office he had to pledge to take “utmost account” of the desires and wishes of the Parliament in matters of political initiative. The assembly occasionally succumbs to the temptations of micro-management – when it supported individual sanctions against certain European officials after the mad cow crisis, for example. For now, though, these are but occasional demonstrations of the European Parliament’s growing authority. For there to be a lasting shift in the centre of political gravity in the European Union, a stable and coherent majority would be needed within Parliament and this does not seem to be the case yet, despite the apparent growth of party discipline in EP votes (Hix, Noury and Roland, 2005). Today, Europe is in a halfway house, with the Commission weaker than ever before and a real parliamentary system still not a reality.

The challenge of numbers

Finally, the enlargement was seen largely as a major source of stress for the EU institutions. Going from 15 to 27 members, with the possibility of further
enlargement before long, can only make an already complex institutional system even more unwieldy – and also less transparent. What is more, the fine balance struck between the large and small states during the 1950s appeared under threat, as all the new members, with the notable exception of Poland, fell into the category of ‘medium’ or ‘small’ countries. This led to protracted discussions concerning both voting in the Council and the structure of the Commission (Magnette and Nicolaidis, 2004). These questions have been at the heart of the debates exercising Europe over the last ten years. In Amsterdam and later in Nice, government representatives struggled to find answers to these different problems, without much success, as they later came to admit. The failure of the draft constitutional treaty left the Union to cope with the arrangements introduced by the Nice Treaty, which were widely regarded as insufficient to enable the Union to face up the challenge of numbers (Tsebelis, 2005). Hence the worries of the declared supporters of the “Community Method”.

Reviewing the evidence

Despite its announced demise, many elements suggest that the Community Method has been more resilient than expected. First of all, the volume of “hard law” produced by the European institutions is anything but declining. As shown in Graph 1, the volume of Commission proposals has remained fairly stable after the last enlargement, despite a temporary drop in 2005.

A similar curve exists in relation to legislative production. Year after year, the Union adopts about 200 legislative texts (Graph 2). True, there was a sharp decline in 2005, but it appears to be a by-product of an acceleration registered the previous year, with a peak of 230 texts, nearly two-thirds of which were adopted in the four months that immediately preceded the arrival of the new members. Obviously, the fear of paralysis generated by the enlargement played a major role in that acceleration. But interestingly, after
the 2005 decline, legislative output has returned to pre-enlargement levels, which suggests that the EU machinery has reacted better than many observers anticipated. Even more surprising, decisions are taken more rapidly (Dehousse, Deloche-Gaudez and Duhamel, 2006, chapter 1). Interestingly, the stability of legislative output is also quite remarkable in the social policy sector, which was the theatre of many attempts to introduce “new modes of governance” (Pochet, 2007).

Sources: Council General Secretariat for years 1999-2002 & Observatory of the European Institutions for years 2003-2006
The same thing could be said about another major source of hard law, namely the European Courts (European Court of Justice and Court of First Instance), whose number of rulings has been climbing, which is hardly a surprise since an increased number of member countries could be expected to lead mechanically to an increase in litigation. Needless to say, those figures say nothing of the normative quality of EU law or of its content (pro-integration or not). But clearly, the enlargement has not had the announced crippling effect on the Community law-making system.

Secondly, the frequency of the resort to voting has remained stable. After a peak observed in 2002 and 2003, the ratio between the number of votes registered and the number of legislative acts taken on the legal basis of QMV has attained 22 per cent in 2006 - a figure that is in the average of figures recorded from 1999 to 2006 (Graph 3).

Interestingly, the time period before voting tends to shorten. Prior to enlargement, it took on average almost 475 days after an act was transmitted...
to the Council for the ministers to decide that a vote was to be taken. This time period has now declined to around 450 days, which might contribute to explaining the acceleration in legislative procedures. Of course, the relatively limited number of votes that took place during this period imposes a great caution in the interpretation of this data. Nevertheless, it appears that contrary to many pre-2004 forecasts, the enlarged Council is not less willing to vote than its predecessors.

Thirdly, the frequency with which states voice their opposition to a Commission proposal does not appear to have changed significantly. To evaluate this, we incorporated all negative votes and abstentions for each member state – since both of these tools can be used to manifest, in varying degrees, their dissent – and compared them to the number of acts having given rise to public votes. Between January 2002 and April 2004, the two states most prone to vote against a proposal or to abstain, Sweden and the United Kingdom, were placed in a minority respectively 21 and 16 times out of 101 publicised votes, which represents an ‘opposition rate’ of respectively 21 per cent and 16 per cent (Graph 4).

After the 2004 enlargement, the number of states whose opposition rate exceeded 15 per cent increased from two to four and the value of these highest opposition rates increased as well. Sweden’s ‘opposition rate’ reached 23 per cent and that of Poland 24 per cent. We should not, however, pay too much importance to the individual situation of any country in particular, since the opposition to ‘packages’ of decisions (as occurred in the domain of fisheries in December 2002 or in the domain of research and development in December 2006) can inflate their opposition rate. What appears more significant is that the average ‘opposition rate’ has declined from 11 to 10 per cent, which suggests that decision-making has retained a consensual character. Another element worthy of some notice is that even though much was made of a purported cleavage between ‘large’ and ‘small’ states during the preparation of the draft constitutional treaty, such a cleavage is not found on
the level of votes cast in the Council. After enlargement, the five states with the highest opposition rates are, in decreasing order: Poland, Sweden, Lithuania, Greece, Germany, Denmark and Malta. The data does not reveal any form of stable coalition. It may be thought that this helps facilitate the acceptance of the vote: a state systematically placed in a minority would have difficulty tolerating its situation.

In this respect, it is interesting to note that, since enlargement, the size of the minorities has been increasing. One of the permanent features in the period between 1998–2004 was that around half of all votes involved only one state (Hayes-Renshaw, Van Aken and Wallace, 2006, pp. 161 and 169). Thus the vote, far from being an instrument of the ‘government’ of the Union, serves first and foremost as a means of unblocking a situation where a unanimous accord is declared impossible. This explains why Germany and
Denmark have rather high rates of opposition: the former can indicate to the Lander and the latter to its national parliament that they were not able to oppose EU decisions despite the commitments made to their legislative bodies. At this level, enlargement seems to have induced a significant change. After May 2004, the number of one-state minorities fell to 35 per cent, while the percentage of minorities that group more than three member states increased to more than 25 per cent (Graph 5). This seems largely due to the behaviour of new member States, who appear less inclined to oppose Commission proposals if they are isolated (Dehousse and Deloche-Gaudez, 2008).

Graph 5: Coalitions of States opposed to the Adoption of Legislative Acts in the Council

Still, this remains very far away from a clear majoritarian pattern: even decisions taken by a vote are best described as consensual, given both the high majority threshold established by the Treaty (over 70 per cent) and the reluctance to outvote a large number of countries. Be that as it may, the quantitative evidence available clearly suggests that enlargement has not led to a major disruption of the system, at least as regards decision-making.
Conclusion

Four decades ago, in a much-remarked article, Stanley Hoffmann (1966) argued that despite functionalist expectations to the contrary, the states were not withering away, and that they should be expected to retain a major role in European affairs. Much the same thing could be said today about the “Community Method”. Fifty years after the Treaty of Rome, which gave it a new shape after the debacle of the European Defense Community, it clearly plays a central role in contemporary EU policy-making, notwithstanding repeated declarations about its alleged obsolescence made by political leaders and students of European integration.

This article has displayed several indicators of its vitality. It has shown an amazing ability to evolve in reaction to new challenges. The main institutional innovation of the past two decades, the emergence of the European Parliament, has been absorbed without major shock, and the same can be said, so far at least, for a spectacular enlargement process. Year after year, the volume of EU legislation remains remarkably stable. Whatever one may think of its political orientations, the European Commission does not sit idle and produces a steady volume of proposals. Although the number of member countries has more than doubled in twenty years, the Council does not seem to face greater difficulties in making decisions. At all these levels, the latest enlargements do not appear to be the major source of difficulties that had been expected. And the very fact that rulings of the Court of Justice can be controversial – as was the case with the Laval and Viking cases, dealing with the rights of workers to collective action and the competition between national systems of social protection – can be seen as indicative that the Court has remained a central actor in EU policy-making – too strong an actor, some would argue.

True, the post-1992 period has seen many innovations and a clear will to experiment with new modes of governance. But the opposition between
old and new governance should not be over-emphasised. First, several hallmarks of the new instruments – flexibility, decentralisation, deliberative policy-making etc. – already featured prominently in some EU policies well before the current governance literature started to blossom (Ehlermann, 1983-84; Sabel and Zeitlin, 2008). Secondly, new modes of governance, such as dialogue with civil society, can also be used by EU institutions to enhance their influence (Cram, 2007). It has also been shown that the modes of action, and even at times the structure, of the actors to which the new governance literature has directed our attention, such as non-governmental organisations, were often influenced by EU policies (Sanchez-Salgado, 2007). Much of the ambiguity of the current situation stems from the fact that the turn to governance has been developed largely to enable the EU to step into policy areas in which, for a variety of reasons, the delegation of powers to supranational actors was deemed unacceptable – the best example being, of course, the famous open method of cooperation, the aim of which was clearly to Europeanise one of the strongholds of modern states, i.e. their welfare systems.

Rather than viewing the relationship between old and new governance as a tug of war in which one will clearly be called upon to prevail over the other one day, one should think of them as distinct, though not clearly antagonist, approaches to policy-making at the European level. For the EU, like most systems of contemporary governance, “normally functions through a mix of co-existing, partly inconsistent organisational and normative principles, patterns of participation, behavioral logics, standard operating procedures and legitimate resources” (Olsen, 2008, p. 7).

Thus, whatever the aims of its promoters, it makes little sense to argue that “new” governance will necessarily lead to the demise of the Community Method. As a recent strand of critical literature has observed, the effectiveness and long-term viability of many new instruments remain to be demonstrated (Idema and Kelemen, 2006). On the basis of the evidence reviewed in this
chapter, the importance of the Community Method does not appear to be in decline. Furthermore, the Lisbon Treaty contains elements that should in all likelihood improve its scope, such as an extension of qualified majority voting and the shift of a substantial part of security and justice matters to the first pillar. More fundamentally, EU governance is too complex to be captured by simple dichotomies, such as the opposition between old and new modes. Rather than thinking in terms of alternatives, we should try to analyse how different modes of governance are combined, and how the mix changes over time (Olsen, 2008, pp. 6 and 11).

In that respect, the quantitative evidence discussed here mostly relates to the decision-making process, which leaves open the possibility that the structural challenges discussed above impinge upon the substance of the decisions taken. Indeed, there are reports that the deals struck in Brussels allow greater flexibility (in the form of opt-outs, for instance) than in the past or that they result in incoherent compromises (Haegeman and De Clerck-Sachse, 2007). More research is therefore needed to be able to say if the balance of power has been altered and if power has moved away from the centre. Recent studies have also shown that EU control mechanisms were far from sufficient to guarantee a faithful implementation of joint decisions (Falkner et al., 2005). Moreover, arguing that the Community Method does retain a central role in today’s EU does not necessarily entail that this model is intrinsically stable. As we saw above, it has generated a fair amount of and remains challenged in various circles. Some of its success stories, such as its adaptation to the rise of the European Parliament, may even bring new problems. Thus, for instance, the fact that about two-thirds of the legislative texts adopted by the Council and the Parliament in co-decision are adopted in the first reading may be seen in two ways. On the one hand, it shows that institutions have been able to find ways to cooperate smoothly with one another; on the other, given the part played in this process by informal dialogues bringing together a handful of people on each side (Shackleton,
2000), it could as well be argued that this trend contributes to strengthening the elitist bias of European policy-making. If the pressure in favour of democratisation remains, as is likely, the Community Model will be called upon to evolve further.

Notes

* This chapter has also been published in the Renaud Dehousse and Laurie Boussaguet (eds.), “The Transformation of EU policies-EU Governance at Work”. CONNEX Reporting Series Nr. 8, 2008.

1 See the literature review in Kohler-Koch and Rittberger (2006); Bähr, Falkner, Treib (2005) and Olsen (2008).

2 As early as 1953, Robert Schuman wrote that “the supranational is positioned at an equal distance between, on the one hand, international individualism, that considers national sovereignty untouchable and only accepts contractual, occasional and revocable obligations as limitations of sovereignty; and on the other hand, the federalism of states that submit to a super state endowed with its own territorial sovereignty. The supranational institution, such as our Community, [...] does not have the characteristics of a state; but it holds and exercises some sovereign powers.” (Schuman, 1953, p. 7. Author’s translation)

3 This Madisonian view finds an echo in the works of Giandomenico Majone (Majone, 2007).

4 See in particular the forceful critique of Giandomenico Majone, 2005.

5 Helen Wallace speaks of ‘intensive transgovernmentalism’ (Wallace and Wallace, 2000, pp. 3-37). See also Majone, 2005, pp. 51-63.

6 The data discussed in this section is taken from a large-scale empirical project conducted at Sciences Po in Paris, the Observatory of the European Institutions.

7 According to Hayes-Renshaw, Van Aken and Wallace (2006), the average figure is 20 per cent over the period 1999-2004. In our data, the average figure is 24 per cent over the period 2002-2006.

8 We do not take account of legislative acts adopted under the rule of unanimity which gave rise to abstentions.
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This chapter aims at exploring the paradox of policy instruments by critically examining the link between policy instruments and forms of governance in the European Union. In many ways, policy instruments have been back into fashion for some time now. Recent publications tend to focus on “new” or “innovative” policy instruments, implicitly assuming that they improve both the accountability and the democratic legitimacy of forms of governance in the EU (Cini, Rhodes, 2007). According to these authors, and at the risk of denying the interplay of social interests and of masking power relations, in a current era of “new governance” or “new negotiated governance” (Salamon, 2002), public policies are less hierarchical and organised to a lesser extent within a sector demarcated or structured by powerful interest groups (e.g., urban policy, environmental policy, new social policies or the negotiation of major infrastructures).

In fact, this rather functionalist orientation links the choice and combination of policy instruments, i.e. public policy instrumentation, to the
evolution of policy objectives (Howlett, 1991: 2). In this perspective, the questions entailed in the notion of public policy instrumentation (justification for choosing, combination of tools and techniques, modes of operation during the implementation phase) are considered as secondary issues, merely an expression of rationality without any further meaning. Drawing on an earlier phase of our project (Lascoumes and Le Galès, 2004; 2007), we firstly assume that policy instruments, as a particular type of institutions, have impacts of their own, which result either from their generic dimension, or from constraints that are specific to the political system and the policy field in which they develop. In this perspective, we critically examine the link between policy instruments and forms of governance in the EU through a systematic analysis of forms of policy instrumentation and modes of operation during the implementation phase. Secondly, we assume that forms of policy instrumentation reveal a (fairly explicit) theorisation of the relationship between the governing and the governed. Public policy instrumentation is understood as “the set of problems posed by the choice and use of instruments (techniques, methods of operation, devices) that allow government policy to be made material and operational. [It] is therefore a means of orienting relations between political society (via the administrative executive) and civil society (via its administered subjects), through intermediaries in the form of devices that mix technical components (measuring, calculating, the rule of law, procedure) and social components (representation, symbol)” (Ibid.). In this sense, it can be argued that every policy instrument entails a condensed and finalised form of knowledge about social control and ways of exercising it. If this assumption is correct, not all undemocratic impacts of policy instruments are unwanted or unintended, but on the contrary, they are seen as a way to avoid public debate, to make some issues invisible and / or some decision-makers non-accountable, and to avoid blame.
In this chapter, we assume that policy instruments offer valuable insights into the functioning of political systems. The focus on policy instruments also highlights aspects of policy-making at EU-level, as well as the internal dynamics of the EU polity. More precisely, the focus on policy instruments relates to the following questions: How does the EU achieve uniform implementation of policy across its territory? How appropriate are the tools selected by the EU in specific policy areas for achieving stated goals? To what extent have EU institutions shown proficiency in coordinating potentially conflicting actions within or between different sectors? Drawing on our empirical results on choice and combination of policy instruments in the environmental and the urban policy fields in the European Union, this chapter argues that EU policy instruments are rarely new; and that the link between policy instruments and the democratic legitimacy of EU forms of governance is not straightforward.

As shown in the environmental and urban policy fields, EU policy instruments are rarely new. They either reorganise pre-existing elements or are borrowed from other sectors or political and institutional contexts. This is particularly true for the environmental policy area, though much less for urban policy. The specificity of the EU rather lies in the development of original forms of policy instrumentation that combine old and new policy instruments. Over the past 30 years or so, forms of instrumentation at EU level are more diverse, and do not rely anymore on just regulatory or legislative tools. The presence of policy instruments aiming at informing the public or at including more actors in the policy-making and implementation phases through agreement- and incentive-based policy instruments is more systematic. However, the introduction of such policy instruments is also used in combination with regulatory tools, as shown by the recent examples of EU legislation on genetically modified organisms (GMO) (Löfstedt, Vogel, 2001), on packaging and packaging waste or on water (Arts, Leroy, 2006).
Indeed, some of the policy instruments, which have been introduced since the mid-1990’s, were developed in order to tackle emerging issues, such as GMO’s and climate change. These issues are characterised by a high level of uncertainty and their global dimension. They are addressed through specific combinations between: 1) regulatory instruments, which draw on existing EU regulation on chemicals, and establish a GMO (adventitious) presence threshold, and 2) information-based instruments (labelling), which aim at associating civil society. In other cases, the development of mixed forms of policy instrumentation has fostered the emergence at EU level of integrated authorization and monitoring systems, as for example in the case of chemicals. This mixed form of policy instrumentation offers few opportunities to environmental actors to influence the elaboration, the selection and the integration process (see also Borraz, 2007). Firstly, in this mixed form of policy instrumentation, expertise, information and knowledge have become key resources for all actors interested in participating to policy-making, thus leading European institutions to diversify their alliance strategies (Rootes, 2002). Secondly, the growing role of experts in these authorization and monitoring systems contributes to the further closure of decision-making processes on a sectoral basis (Borraz, 2008). In this context, environmental issues are still addressed on a sectoral and a technical basis, but forms of legitimation have changed and tend to include a wider range of actors.

The focus on evolving forms of policy instrumentation at EU level also contributes to our understanding of the political dimension of instruments. Various mechanisms (Gambetta, 1998), through which policy instruments and evolving forms of governance at EU level exert an influence on one another, have been identified. Firstly, in some cases, policy objectives remain so vague or ambiguous, that their operationalisation through a specific set of policy instruments is hindered, as shown by the European legislation on major-accident hazards, for example (see also McCormick, 2001; Lenschow, 2002). Secondly, a policy instrument is usually meant to stabilise the framing of
a problem, or the issues related to a specific problem. However, empirical evidence shows that some problems, such as noise as an environmental nuisance, are not addressed by a specific policy instrument at EU level; whereas competing frames and/or recurrent re-framing processes block the stabilisation of a problem’s framing, as exemplified by European policy programmes in deprived urban areas. Thirdly, the analysis of forms of policy instrumentation contributes to explaining how some issues are given more or less visibility in the public debate (Baumgartner, Jones, 2005), through the strategic uses of discreet and / or non-visible instruments, as exemplified by the integration of European urban policy instruments in the British urban policy under the Blair government (Harding, 2005).

Finally, policy instruments might work as a filter, thus contributing to the further closure of decision-making processes, both at EU and at national levels. The introduction of information- and communication-based, or agreement- and incentive-based instruments in the environmental and urban policy fields offered a formal opportunity to a high number of actors and interests to participate in decision-making. However, a longitudinal analysis of consultation devices, charters or partnerships shows that influence over decision-making remains in the hands of a small group of actors, at times creating new oligarchies. In France for example, the implementation of such policy instruments has favoured the emergence of “technotables”, i.e. local elites who specialise in consultation and partnership processes, thus managing crucial resources in the policy process without contributing to reinforcing local democracy (Gaudin, 2007; Loughlin, 2007). Similar processes could be observed during the implementation of the EU Water Framework Directive in several member states (Van Tatenhove et al., 2000). The implementation of European spatial development perspective (ESDP) also shows that information- and communication based instruments, originally aiming at offering a formal opportunity for a high number of actors and interests to participate in decision-making, have worked as a filter (Faludi, Waterhout,
In several strategic planning processes, both at member state and regional levels, large consultation devices, such as citizen panels or online consultation forums, were introduced. However, the use of these devices, in combination with specific cartographic techniques (e.g., dots vs. boundary lines), has only offered a small number of actors and interests the opportunity to impact the decision-making process.

Through a brief presentation of empirical evidence on choice and combination of policy instruments in the environmental and the urban policy fields in the European Union, this chapter has critically examined the link between policy instruments and forms of governance in the European Union. Focusing on the political dimension of policy instruments, this chapter firstly shows that most *ex ante* expectations on the effects of EU policy instruments need to be critically assessed through a systematic analysis of the implementation phase and of outcomes. It secondly shows that EU policy instruments are rarely new; the specificity of the EU rather lies in the development of original forms of policy instrumentation that combine old and new policy instruments. By showing that the distinction usually made in the literature on European governance between “old” and “new” instruments (Jordan et al., 2003; Knill, Lenschow, 2000) does not allow for addressing the link between policy instruments and democratisation process in a satisfactory way, this result contributes to opening new perspectives for research on the development of different (or not) modes of governance at EU-level. More precisely, the supposedly “new” instruments of the “new” governance are at times chosen to justify the invisibility and / or lack of transparency of policy processes, both at EU and member state levels.
Notes

1. This chapter presents some results of a research on “Choice and combination of policy instruments: Evolving policy instruments in the urban and the environmental policy fields since the 1970s”. This research was conducted together with Patrick Le Galès within the 6th Framework « NewGov – New Modes of Governance » Research Program: http://www.eu-newgov.org/datalists/project_detail.asp?Project_ID=09 (15/02/2008).

2. An earlier version of this chapter was presented during a Connex Workshop (Paris, June 2007) on “Governing the EU: Policy instruments in a multi-level policy”, that was organised together with Hussein Kassim, Patrick Le Galès and Sophie Jacquot.

3. In those two sectors over a 30 years period and in four different political systems, we analysed systematically the combination, choice and impact of various policy instruments. The data was then organized in a database developed for this purpose. It aims at organizing all information on policy instruments in order to analyse their evolution over time and their integration within their respective public policy.

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Chapter 7

A New Public-Private Divide?
Co- and Self-Regulation in the EU

Thomas Conzelmann
University of Maastricht

Introduction

The increasing use of the term 'governance' within EU research signifies that private actors are now playing a significant role in governing society and economy in the EU. They are doing so not just as interest advocates, but rather as an integral element in the drafting and implementation of policy – thus making them an indispensable element of governance. Both in global and in EU governance, a number of arguments have been put forward to explain (and, at the same time, to normatively endorse) this development. In a nutshell, these arguments are a) the increasing complexity of public policy problems and the issue of how to organize knowledge in dealing with such problems; b) the resulting necessity to mobilize a wide range of actor resources – including those of private actors – for dealing with the contingencies of modern societies; and finally c) the limited capacity of ‘hard’ (binding) law in instigating the necessary cooperation among societal actors. Stemming from this last point in particular, there is also a greater interest
nowadays in the ability of ‘soft’ (i.e. non-binding) law in governance within and beyond the EU (Mörth 2004).

At the European level, the first experiments with the inclusion of private actors in implementation were made in the structural funds area after 1993, in the Environmental Action Programmes and in the context of the ‘New Approach’ directives. Later, different forms of voluntary self-regulation by industry actors in the shadow of EU law and the Social Dialogue became important examples of the responsibilities in EU governance that private actors were taking over. The propagation of the ‘Better Lawmaking’ agenda and especially the publication of the 2001 White Paper on ‘European Governance’ have abetted the political debate, particularly since public-private rule-making was presented as a sort of panacea to address the effectiveness and legitimacy problems of classical rule-making at the EU level. For example, the White Paper on ‘European Governance’ argues with respect to ‘co-regulation’ between public and private actors:

Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance, even where the detailed rules are non-binding (European Commission 2001b: 21).

The scientific discussion of public-private rule-making has focused on different aspects in different disciplines. Lawyers have mapped different forms of these regulatory techniques and predominantly discussed the issue of how they relate to binding law and fit into the regulatory landscape of the EU (cf. Senden 2005; Svilpaite 2007a). Political scientists, in contrast, have become more interested in the intra-organizational dynamics of public-private governance arrangements, and the potentials they hold in terms of effective and legitimate governing (cf. Börzel/Risse 2005). Despite these somewhat different foci, an overarching research interest in both disciplines has been the
issue of what type of public-private divide is conceivable, or is in fact emerging, and what we can learn from this about the more general issue of shared responsibilities between public and private actors ("Verantwortungsteilung"; cf. Trute 1999).

The present contribution focuses on the conditions for forming and implementing public-private regulatory agreements at EU level, both as regards certain structural preconditions and as regards motivations on the side of public and private actors. The starting assumption is that we cannot expect public-private forms of regulation to emerge simply because there may be a need for them, i.e. for functional reasons. Rather, both the Commission and private actors will enter into these arrangements if they perceive them to be in their interest. In this latter respect, the debate has predominantly focused on why the EU – in particular the Commission – would be interested in initiating such cooperation arrangements. As the quote from the White Paper given above shows, the Commission argues that the practical experience and other resources of private actors (such as financial resources, technical expertise, and their ability to commit other business actors – for example through business associations) can be used for attaining certain EU policy objectives in a relatively effective manner. In addition, the inclusion of private actors may also increase ‘ownership’ and willingness to comply with EU regulations. It may be added that co- or self-regulation can also be more flexible and less dependent on cumbersome legislative procedures through which implementation details are worked out and may also be more cost-effective, thus adding to the attractiveness of these regulation models for public actors (cf. Héritier 2002: 11; Töller 2003: 160; Porter 2005: 222).

There is comparatively less debate on why private actors would be willing to participate in European co- or self-regulation. While it may be argued that co- or self-regulation is advantageous for private actors because it gives them a greater say over the content and rigour of regulation, makes future government activity more calculable, and may also be more flexible,
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convenient and more practicable for business, an important open issue is why business actors should support European co- or self-regulation. Recent years have shown that business actors have usually striven to attain self-regulatory practices at either the global level, because this simply makes more sense in globally integrated markets, or at the domestic level, because domestic regulators may still be more powerful or inviting to private actors. Even more numerous are probably the cases where business actors have rejected all forms of regulation, even in the form of self-regulation. In other words, it seems that the question of why private actors would be interested in taking part in co- or self-regulation at the European level, and what the structural conditions for any such role are, warrants a greater deal of attention.

In discussing these questions, this chapter will proceed in four steps. After defining some key terms, the available theoretical thinking on why private actors would want to take part in self-regulatory exercises is discussed. As argued above, the material and social environment within which business actors find themselves can yield important answers here. This pertains to market structures as well as regulatory activity of public actors and the activities of civil society actors that might pressure business to comply with certain environmental or social standards. Because such thinking has predominantly been developed with respect to the global level, it is important to consider the extent to which such models are transferable to the EU level. One possible assumption is that the EU would be a likely candidate for bringing business actors to commit voluntarily due to its strong regulatory powers and because of its ambitious agenda in for example making sustainable development a reality. Starting from this thought, the article will then look at two different initiatives of the European Union in bringing business actors to commit voluntarily, namely the so-called ACEA agreement in the field of voluntary environmental agreements and several attempts of the Commission to promote a European approach in the field of corporate social responsibility (CSR). To organize the discussion, two issues will be discussed for each of
these fields, namely a) the motivations of the private sector to get involved in co- and self-regulation at the European level; and b) the dynamics of these forms of rule-making at EU level and the role of the Commission in their development. I conclude by offering some thoughts on the lessons that can be drawn concerning the future form and shape of the 'public-private divide' in the EU, and, in particular, the roles that the EU can play in this context.

A definition of key terms

An important variation in public-private regulation at the European level (and elsewhere) is the degree of legalization of public-private rulemaking (acknowledging that only public actors are able to issue legally binding rules). Conceptually, this is often discussed by distinguishing co-regulation within the EU from self-regulation (cf. Senden 2005; Svilpaite 2007a; Rottmann/Lenschow 2008). The advantage in making this distinction is that it finds some important points of reference in official Commission documents – most importantly in the Interinstitutional Agreement on Better Law-Making (IIA) signed between the Commission, the Council and the Parliament in 2003. In the IIA, the main dividing line between co- and self-regulation is considered to be the existence of a legal act, so that co-regulation is defined as:

... the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations) (point 18 of the IIA; my emphasis).

In contrast, self-regulation exists where there is:

... the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements) (point 22 of the IIA; my emphasis).
The IIA states that self-regulation does not necessarily imply any sort of activity by the Community, thus making it possible that self-regulation exists independently from any Community activity. However, there is in fact ample room for such activity. As pointed out by Svilpaite (2007a: 11), the reference to a legislative act excludes for example recommendations and communications by the Commission. Therefore, she argues, we often see situations where self-regulatory instruments were in fact “encouraged” by the Commission or where “their adoption was guided by the Commission through soft instruments, often under the threat of legislation”. In a similar manner, Senden (2005: chpt. 3.1.) points out that “the Commission may (...) suggest, by means of a recommendation, (...) that such an [voluntary, TC] agreement be concluded by the parties concerned to avoid having to pass legislation. These voluntary agreements are considered to constitute a form of self-regulation, unless concluded on the basis of a legislative act”. In other words, self-regulation as defined in the IIA may still be promoted or encouraged by the Commission; up to the extent that it is later formally acknowledged by the Commission (and thus comes closer to the status of ‘co-regulation’). These different dynamics in the interplay of private regulation and encouragement or acknowledgement of these activities by the Commission have led other observers to distinguish between top-down and bottom-up forms of co-regulation (for example Best 2003: 3). Top-down forms relate to cases where private actors are mandated to develop implementation rules and procedures of European legislation, while public regulators monitor the achievements of these procedures. Bottom-up co-regulation relates to a situation where “it is unlikely that stakeholders will make the necessary effort to set up or activate a representative body to formulate codes or standards, unless they have been invited to do so by public authorities and have some reasonably firm assurance that the results of their work will be endorsed”. One example of this is the Commission Recommendation on the reduction of CO$_2$ emissions from passenger cars
that followed up on and acknowledged voluntary agreements between European vehicle manufacturers (cf. Rottmann/Lenschow 2008). If one uses such a broader definition of “co-regulation”, the practice of self-regulation then becomes limited to phenomena like self-regulation of the Internet or advertising standards for print, radio and broadcast media.

The analytical relevance of such distinctions is that they not only offer a taxonomy of different scenarios of “Verantwortungsteilung”, but also help us to better understand the strategic situation of business actors who consider joining or implementing co- and self-regulatory schemes at the European level. As a rule of thumb, one would assume that business actors in situations of “top down co-regulation” implement and sometimes fill out the technical details of a legislative act of the European authorities. Their likely prime motivation here is to adapt given public rules to private circumstances and to make these rules as workable as possible for them. They are, however, relegated to a rather passive role of “norm consumers” (Flohr/Rieth/Schwindenhammer 2007), since they do not participate in the development of norms and may even simply acknowledge certain standards without implementing them (the free-riding scenario) if there is no proper monitoring. In contrast, bottom up forms of co-regulation and pure self-regulation give business actors the possibility to act as “norm entrepreneurs”, i.e. to set, specify and further elaborate the rules (and not just to accept and implement norms, as “norm consumers” would do; cf. Flohr/Rieth/Schwindenhammer 2007).

If one combines these distinctions with the taxonomy of different scenarios of “Verantwortungsteilung”, we arrive at a matrix outlining the likely intensity of participation of business actors in EU rule-making (Table 1). Different forms of regulation at EU level would offer business actors different opportunities to actually become engaged in EU rule-making. The areas shaded in grey show the activities that we would expect business actors to play. The message is rather straightforward here: The stronger the balance of
public-private rule-making is tilted towards top-down co-regulation, the smaller are the chances for private actors to actually play a meaningful role as “norm entrepreneurs” in EU regulation.

Table 1: Intensity of participation of private actors in EU rule-making

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<th>Norm setting</th>
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<td>‘Top down’ co-regulation</td>
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<td>‘Bottom up’ co-regulation</td>
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<td>‘Pure’ self-regulation</td>
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While we thus can identify a range of possible governance contributions that private actors can play at the European level, the question remains why private actors (on whose co-operation the success both of co-regulation and of self-regulation depends) would be willing to engage in practices of co- and self-regulation at the European level. Furthermore, to the extent that they do so, we are interested in the quality of their governance contributions: Do they merely accept the existing or proposed norms of an initiative (norm acceptance), do they make steps to actually implement them, or do they actually become more proactive in terms of engaging in norm setting or in the co-development of norms?

As a first step in discussing such a broad research agenda, I will take up the motivational aspects and structural conditions for business actors playing a role in EU rule-making in the next steps.
Why would private actors join and comply with co- or self-regulatory initiatives?

The general picture

On a general level, explanations as to why private companies enter into and comply with voluntary co- and self-regulatory mechanisms may be based on different theoretical assumptions about the motivations of these actors. As ideal types, one may distinguish between (1) ‘narrow’ market rationalism, (2) ‘complex’ market rationalism, and (3) an intrinsically norm-oriented behaviour. First, narrow market rationalism would see societal and political forces as influential only insofar as they can be translated into a ‘business case’, i.e. can be felt in the cost structure of the business concerned. For example, socially and ecologically sensitive production and products would serve certain niche markets, might help to recruit and retain the best employees, and might help to lower production costs (for example by diminishing waste or energy use or by lowering insurance costs). Second, complex market rationality would assume that business acts in a more long-term and anticipatory fashion. Costs that need to be taken into account (in addition to those mentioned in the “narrow market rationalism” scenario) may stem from boycotts and adverse campaigning by civil society activists, and from problems with stakeholders or the people living in the vicinity of production sites. Ecologically and socially sound means of production may also make certain firms attractive for ‘socially responsible investing’ through institutional investors (such as pension funds). All these factors depend on the public perception of certain businesses and may help businesses to retain market chances, the access to capital, and more generally their ‘licence to operate’. Another aspect to be considered in this context is public regulation, which may react upon public demands to regulate certain businesses more strictly. Such regulation may complicate the process of doing business in some
markets and leads to a complex and unwieldy regulatory situation at the
global level. Third, the existence of a normatively textured environment may
also give rise to an increased reflection and self-questioning of business actors
and to the recognition of certain values as guiding principles for business
conduct. The result may be an “intrinsic” motivation of business to observe
and implement ethical principles even where there is no clear economic or
political incentive to do so.

Reflecting on these thoughts, there is good reason to believe that the
governance potential of self-regulation may be limited at the global level. The
success of CSR activities and therefore the motivations of business actors to
join and to comply with self-regulatory schemes depend upon the existence
of certain context conditions at the global level that CSR activity in itself
cannot generate. For example, many CSR activities operate on the
assumption of informed consumers who are willing to spend a few Euros
more on ‘ethical’ products, and on the willingness and ability of civil society
actors and critical consumers to boycott unethical ways of production. In a
similar manner, the existence of powerful regulatory threats must be assumed
in order for CSR policies to make sense. Because these conditions are
distributed unevenly both territorially and across industry sectors and
products, it can be argued that the governance potential of codes of conduct
overall will remain fragile as long as one cannot count on an intrinsic
motivation of at least parts of the international business community to
maintain and actively promote the observance of certain ethical standards –
even at the price of foregoing certain short term gains and opportunities.
Thus, a reasonably stable moral motivation of business to comply with certain
self imposed standards would be the only conceivable way of unfolding the
governance potential of voluntary self regulation (see Rieth/Zimmer 2004:
31 for a sceptical view). The improbability of such a general intrinsic
motivation among business leaders is behind the sceptical assessments of
NGO activists in pointing out the ‘limits of voluntariness’ (Kerkow/Martens/Schmitt 2003; also see De Schutter 2008: 218-219).

The importance of home state variables

Still, the picture may not be all that bleak. Empirical research on the membership of business actors in global self-regulatory initiatives (such as the UN Global Compact) and their activities in norm setting, norm development, norm implementation, and norm acceptance show that there is a grossly uneven distribution of these activities according to the home states of individual businesses (i.e. the state where these businesses are headquartered; cf. Flohr/Rieth/Schwindenhammer 2007). In a similar vein, Kollmann and Prakash (2001) observe that within the European Union the response of business actors to the EU’s Eco-Management and Audit Scheme (EMAS) differs significantly across ‘home states’ (also see Heinelt 2000). Starting from the thoughts developed above, there are two rationalist hypotheses that can account for this observation. The first hypothesis rests on the assumption of “narrow market rationality” as developed above. In this scenario, the explanation for the importance of home state variables would lie with nationally different consumer demands or with different pricing structures. One obvious example would be situations where nationally divergent prices for energy consumption or waste disposal will lead to somewhat different business cases for adopting environmentally friendly forms of production, as is the case with EMAS (De Schutter 2008: 220). The second hypothesis rests on the assumption of “complex market rationality”. It argues that the willingness of private actors to enter private self-regulation or co-regulation depends on a credible threat of public regulation or of critical consumer attention in the respective home state. For example, nationally different likelihood of regulation and different regulatory styles, and the general awareness of the public concerning issues of corporate social
responsibility would play a role here. Relating to such ideas, Kollmann and Prakash (2001: 427-429) argue that different regulatory styles in the US, Germany and Britain and the presence of large and adversarial environmental movements in Germany and the United States have led to divergent responses by public regulators, which in turn was responsible for nationally different rates in the acceptance of EMAS and a comparable US scheme. It can also be argued that well-established and government sponsored eco-labelling schemes like the “Blauer Engel” in Germany may help to make consumers more aware of ecologically sound products and will act as an incentive for firms to commit to environmentally less harmful practices of production.

Structural conditions at EU level

Both hypotheses raise the question of the extent to which such models are transferable to the EU level. It seems that due to the nature of the EU as a ‘regulatory state’, the EU can mostly be influential through its regulatory powers, i.e. through one of the factors discussed in the scenario of ‘complex market rationality’. While the EU has few powers to directly influence the cost structures of doing business in different member states (for example costs for insurances, waste disposal, or energy use), EU-wide regulation can serve as a powerful tool that will most likely influence the decisions of business actors to commit or to stay away from certain forms of co- and self-regulation. First, European regulators are able to impose considerable costs upon business and thus pressurize them into committing to self- and co-regulation at the European level in order to avoid more costly unilateral regulation by the EU. Business actors would commit to regulatory activities at European level in order to avert binding regulation that in general will be less flexible and thus more costly for them. Second, the EU can – as in the case of the EMAS scheme – put forward certain templates for economically
sound management, that individual firms are then free to adopt. To the extent that the EMAS label is known by European consumers, the EU can also offer important incentives for business actors to adopt and voluntarily implement such schemes. Likewise, there may be a role for the EU in harmonising and sponsoring EU-wide labelling schemes such as the EU eco label. On the other hand, due to the relative weakness of the European public sphere (de Vreese/Schmitt 2007), it is less likely that Europeanised environmental movements or pressure groups would form a powerful trigger for co- or self-regulation that operates specifically at the European level.

It therefore seems safe to conclude that the attractiveness of voluntary regulatory activity of business interests at the European level is closely linked to the regulatory activity of the EU itself. Uniform cost structures at the European level exist to only a very limited extent, public spheres are weak, and intrinsic motivations of business actors to adhere to certain non-binding environmental or social standards will logically not end at the borders of the EU. As regulatory activity or threats of the EU are therefore likely to be the single most important driver of voluntary co- and self-regulation at EU level, it seems that voluntary regulation at EU level would be a most interesting case to study the interaction between public and private regulation and the ensuing patterns of shared responsibility (’Verantwortungsteilung’) between these two approaches.

Two illustrations

Against the background of these thoughts, the following section will give brief empirical illustrations of two examples of co- and self-regulation at the European level. One is the so-called ACEA agreement concerning the issue of CO₂ emissions reduction from passenger cars. It was concluded between the association of European car manufacturers, ACEA (Association des Constructeurs d’Automobiles Européens), and the European Commission, and sets
quite ambitious targets for the reduction of emissions. In this case, we can see a pattern of clear regulatory threats by the Commission that finally resulted in a ‘voluntary’ agreement among the EU car producers to decrease CO\textsubscript{2} emissions from passenger cars. The other example is the attempt of the European Commission to promote CSR policies at the European level through the EU Multistakeholder Forum on CSR (2002-2004) and the CSR Alliance (launched in 2006). In this case, the Commission did not issue regulatory threats, but rather sought to provide a platform for business actors to develop their own standards, leaving the question of acknowledgement of the outcomes largely open. The two examples\cite{11} will be used to better understand the motivations of the private sector to get involved in co- and self-regulation at the European level. In addition, I will also look at the dynamics of these forms of rule-making at EU level and the role of the Commission in their development.

**CO emissions reduction – the ACEA agreement**

As mentioned above, the ACEA agreement agreed in 1998 sets targets for the reduction of emissions, however leaves the issue of implementation almost completely to industry. In particular, there are no detailed technical requirements and no direct intervention in the markets. This outcome is the result of a situation in which the Commission openly threatened to regulate if ACEA would not adopt the targets set politically by the Commission and the Council. Under these conditions, ACEA finally agreed to ambitious targets, however was able to ‘save’ the self-regulatory nature of the initiative, which for example left it open to industry to achieve the targets not for each individual car, but as an average of the range of cars that any individual manufacturer produced. In addition, the Commission followed the demands of European car producers to negotiate similar standards with Korean and Japanese car manufacturers. Concerning the issue of compliance, the
agreement set out a relatively demanding format, with regular reporting by national industry associations on achievements towards the targets, which were then checked by the Commission and later publicized. Later the Council and the Parliament also received a role in the monitoring of the agreement through annual communications on the state of implementation from the Commission to the EP and the Council. “This means that different European institutions are much more involved in the agreement compared to other self-regulatory arrangements” (Rottmann/Lenschow 2008: 243). All this could be achieved only due to the ongoing regulatory threats of the Commission as well as due to the relatively homogenous nature of the industry association ACEA. ACEA possessed “Verpflichtungsfähigkeit” (cf. Héritier 2002: 11) in the sense that it actually managed to oblige its members to comply with the accords between it and the Commission.

Concerning the actual success of the ACEA scheme, the reduction of CO₂ emissions turned out to proceed slower than envisaged. In its 2006 assessment of the scheme, the Commission noted that “[i]n order to meet the final target of 140 g CO₂/km major additional efforts are necessary”, and said that this was “a cause of concern”, even though there had been some reductions in emissions since 1995. In reaction to this, the Commission adopted a Communication in February 2007 and a legislative proposal in December 2007 with the aim of further reducing CO₂ emissions to 120 g CO₂/km by 2012. As explained in an accompanying press memo, the Commission had concluded “that the voluntary commitments have not succeeded and that the 120 g target will not be met on time without further measures”.

While the ACEA agreement may therefore serve as an example of the limited overall suitability of the voluntary approach as an instrument of governance, its relative success in terms of agreeing to comparatively demanding targets and binding industry actors to them become clear when compared with the voluntary agreement between the EICTA (European
Information, Communications and Consumer Electronics Technology Industry Associations) and the Commission (the case is also treated in Rottmann/Lenschow 2008). The agreement aims at improving the energy performance of consumer electronics such as television sets or DVD players. Again, the regulatory threats by the Commission which considered introducing a mandatory labelling scheme of the energy consumption of consumer electronics (comparable to the one that already existed in the area of household appliances like fridges and washing machines) were an important factor in the emergence of the agreement. While EICTA managed to avert the labelling scheme with the argument that it would confuse customers, it was on the other hand unable to make a success of the voluntary agreement. In particular, the willingness of industry actors to join the agreement was much more limited than in the automotive industry. As explained by Rottmann and Lenschow (ibid.: 249),

the association could not convince all companies in the sector to join the VA [Voluntary Agreement, TC]. (...) Due to the fact that participation in the VA is voluntary, free-riding is a possible or even legitimate option for companies in the sector. The global nature of the electronics market and the fact that competitors from other continents are not bound to a voluntary agreement (...) undermines any incentives to participate in this self-regulatory arrangement. In addition, (...) consumers interested in buying high-tech products generally do not pay much attention to energy efficiency.

It thus seems that in this case consumer choice works differently than in the case of automobiles, putting (even) less of a premium on environmentally friendly products. Two further factors are crucial in explaining the lesser extent to which industry actors were willing to join the voluntary agreement in the case of the consumer electronics industry: First, the failure of the Commission to create a ‘level playing field’ by negotiating similar environmental standards with foreign competitors distributed economic costs unevenly. Second, the much lesser degree of business concentration in the
electronics sector played an important role. While ACEA currently consists of only 14 individual members (European car, bus, and truck manufacturers), EICTA is made up of “41 national digital technology associations from 29 European countries with over 59 direct company members, [and] altogether represents more than 10,000 enterprises in Europe.”17 While it is of course difficult to generalize on the basis of just two cases, one can nevertheless hypothesize that small, concentrated and homogenous interest associations and the ability of the Commission to minimize adverse economic consequences of voluntary agreements for the sector concerned play an important role in the attractiveness of co- and self-regulation as a regulatory strategy. While the latter decreases the economic costs of committing to certain environmental standards, the former facilitates internal monitoring and thus minimizes the likelihood of free-riding by individual business actors. In addition, effective and homogenous interest associations make it easier for the Commission to interact with industry and to develop standards and rules in cooperation with these actors (Schneider and Baltz 2004).

CSR promotion by the EU

The European Commission’s attempts to promote CSR policies at the European level through the EU Multistakeholder Forum on CSR (2002-2004) and the CSR Alliance (launched in 2006) form another interesting case for assessing the dynamic of public-private interaction at EU level. Both the Multi-Stakeholder Forum (MSF) and the CSR Alliance are themselves not forms of regulation, but rather networks convened by the Commission through which it aimed to popularise CSR ideas at the European level and to get the participating business actors to adopt a more unified framework of CSR practices at EU level. The background to their development are the EU’s Lisbon Strategy and an ensuing consultation process beginning with the publication of the 2001 Green Paper “Promoting a European Framework for
Corporate Social Responsibility” (European Commission 2001a). In its response to this first consultation exercise, the Commission argued that

the proliferation of different CSR instruments (such as management standards, labelling and certification schemes, reporting, etc.) that are difficult to compare, is confusing for business, consumers, investors, other stakeholders and the public and this, in turn, could be a source of market distortion. Therefore, there is a role for Community action to facilitate convergence in the instruments used in the light of the need to ensure a proper functioning of the internal market and the preservation of a level playing field.18

Other than in the cases of the ACEA and EICTA agreements, the Commission did not trigger the development of self-regulatory practices, but argued that there was a need to streamline the existing proliferation of CSR instruments. Despite the critical remarks of business associations concerning this idea,19 the Commission went on to set up the MSF in 2002, bringing together representatives of the Commission as well as business, employer organisations, trade unions, and civil society. Among these actors there was little agreement on the form of regulation of CSR, whether CSR should be mandatory or voluntary, or whether a mixture should be sought. In this context, the social NGOs that had been invited to the MSF generally demanded a stronger role of binding regulation, while business and employers’ organisations argued more in favour of voluntarism (cf. Buhmann 2006: 12). These strong divergences are reflected in the rather cautious conclusions of the MSF concerning the promotion of CSR at the European level and the role of binding regulation in this. The main objectives formulated in the 2004 Final Report of the MSF are focused on the promotion of CSR policies at the European level, raising awareness and improving knowledge at the EU level of CSR policies. At the same time, it was stated that the OECD Guidelines, the UN Global Compact, and the ILO Tripartite Declaration of principles concerning Multinational Enterprises should inform European CSR policies (MSF 2004: 6). In that sense, a distinct
regulatory role of the EU was denied, apart from a rather general reference to documents like the EU Sustainable Development Strategy and the Lisbon and Gothenburg Agendas. The report recommended implementation of these agendas and continued to argue that “…public authorities [should] ensure that there is both a legal framework and the right economic and social conditions in place to allow companies which wish to go further through CSR, to benefit from this in the market place” (ibid.: 15). This can be considered an outright rejection of any prominent regulatory role for the EU.20

Following this logic, the next (2006) communication from the Commission explicitly “acknowledged” that “enterprises are the primary actors in CSR” and that therefore “the Commission has decided that it can best achieve its objectives by working more closely with European business”. In the same communication, it announced the launch of the CSR Alliance and explained that the alliance

is a political umbrella for new or existing CSR initiatives by large companies, SMEs and their stakeholders. It is not a legal instrument and is not to be signed by enterprises (…). It is a political process to increase the uptake of CSR.21

The CSR alliance thus heralded the explicit backing down of the Commission from any sort of regulatory attempts, and at the same time seemed to clearly favour interaction with business over consultation with other stakeholders (cf. De Schutter 2008: 216). The earlier ambitions of the Commission (expressed in the 2002 Communication discussed above) to “facilitate convergence in the instruments used in the light of the need to ensure a proper functioning of the internal market and the preservation of a level playing field” vanished completely but for a short reference to “examine, in consultation with all relevant stakeholders, the need for further voluntary actions to achieve the objectives of transparency and information
for consumers”. This can be considered a victory of those interests that were against the idea of promoting CSR standards at the EU level from the outset.

However, the Commission may be able to win back some of the terrain by promoting CSR practices at the international level. Examples mentioned in the 2006 communication are attempts to promote awareness and implementation of the principles contained in the OECD Guidelines, the ILO Tripartite Declaration, and the UN Global Compact. More importantly, the Commission pledges to use its powers in the external trade area to include CSR standards in the Generalised System of Preferences (GSP) ‘Plus’, the Economic Partnership Agreements (EPAs) negotiated in the context of the Cotonou Convention, and in other bilateral trade agreements (ibid.: p. 8). The recent conclusion of the first EPAs shows that the Commission has been successful with this agenda, however in a relationship that is at best marginal for European trade interests. To the extent that the Commission is successful in promoting these standards also vis-à-vis more significant trading partners, it would finally create the ‘level playing field’ concerning CSR standards that was demanded in many critical comments from the side of business. It would, thereby, also erect further incentives for business actors to voluntarily commit to the most prominent CSR schemes at the global level, such as the OECD, ILO, and UN schemes mentioned above as well as the principles of the Global Reporting Initiative (GRI).

**Towards a New Public-Private Divide?**

An observation to be gained from the previous discussion is that in the two cases discussed the EU has been relatively unsuccessful in getting private actors to join and to implement the self-regulatory or co-regulatory schemes that it initiated. In the ACEA case, it had to use strong regulatory pressure to get business actors to join the initiative, and was successful only because it also managed to get non-European carmakers on board. While the
Commission succeeded in agreeing relatively ambitious reduction targets with ACEA and likewise the Japanese and Korean automotive business associations, the European producers did not reach the targets and the implementation of the agreement failed. As a result, the Commission is now proposing to resort to binding regulation to achieve the political targets in the field of CO₂ emissions reduction. In the field of CSR promotion, the situation is not more encouraging. The business associations have been unwilling to follow the Commission lead for the time being. While a host of different forms of voluntary self-regulation continues to exist, the attempts by the Commission to veer closer towards a form of co-regulation have been unsuccessful. Again, the Commission seems to resort to strategies where it actually enjoys more powers by highlighting the importance of promoting CSR standards in global trade agreements.

Possible explanations for the difficulties of the Commission might be a) that voluntary self-regulation by businesses at EU level can only work if similar standards are made mandatory for foreign competitors; b) that business actors are turned away by what are perceived to be hidden regulatory agendas of the Commission; and c) that the workability of private self-regulation is actually dependent on industry structures and the presence of powerful norms and governance structures on the side of industry itself – something that tends to be beyond the reach of EU players. Concerning this last factor, it seems that the presence of capable and unified European umbrella associations is an important element in making co- and self-regulation work. Furthermore, it could be hypothesised that the more corporations are used to exerting public functions and are socialized at the domestic (national) level, the more likely they are willing to take on political roles and engage in voluntary self regulation also beyond the state (i.e. at EU level). Should this be the case, then the existing diverse pattern of business-government relations in different member states (cf. Kollmann/Prakash 2001) could be expected to constitute a formidable obstacle to effective voluntary self-regulation at the EU level.
The issue of whether we see an emerging or changing and thus “new” form of public-private divide in the EU can be led on several levels. If we understand the term in the sense of a political division between public and private actors, the discussion above has shown that there is actually a great deal of disagreement and conflicting interests between public and private actors in the operation of co- and self-regulation at EU level. If we interpret the term in the sense of ‘Verantwortungsteilung’, it seems that the success of self-regulation and bottom up co-regulation is dependent upon conditions that public regulators cannot themselves create – most importantly the willingness of business actors to actually engage in such forms of governance. In that sense and speaking on a rather abstract level, a number of more general functions can be identified which public actors at EU (and at domestic) level would be able to fulfil short of direct pressure on business actors.31 These are:

- the provision and guarantee of the legal and economic framework for private self-regulation, such as the functioning of markets and competition;
- shaping the normative environment of private self-regulation in order to lend legitimacy to the goals of private actors and keep self-regulation geared towards the general good,
- encouragement in the erection of voluntary self-regulation and help in securing compliance through the maintenance of a credible ‘shadow of hierarchy’,
- demand-side oriented measures supporting the voluntary commitments of business actors, e.g. the guarantee of ‘level playing fields’ in comparison to foreign competitors, tax cuts for eco-products, or the endorsement of labelling schemes, and
support in the monitoring of self-regulation, for example through own efforts or the licensing of accountants.

The Council and the Commission have to some extent taken up this challenge by formalizing over time a criterion-based approach of dealing with the existence of self-regulatory practices. Starting with the 2001 White Paper, where a few basic principles are outlined (European Commission 2001b: 21), the June 2002 Better Regulation Action Plan and the 2003 IIA developed a number of principles to be observed in co-regulation or the acknowledgement of pre-existing self-regulation. These are both of a formal nature (for example it is required that all co-regulation is consistent with existing Community law, is based on a legislative act, and that this act stipulates both the objectives and the extent to which implementation tasks are left to third parties), but also of a substantial nature. For example, the documents mentioned above require that

- the co-regulatory schemes are mindful of “the interests of the general public”;
- co-regulation cannot be used where fundamental rights or important political options are at stake, or where the uniform application of rules is required in the Community;
- the respective societal actors and other parties are representative, organised and can be held responsible by the Commission, Council and the Parliament; and that there are mechanisms for monitoring the implementation and enforcement;
- the Commission reserves the right to make a traditional legislative proposal to the legislator in cases where co-regulation has not produced the expected results.
These ideas line out possible contours of a ‘new public private divide’ at EU level. While reflecting some of the concerns voiced by the European Parliament and by environmental and consumer groups over the use of co- and self-regulation, they also carry a number of dangers. In particular, one can see a tendency in the IIA of tilting the balance of EU co- and self-regulation too far towards the ‘legalized’ end. This possibly entails the danger of relegating business actors to the role of norm consumers, and producing ‘dead’ agreements that are poorly implemented. As argued by Svilpaite (2007b: 8), there is the danger that too much involvement by private actors “washes out the authentic autonomous and spontaneous nature of self-regulation”. In other words, it might not be possible to commit as many business actors and to make use of their resources as necessary for a viable agreement. Empirical evidence shows that co- and self-regulation at the European level quite often serve the function of “[initiating] European policy-making in an area previously entirely reserved to member states” (Héritier 2002: 12). This may actually be another important reason for the scepticism of private actors towards joining EU initiatives.

Second, the high demands concerning the organisation of societal actors (in terms of representativeness and responsiveness) puts a burden on business associations that only some of them may be able to meet. One important result of the comparative analysis by Rottmann and Lenschow discussed above is that the success of voluntary agreements as well as the attractiveness for business actors to join in seems to be strongly dependent on the presence of relatively homogenous and internally strong business associations that can commit their members, as well as the ability of the Commission to apply comparable standards to foreign (or intra-European) competitors. The model is risky, however where the organization of a sector is weak, where industry is fragmented, or where there are several competing umbrella associations. An important research topic therefore will be what role business associations play in the emerging landscape of European co- and self-regulation, and what
organizational features they must possess in order to be viable partners in European level self- and co-regulation. In addition, there are legitimacy concerns about the increasing role of these largely unaccountable private actors and the ability of the Commission and the Council to credibly hold them to account.

Seen this way, EU co- and self-regulation has to navigate between the Scylla of using (or threatening the use of) its regulatory powers and thus to potentially alienate business actors and to produce ‘dead’ agreements, and the Charybdis of entrusting business actors with the attainment of public goods, which in turn may put into question the EU-wide application of rules, may produce free-riding behaviour and may be questionable from the standpoint of democratic legitimacy. The first two of these dangers could, however, to some extent be mitigated if there are powerful European associations which can not only negotiate (among themselves or with the Commission) co- or self-regulatory schemes at the European level but that could also garner support for them among business actors.

Reflecting on these thoughts, it seems that future research will therefore need to look at the following issues:

- What is the connection between the type of regulation (bottom up and top down forms of co-regulation and self-regulation) on the one hand and the degree of commitment of business actors on the other hand (norm acceptance, norm implementation, norm development, norm setting)? Is it true (as argued in Table 1) that there is an inverse relationship between the degree of legalization of co- and self-regulation and the degree of commitment at the side of business actors?

- Under what conditions does the EU (in particular the Commission) resort to regulatory threats, and when does it rather entrust business actors with attaining Community goals?
• Do domestically ingrained relations between business and public actors affect the willingness of business associations or of individual businesses to join and to comply with EU level co- and self-regulatory initiatives? Do we see a nationally different response to invitations by the Commission to contribute to EU level co- and self-regulation, and how can this be explained?

• What importance do national business associations and European umbrella associations have in bringing about co- and self-regulation at the European level?

• To what extent can the EU’s CSR agenda be pushed at the international level, for example through inclusion in trade instruments such as the ‘GSP Plus’ scheme?

Notes

1 The arguments developed in this paper have immensely profited from the debates in the three CONNEX workshops organized within the Research Team “Soft Modes of Governance and the Private Sector in EU policy-making” (RG 6), as well as from discussions in a research project on ‘Enterprises as Normative Entrepreneurs’ at the University of Darmstadt (see http://www.csrproject.tu-darmstadt.de/index.php?id=pw_csrstart&L=2 ). I would like to thank Anne Flohr, Mark A. Pollack, Lothar Rieth, and Sandra Schwindenhammer for immensely valuable comments on earlier drafts of this paper.

2 For a definition of this concept and its relation to ‘self-regulation’ by private actors see below.

3 OJ 2003, C 321/01.


5 The arguments summarized in this paragraph can be found in a more developed form in Conzelmann/Wolf 2007.
This is due to the uneven capacity of states and civil society globally and the different role of the media.

The sensitivity of a particular firm will be higher the more it operates brand names that are both easily identifiable in the market place and where the replacement of that brand with another carries only marginal costs for the consumer (cf. Diekmann 1998; Noll 2002).

The authors refer to a number of scholars such as Muchlinski (2007) and Doremus et al. (1998) who take issue with the view that global capital has become ‘footloose’. Even though MNCs nowadays operate globally, national histories and regulatory traditions continue to affect the behaviour of leading MNCs.

In the following paragraphs, I do not discuss the constructivist notion of ‘intrinsic’ motivations that are guided by standards of appropriateness or are generated through continuous interactions among committed business elites. The generalized nature of such intrinsic motivations makes it unlikely that socially and environmentally sound behaviour would be restricted to the European market.

The proposed considerable fines for car makers not meeting the CO₂ emissions reduction targets envisaged by the Commission are a case in point – see the discussion of voluntary regulation in this area below.

Both cases are treated in working papers emerging from the CONNEX research team on ‘Soft Modes of Governance and the Private Sector’ (Buhmann 2006; Rottmann/Lenschow 2008).


See, however, the position of ACEA which argues that changing consumer demands and EU regulations (e.g. safety requirements the implementation of which increased the weight of cars) were responsible for the slow progress. See pp. 7–8 of the ‘Questions & Answers’ document available on http://www.acea.be/images/uploads/files/20071218_qa.pdf (retrieved 27 July 2008).
The extent to which the fuel consumption of cars plays a role in consumer choice is contested, with ACEA pointing out that consumers continue to demand faster and bigger cars with a higher consumption, as long as public authorities do not offer additional incentives to consumers (such as tax cuts). See the ‘Questions & Answers’ document mentioned in the previous footnote.


The International Chamber of Commerce argued that “corporate responsibility is a global issue that needs to be approached at a global level. Therefore, it does not necessarily follow, as the Green Paper seems to suggest, that there is a need for European legislation or for a European public policy framework on corporate responsibility”. The European Round Table of Industrialists argued that the Commission “would be well advised not to try to promote a European framework as a world model. Any such model based on European values would be unacceptable to the rest of the world”. The responses to the consultation process can be found on http://ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm (retrieved 4 June 2008).

See De Schutter 2008: 210-215 for a masterly analysis of the development of the MSF and the conflicts that shaped its erection and functioning.


The ‘GSP Plus’ scheme offers a more generous system of trade preferences to developing countries with vulnerable economies under the condition that they commit to a large number of international conventions in the area of labour rights, sustainable development and good governance / freedom from corruption.

See Porter 2005: 222-223; Conzelmann/Wolf 2007: 113; De Schutter 2008: 221-224 for similar arguments.


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The three papers on this panel share two fundamental characteristics. First, each of them addresses, albeit in different ways, the relationship between traditional modes of governance, such as the Community Method and command-and-control regulations, and so-called new modes of governance or new instruments – a broad category including fiscal and tax instruments used to achieve regulatory aims, as well as self- and co-regulation, and the Open Method of Coordination (OMC).

The second fundamental characteristic that these papers share is that – spurred largely by the networking contributions of the CONNEX network as well as by the cumulative research efforts an ever-growing EU studies community – they each belong to what one might call the “second generation” of studies analyzing the nature and the potential of new modes of governance in the EU. The first generation of studies, which can be traced back to the establishment of the European Employment Strategy (EES) in the 1990s and the OMC at the Lisbon European Council in 2000, made far-reaching claims about the effectiveness of new modes such as the OMC,
which were often argued to foster a new, deliberative style of decision-making in areas where traditional EU regulation was either ineffective or unavailable. These far-reaching claims, in turn, led to something of a backlash, with a number of scholars offering corrective evaluations demonstrating the limited impact and implementation of new governance practices such as the EES.

The second generation of new governance studies, including these three papers, have moved beyond a dichotomous debate in favor of, or opposed to, the OMC, asking a more discriminating set of questions about the conditions under which new governance instruments are applied, as well as the conditions for the effectiveness of such instruments. In that context, Renaud Dehousse’s paper asks whether the Community Method has become obsolete in the wake of new governance methods; Charlotte Halpern asks whether new regulatory instruments represent new means of achieving existing ends or whether the instruments themselves alter the nature of the ends pursued; and Thomas Conzelmann explores the conditions under which private actors agree to engage in either self- or co-regulation at the European level, as well as the effectiveness and legitimacy of such efforts.

Dehousse: Reports of the Community Method’s Death Have Been Exaggerated

The central point of Renaud Dehousse’s paper is that, notwithstanding the European Union’s ongoing constitutional crisis, and notwithstanding the rise of the OMC and other new governance mechanisms, the traditional Community method of legislation – which I understand broadly to incorporate all binding legislation adopted by the Council of Ministers and the European Parliament upon a proposal from the Commission – is alive and well, and continues to dominate the regulatory output of the European Union. This point is well worth underlining, because while the OMC and
other new governance mechanisms have been increasingly questioned from the point of view of efficiency and/or legitimacy (see e.g. Rhodes and Citi 2007), few scholars have pointed out that the OMC can arguably be considered a “side show,” a relatively small and limited experiment in new governance conducted alongside an ongoing torrent of traditional, binding regulations.

Furthermore, Dehousse’s claims are bolstered by his use of the wealth of data generated by the Observatory of European Institutions at Sciences-Po, which in turn are very much in line with data that Molly Ruhlman and I recently collected from the Commission’s Eur-Lex database. In a forthcoming paper (Pollack and Ruhlman, forthcoming 2008), we sought to test the hypothesis – which I myself had put forward in 2000 – that the Union’s regulatory output might have peaked with the completion of the 1992 internal market program (Pollack 2000). To test this claim, we collected annual data on the growth of the acquis communautaire, measured in terms of all binding legislation and in terms of Directives, which are the most distinctive regulatory instrument associated with the Community method. As a first approximation, we collected data, on an annual basis, on the total number of legislative instruments in force in each year from 1952 (the first year of operation of the Coal and Steel Community) to 2006. The results, shown in Figure 1, demonstrate a steady and continuing increase in the size of the acquis, which has continued to grow incrementally each year for decades, including in the period since the “completion” of the 1992 internal market program and the 1995 and 2004 enlargements of the EU. Since this figure includes a range of regulatory instruments including Directives, Regulations, and Decisions (many of which are adopted by the Commission as secondary or tertiary regulation), we double-checked these findings by calculating the size of the acquis on an annual basis looking only at Directives, which have been the preferred method for laying out the regulatory frameworks for the internal market since the Single European Act. While the
numbers are smaller (approximately 2,000 Directives in force in 2006 as compared with more than 25,000 total pieces of legislation in force that same year), the pattern of steady and continuing growth in Figure 2 is similar to that of Figure 1.

Two other questions posed in the literature are whether the EU’s regulatory activity has decreased since the heyday of the 1992 program, and/or whether specific issue-areas have decreased or increased in importance.
Discussion: The Community Method & New Modes of Governance

Figure 3 speaks to the first question, showing the average annual rates of growth of the *acquis communautaire* for each of the six decades since the establishment of the Coal and Steel Community. Here, we find that, whether we measure in terms of all binding legislation or restrict our analysis to Directives, the story is the same: After growing quickly from a very low base in the early years, the *acquis* has continued to grow, albeit as a slightly declining rate, during the decades of the 1980s, 1990s, and 2000s. While these figures list total regulation in force rather than annual output of legislation, they suggest that the EU remains an active regulator, with a body of regulation that continues to grow by approximately 5% per year into the current decade.

![Figure 3: Annual Growth Rate of the Acquis, by Decade](image)

Source: Eur-lex database

Nevertheless, we were interested to see whether some areas of regulation had matured and cease to grow, while others might perhaps demonstrate greater dynamism in the current decade. Table 1, accordingly, shows the average annual rates of growth in EU regulation during the 2000-2006 period, by issue-area. The results demonstrate great sensitivity to the choice of legislative instrument, with Directives showing either faster growth rates (energy, JHA) or slower growth rates (0% for CFSP) than the more inclusive measure of all legislation. Looking across both columns and both measures, we see that certain issue-areas are indeed growing far more rapidly...
than others in the current decade, with the second and third pillars of CFSP and JHA, the relatively new area of Economic and Monetary Union, and several other issue-areas such as energy growing relatively quickly, while many of the more mature areas associated with the common market show single-digit – but still uniformly positive – rates of growth.

**Table 1: Annual Growth Rates of EU Regulation by Issue-Area, 2001–2006**

<table>
<thead>
<tr>
<th>Issue-Area</th>
<th>Average annual growth rate, all legislation</th>
<th>Average annual growth rate, Directives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common Foreign and Security Policy</td>
<td>27.25%</td>
<td>0.00%</td>
</tr>
<tr>
<td>Economic and monetary policy/free movement of capital</td>
<td>16.34</td>
<td>11.88</td>
</tr>
<tr>
<td>Fisheries</td>
<td>14.05</td>
<td>10.28</td>
</tr>
<tr>
<td>Competition policy</td>
<td>13.53</td>
<td>9.09</td>
</tr>
<tr>
<td>Area of freedom, security and justice</td>
<td>12.92</td>
<td>27.99</td>
</tr>
<tr>
<td>Laws relating to undertakings</td>
<td>12.26</td>
<td>10.43</td>
</tr>
<tr>
<td>Environment, consumers, and health</td>
<td>11.35</td>
<td>9.09</td>
</tr>
<tr>
<td>General, financial, and institutional matters</td>
<td>11.15</td>
<td>18.93</td>
</tr>
<tr>
<td>External relations</td>
<td>11.09</td>
<td>2.30</td>
</tr>
<tr>
<td>Agriculture</td>
<td>9.95</td>
<td>6.81</td>
</tr>
<tr>
<td>Taxation</td>
<td>9.84</td>
<td>5.76</td>
</tr>
<tr>
<td>Industrial policy and internal market</td>
<td>7.99</td>
<td>6.06</td>
</tr>
<tr>
<td>Science, information, education and culture</td>
<td>7.99</td>
<td>3.26</td>
</tr>
<tr>
<td>People’s Europe</td>
<td>7.82</td>
<td>10.28</td>
</tr>
<tr>
<td>Transport</td>
<td>7.71</td>
<td>10.15</td>
</tr>
<tr>
<td>Freedom of movement for workers/social policy</td>
<td>6.80</td>
<td>7.66</td>
</tr>
<tr>
<td>Energy</td>
<td>6.42</td>
<td>15.31</td>
</tr>
<tr>
<td>Right to establishment/freedom to provide services</td>
<td>6.25</td>
<td>7.34</td>
</tr>
<tr>
<td>Customs union/free movement of goods</td>
<td>5.00</td>
<td>6.89</td>
</tr>
<tr>
<td>Regional/structural policy</td>
<td>4.58</td>
<td>3.94</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>10.42%</strong></td>
<td><strong>7.13%</strong></td>
</tr>
</tbody>
</table>

*Source: Eur-lex database*
In sum, our data, like those collected by the Observatory of European Institutions, suggest that the popular image of the European Union as a regulatory state is broadly correct, and the body of traditional EU regulations, including Directives adopted through the traditional Community Method, continues to grow at a slightly diminished rate in recent years, with areas of real dynamism in selected areas. Nevertheless, despite my broad agreement with Dehousse’s central thesis, his findings prompt one question and one comment in my mind. First a question: Do we know anything systematic about the relative importance or weighting of the Community Method as against new governance instruments over time? While it is a relatively simple matter to collect data on the adoption of formal, binding regulations in the EU, we have less data about the aggregate number of new governance instruments, including but not limited to the OMC. The literature on the latter has established that new governance mechanisms are intellectually interesting, but are they quantitatively commonplace?

Second, a comment: Thus far in the paper, I have referred to the Community Method and new governance instruments as non-overlapping categories. Yet such a simple dichotomy quickly breaks down under close scrutiny. Increasingly – although here again we have only anecdotal and case-study accounts, not aggregate statistics – legislation adopted under the Community Method has incorporated both traditional command-and-control regulations as well as the full range of new-governance instruments, including deliberative elements associated with the OMC and with the creation of European networks of regulators that seek to coordinate national regulations in an informal, non-binding fashion (Coen and Thatcher 2008). Directive 2002/73/EC, for example, the recast Equal Treatment Directive, was adopted by the European Parliament and the Council of Ministers upon a proposal from the Commission under the co-decision procedure, and substantially strengthened the legally binding requirements of previous Directives most notably with regard to sexual harassment. Yet the same
Directive also required all member states to establish gender equality bodies, and created an EU-wide network of such bodies. The resulting network, moreover, has begun to meet regularly under the aegis and with the financial support of the Commission, exchanging support and best practice among a heterogeneous group that ranges from the well-established bodies in the United Kingdom, the Netherlands and Ireland, to newly established and underfunded agencies in many of the new member states. This Directive, and others like it, suggests that the nature of EU regulation may be changing substantially, with the Community Method being used to adopt legislation that, in its implementation, relies increasingly on more informal, inclusive and deliberative governance methods. In sum, we may be witnessing both the continuing relevance of the Community Method in adopting new regulations, together with a “Cambrian explosion” of hybrid institutional forms to facilitate their implementation (Sabel and Zeitlin 2008).

Halpern: New Regulatory Instruments Affect the Ends of Policy, Not Just the Means

Like Dehousse, Charlotte Halpern addresses the question of how “old” and “new” policy instruments co-exist, with specific attention to the effect of new instruments on policy. Put simply, Halpern asks, are new policy instruments merely new ways of pursuing existing policy aims – an innovative means to essentially unchanged ends? Her answer is a clear and provocative no, “policy instruments are not neutral, they are related to politicization processes and have impacts of their own (like institutions) which structure the implementation process and policy outcomes.”

Halpern’s conclusions arise from an admirably detailed analysis of the history of environmental policy-making in France, which she divides into three phases. In Phases 1 and 2 (1971-1990), French state regulators relied primarily on command-and-control instruments, with predictable political
consequences including the judicialization of the policy process and the inclusion of a growing number of environmental groups in the making and implementation of policy. In Phase 3 (1990–2006), by contrast, Halpern depicts rapid adjustment and innovation in the use of regulatory instruments, largely in response to scientific uncertainty and to the global nature of new issues such as climate change and genetically modified organisms (GMOs). The central claim of the paper is that these new instruments offer “few opportunities to environmental actors to influence the elaboration, the selection and the implementation process.”

Although largely ignorant of the details of the French environmental policy process, I find extraordinarily compelling Halpern’s central argument that policy instruments are “not neutral,” but affect the openness and inclusiveness of the policy process and presumably thereby the policy outputs of governmental actors as well. This is a rich line of argument, which in turn raises two questions. First, can we offer any more generalizable hypotheses about how new instruments limit (or facilitate) participation in policy-making and implementation beyond the French case? More specifically, can we hypothesize that specific policy instruments may have systematic and predictable effects on participation and policy outcomes across different political systems? If so, this would be a remarkably important and policy-relevant finding in Europe and beyond.

Secondly, however, it is worth asking whether the effects that Halpern observes – including most notably decreased public participation and increased reliance on experts and expertise in the policy process – are the result of new policy instruments, or whether it is the nature of new environmental problems that drives the observed changes. Both GMOs and climate change are genuinely new issues that have arisen over the past 1–2 decades, and both are characterized by significant (although declining) scientific uncertainty and by global stakes. Such problems may in themselves generate a tendency toward more technocratic decision-making, as well as
decision-making that is more attentive to global as well as local stakeholders. If this is so – and it is offered here only as speculation – then it may be that the apparent effects of new policy instruments are spurious, and it is in fact the nature of new policy problems that drives both the adoption of new instruments and the observed changes in public participation.

Conzelmann: The Efficacy and Legitimacy of Self- and Co-Regulation

Thomas Conzelmann, finally, undertakes a superb empirical and theoretical review of the phenomena of self- and co-regulation in the EU. The paper is particularly fine in that it not only chronicles the rise of these new regulatory instruments, but begins to theorize systematically and clearly about the respective preferences of governmental and private (including business and consumers) actors in the choice of regulatory instruments. I would offer only two questions to the author. First, if we adopt a rational-choice perspective on institutional choice, it would seem that firms might opt quite frequently for top-down co-regulation as well as for self-regulation, if and to the extent that doing so would pre-empt a credible threat of more stringent public regulations. For this reason, it would seem that the choice of any particular regulatory instrument would necessarily depend upon an assessment of the likely outcome of public regulation at the local, national or EU level, thereby complicating the theorist’s job in generalizing about the choice of regulatory instruments across the board.

Second and finally, Conzelmann correctly notes that the promise of self- and co-regulation are often said to hinge upon the ability of firms to become socialized into and internalize new norms informally, rather than responding to binding legal rules and the threat of enforcement. In recent years, however, a growing body of work has suggested that European socialization of member-state officials is far less common than constructivist
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scholars had originally believed (e.g. Zürn and Checkel 2005), and even European Commission officials appear somewhat resistant to Euro-socialization despite their extended exposure to European colleagues and norms (Hooghe 2001). Such findings raise doubts about the socializing effect of soft-law self- and co-regulation schemes upon firms, and suggest an important research agenda looking not only into choice of self- and co-regulation schemes, but also at their implementation and their effects on the actors thus regulated. Such as study would inform not only the study of new modes of governance, but also the ongoing debate about the prospects for actor socialization in the still-underdeveloped public sphere of the European Union.

References


Chapter 9

Accountability in Europe's Accumulated Executive Order

Deirdre Curtin
University of Utrecht & University of Amsterdam

The EU Political System

As long ago as 1974, one of the great English Vice-Chancellor's, Lord Denning used the tidal metaphor to describe the effect of European law on national legal orders. He described European law as: "an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."

An incoming tide is a highly suggestive metaphor as the waves of an incoming tide are relentless - they cannot be stopped. Lord Denning was referring to the constant ebb and flow of European laws and rules at the tidal margins of a legal system. When this metaphor was used some thirty-four odd years ago one could still analyse the nature of the European Economic Community - as it then was - as a very specific kind of international organisation.

In 2008, almost 35 years later, one can speak of the constant ebb and flow at the tidal margins not only of the national legal systems but also of national political systems and the national administrative systems. Various actors and institutions have acquired and exercised legislative and executive powers
over a broad range of policy areas. They have further shaped them in their
daily legal and institutional practices. Institutions after all become “living” and
acquire a life of their own by virtue of their empirical practices.

Multi level governance is the term used by some for the different layers
and interactions involved in decision-making beyond that of the nation State.
The point is that the decision-making layers may be multi-level but
paradoxically the political and administrative actors are often the same. In
other words national ministers and national civil servants will appear on
various political stages –international, European and national– even though
they may be playing different roles in each. At the same time the multi-level
approach may in its focus on separate ‘levels’ be too exclusive and limiting
and imply a degree of hierarchy and of verticality that may not be reflected in
governance practices. Indeed that is something to have emerged already from
the findings of other CONNEX Research Groups focusing on the
institutional architecture of the EU (RG 1) and on new instruments of
governance (RG 6) respectively and that also emerges as part of a future
research agenda from the work of our Research Group (RG 2) concerned
with multilevel accountability.

The Treaty of Lisbon (hereafter: LT) like the Constitutional Treaty
(hereafter: CT) before it, can be said to make more visible than hitherto that
the European Union is evolving as a matter of legal and institutional practices
into a political system in its own right. This is not the same as saying that it is
evolving into a super-state, federal or otherwise, but that the manner in
which power is being organized and by the instruments used is closer to an
analysis grounded in comparative politics than in international relations. The
European Union is no longer adequately captured by the term “international
organization”, not even that of a constitutional international organization
composed of States and citizens because of the manner in which the (inter-)
institutional system has taken shape both in formal treaty provisions and as a
matter of “living” practice.
This evolution has been on-going for quite some time now but several already existing trends are consolidated in the LT. First in the EU we can henceforth speak of the main legislative procedure as leading to the adoption of what are de facto “laws” even if the language is more opaque than that of the CT. The mainstreaming of the European Parliament at the heart of the adoption of EU legislation has been ongoing for some time but now reaches fairly advanced proportions. There are however still plenty of exceptions and “specific” legislative procedures that retain the primordial role of the Council of Ministers as legislator in specific policy fields and areas.

Second, the LT has consolidated and accentuated the fact that we have at the level of the EU political system itself a plural executive power. This is composed of the Commission, the Council of Ministers and the European Council. The position of the latter is not only institutionalized and linked closely to the Council of Ministers, it is reinforced considerably by the provision made for a semi-permanent President. There are two aspects to executive power: political and administrative and in fact all three core institutions can be analyzed increasingly in terms of this dichotomy.

This brings me to the third aspect of the EU political system and that is the role played at the EU level by national ministers and national civil servants. This contributes to the distinctive nature of the EU political system; some of its key players right across the board are agents of democratic principals (ultimately the citizens) in the national political processes but do not have a “European” mandate as such. Contrary to the belief that these actors play a democratically legitimate role in the EU political system having been elected and mandated in national elections, the reality is much more that these components of the national executive power have become effectively “depoliticised” when they operate in the European context.

The paradox is that at the same time as national actors became increasingly depoliticised, the Commission, which was originally conceived as a technocratic expert based body, has become increasingly “ politicized” at the
This has to do partially with the manner in which it has interpreted its own role and tasks in the EU context by delegating to others its non-political and more administrative and managerial tasks. But it is also a reflection of the manner in which the European Parliament has consolidated its power to hold the Commission to account for its actions and failings. As we have seen in recent years this role of holding the Commission politically to account has acquired some flesh both formally and as a matter of (nascent) practice.

Nonetheless the EU is not responsive in terms of elections, parties and the conventional procedures of popular democracy. This is what Vivien Schmidt in her recent book *Democracy in Europe* refers to as “policy without politics”. At the same time the EU is institutionally part of the national political systems of the member states. At present we only find the conditions for electoral and party democracy at the national level and even these are weakening. In this case says Schmidt we are left with “politics without policy”. By this is meant that the linkages between national systems of representative democracy and the manner in which policy is adopted at the EU level is fragmentary and inadequate.

**Focus on ‘accountability’**

One possible analysis is in terms of a democratic challenge at different levels. Firstly the challenge is to democratize at the level of the EU political system itself; secondly at the level of the national political system and thirdly the often intricate inter-actions between the two. This description already indicates that there is unlikely to be a single solution for Europe’s democratic challenge at any level since national democracies are not only different but have been affected in critically different ways by ongoing processes of European integration. Indeed, rather early on in the work of this Research Group we reached the conclusion that it was *not possible* to agree on a
common definition of ‘democracy’ that would cut across strong national
democratic traditions both institutionally and in terms of underlying values.

Instead, the decision was taken to focus on an aspect of the democratic
tradition, what can be called the ‘organizing principle’ of accountability as
opposed to the ‘meta-norm’ of democracy. Accountability can be construed
as an important organizing principle of democracy resting upon specific
standardized procedures. It is as a concept relatively uncontested in the sense
that everyone intuitively agrees that public institutions or authorities should
render account publicly for the use of their mandates and the manner in
which public money is spent. In order however to look more closely at the
practice of accountability across a range of actors and to hopefully compare
results we needed a working definition of accountability that would help us to
operationalize empirical study, thus moving the debate one step beyond
conceptual generalizations. My colleague in Utrecht, Mark Bovens,
formulated a working definition of accountability that was widely accepted
within Research Group 2 as a useful way of enabling empirical work across
actors and issue areas to take place.

‘Public accountability’ was to be understood as: “a social relationship
between an actor and a forum, in which the actor explains his conduct and
gives information to the forum, in which the forum can reach a judgment or
render an assessment of that conduct, and on which it may be possible for
some form of sanction (formal or informal) to be imposed on the actor”. This
definition was analytically precise, consisted of several distinct and
discrete stages that could be rendered operational, and had the great merit of
being able to link actors, any actors at any level, whether institutionalised
formally or not with accountability forums. The latter did not have to be in a
principal-agent relationship with the actors and was inclusive and open in
terms of mechanism or type of accountability forums. They could be legal,
political, financial, administrative etc irrespective of the grand constitutional
design.
Emergent practices might be linked to systems of democratic accountability but was not limited in any way to this. Nor was there any claim being made that accountability as thus defined would not solve the legitimacy problems of the EU nor would give rise to an appropriate and uncontested notion of supranational democracy at the level of the EU or anywhere else. On the contrary, the relationship between the rather precise notion of accountability as thus defined and much broader themes and even meta-norms of any political system were temporarily left to one side in the interest of being able to focus on establishing more neutrally to what extent one could speak of existing and evolving ‘practices’ of accountability at various different levels and with regard to various different types of actors or institutions.

By applying the Bovens definition in its various stages to various different kinds of actors we could attempt to open the black box of the accountability process. Much of the empirical work is still ongoing. In the Netherlands for example a program is funded to investigate how trends towards multilevel policymaking and implementation in Europe have been matched by correspondent changes and innovations in public accountability regimes and practices. Let me give you two examples.

a) One focus has been the practices of accountability in the context of comitology committees especially at the level of the national political systems as opposed to the EU political system. One of the doctoral dissertations that is still being worked on focuses on the manner in which such national ‘agents’ are in practice embedded in hierarchical chains of accountability in the national context. The lesson from both quantitative and qualitative empirical work is that committee members may often be fully autonomous in organizing their own work. In such cases bureaucratic principals are usually informed of their agents behaviour but tend not to engage in debating their agents points of view that lie at the heart of their input in Brussels.
b) Another study involves taking a step back from *ex post* accountability practices to focus on the degree of autonomy from EU political institutions that EU level non-majoritarian agencies enjoy as a matter of fact as opposed to law. It emerges from a rather extensive series of interviews with high-level practitioners that such agencies are often controlled on an ongoing basis by their EU political principal, either the Commission or the Council of Ministers. Before evaluating agency accountability and identifying deficits, it has to be ascertained *a priori* whether agencies and perhaps other actors really benefit from all the discretion and independence they are formally said to possess.

**Agenda of Research**

In terms of a future *agenda of research* let me already mention the following:

1. There is a need for more empirical work taking specific actors and networks at the European level as focus of study and exploring nature of accountability practices with regard to various accountability forums (eg, evolving roles in practice of European Parliament, European Court of Justice, Court of Auditors, European Ombudsman etc). For example I am personally very interested in studying actors such as the General Secretariat of the Council of Ministers or the European level network of financial regulators, with European tasks, known by the acronym CESR. At the same time the focus of accountability can be shifted more to the forums (and not exclusively on the actor anymore) and to question and investigate their role and input in the process. The ‘accountability of the account-holders for their role in the process’ is a very relevant point for a research agenda as it has direct impact on the effectiveness/success of the accountability arrangements in holding the actor to account.
2. More empirical work taking specific actors and networks as the focus of study and exploring the nature of accountability practices at the **national level** (national parliament, national ministers, hierarchical superiors in civil service, other diagonal accountability forums, etc). For example, how are the members of the European Council held to account at the national level as a matter of practice? And what about weakly institutionalised networks of actors, such as those operating under the auspices of the OMC? Can we say that they enjoy a relationship of one kind or another with one or more accountability forums (in line with the Bovens definition)?

3. There is a need for more conceptual (and empirical) work on the linkages between a concept of accountability as relatively precisely defined and other general ‘themes’ of any political system. This can include both meta-norms such as ‘democracy’, ‘representation’ and ‘legitimacy’ but also more secondary norms of the type ‘organizing principles’ such as ‘transparency’, ‘administration’ and ‘civil society’. At the same time there is a need to take the empirical work one step further by building on the insights from the empirical research. What do we learn from the empirical work? How we can contribute to/ refine the existing theory?

4. There is a need for more conceptual focus on the normative and legal dimension. The EU is undoubtedly the most advanced example we have of institutional normative order beyond the level of the Nation State. To what extent is it given further shape and form in a context of multi-level interactions and challenges across legal orders (international, European and national)? To what extent are the values of our constitutional states being eroded from above and are their practices of account holding by accountability forums that offer some sedimentation? What is the role of
the EU as an autonomous actor in that context and is it being held to account for its actions by any forum?

5. This brings me to the final point for the moment. To what extent should we limit our analysis of the overall emerging orders (political, executive, democratic etc) to the concept of levels? The notion of composite orders, as suggested by a Dutch colleague, a lawyer, Leonard Besselink, may ultimately prove a more inclusive and realistic way of structuring further analysis. The notion of composite orders can bring a fresh look at things and broaden horizons in a crosscutting fashion beyond that of an analysis grounded in separate, vertical ‘levels’.

Let me conclude. We are at the end of the beginning, not the beginning of the end in terms both of the conversation, the concepts and the empirical focus.

Notes

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5 V.Schmidt, Democracy in Europe. The EU and National Polities (OUP, 2006).

8 “Multilevel governance and public accountability in Europe: Which institutions, which practices, which deficit?”, http://www.usg.uu.nl/index.cfm/site/USBO/pageid/F94C8BDE-E081-2E3C-90D199F31441D8EC/index.cfm

9 See, G. J. Brandsma, TITLE forthcoming, (2009)


An early view of the EU was of a technical and regulatory regime legitimated on output criteria (Majone, 1994) or, as Vivien Schmidt has put it, an area of 'policy without politics'. This analysis, if once correct, is no longer accurate and Majone, formerly a major proponent of the idea, now admits as much (Majone, 1998, 2005, 2007). The true problem is that the politics of the EU remain the secretive politics of international relations and diplomacy and have not yet adequately transmuted into the relatively open and transparent politics of representative democracy, though this was confirmed as a goal for European governance in the Maastricht Treaty (Curtin & Meiers, 1997; Curtin, 2005). Secondly, with the enormous expansion of EU competences into areas of 'high visibility politics', a technocracy is no longer acceptable. To put this differently, technocratic outputs are no longer (if they ever were) sufficient to legitimate the European enterprise and the legitimacy of the EU cannot rest purely on output measurements (Follesdal & Hix, 2005). That there is today a widely perceived democratic deficit is registered on virtually every occasion for ratification of Treaty amendments with negative popular
votes in referendums (Svennson, 1994; Qvortrup, 2006). That the French and Dutch 'No!' to the European Constitution was followed up with a further 'No!' to the Lisbon Treaty by Ireland, the only Member State to hold a referendum, can only confirm that a serious gap is opening up between the leaders and the led.

The history of the EU provides much support for Mair's thesis (Mair, 2005) that the European enterprise has always been about politics; about the construction of a sheltered political sphere in which political games can be played and important policy-making take place outside the constraints imposed by representative democracy. Take the way in which the outlines of the single market were virtually completed before democratic institutions were developed, the Community method had emerged or the doctrine of 'institutional balance' (Lenaerts & Verhoeven, 2002) been refined by the Court of Justice. In similar fashion, the engines of police and immigration cooperation were the behind-the-scenes conventions and cooperation agreements signed at Trevi and Dublin. These backroom arrangements allowed for the rapid concretisation of the Third Pillar, where all the institutional floor and key policies were rapidly constructed before any machinery for accountability could be set in place (Guild, 1996; Balzacq et al, 2006).

But if Mair's analysis is correct, then it is the task of political scientists and public lawyers to construct new constraints. As Martin Shapiro (2001) once observed, administrative law is a constant game of 'catch up', in which the rulers evade the rendering of account to the governed (Committee of Experts, 1999). This is the spirit in which I, as an administrative lawyer, approached the opportunity to work with the Connex accountability network.

I would prefer to speak in terms of opportunity rather than of lessons learned. Although there is (and has always been) much contact between lawyers and the political sciences, there are also many gaps. In the EU
context, European study centres and institutes around the Community have offered opportunities for cooperation and joint work. Good interdisciplinary work has also taken place at the EUI, where the development of the 'new school' of EU legal scholarship was 'thickened' by the founding of a legal journal, the *European Law Journal* specifically devoted to inter-disciplinary studies. The EUI is also one of a growing number of venues which, on both sides of the Atlantic, afford the opportunity for European and American scholars to work together on globalisation and its problems, studies in which the EU forms a unit and potential building-block. What CONNEX has added is a number of new forums in which inter-disciplinary work could take place and contacts between scholars from different disciplines and Member State institutions begun, forming a basis (so I hope) for much future work.

Although public lawyers have started to talk in terms of accountability, their allegiance is really to the rule of law - as every significant judgment from the ECJ attests! Courts are not seen by lawyers so much as accountability forums but as temples of the rule of law in which judges (whose political neutrality is overrated and virtual exemption from accountability conveniently ignored) are the high priests. A number of obstacles to inter-disciplinary understanding exist. Political scientists see accountability primarily in terms of 'democratic accountability' to electorates and 'political accountability' to representative institutions, though if pressed they would agree that an 'effective, independent judicial system is a fundamental prerequisite for effective executive accountability' (Mulgan, 2003, 76). Lawyers are likely to discount or politely ignore political machinery as sporadic, ineffective and secondary to the legal responsibility of political actors to courts. Outdated views of law and the legal order fuel misunderstandings; classical legal theory, to which political scientists frequently subscribe, is hierarchical in character and has until recently lacked tools to deal with legal pluralism (MacCormick, 1999, 2004; Snyder, 2002). Lawyers have moved on. Political scientists, on the other hand, show little
interest in a re-ordering of legal norms in terms of contemporary jurisprudence. This is an area for future research, with international lawyers drawn into the network (Wessels, forthcoming) as in the Amsterdam workshop in January 2008.

The lesson I personally draw from the CONNEX experience is, however, the need to break away from the conceptualisation of the EU in terms of 'levels': a three-tiered construction composed of transnational, national and sub-national levels, the bottom level receiving minimal attention. At national level, policy-making and accountability are seen to be the responsibility of national institutions in the framework of a national constitution and political system. At transnational levels, a democratic deficit is generally acknowledged in which an inter-institutional political power struggle rages while the European Parliament struggles to fill the less visible accountability gap (Lodge, 1996). The ECJ, on which the duty rests of holding Community institutions accountable, has generally shown more interest in the accountability of Member States (Shapiro, 1999). A better balance needs to be struck.

Democracy at national or ground floor level cannot be used to validate the top tier unless it is itself truly democratic and, as powers are less than carefully transferred to the EU, democracy and accountability deficits are developing at national levels. This is a particular danger for political systems (such as the United Kingdom and Netherlands) where accountability plays a significant role in legitimating government or where, as in Sweden, Finland and the Netherlands, open government is a constitutional right. If accountability is to be achieved in the EU, we need to replace the model of levels with a network concept of accountability that can match and outstrip the apparatus of network governance (Scott, 2000; Harlow & Rawlings, 2006). The rapid proliferation of European agencies, and hiving off of policy responsibility to transnational and international networks of agencies
(Gerardin, Munoz and Petit, 2006), renders a new theoretical approach the more necessary. It is, indeed, yet a further example of Mair's thesis.

More empirical work is clearly necessary but lawyers are often not well-placed to do this on their own. Here too CONNEX affords opportunity. The CONNEX experience may provide new linkages for inter-disciplinary empirical work (Vos 2007) on legal actors and accountability forums, such as the European ombudsmen network and courts.

Lawyers could also contribute to work on the increasing tendency to bypass accountability and control by resort to 'soft law' (Trubek & Trubek, 2006) and 'soft governance' mechanisms (Scott & Trubek, 2002). At the theoretical level, the management of plural legal systems and the under-used concept of subsidiarity (Bermann, 1994; Estella, 2002) both deserve our attention. In the context of the new Reform Treaty, further work on national parliaments and new work on audit is necessary. New Council agencies, such as Europol and Eurojust, and expanding networks of the EU administration, such as OLAF, also demand attention in the context of accountability.²

Notes

1 In the context of the Connex project, this journal has hosted a Special Issue made up of papers from a CONNEX workshop. European Law Journal of July 2007 on “Accountability in EU multi-level governance” edited by Arthur Benz, Carol Harlow and Yannis Papadopoulos

2 I would like to end this short presentation by expressing my gratitude to the Commission for its foresight in funding and helping to coordinate the CONNEX network and to all those who, like Beate Kohler-Koch, Deirdre Curtin and workshop organisers, who have made it work. It has been for me personally a valuable and enriching experience, which has greatly expanded my horizons. With my thanks, I would express my hope that the Mannheim Final Conference will not be an end but a staging post to new and more ambitious research.
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M. Shapiro, ‘The European Court of Justice’ in P. Craig and G. de Burca (eds), The Evolution of EU Law (Oxford: Oxford University Press) 1999
P. Svensson, ‘The Danish Yes to Maastricht and the EC Referendum of May 1993’ (1994) 17 Scandinavian Political Studies 69
In RG 2 we do not claim to have covered all issues of accountability in the EU system of governance. In order to avoid repetition, I shall deal here rather rapidly with the issues that were addressed in more detail in scientific publications (definitional adjustments that are necessary to apply the concept of accountability to a complex and multi-level system of governance, or the specific place of accountability in the EU as a condition for legitimacy, given the “democratic deficit”). Moreover, I will mainly focus on the prospective dimension, explaining where our work could lead us to in terms of renewed research questions looking for empirical answers.

**Conceptualisation of accountability**

I would like to stress first the undeniable value-added provided to our work by the interdisciplinary collaboration between political scientists and public lawyers. Political scientists, for instance, realised the limits of their preferred framework of accountability, which is based on “principal-agent” theory (itself borrowed from economics): In complex systems of governance,
accountability forums are not necessarily principals that have delegated authority to agents who would act as their representatives (“watchdogs” count for instance among them civil society organisations). As to public lawyers, although I cannot speak for them, I guess that they became increasingly sensitive to the fact that accountability is not limited to the role of the rule of law (it has a substantive dimension as incumbents must convince that their policy choices correspond to the preferences of their constituencies), and that accountability can be safeguarded by several other actors than courts (and also by softer means than formal sanction). We very much relied on Mark Bovens’ (2007) concept of accountability as a relationship (i) between an actor and a forum, in which (ii) the actor has an obligation to explain and to justify his or her conduct, (iii) the forum can pose questions and pass judgement, and (iv) the actor may face consequences. It has the strong merit to be at the same time encompassing and fine grained enough to be applied to multiple situations. However, our consensus remained imperfect on some issues unsettled so far: on whether accountability can be *ex ante* too, on the kind of sanctions that are necessary, etc.

**Operationalisation**

The most interesting finding from our work on multi-level systems (and namely the EU) was the identification of multiple forms of accountability. To my knowledge it was the first time that work concentrating on how accountability operates in a complex system such as that of the EU was done, or at least put together in a coherent manner, with common questions addressed. Without being able here to systematically review all the interesting results from our work, I would like to point out that the innovative empirical research that was conducted led us to a more refined approach on the way accountability operates in what is a complex and multi-level system. Let me just give two examples:
• Accountability to courts and the ombudsman: A major contribution of empirical research by Carol Harlow and Richard Rawlings (2007) is that not only courts and ombudsmen institutions play today an important role in ensuring the accountability of rules in multi-level systems, but also that for accountability to operate efficiently this requires the establishment of networks of accountability (enabling exchange of information and cooperation between the EU and the national levels). A complexification of the decisional system requires thus an equivalent complexification of controlling institutions, which may be formulated in terms of a problem of adjusting the “requisite variety” of accountors to the increasing variety of actors who should be accountable.

• Accountability of national governments to national parliaments: this is a classic issue, but Katrin Auel (2007) shows in her ELJ paper that when strong linkages that ensure accountability exist between governments and parliamentary instances, this implies a trade-off between positively valued norms. As a matter of fact, governments must negotiate on their mandate with parliaments and this is usually done under discretion at the cost of transparency. Interestingly, Deirdre Curtin (2007) concludes to a similar trade-off related to the role of the EP as an accountability forum.

In sum, the empirical limits of the classic concept of (democratic) accountability appeared clearly. One may agree on this without agreeing on the normative assessment of such a situation:

• it may be argued that “new” forms of accountability offset the deficit of accountability in its democratic form, or

• a strict intergovernmentalist position on European integration would even deny that such a compensation is necessary, or
• one may conversely deplore the loss of democratic accountability and criticise the shift to more technocratic forms of governance, or
• a fragmented system of largely horizontal mechanisms based on a checks and balances logic and sometimes operating on an informal (“soft”) logic may be viewed as an acceptable “second best” option given the impossibility of direct democratic accountability.

Limits and prospects

Our work could not cover all places where accountability issues emerge in multi-level governance. This requires ideally to be based on a “cartography” of all possible accountability relations between the multiple actors and forums of the EU system (with several among them being at the same time accountors and accountees): the Council and its Secretariat, the Commission and its administration, various committees, the ECB and agencies, the EP and national parliaments, the ECJ, the Ombudsman, NGOs, the media, European citizens, etc. And ideally again such a work should present a dynamic view of accountability, i.e. of the changing accountability relations between the multiple elements of the EU system. As a matter of fact, the EU system of governance can be considered as a “laboratory” to analyse changes in accountability relations across time because it has been much more fluid than its national counterparts in the last decades.

Another limitation is that in practice our work focused exclusively on the question of accountability. The related question of legitimacy, for instance, (its limits, changing bases, prospects for improvement) was not addressed per se, in relation to accountability problems or deficits. Thus, further work is necessary in the direction of the links of accountability to related concepts.

We also need to learn more on the efficiency of different accountability mechanisms. What is for example the impact of redundancy or fragmentation
on the conduct of accountees: Are they caught in dilemmas because they are under pressure to satisfy multiple forums? Or what is the actual force of “soft” mechanisms and are there any consequences for accountability due to their low degree of formalisation? We should analyse more precisely the practices of accountability, in other words the resources, strategies and instruments of accountors and accountees. “Peer” and intra-group forms of accountability, for instance, seem increasingly important, but in order to assess more accurately how these forms operate, one needs to resort to micro-sociological observation informed by organisational theory. Contrasting hypotheses may indeed be formulated as actors' behaviour under conditions of relative unpredictability regarding their obligations in terms of accountability may turn unpredictable as well: Are actors disciplined by pressure from the peer-group, and does “naming and shaming”, or fear of discredit and loss of reputation, operate efficiently, or is this countered perhaps by defensive and conformist conduct, simulation, blame-avoidance and blame-shifting manoeuvres? To give an example, in order to have a more accurate picture of peer accountability in the growing European “administrative space”, one should extend to committees (that are involved in comitology decisions, in the Open Method of Coordination, etc.) the ethnographic approach adopted by some researchers (Abélès 1992) for the study of the EP.

Probably the issue of accountability deserves a comparative treatment across levels (national, European, trans-national) similar to the treatment of the relations between governance and democracy (see Arthur Benz and Yannis Papadopoulos 2006). For example, in the EU the Commission is to some extent (and increasingly) accountable to the EP. This is not really parliamentary accountability of the executive, but is nevertheless much closer to the national model than the pattern observed in trans-national forms of governance beyond the EU. At this level, collectively binding decisions are produced by actors as different as international regimes such as the WTO, international institutions such as the IMF, or even private bodies such as the
ICANN. And when novel trends in governance are observed simultaneously (e.g. via diffusion) at different levels, are accountability issues different – or are they framed differently - across them? For instance “agencification” that Deirdre Curtin (2007) studied at the EU level or cooperative governance studied by myself, count among these trends.

Finally, the media as an accountability forum should be the object of more attention. Although the mediatisation of politics is undeniable at national level (however not necessarily of all relevant policy issues), such a trend is more limited beyond that level. In the EU this is usually attributed to the absence of a unified public sphere, but more research is required on the objects at EU level on which the media (with differences among them) concentrate their scrutiny, and on which parts of the EU multi-level system are immune to media surveillance.

Notes

1 Revised version of the position paper by Yannis Papadopoulos for the “CONNEX” RG2 Wrapping-up Workshop, 11-12 October 2007, Utrecht School of Governance, Netherlands.
2 A thematic conference was co-organised with that purpose at the European University Institute in June 2007 by D. Curtin, P. Mair and Y. Papadopoulos, followed by a workshop in April 2008. A journal special issue should be published in 2009.

References


Introduction

A number of recent studies on international encounters reveal diverging interpretations of fundamental norms. This suggests that patterns of cultural, day-to-day experience remain surprisingly intact despite enhanced international interaction on a global level. This finding is puzzling, considering the literature on the power of global norms and the significant change of state behaviour that has been attributed to socialisation and learning within international environments. Are we therefore to question assumptions about shared beliefs, principles and worldviews that are generally attributed to liberal communities? Can we hypothesise that the interpretation of norms increases rather than declines with globalisation? Systematic documentation of instances of conflictive norm interpretation by members of liberal communities would challenge the liberal community hypothesis. Subsequently, social constructivist assumptions about appropriateness in relation to the patterned interplay between norms, community identity and
behaviour would require scrutiny. To explore this puzzle, this contribution
turns to findings from a case study on norm interpretation in Europe. While
this first systematic comparative assessment of individually enacted meanings
of norms is restricted to four European elite groups, it is argued that this study
has generated insights which offer valuable pointers towards further research
on norms in inter-national relations more generally.3

Before turning to the details of the proposed research framework, the
following notes five instances and conditions of norm contestation. All
involve inter-national encounters driven or guided by norms. And all
instances of norm contestation have a second element in common. That is, in
addition to fundamental norms, they all refer to the assumption of
membership within a community with a given identity as an environment
that is constitutive for shared social recognition.

The first instance relates to compliance with norms within a global
context (Chayes and Chayes 1993, 1995) such as, for example, the structural
adjustment policy which was developed and applied by the United Nations
(UN) monetary institutions, i.e. the International Monetary Fund (IMF) and
the World Bank, towards highly indebted countries. In this global
compliance situation, typically developing countries were expected to comply
with a set of structural domestic changes to enhance democracy as a
condition for obtaining financial aid (keyword: democratic conditionality).
The second instance relates to regional contexts such as for example, the
European Union’s enlargement policy which similarly involves the
implementation of a set of fundamental norms that are at the core of Western
liberal democracies. In comparison to the first instance, they are however
more specific and elaborated, reflecting decades of economic, administrative
and political integration in Western Europe. As the European Union’s \textit{acquis
communautaire} which is expected to be adopted and implemented wholesale
by new members of the EU, this conditionality involves for example
fundamental norms such as democracy, human rights, the rule of law and
with the massive enlargement in 2004, for the first time, respect for minority rights as an additional condition, as well as a range of organising principles including administrative procedures, but also voting rules and policy details such as gender mainstreaming. These conditionalities were expected to be implemented by candidate countries in exchange for obtaining EU membership (keyword: enlargement conditionality).

The third instance of norm contestation relates to enforcing human rights policy on a global scale in exchange for recognition within the global community of ‘civilised nations’ (see Article 38c(1)). Here, the stakes have been raised considerably. That is, in comparison with the first two conditionalities which referred to more or less straightforward and generally legitimate expectations rooted in the interest-based model of club membership, the distinctly political dimension of global human rights conditionality including, e.g. advocacy groups, politicians and lobbyists largely of ‘Northern’ origin have engaged in naming and shaming states usually from ‘Southern’ regions that were in breach with the human rights principle under the UN Charter, has added a political dimension to international encounters about norms. Norm contestation has therefore been taken to a higher level. Now, conditionality no longer draws its legitimacy from the ‘club rationale’. Instead, a ‘community rationale’ becomes the new yardstick. This shift involves a move towards detecting a new constitutional quality in the global realm, as the literature in international law and international relations demonstrates quite well (keyword: human rights conditionality).

The fourth instance of norm contestation is closely linked with the third. It refers to the claim to legitimately contest the right of sovereign equality of states, which has been undermined by a series of contested military interventions, mostly by ‘Western’ states, in order to protect groups from domestic human rights abuse in so-called rogue states. This form of norm contestation is either based on political actions such as for example
military intervention, or based on learned commentary on international law such as the principle of civilian inviolability, the responsibility to protect and the duty to prevent⁶ (keyword: shifting grundnorms in the global realm). In addition, fifthly, norms are contested less visibly but perhaps all the more importantly in day-to-day interactions. These contestations are due to different habits, cultural traditions and individual experiences. They form the indexicality of the daily context on which individuals draw (Garfinkel 1967). Their potential for contestation increases when boundaries of shared social and cultural practices are crossed (keyword: invisible constitution of politics).⁷

The following proceeds in three further sections. The second section turns to norm contestation and presents a framework for research on norms based on three norm types. The framework facilitates a reference point for interdisciplinary bifocal - i.e. empirical and normative - comparative research on norms. The third section elaborates on the point of bringing cultural practices back into constitutionalism, and the final section concludes by drawing on three dimensions of norm implementation, and their input on democratic legitimacy (compare Table 3).

Norm Contestation

Any work on norms will proceed from the premise that norms - and their meanings – evolve through interaction in context. They are therefore social and contested, by default. This quality thus overrides a range of distinctions with reference to adjectives such as cultural, legal or social. While norms may acquire stability over extended periods of time, they remain flexible by definition. Dialogue thus plays a key role both in revealing normative meanings and in keeping them at bay based on the application of the two core constitutional principles. We can therefore hypothesise that the contested meaning of norms is enhanced under three conditions (see Table 1). First, the historical contingency of normative meaning indicates a change
of constitutive social practices both cultural and organisational, and hence normative meaning over time. Second, moving social practice beyond given social contexts, i.e. as part of changing patterns of governance, changes the social environment and hence the reference frame of social institutions; the social feedback factor is reduced. And thirdly, a situation of crisis raises stakes for understanding meanings based on social institutions, the social feedback factor is reduced as well.

<table>
<thead>
<tr>
<th>Steps</th>
<th>Type</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Continency</td>
<td>Historical contingency means that norm interpretation depends on context.</td>
</tr>
<tr>
<td>1 + 2</td>
<td>Social Practices</td>
<td>Moving selected social practices (i.e. organisational practices only) beyond a given social context reduces the social feedback factor when interpreting norms.</td>
</tr>
<tr>
<td>1+2+3</td>
<td>Crisis</td>
<td>A situation of crisis raises the stakes for norm interpretation as time constraints enhance the reduced social feedback factor.</td>
</tr>
</tbody>
</table>

Source: Table 4.1, Wiener 2008, p. 64

Research on norms, therefore, needs to address the conflicting normative substance of resources which emerge and are firmly rooted in specific political arenas of domestic politics or international organisations. We know equally little about the emergence of common substance of resources which are generated in transnational arenas. Yet, diverging interpretations of meaning may induce a clash of normative resources and hence potentially present a source of conflict for politics beyond the state. Its importance increases as globalisation and transnationalisation proceed to expand. We can therefore hypothesise more generally that the more inter-national a context of interaction, the more likely are encounters among bearers of different
culturally and socially generated resources. Whether or not this conflict of meanings turns into international political conflict or, whether it may be turned into an innovative contribution to enhance institutional legitimacy in transnationalised politics remains to be established.

Norms may entail formal validity based on a constitution, convention or treaty and have achieved social recognition when appearing appropriate to a group within a stable social environment. Yet, successful norm diffusion ultimately depends on the additional third category of cultural validation. Research on norm contestation contributes to the literature on the dynamic of norms and its impact on the potential of conflict and the possibility of legitimate order in world politics, it is reflexive, relational and historical. A main consideration for a research framework that allows comparative studies of normative meanings lies with the more or less consequent application of the contingency imperative of norms as socially constructed. That is, to be able to grasp norms as a contested political resource, we need to understand how and where they are situated. “What we need in order to be both critical and effective is not an account of norm creation for some ideal game, but an account of the possibility of democratic norm creation under the conditions of the field in which we find ourselves here and now.” (Tully 2005, 19) To tackle these conditions, Giddens’ seminal observation of the duality of structures presents a key analytical cue with a view to situating normative meaning when he points out “[B]y its recursive nature I mean that the structured properties of social activity – via the dual quality of structure – are constantly recreated out of the very resources which constitute them.” (Giddens 1984, emphasis added AW)

This observation about the dual quality stresses the impact of two dimensions on the study of norms. One dimension refers to conflictive decisions as the outcome of inter-national negotiations; the other addresses the normative assumption of a ‘good’ post-state political order. It is therefore advocated to extend the analysis of the role of norms from understanding
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their stable dimension as a social institution towards theorising their dynamic dimension as a flexible social construct. Contestation is then an intervening variable for research either more pragmatically on the debate about procedural and institutional changes, or on the possibilities of enhancing democratic legitimacy based on access to contestation and mutual recognition. While this notion builds on Robert Dahl’s erstwhile observation on measuring a democratic system’s inclusiveness based on access to participation “in the system of public contestation” (Dahl 1971, 4), it considers the republican understanding of ongoing “democratic communicative action” as a necessary condition for norms, rules and principles to be considered as appropriate and legitimate (Tully 2005, 20-22). If democratic processes require contestation as a necessary element in order to generate and maintain legitimacy of legal norms, contestation needs to be integrated in supranational institutional settings as a common procedure.

Norm Types

For analytical reasons, a distinction among three types of norms including fundamental norms, organising principles and standardised procedures is proposed (see Table 2). The typology distinguishes fundamental norms, organising principles and standardised procedures. Studies drawing on this typology have for example examined organising principles such as accountability, the democratic audit, transparency and fundamental norms such as access to contestation, citizenship and representation in different policy sectors of non-state governance. Three types of norms are distinguished according to their respective degree of generalisation and specification, as well as with regard to their moral and ethical scope. Fundamental norms include both core constitutional norms and basic procedural norms such as citizenship, human rights, the rule of law, democracy, as well as non-intervention, abstention from torture, and so forth.
Organising principles evolve through policy or political processes. They inform political procedures and guide policy practices and include such principles as legality, accountability, transparency, legitimacy and gender-mainstreaming. Standardised procedures such as rules and provisions are the least likely to be contested on moral or ethical grounds as they entail prescriptions for action which are not-contingent and as specified as possible such as the instructions to assemble a flat-pack piece of furniture or a shelf or guidelines pertaining to electoral processes e.g. qualified majority voting.

Table 2: Types of Norms

<table>
<thead>
<tr>
<th>Type of Norms</th>
<th>Substance</th>
<th>Generalisation</th>
<th>Specification</th>
<th>Contestation on Ethical Grounds</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fundamental Norms</strong></td>
<td>Citizenship, Human rights,</td>
<td>More</td>
<td>Less</td>
<td>More</td>
</tr>
<tr>
<td></td>
<td>Fundamental freedoms, Democracy,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rule of law, Non-Intervention,</td>
<td></td>
<td></td>
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</tr>
<tr>
<td></td>
<td>Sovereignty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Organising Principles</strong></td>
<td>Proportionality, Accountability,</td>
<td>Medium</td>
<td>Medium</td>
<td>Medium</td>
</tr>
<tr>
<td></td>
<td>Transparency, Flexibility, Gender-</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>mainstreaming, Mutual recognition,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Direct effect</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Standardised Procedures</strong></td>
<td>Qualified majority voting,</td>
<td>Less</td>
<td>More</td>
<td>Less</td>
</tr>
<tr>
<td></td>
<td>Unanimous decisions, Proportional</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>representation</td>
<td></td>
<td></td>
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</tbody>
</table>

*Source: Table 4.2 Wiener 2008, p. 66*
Since “[N]o rules in international law are absolute”, indeed, “[N]othing in this normative sphere is absolute” (Jackson 2003, 19), the expectation among international lawyers is that the substance of law depends on input through legal discourse, *i.e.* deliberation, jurisprudence, learned opinion and other discursive interventions. The contested issue regarding the crucial input of discourse in international law lies in different legal traditions. These can generally be distinguished according to a stronger disposition to interpret the letter of the law among continental lawyers, on the one hand, and a disposition towards a generally flexible quality of international law understood as evolving through the process of jurisprudence among Anglo-Saxon lawyers, on the other (Scott 2003). Nonetheless, it can be argued that while considering the input of discourse at different stages, lawyers would attribute a strong and constitutive role to discursive interventions in the process of international law.\(^{11}\) That emphasis on discourse as constitutive towards establishing substantive meaning of norms is not necessarily shared among political scientists who make conceptual distinctions between arguing, contestation, deliberation and discursive interventions.\(^{12}\) In international relations theory the most distinctive input into the role of language as an intersubjective element in the process of the construction of norms was introduced by regime theory. In particular, Kratochwil and Ruggie’s (1986) intervention in this debate singled out a constructive as opposed to a behavioural approach to discourse as intervening in politics based on the generation of substantive meaning, rather than merely studying behavioural reactions to the norms, rules and beliefs that emerged in the environment of supranational regimes.

**Bringing Culture Back In**

The transnationalisation of political processes and policies indicates a change of the constitutional framework (legal validity), as well as the social
environment (social recognition) in which politics takes place. Transnationalisation raises the ‘community problem’ which has become so adamant for students of European integration. Two insights from recent scholarship on the EU’s constitutional process or project illustrate the problem. The first calls for a constitution, arguing, “[T]he more diverse the society, the more important [it is] to have a constitution delineating authority, power, responsibilities, rights and obligations, including guaranties for individuals and minorities.” (Olsen 2005, 8) The second holds that in the absence of a community, a constitutional project is unlikely to succeed. As Peters notes, “[I]n German debates over the European Union, in general, and its ‘democratic deficit’ in particular, the following quotation by Peter Graf Kielmansegg has become almost canonical: ‘Europe, even limited to Western Europe, is not a community of communications, barely a community of members, and only a very limited community of experience’.” (B. Peters 2005, 84) That is, the ‘community’ condition is considered as both impossible and necessary for democratic governance in the EU’s “beyond the state” context (Weiler and Wind 1993; Wobbe 2003). If we follow Dewey’s point on democracy as “an ideal” which is based on the “idea of community life” (Dewey 1954, 14), then it is crucial to understand both the ideal and the day-to-day practice of democracy. A triangular interplay between the democratic ideal, the way it is practiced and experienced in different contexts, and the often contested expectations forged by these social practices comes into play. Studying the practices of democracy in different contexts and comparing them hence enables us to assess the different meanings of the concept of democracy as a set of norms, principles and procedures. This perspective suggests a comparison between the meanings of norms in contexts beyond the state and among different national contexts, each of which entails a particular variety of normative interpretations pending on cultural diversity. Both perspectives take the framework of modern constitutionalism as a reference frame for comparison.
With a view to uncover hidden meanings of norms which have been produced through cultural practices in different contexts, I propose to work with a “prospective” method of analysis. While Tully’s studies to recover hidden constitutional meanings in the context of the Canadian one-state employed a “retrospective” method, beginning with a particular historical condition (inequality before the constitution according to cultural identity) and searching back for its causes, prospective analysis works with a view e.g. to the European beyond-the-state context begins with a particular historical condition (conflicting interpretations of constitutional meanings) and searching forward to the alternative outcomes of that condition with a specification of the paths leading to each of the outcomes. This allows the reconstruction of constitutional dialogues based on the empirical focus on two sets of practices (organisational and cultural) that contributed to construct the meaning of constitutional norms over time (ancient type of constitution), the beyond-the-state context requires the additional dimension of comparing political arenas.

The comparative dimension facilitates the tools to observe changes in patterns of interpretation. Accordingly, the comparative research design which is proposed here takes account of contemporary constitutionalism with reference to emerging transnational political arenas, on the one hand, and enduring domestic arenas, on the other. The research assumption is based on the observation that once constitutional norms are dealt with outside their sociocultural context of origin, a situation of potential conflict emerges. The conflict follows the de-linking of the two sets of social practices which compose the organisational and the customary dimensions of a constitution. The potential for conflict caused by moving constitutional norms outside the domestic polity lies in the decoupling of the customary from the organizational. As in different domestic contexts, the meaning of norms is likely to differ according to experience with norm-use, it is important to recover the crucial interrelation between the social practices that generate
meaning, on the one hand, and public performance that interprets the norm for political and legal use, on the other (Kratochwil 1989, Dworkin 1978). Both aspects of the *nomos* – the organizational and the customary – contribute to the interpretation of meanings that are entailed in constitutional norms.

As Tully has pointed out, “[A] constitution can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics” (Tully 1995, 6). Cultural validation draws on the day-to-day dimension that details the customary in constitutional politics. The challenge lies in bringing the culture back into studies of contemporary constitutionalism: Where to locate the cultural dimension analytically and how to study it empirically? It is crucial for norms research to identify indicators for diversity and commonality of meaning of constitutional norms at a level of desegregation that allows for the empirical assessment of meaning. Approaches which focus on different kinds of norms i.e. human rights, minority rights or other, rather than on their respective meanings, cannot account for information regarding potential conflict and its resolution, nor can this offer an assessment of changes in the normative structure which guides politics at all times, be it within or beyond state boundaries. The following Table 3 summarises the interplay between the three dimensions of norm implementation (formal validity, social recognition and cultural validation) in relation with visibility, on the one hand, and democratic legitimacy, on the other."
Table 3: Three Dimensions of Norm Implementation

<table>
<thead>
<tr>
<th>Dimensions</th>
<th>Formal Validity</th>
<th>Social Recognition</th>
<th>Cultural Validation</th>
<th>Assumptions/ Logics</th>
</tr>
</thead>
<tbody>
<tr>
<td>visible</td>
<td>UN Charter</td>
<td>Learning</td>
<td>Community</td>
<td>Logic of</td>
</tr>
<tr>
<td></td>
<td>EU Treaties</td>
<td>Socialisation</td>
<td>Assumption</td>
<td>Consequence</td>
</tr>
<tr>
<td></td>
<td>Conventions</td>
<td>Community-based</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Agreements</td>
<td>behaviour</td>
<td></td>
<td></td>
</tr>
<tr>
<td>invisible</td>
<td>▲</td>
<td>▼</td>
<td>Identity</td>
<td>Logic of</td>
</tr>
<tr>
<td></td>
<td>Individual</td>
<td>Expectations</td>
<td>Diversity</td>
<td></td>
</tr>
<tr>
<td></td>
<td>expectations</td>
<td>Experience</td>
<td>Assumption</td>
<td>Logic of</td>
</tr>
<tr>
<td></td>
<td>Background</td>
<td>Background</td>
<td></td>
<td>Appropriateness</td>
</tr>
<tr>
<td></td>
<td>knowledge</td>
<td>knowledge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democratic</td>
<td>less</td>
<td>more</td>
<td>more</td>
<td>more</td>
</tr>
<tr>
<td>Legitimacy</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: This table elaborates on Table 9.2, Wiener 2008, p. 202

One observation that helps situating instances of contestation would be that dealing with constitutional norms outside their contexts of origin, is potentially conflictive since this situation involves the de-linking of the two sets of social practices which are constitutive for constitutional norms. That is, the organisational practices which focus on regulatory and organisational rules and cultural practices that reflect the customary dimension. The potential for conflict caused by moving constitutional norms outside the bounded territory of modern states lies in the decoupling of the customary from the organisational dimension of the *nomos* (Tully 1995). That is, the contestation of normative meaning is enhanced through transfer between contexts (compare condition 2, Table 1). It is empirically accessible by examining the individually held associative connotations of differently socialised actors such as politicians, civil servants, parliamentarians or lawyers trained in different legal traditions seek to interpret the norms they encounter in a transnational environment (Wiener 2008). While in supranational contexts actors might
well agree on the importance of a particular norm, say for example human
rights matters, the agreement about a type of norm does not allow for
closeusions about the meaning of norms. In different domestic contexts that
meaning is likely to differ according to experience with “norm-use” or
“enacting meaning-in-use”.16

Given the likelihood of contestation, agreements on the rules,
principles and procedures of democratic constitutionalism beyond the state
depend on dialogue (Puetter 2007). In other words, to agree on
transnationalised principles of constitutionalism, for example in the EU or
other multi-national environments, requires awareness of multiplicity in
meaning and, subsequently, mechanisms which allow for ongoing exchange
about the multiple meanings of norms. This awareness depends on the proper
analytical tools to capture how the complex interplay between the customary
and the organizational dimension of constitutionalism is linked. Working
with the generally accepted definition of institutions as “formal and informal
procedures, routines, norms and conventions embedded in the organisational
structure of the polity or political economy,” (Hall and Taylor 1996, 938) it
is possible to reflect the input of the dual challenge of accommodating the
diversity of normative meanings within modern constitutional frameworks
that are, in addition, moved outside the territorial boundaries of modern
states.

Conclusion

This contribution sought to reveal the impact of cultural validation expressed
through individually enacted meanings as influential for the assessment of
conflict and/or legitimacy as potential outcomes of contestation. Moving
organisational practices, i.e. processes, practices and principles of governance
out of the modern state context, enhances norm contestation. Differences in
the interpretation of norms and their meanings are therefore expected to be
the rule rather than the exception. The findings are of particular relevance to the compliance and governance literatures, respectively. Both have so far predominantly studied state behaviour in reaction to norms, thus considering norms as structural variables. In turn, the proposed research framework applies a relational perspective that focuses on contestation as part of the social practice of enacting meaning in use and hence constitutive for the normative structure. The latter perspective has received comparatively less attention in international relations theory.\footnote{The findings can be summarised as follows: Under conditions of globalisation and regional integration organisational practices of modern constitutionalism are increasingly moved out of the social contexts of their modern conception. Subsequently, interpretation of the principles and norms of governance depends increasingly on cultural practices. That is, in as much as the “stable certainties of the constitutional settlement derived from the peace of Westphalia” (Everson 2004, 125) are undermined, the contingency of cultural practices gains analytical importance. For the analysis of contested norms this implies that individually enacted associative connotations are central to studying contestation of normative meanings beyond the state. In addition to the familiar dimensions of formal validity and social recognition, it was suggested to desegregate norms further to include cultural validation as the third dimension. It was argued that studying cultural validation offers an important key towards dealing with norm conflict in inter-national encounters, and hypothesise that norm contestation increases with a decline in overlapping cultural validation of the interpreters.

This presented research framework is based on two observations, one empirical the other normative. The empirical observation holds that contestation is expected once norms are interpreted by individuals who do not engage in continuous interaction (e.g. conflict emerges as a problem for both policy and politics). The normative observation maintains that if contestation is a necessary condition for norm validity, norms must in}
principle be contestable (e.g. *legitimacy* emerges as the key organising principle which needs to be accommodated and warranted). These two observations are applicable to different types of political arenas including domestic, international, supranational and transnational ones. Diversified governance then requires a turn to the increasingly mobile individual or micro-group as interpreter and negotiator of diversity.

**Notes**

* Some of the core ideas of this chapter have been already developed in the previous article "Contested Meanings of Norms: A Research Framework." published in *Comparative European Politics* 5: 1-17, 2007.


3 For more detailed elaboration and reference to case studies, see Wiener 2007, 2008. Please note that the term ‘inter-national relations’ in lower case letters is always meant to refer to the entire spectrum of social relations (as opposed to political relations only). The hyphenated use of the term distinguishes inter- from transnational relations. While the former are defined as interaction among groups of distinct national quality, the latter are defined as interaction among groups whose actions are no longer distinguishable with reference to nationality.

4 See e.g. De Witte 2000, Schwellnus 2007.

5 See e.g. Slaughter and Burke-White 2002, Fischer-Lescano and Teubner 2006, among others.

6 Among many, see e.g. ICISS 2001, Slaughter 2005, Cohen 2004.


9 Note a similar pattern of distinction by Dimitrova (2006) who distinguishes however, between 'levels' not 'types' of norms.

10 For example, the contributions to Wiener (2007) reveal a considerable degree of contestation regarding the meaning of norms and their interpretation not only according to the context of norm implementation *i.e.* in different policy sectors (Begg, Puetter, Jenson and Puntcher-
Riekmann), but also in contexts of theory generation, i.e. in different academic contexts (Bovens, Pollack and Lord).

11 See e.g. Keohane 1997; Brunnée and Toope 2000.


13 For the distinction between retrospective and prospective methods of analysis see Tilly (1975, 14).

14 This summary contribution does not offer the space for elaboration. For details see Wiener 2008.

15 Adler: “background knowledge” that “can be grasped only as embedded in practice” (Adler 2007, 11).


17 See however, the increasing interest in and influence generated by work in international political theory that draws on normative and/or democratic political theory or philosophy (see e.g. the work of Rainer Forst, David Owen, James Tully, Iris M. Young, Martha Nussbaum, Jürgen Habermas, John Rawls and Seyla Benhabib among others).

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Chapter 13

The Legitimacy of the EU After Enlargement

Jacques Thomassen
University of Twente

The main objective of the 2004 European Election Study (EES) was to assess the effect of the 2004 enlargement on the legitimacy of the European Union.

Basically, there are two different methods for assessing the legitimacy of a political system. First, by evaluating the political system against criteria derived from normative theory. Secondly, by assessing to what extent the political system is right in the eyes of the beholders, i.e. the members of a particular polity. In the 2004 EES we did both, but in this paper I limit myself to the first method. In order to apply this method, it is necessary to elaborate a normative theory and then to specify criteria against which political reality can be evaluated. In our study we developed a set of criteria with regard to three dimensions of legitimacy: Identity, representation and accountability, and performance. Here I limit myself to the representation aspect.

In most contemporary theories of democracy, democracy is tantamount to electoral democracy. Of course, the idea of electoral democracy has been developed in the context of the nation-state and it is still a matter of dispute
whether it is applicable to the European Union. At least the *Treaty on European Union* as amended in the Lisbon Treaty of 2007 leaves little room for doubt. In article 10, the principle of representative democracy at the European level, with a key role for European political parties, is explicitly recognized:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.
3. Member states are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union².

In this article two different channels of political representation are recognized. In addition to the national channel, ‘Citizens are directly represented at Union level’.

In contrast to the national level, the necessity of a full blown system of representative democracy at EU level is still a matter of dispute. There is an ongoing debate in the literature on the question whether or not electoral democracy at the European level is needed. Different answers to that question are related to different views on the kind of organisation the European Union is and to different normative views on democracy. This is not the place to review this literature, but once one accepts the argument that electoral democracy at the level of the EU is needed, one can specify more specific criteria against which the daily practice of EU politics can be evaluated.
The view on representative democracy expressed in the treaty is remarkably consistent with the model of party government, the dominant model of political representation in the political science literature. According to this model, elections can function as an instrument of democracy when the following requirements are met:

1. Voters do have a choice, i.e. they can choose between at least two parties with different policy proposals.
2. Voters do vote according to their policy preferences, i.e. they choose the party that represents their policy preferences best.
3. The internal cohesion of parliamentary parties is sufficient to enable them to implement their policies.
4. The party or coalition of parties winning the elections takes over the government.

It might be obvious that this is a set of stringent and perhaps unrealistic requirements – even at the national level - but they offer a useful conceptual framework to evaluate the effectiveness of the process of political representation in any polity.

According to the dominant political science literature, none of these essential requirements of the process of political representation operates effectively at the European level. First, despite the increased - and perhaps underestimated - powers of the European parliament, it does not form and control a European government, for the simple reason that there is no such thing as a European government, at least not in any traditional sense of the concept. Therefore, it hardly needs to be argued that at least one requirement of the system of party government, the formation and control of the government by a majority in parliament, is not met.

In our study we focus on how well the remaining requirements of the model of party government are met, i.e. the requirements referring to political parties and voters, both before and after enlargement.
The traditional verdict on this process is hardly less negative. According to the party government model, political parties are supposed to supply different policy platforms for the voters to choose from. At the European level this does not occur. European political parties as such do not compete for the votes of a European electorate. European elections are still the arena of national political parties which compete mainly on national issues. Also, voters make their choice on the basis of their opinions on national issues and their perception of the position of national political parties on these issues. As a consequence, European elections fail as an instrument of democracy at the European level, i.e. they fail to express the will of the European people on European issues, i.e. issues with regard to the process of European integration itself.

The remedy, according to some observers, is for political parties to organise themselves at the European level and try to win elections on European rather than national issues. However, as argued before, this argument is disputable. The idea that elections for the European Parliament should be campaigned for on so-called European issues is based on a fundamental misunderstanding. Formal decisions on a further transfer of sovereignty from the national to the European level and on enlargement are subject to the intergovernmental regime of European decision-making. They need the consent of national governments and are, at least in principle, under the control of national parliaments and national electorates. Therefore, the interesting paradox is that what usually are called European issues are basically national issues. As far as the existing party system fails to offer a meaningful choice to the voters, this is a problem at the national rather than the European level.

Therefore, the crucial test for the effectiveness of the European system of political representation is the extent to which it is effective with regard to more substantive policy areas where the European Parliament is competent. However, this argument can hardly change the verdict on the European
system of political representation. It is still true that European political parties as such do not compete for the votes of a European electorate, that European elections are run by national political parties and mainly on national issues, that voters make their choice on the basis of their opinions on national issues. This, however, does not necessarily mean that European elections fail as an instrument to ‘express the will of the citizens of the Union’. Once we accept the argument that the European level of governance is mainly responsible for substantive rather than constitutional issues there is no reason to assume that issues on the European agenda are very different from the policy agendas at the national level. Quite the contrary, the effectiveness of a European system of political representation depends on its ability to aggregate and integrate national political agendas and the national cleavage structures at the European level. The major challenge for an effective democratic political system at the European level is to overcome the traditional dividing lines in Europe, the national borders. The more political differences coincide with national borders, the more disruptive is the politicization of these differences. But the more political parties base their policy appeals on cross-national cleavages rather than on national interests, the better they can serve their function of ‘expressing the will of citizens of the Union’.

Even though there is not much of a process of political representation at the European level, elections for the European parliament – following the requirements of the party government model – might still serve this function if:

a) Political parties of the same party family across member states develop similar party manifestos and profiles during their election campaigns;

b) Their voters across Europe have similar policy priorities and vote according to similar considerations;
c) Being a member of a particular party group rather than national background defines the policy views and the roll call behaviour of members of the European Parliament.

Previous research has shown that these requirements are amazingly well met. The compatibility of national party systems is surprisingly high due to a roughly similar cleavage structure across Western Europe. The manifestos of parties of the same party family are strongly constrained by the same ideological dimensions and in particular by the left-right dimension. Members of the European Parliament are organised in political groups rather than in national delegations, whereas roll call votes can be explained to a large extent by their positions on the left-right dimension. Other dimensions such as the pro-anti-European integration dimension are only of minor importance.

In all countries of the European Union the left-right position is amongst the most significant factors explaining party choice and the effect of left-right is about the same in all countries. In this sense, one might speak of ‘a single European electorate’. As a consequence, the left-right dimension is a suitable vehicle for meaningful mass–elite communication across the European Union and the system of political representation at the European level is functioning much better than often assumed. Despite the lack of a process of political representation at the European level, the aggregation of the outcomes of national processes still leads to reasonable policy congruence between Party Groups in the European Parliament and their electorates across Europe, at least on policy issues related to the left-right dimension.

However, most of the empirical evidence sustaining this conclusion is based on research conducted before the 2004 enlargement. It was still to be seen whether the new post-communist parties and their voters were sufficiently similar to their West European counterparts to fit into the existing party system. If they were not it would no longer be possible to aggregate the national cleavage systems and the national systems of political representation
into an effective process of political representation at the European level. The dominance of the left-right dimension in most West-European democracies is generally attributed to certain historical commonalities, in particular the industrial revolution. Eastern European party systems are of much more recent origins and the nature and relevance of cleavages in these countries is still not totally clear. Therefore, there was a serious concern that the political parties and the dimensions of contestation in these countries would not fit in the existing European party system.

The findings of our project strongly suggest though that the inclusion of the post-communist countries into the European Union did not produce a fundamental change in the left-right structuring of either voting behaviour or the party system. Just like in the older member states, left-right is by far the most important factor structuring the voting behaviour of the electorate in the new member states. Therefore, the idea of a single European electorate, primarily motivated by the same left-right dimension, can still be sustained. However, this is not to say that there are no differences. The effect of left-right orientations on party choice is significantly weaker in the new member states in Central and Eastern Europe than in the older member states. Also, citizens in Central and Eastern Europe in general tend to differ greatly from the citizens of the established European democracies on a number of issues: They are more egalitarian, anti-immigrant and socially conservative than West Europeans. Hence, even though the differences between the voters of different parties follow the same pattern in new and old member states, at the electoral level the East-West differences within the party groups are in a few cases even larger than the differences between them. This means that although the left-right dimension still is a suitable vehicle for mass-elite communication across the European Union, the issue space that needs to be represented by a single European Party Group is further stretched (Van der Brug et al. 2008).
A similar conclusion can be drawn with regard to the development of the European party system. The 2004 enlargement hardly had an effect on it. An analysis of party manifestos and expert judgments leads to the conclusion that the parties from the new member states fit very well in the existing party system and do not seriously affect the cohesiveness and distinctiveness of the party groups. With or without the new members, the party groups in the European Parliament look very much the same (Schmitt and Thomassen 2008). This is largely confirmed by an analysis of roll calls in the European Parliament since 2004. The left-right divide is by far the most important dimension explaining roll call behaviour, just like it has been before enlargement (Voeten 2008).

Nevertheless, there are indications of an increase of latent tensions within the major party groups. Just like the voters from Central and Eastern European countries, MEPs representing them tend to be less libertarian and more traditional or authoritarian than their colleagues from Western Europe. In particular the PES, the socialist party group, has become less cohesive in this respect. But as a general conclusion we can still maintain that the 2004 enlargement had less effect on the effectiveness of the European system of political representation than often expected.

This does not at all mean though that the 2004 enlargement did not have an effect on the legitimacy of the EU. As explained above, representation is only one dimension we took into account in our study of legitimacy. The effect of enlargement on the dimension of identity e.g. is a totally different story. Whatever illusions one might have about the development of a European identity or the sense of a European political community, this development has suffered a serious drawback because of enlargement (Thomassen 2008).
Notes


2 In the treaty of Lisbon replacing the constitutional treaty, this article was maintained (article 8a).


5 This, of course, does not solve the problem. At the contrary, because in most countries opinions on ‘Europe’ are not related to the main dimension of contestation, the left-right dimension, national elections do not serve as an instrument of linkage with regard to this issue either. As a consequence, time and again major political parties are taken by surprise by their own electorate in referenda on European treaties.
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A directly elected European Parliament was advanced as the obvious solution to a perceived democratic deficit in the process of European integration. Just a directly elected parliaments can provide – not least through the electoral process – legitimacy to national governments, so a directly elected EP raise interest in the EU and provide clearer lines of contact between Brussels and member states. Alas, this plan ignored the accumulated wisdom that came from observing elections to different levels of government both within some of the member states and elsewhere, notably in the US, where the elections to Congress mid-term in a Presidential cycle were almost always characterised by low turnout and losses by the president’s party, a pattern that people did vote, would do so in a way that owed more to events in an institution quite separate from that which was being elected. In the aftermath of the first elections Reif and Schmitt drew on much of this experience in labelling EP elections as a second-order national elections (Reif and Schmitt 1980). In a later work Reif proposed an operational definition of such second-order elections: “All elections (except the one that fills the most important political
office of the entire system and therefore is the first-order election) are "national second order elections", irrespective of whether they take place in the entire, or only in a part of, the country." (Reif 1997: 117) Results of second-order elections are influenced not only by second-order factors, but also by the situation in the first-order arena at the time of the second-order election (Reif 1985: 8-9). In the 28 years and five more sets of European Parliament elections since the publication of their seminal work, the concept has become the dominant one in any academic discussion of European elections.

Reif and Schmitt (1980) offer three broad propositions to characterize differences between the aggregate results of European Parliament elections and previous (and subsequent) national elections. These are based on general characteristics of second-order elections. Firstly, the turnout in European Parliament elections is lower than in national elections. If voters perceive that there is less at stake in European Parliament elections and political actors, media, and voters share this perception, then the benefits of voting decrease for individual voters while costs increase. This leads to lower turnout in European Parliament elections compared to first-order elections.

Two more patterns relate to the effect of second-order elections on political parties and their electoral performance. Larger parties will do worse and smaller parties will do better in European Parliament elections relative to their performance in national elections. In addition, national governing parties will suffer losses in European Parliament elections.

The key point here for our understanding of the role of EP elections is that, for Reif and Schmitt, these patterns are in essence unconnected with either how voters see the EU, or the attitudes the various parties have towards the EU.

Much of the work of the Connex Research Group 3 “The citizens' perception of accountability” has examined the continuing reality of the second-order depiction. This is particularly apt because of changes in the EU
since 1979. First, parliament has become more influential in the policy process as a result of changes to the original treaties. What impact has this had? Secondly, the EU itself has tripled in size since those first elections, five additions between 1979 and 1999 and with 12 new countries taking part in the 2004 elections. The applicability of second-order election theory in “new” member states, particularly those joining in 2004, may not be as straightforward as it is in “old” member states.

Figures 1a and 1b show the election performance of governments, first between 1979 and 1999 and then in 2004. Reif and Schmitt suggest that the timing of the European election within the cycle of national elections will have consequences for the extent of government losses. A post-electoral honeymoon is usually followed by disenchantment that forces disappointed supporters of governing parties to switch votes. Defections from government parties increase in the time between national elections and European Parliament elections. The horizontal axis shows the timing of each election within each national cycle. Each graph shows a very similar pattern: governments tend to lose votes. Only 11 have resisted this trend in the five sets of elections, most of these coming either early or very late in the lifetime of those governments. 2004 is only unusual in that the three biggest losses recorded by governments between 1979 and 2004 were all recorded in 2004. The implication of this trend is of course that parties represented in the European Council will lose support relatively in the EP: the EP will thus provide more representation for parties not in national governments than we might expect if national circumstances played little weight in the electoral decision.
Figure 1a EP election performance of governments
1979 - 1999

Figure 1b EP election performance of governments
2004
What of parties? Figures 2a and 2b show the election performance of governments, first between 1979 and 1999 and then in 2004. The horizontal axis now is vote in the previous national election. The pattern is again quite clear. First, that losses are more likely to be sustained by larger parties and gains by very small ones, and second, that large government parties tend to sustain very significant losses. This holds both for 1979-99 and for 2004. Of course there are many exceptions. A fair scatter of cases surrounds the trend lines showing average performance. Even so, the generalisations drawn on the basis of results in 9 countries in 1979 are echoed in the experience of 25 countries in 2004. A more general point, however, is that there is really a very simple relationship between votes at general and at EP elections, which is that they are very similar. Because of this, and because the main difference between the two seem to be a function of the size and government status of the parties, there must be a real doubt about the independence of EP elections.
Finally, Figure 3 shows turnout relative to turnout in the previous general election. In the period 1979-99 turnouts were almost uniformly down in the EP elections, with the median case 20 pc down on the previous general election. In 2004, the figure was even more depressing for those proclaiming the importance of the EP, being down more than 25pc on the most recent general election. This impression of declining turnout in reinforced by Figure 4, which shows a falling trend 1979-2004. However, does this indicate an opposition to the European project, or just an indifference to yet another election?
In general it appears that the aggregate pictures fit the second-order model, although there are some signs that with the addition of the 12 new accession states, some of the patterns have been exaggerated. What about the individual level picture? EP election studies had already been carried out for the elections of 1989, 1994 and 1999 and the support of CONNEX helped in making possible a further study in 2004. A huge data set is now in place, which allows us to examine the voting decisions of European voters in 25 countries in these elections in many countries over, in some cases, 15 years. What does this tell us about the nature of the EP vote? In general two things are very clear. The first is that turnout is NOT a function of attitudes towards the EU or the EP. While these factors play a very minor part in some countries at some times, the relationship is certainly not strong enough for us to be able to say that the low turnout indicates any significant opposition to the European project. The second point is closely related. This is that there is little evidence that shifts in party support are a function of EU attitudes, with people changing their support towards or away from a party because of its views on the EU. There are exceptions, but as a general rule it appears that
neither the turnout in nor the outcome of EP elections owes much to what happens in the EP being elected.

In other work also supported as part of our overall project, media analysis gives some indication of why this should be so. The election campaigns in the media give very attention to EU issues and personalities. The emphasis is much more – at least to the extent that there is any attention given at all to the elections – on national politics. In the new accession states in 2004 the elections were more visible than they were in the older member states, but in the old ones there was also more emphasis on political conflict, essentially national political conflict. Typically the elections were labelled ‘boring’ and turnout was predicted to be low.

Research will continue. The CONNEX experience has strengthened a network that made a successful bid for funding under FP 7 for a social science infrastructure project that will carry out an extensive study of the 2009 elections. This will take place in all 27 EU countries, and will involve integrated studies of voters, candidates, parties and the media. What will we find in the future? There are three scenarios. The first is that matters continue as they are, with low, even falling turnout and little attention given to the EU context of the elections. The second, hoped for by the architects of a directly elected parliament, is that the elections do highlight more EU business and in consequence lead to results that differ more markedly from those in general elections. However, a third scenario is that while these elections do acquire a more ‘European’ focus, so also do national general elections. Then ‘Europe’ simply is added to and integrated within the national political debate, with the result that general and EP election outcomes remain very similar.
References


Chapter 15
Civic Engagement and the Quality of Governance

William Maloney
University of Newcastle

Introduction
In recent years the European Union (EU) has been seeking to bridge the ‘democratic deficit’ and to increase the political linkage between European citizens and EU institutions as a means of further enhancing its legitimacy and increasing transparency and accountability. Its ambition has been to encourage the active and meaningful engagement of citizens with EU institutions and ‘... to stimulate initiatives by bodies engaged in the promotion of active and participatory citizenship’ (CEC, 2001) – e.g. civil society organisations (CSOs).\(^1\) It is also hoped that this may even increase citizens’ attachment to, trust and confidence in, and identification with, the EU and European institutions among citizens across Europe (cf. Noll and Scheuer, 2006, cited in van Deth and Maloney, 2009). Accordingly, there are two main approaches to realise such ambitions: top-down and bottom-up. Either the EU can take the interested bystander role and rely on (bottom-up) spontaneous citizen initiatives that seek a bigger say in decision-making
processes. Alternatively, the EU can try to act as a (top-down) catalyst stimulating the active involvement of CSOs in decision-making.  

The CONNEX research investigating the issues surrounding the role of CSOs as a partial corrective to democratic deficit have focused on several interrelated, interdependent and cross-disciplinary approaches and topics in the major areas of social capital, civil society, Europeanization and EU governance (discussed in more detail below). For example, the unequal distribution of social capital within and across European societies that leads to differential participation rates between social groups and within European democracies themselves requires a comparative and cross-disciplinary approach. Such a methodology facilitates a more accurate assessment of both the level of social capital and its contribution towards the empowerment of citizens in the multi-level EU system. A second cross-cutting theme relates to the kind of social capital that is required for building civil society at the local, national and transnational (EU) levels. Can civil society organisations deliver democracy both in terms of citizen involvement/political linkage and policy-making efficiency in the European multi-level system? There might be a trade-off: In other words, to affect policy outcomes do groups need to professionalize their operations to such an extent that the meaningful involvement of members is undermined and political linkage is weakened?  
Thirdly, in many EU states associational life is vibrant. However, intra-state social capital has a limited capacity to facilitate and bolster citizen linkage to the European sphere – citizens exhibit greater levels of confidence and trust in local, regional and national political administrations than EU institutions. Can an increase in Europeanisation bridge the gap? How successful have the attempts at top-down Europeanisation been both in shaping member-state civil societies and bolstering the democratic potential of civil society organisations in third countries?
Europeanization, Social Capital and Governance

Europeanization and Social Capital

The integration of top-down approaches for the study of relationships within the developing EU-multilevel system (i.e. the consequences of Europeanisation for civil society at the local level) and bottom-up approaches (i.e. the consequences of civil society for the process of European integration and democracy in the EU) generated several noteworthy scientific findings. First, the combination of various research perspectives and approaches demonstrated that the linkages in the European multi-level system are characterised by national features and developments and that voluntary associations have a very limited capacity to enhance meaningful political linkages between the EU and its citizens. The linkages are heavily influenced by national elites who play a key gatekeeper role to exert top-down control. Secondly, research also demonstrated that the Europeanisation process in terms of civil society actors adapting to the European political space has been somewhat uneven. Engagement with and confidence in the EU (compared to national institutions) is relatively weak exactly among the group of citizens that the social capital model predicts would be highest – members of voluntary associations. Empirical evidence is quite unambiguous: Attitudes towards Europe and European institutions among activists are not much more positive than those found among the general populations. Consequently, because support for the EU is weak among citizens active at the local level bottom-up engagement at the EU level is unlikely to emerge. Thus, the social capital being generated in EU democracies is nation-centred: i.e. values and trust are heavily oriented to national societies and political systems. Consequently, there appears to be a deficit in the stock of social capital required that could contribute to ‘good’ EU governance and enhance political legitimation. Social capital research carried out under the auspices of
CONNEX (and elsewhere) demonstrated that European associational life is vibrant and has relatively robust foundations. Nevertheless, significant variations exist between European (EU) countries. However, we have to be careful in our interpretation because some of these can be accounted for by the use of relatively insensitive tools for measuring the intensity and distribution of social capital. For example, in Poland it is not necessarily the case that social capital is lower – it is likely that it takes a different form from that recorded in other EU democracies. Thus, social capital should be measured not only through indicators such as civic engagement, political involvement and the density and diversity of voluntary associations – it may also be generated in informal participatory settings and unorganized civicness (see, Adam, 2007). Thirdly, research on democratization promotion by the EU challenged the ‘one size fits all’ approach. Different strategies for the promotion of civil society in external states can be observed and the EU akin to other external actors faced significant problems in adequately taking the local contexts into account. There were problems with regard to the funding programmes and democratization instruments. EU funding of civil society tended to privilege a few large and well-connected NGOs and smaller and geographically dispersed organizations became the poorer relatives. The EU also tended to draw on large resource rich NGOs as ‘administrative partners’ and the increasingly complexity of policy-making and funding acts as a further barrier to the development of resource poor and smaller NGOs. These developments are likely to lead to greater hierarchy and stratification within civil society (see the special issue of Democratization in 2009, edited by Susan Stewart).

In summary, combining various perspectives made clear that linkages in the European multi-level system are: (i) evidently characterised by national features and developments, (ii) only, in rather restricted ways, ascertained by voluntary associations, and (iii) heavily influenced by national elites who are
able to control top-down linkages. (For a more detailed discussion of these issues see Maloney and van Deth, 2008.)

Governance

When reflecting on the link between European civil society and EU governance, we are faced with the familiar assertion that business and economic interests are heavily engaged in political lobbying at the EU level and enjoy greater levels of success than civil society associations whose participation is more limited. Much research has emphasised that successful interest representation requires the development of specific attributes: e.g. negotiation expertise and skills, a long-term outlook, maintaining a (high) profile, political and technical expertise and a familiarity with EU policy-making routines and procedures etc. The internal structure of organisations and the communication channels also affects representation. Effective interest representation can only take place at the European and national levels if civic associations and political elites can reach a working consensus and attain effective and implementable policy outcomes. However, the accession of new (formerly communist) states to the EU brings with it some difficulties with regard to interest representation. In many countries business associations are relatively poorly organised and citizen membership of organisations largely eschewed because under the previous regime associations were controlled by the communist party. Turning to interest representation in Brussels there is a lack of consensus about their role and activities and a deficit of long-term strategic planning. Finally, there is a lack of human and financial capital to get meaningfully engaged in the EU policy-making process.

Finally, turning to the relationship between the internal and external dynamics of CSO the core research question addressed was to what extent are trans-national (EU) CSOs operating like elite-type advocacy groups? The growing trend towards the professionalization of representation is evident in
both established and new EU members (akin to Skocpol’s [2003] findings in the US). For example, research in Poland and Slovenia showed that the NGOs sector exhibited trends towards professionalization with a shift to service provision and with management and expertise increasing in importance leading to a strengthening of the leadership vis-à-vis the membership. If group leaders interact mainly with other political ‘elites’ then the role of members, and thus democratic participation, may be further atrophied. From the group perspective the best way to produce effective results clearly has a significant impact on the nature of the ‘demands’ it makes of its membership. There are clearly tensions – felt by groups and policymakers – between democratic efficiency and more participatory modus operandi. Directly at the EU level Saurugger (2007: 397) more than hints at the tension that exists between being representative, responsive and accountable on the one hand and acting as an efficient policy-making partner on the other. The more efficient groups are at:

... representing their interests in a constructive, precise and coherent manner, the more influence they exert. These activities, however, require major expertise on the group’s and movement’s side which contributes to modeling the style of militancy and leads to greater internal professionalization. Thus, the organizational structures of civil society have reformed to match better the perceived access structure of the European political system ... Organized civil society – organized as groups or social movements – has a tendency to become increasingly professionalized to represent the interests of their constituency in an efficient way (Saurugger, 2007: 397-398).

In this situation crucial questions can be raised regarding legitimacy, internal EU democratisation and civil-society mediation. While the ‘power balance’ may be tipping towards leaders there remains a necessity for an active core of members who can be mobilized when required. For some scholars these changes may signal a shift away from democratic aspirations and/or expectations. However, from the group perspective it is a necessary response
to trans-nationalisation processes and EU multi-level policy-making system. Professionalization and bureaucratization appear to be inevitable if NGOs are to effectively represent their interests and influence outcomes. These developments may ultimately result in a segmented and hierarchically structured civil society offering decreasing levels of political linkage and leading to the development of a new political elite.

Concluding Comment

It is clear that research in the areas outlined above was relatively wide ranging and demonstrated much interconnectedness – e.g. the impact of social capital on Europeanization and EU governance. It tapped into some of the major themes in the areas of social capital, civil society, citizen engagement, political participation, Europeanization, external democratisation, and governance within the European Union and Europe. It has inevitably, generated additional scientific questions, but it has also provided some light on contemporary problems and issues.

Notes

1 CSOs are seen as: ‘… fostering a more participatory democracy’ (CEC, 2000: 4); schools of democracy and generators of social capital; crucial representative and surrogate representative institutions; countervailing interests; providing policy expertise and ‘monitoring and evaluating projects financed by the EU’ (CEC, 2000: 5).

2 Greenwood (2007: 343) notes the Commission has played an ‘active role’ as a financial patron of ‘… citizen interest groups and in empowering citizen interest groups through (various) policy initiatives’.
References


Introduction

Democracy cannot survive without democrats. Citizens should show at least some minimum level of interest in democratic decision-making processes in order to present their wishes and demands, and to communicate with other citizens. Besides, citizens should consider the rules of the game as basically fair and appropriate; that is, the legitimacy of the system should be undisputed. Probably no community can exist on the basis of power and control only – without some minimum level of acceptance of its fundamental principles by its members, the persistence of any community is endangered. By now, these platitudes are widely recognized. The core debates about democracy and citizenship do not focus on the need for engaged citizens with democratic orientation. What is disputed, however, is the degree of involvement and the nature of the orientations required for a vital democracy. Furthermore, citizenship does not only include engagement in public and political affairs and the acceptance of particular norms and values, but also the recognition of
particular duties. In fact, it is the very recognition of a balance between rights and duties which characterizes democratic citizenship.¹

The general consent about the balance between rights and duties of democratic citizens disappears rapidly when we take a closer look at specific depictions of the ‘good citizen’. Political philosophers from Aristotle and Plato to Michael Walzer and Benjamin Barber have dealt with the relationships between the requirements of the community on the one hand, and the rights and obligations of people living in that community on the other. Interesting and stimulating as these ideas might be, it remains unclear which conceptualizations of the ‘good citizen’ are actually used by politicians, policy makers, and citizens. What image do these actors have of citizens and citizenship? How are these images distributed in democracies? These questions appear to be especially relevant for the opportunities to develop (more) democratic decision-making processes and active citizenship in the European Union (EU). Almost by definition, the ‘good citizen’ is a national citizen; that is, the rights and duties which come with citizenship are the rights and duties of citizens towards the national state (cf. Hix 2005: 345-346). The rise of the EU system of multi-level governance has affected this situation deeply. A complex system of national, sub-national, international, trans-national, and supra-national institutions has emerged, whose democratic character increasingly is approached sceptically (cf. Majone 1998; Follesdal and Hix 2006; Eriksen and Fossum 2007). Political decision-making is more and more characterized by ‘Europeanization’ (cf. Graziano and Vink 2007) and the ‘good citizen’ seems to have difficulties to keep up with the high speed of changes in Europe.

With respect to the huge amount of conceptualizations and the century-old discussions about the ‘good citizen’, it is remarkable that empirical research on these images is rare. Besides, empirical research on images of a ‘good European citizen’ is even more difficult to find. In this paper a search for actually used images of the ‘good citizen’ in Europe is
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presented from various points of view. Following a conventional top-down approach, the ideas of EU Policymakers (Commission and Council) on the further democratization of the EU and the expected role of citizens in that process are examined. Since civil society is presumed to perform essential functions in these democratization processes by linking the various levels of decision making, the second point of view considered here is offered by civil society bodies. Finally, the images of the ‘good citizen’ among EU citizens are considered. The main conclusion is that civil society organizations and ordinary citizens are content with the dual process of strengthening the position of civil society and not increasing the participatory demands on citizens, whereas EU policymakers are left behind with their ideas about civil society as a means to integrate ordinary citizens and to close the gap between citizens and the EU. Apparently, WYSIWYG does not apply to the ways European elites perceive the ‘good European citizen’.

Different Points of View

Images of the ‘good citizen’ are, by definition, normative statements about desirable orientations and behaviours of individuals in a democratic polity. As such, appraising the specific content of these images is the domain of political philosophers, ideologues, politicians, and, of course, citizens themselves. Interesting as normative questions about the desirability of orientations and behaviour are, they are not the main concern here. Instead, the principal empirical question here is which orientations and behaviours are considered desirable by various actors in Europe. A factual gap between the images among those actors might effectively block the chances of improving democratic decision-making processes. Similar barriers can hamper improvements if policy makers have unrealistic images of orientations and behaviour of citizens, and base their plans on these ideas directly. In reverse, citizens will be frustrated if they
are constantly confronted with proposals based on either over-exaggerated or underestimated expectations about their orientations and behaviours.

Viewpoint I: EU Policymakers

For a long time citizens were not considered to be very relevant actors for the democratic character of the European Union (or its predecessors). Until the 1992 Maastricht Treaty, the democratic legitimacy of the EU was presumed to be based mainly on the democratic character of its member states (Majone 1998). Consequently, the phrase ‘democratic deficit’ became fashionable only recently. With the publication of the *EU White Paper on Governance*, the Commission took the initiative to improve the democratic character of the EU by encouraging citizens “… to engage more frequently with its institutions … [and] to stimulate initiatives by bodies engaged in the promotion of active and participatory citizenship” (COM 2001; emphasis added). In a speech to the European Parliament in February 2000, Commissioner Prodi “… called for a civic participation in all stages of the policymaking process” (as cited by Sloot 2003: 130). In a similar manner, the Council launched a “Community action programme to promote active European citizenship (civic participation)”. The main objective of this programme is “… to bring citizens closer to the European Union and its institutions and to encourage them to engage more frequently with its institutions”. These goals clearly indicate a withdrawal from the conventional approaches to integrate citizens in decision-making processes, that are restricted to the role of member states and representative democracy. Although citizens’ involvement and the wish to “bring citizens closer to the European Union” unambiguously are the main targets of European policymakers, citizens are not expected to play major roles in attempts to close the presumed deficiencies in this area. Instead, “bodies engaged in the promotion of active and participatory citizenship” and “civic participation” are the main mechanisms proposed to
improve the democratic character of the EU. In order to make decision-making in Europe more open, transparent, and participatory, a wide range of collective actors – not citizens – from varying institutional, territorial levels or thematic areas are to be mobilized and should offer access to these decision-making processes.¹

With their focus on “civil society” and “civil society bodies” European policymakers apparently aim at collective actors and thus only indirectly at individual citizens (Sánchez-Salgado 2007). This aim is based on two different, but complementary lines of reasoning. Firstly, civil society, by definition, encompasses non-governmental organisations (NGOs), which are presumed to offer a kind of countervailing power to the institutionalized political actors of conventional, representative democratic decision-making processes.⁶ As Friedrich notes, civil society opens “… the possibility for thoughts about additional, complementary institutionalisations that are capable of rendering policy-making process more democratic which cannot (and perhaps even should not) rely predominantly on representative mechanisms” (2007: 9).¹ In this respect, it is important to emphasize that NGOs are seen as being able to act as a counterbalance to other societal interests and “… to reach the poorest and most disadvantaged and to provide a voice for those not sufficiently heard through other channels” (COM 2001: 5). Secondly, the renaissance of communitarian and neo-Tocquevillean ideas in the 1990s evidently had an impact on European policymakers by strengthening the belief in the benevolent consequences of civil society and social capital for the functioning of democracy. Putnam summarized these ideas neatly: “Good government in Italy is a by-product of singing groups and soccer clubs” (1993: 176).⁸ By now, the notion that democracies are dependent on a well-developed civil society and a considerable stock of social capital is widely accepted. From the perspective of EU policymakers, then, “civil society” and “civil society bodies” have the potential to enhance the quality of political decision-making processes by expanding the group of
collective participants beyond the conventional borders of representative democracy. Furthermore, “civic participation” of citizens within associations is expected to generate democratic orientations and values which, in turn, strengthen democracy and reduce the distance between citizens and the EU.

EU policymakers have not only presented ideas about the improvement of democracy and the need to narrow the gap with its citizens. The strong focus on civil society and civil society bodies has also been materialized in opulent and continuous subsidizing of these organisations (cf. Greenwood 2007; Sánchez-Salgado 2007). Almost each and every citizens’ group in Brussels or Strasbourg receives EU funding and some groups are almost completely financed by the Union. In order to strengthen “civic participation”, the EU is apparently willing to pay the bill of mobilizing potentially critical citizens’ groups. We do not need to go into plausible motives for this, at least partly, masochistic behaviour here – clear is that the EU takes the mobilization of civil society organisations very seriously. In practice, the EU goes much further than providing cheap rhetoric about civil society or only inviting collective actors to participate.

From the perspective of European policymakers, the ‘good European citizen’ has disappeared rapidly behind the benign horizon of civil society bodies. The arguments used seem to be characterized by the following five aspects. A ‘good European citizen’ is somebody who:

1. uses the opportunities offered by representative democracy;
2. supports a variety of civil society organizations;
3. supports the role of civil society organizations in decision-making processes; direct involvement of citizens is superfluous;
4. develops (more) positive orientations towards the EU due to the mobilization of civil society organizations in EU policymaking processes;
5. is not concerned about possible inconsistencies between the results of electoral participation and participation of civil society organizations.

Viewpoint II: Civil Society

Civil society associations usually do not present explicit ideas about images of the desirable orientations and behaviours of the activists, volunteers, or members of their organizations. Neither do they offer ideas about the ‘good citizen’ in general. Instead, they articulate the aims of the organization and give voice to the interests and viewpoints of particular groups among the population – certainly not only of the members of the organization concerned. The relevance of civil society bodies is based on their perceived functions as collective actors in democratic decision-making processes and not on probable normative ideas about the ‘good citizen’. As Saurugger remarks, civil society associations are “supposed” to come with grass-roots involvement and accountable leadership (2007: 388) and these presumptions are often taken for granted.¹¹

How do civil society organisations view their members and citizens in general? Empirical research in this area is rare, but the available findings seem to be coherent (cf. Maloney and van Deth 2008).¹² A century after Robert Michels predicted the unavoidable rise of oligarchic tendencies in each organization, civil society bodies in the EU are confronted with exactly these developments. Studying the role of associations in development policies, for instance, Warleigh found that these bodies were staff-dominated and made “… little or no effort to educate their supporters about the need for engagement with EU decision-makers” (2001: 623). Later he notes that several group leaders conceded that a lack of membership “… participation was a problem for their credibility” (2001: 634). In their recent, extensive study of campaign groups in Britain, Jordan and Maloney (2007: 158-159) also cite similar evidence of staff dominance and the attractiveness of passivity
for members of these groups. Working in a very different policy area, Sudbery (2003: 90) found that with limited resources groups preferred “effective results” to raising awareness. She quotes a senior representative of the European Environment Bureau who said that “While ideally it would be good to get people involved … my role is not to encourage the most participatory governance, but to ensure the best results for the environment” (2003: 91-92). Civil society bodies, then, are increasingly characterized by staff-dominance (professionalization) and the need to concentrate on their mission (cf. Saurugger 2007: 397-398; Grande 2002: 130).

The flipside of the professionalization of associational life is the relative passivity of members and supporters. Empirical studies on this linkage have been especially stimulated by the fruitful application of interpretations based on rational expectations of both leaders and members. From the perspective of civil society associations, the urge to show effective results clearly has a significant impact on the nature of the ‘demands’ it makes of its membership. For instance, Crenson and Ginsberg (2002) draw attention to the need for expertise and technical knowledge in new policy areas as being much more important for reaching associational goals than the mobilization of large numbers of citizens. As they conclude, a new policy area is open “… to all those who have ideas and expertise rather than to those who assert interest and preferences” (2002: 147). Skocpol points out a similar mechanism: “If a new cause arises, entrepreneurs think of opening a national office, raising funds through direct mail and hiring pollsters and media consultants … Organizational leaders have little time to discuss things with groups of members” (2003: 134). Consequently, a ‘protest business’ of increasingly professionalized organizations aroused articulating interests and demands, and mobilizing expertise and power (Jordan and Maloney 1997).

These rather practical restrictions on the opportunities to stimulate grass-root activities seem to be remarkably congruent with the demands and expectations of ordinary citizens. If civil society bodies are urgently looking
for opportunities to be involved in political decision-making processes, many citizens are willing to leave that job to those associations and their professionals. As Jordan and Maloney note, most members and supporters “…are content to embrace a politically marginal role and contract-out their participation” to groups and many do not see membership of groups as a means of being ‘active in politics’ (2007: 160-161). The opposite seems to be the case for ordinary citizens. Many citizens perceive passive involvement as a ‘benefit’ and would consider leaving organizations that sought to impose the ‘cost’ of active involvement in group activities. Although the evidence is clear, simple generalizations should be avoided:

“… it is too simplistic to suggest that groups want only passive cash-cow members, rather than activists. More accurately it should be seen that groups are prepared to accept membership on that basis, and may welcome more active involvement. However, they may not always be keen to roll out the red carpet for a policy-making membership” (Jordan and Maloney 2007: 161; emphasis in original)

‘Checkbook participation’ seems to be a division of labour that combines the best of two worlds, enabling organizations to focus on policymaking and citizens to provide resources. At the EU level, this gearing for one another is stimulated by the considerable support provided for European civil society bodies by the EU. As mentioned in the previous section, the EU subsidizes most of the citizens’ groups in Brussels and Strasbourg, and this financial backing covers almost the whole budget of some of these associations. This generous funding relieves civil society bodies from the pressure to mobilize members and supporters and to secure their resources based on contributions made by these members and supporters. Rather bluntly, Skocpol brings this to the point – for civil society bodies “[m]embers are a nonlucrative distraction” (2003: 134). There is no need to spend organizational resources seeking and servicing members or supporters, when EU subventions enable fully focussed professional lobbying.
Structural and organisational aspects enable civil society bodies to be indifferent to images of the ‘good European citizen’. The arguments seem to be characterized by the following aspects. A ‘good European citizen’ is somebody who:

1. supports civil society organisations, which, in turn, participate in decision-making processes;
2. supports the role of civil society organizations in decision-making processes; direct involvement of citizens is superfluous;
3. judges civil society organisations on the results they obtain in decision-making processes;
4. is not concerned about possible inconsistencies between the results of electoral participation and participation of civil society organizations.

Viewpoint III: Citizens

What image do ordinary citizens have of a ‘good citizen’? How are norms of citizenship distributed in democracies? Astonishing as it might be, not much empirical information is available to answer these questions (cf. van Deth 2007), although for instance Lane (1962) had already asked people what they consider important aspects of ‘good citizens’. Pamela Johnston Conover and her collaborators (1990; 1991; 1993; 2004) relied on focus groups and found a fairly clear outline of a ‘good citizen’ in Britain and the United States. A ‘good citizen’, firstly, understands his or her rights mainly as civil rights (US) or social rights (Britain) and does not consider political rights to be equally important or relevant. Secondly, a ‘good citizen’ understands his or her duties mainly as duties and responsibilities that are required to preserve civil life. A ‘good citizen’ certainly values social engagement and active involvement in community matters, but no consensus exists about the reasons for these activities (cf. Conover et al. 1993; Conover et al. 1990; Conover et al. 1991).
Focus groups are useful to trace images of the ‘good citizen’, but these findings do not provide information about the distribution of various aspects of these images among the population. Survey research can fill this gap. Major examples of international studies covering these images are the Citizenship, Involvement, Democracy project (CID) and the first wave of the European Social Survey (ESS). Questions on the image of a ‘good citizen’ used in these two surveys clearly direct the attention of the respondents to the contested meaning of the concept, as well as to his or her personal opinions about the ‘good citizen’:

As you know, there are different opinions as to what it takes to be a good citizen. I would therefore like to ask you to examine the characteristics listed on the card. Looking at what you personally think, how important is it:
A. To show solidarity with people who are worse off than yourself
B. To vote in public elections
C. Never to try to evade taxes
D. To form your own opinion, independently of others
E. Always to obey laws and regulations
F. To be active in organizations
G. To think of others more than yourself
H. To subject your own opinions to critical examination.

Respondents expressed their opinion for each item on an 11-point scale ranging from ‘very unimportant’ to ‘very important’. A similar, but shorter instrument is used by the ESS including the items A, B, D, E, and F as well as an additional item “Be active in politics”.

The results of both the CID and ESS findings are summarized in Figure 1. In spite of the use of different items and different sets of countries, the results are remarkably similar for the two studies. Autonomy and law obeying are unreservedly supported by about 70 percent of the respondents, whereas voting and solidarity are considered to be important by about 60 percent. On the other hand, we see that the neo-Tocquevillian idea that engagement in voluntary associations is an important aspect of being a ‘good citizen’ is supported by about one out of every four respondents only. Even more
remarkable is the clear lack of support for the idea that a ‘good citizen’ should be active in politics: Only ten percent of the respondents support the norm that a ‘good citizen’ is – generally speaking – a politically active citizen.¹⁸

Figure 1: Aspects of being a ‘good citizen’
(Percentages of respondents scoring 8, 9 or 10)

Sources: ESS: Austria, Belgium, Switzerland, Czech Republic, Germany, Denmark, Spain, Finland, France, United Kingdom, Greece, Hungary, Ireland, Israel, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Sweden, Slovenia. CID: Denmark, Germany, Moldova, Netherlands, Norway, Portugal, Poland, Russia, Slovenia, Spain, Sweden, Switzerland.

These results are confirmed by several other analyses. Denters, Gabriel, and Torcal (2007) analyzed the CID-questions and report a high degree of integration of the various aspects, as well as a remarkably high level of support for the major aspects of being a ‘good citizen’: law-abiding, opinionating, and solidarity. Using the ESS data, Rossteutscher (2005) reports high levels of support for law obeying, solidarity, and autonomy. This high level of support can also be revealed for the norm to vote in public elections. Much lower, however, is the support for the norm to be active in organizations. British
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and American surveys applying measures from the CID-project found high levels of support for “civic duties and obligations” and a corresponding limited “sense of duty to become politically engaged” beyond voting (Patty, Seyd, and Whiteley 2004, 48-50; Dalton 2008: 88, respectively). Based on completely different sources, Schudson (1998) describes the rise of “monitorial citizens” in modern democracies in a similar way: They are “perhaps better informed” and “have no more virtue than citizens of the past – but not less, either”. The crucial point is that they “… tend to be defensive rather than proactive” (Schudson 1998, 311; cf. Hooghe and Dejaeghere 2007). People do take their rights and duties as citizens seriously, but they are reluctant to get involved in public and political affairs beyond voting.

As these results show, for the majority of respondents a ‘good citizen’ is someone who visits the ballot box – not someone who is engaged in public and political affairs beyond voting. Moreover, these findings do not support the idea that engagement in voluntary associations can be seen as a substitute for political engagement. People are consistently reluctant to place much value on both social and on political participation as core aspects of being a ‘good citizen’ (cf. Theiss-Morse and Hibbing 2005, 242-245). Obviously, the “... ideal citizen is not the enlightened political participant cognizant of the common good but the effective one” (Gross 1997, 233). This is a remarkably restricted conception of a ‘good citizen’, which is not only far away from ideas presented by political theorists from Pericles to Benjamin Barber, but also far away from the ideas presented by EU policymakers.

Although no empirical information is available about the images of a ‘good EU citizen’ it is very unlikely that these images would attach more importance to engagement in political affairs beyond voting or to activities in civil society associations than found in images of a ‘good citizen’. From the perspective of citizens, the ‘good EU citizen’ is probably rather similar to the ‘good citizen’ at best. The arguments seem to be characterized by the following aspects. A ‘good [European] citizen’ is somebody who is:
1. law-abiding, opinionated, and solidary;
2. casts a vote in elections, but is not necessarily involved in other political activities;
3. is not necessarily involved in civil society organizations;
4. supports the role of civil society organizations in decision-making processes; direct involvement of citizens is superfluous;
5. is unlikely to develop (more) positive orientations towards the EU due to the mobilization of civil society organisations in EU policymaking processes;
6. is not concerned about possible inconsistencies between the results of electoral participation and participation of civil society organizations, because the latter is not salient.

**WYSIWYG?**

The images of the ‘good European citizen’ appear to deviate clearly between EU policymakers, civil society organisations, and ordinary citizens. Apparently, EU policymakers and civil society bodies do not get what they see as the ‘good European citizen’. As in other areas, the images of a ‘good citizen’ seem to confirm the depiction of the EU as “Union of deep diversity” (Eriksen and Fossum 2007). Among citizens, normative considerations about solidarity, obeying laws, autonomy, and electoral participation are widely shared and supported. Citizens are much less convinced that participating in voluntary associations or being politically active are features of a ‘good citizen’. Empirical information on images of a ‘good citizen’, then, is not in line with over-enthusiastic expectations about citizens eagerly looking for opportunities to participate in “thick democracy”. Whether such participation, in turn, would have positive consequences for the development of support for broader conceptualizations of citizenship still is a controversial topic. Some authors strongly argue that participation does not seem to be
necessary for the development of support for aspects of citizenship such as solidarity (cf. Segall 2005). Others draw a more complicated picture (cf. Theiss-Morse 1993; Mansbridge 1999; Verba et al. 1995: 500) or underline the benevolent impacts of “deliberation” (Fishkin and Luskin 2005).

Since the differences in the images of the ‘good European citizen’ between the EU policymakers, civil society organisations, and ordinary citizens are considerable, the consequences will be considerable, too. Firstly, we see that the ideas of EU policymakers to integrate citizens more intensively in democratic decision-making processes is not met with equal enthusiasm among these very same citizens. Apart from casting a vote, ordinary citizens do not support the idea that a ‘good citizen’ is necessarily characterized by political and social engagement. The restricted importance attached to voluntary association, moreover, makes it rather unlikely that mobilizing civil society bodies as proposed by EU policymakers will change this reluctance.

Secondly, the attempts to include civil society organizations in EU decision-making processes will be much more effective than efforts to mobilize citizens, because they fit seamlessly to the ideas of these organisations about their main tasks. Both EU policymakers and spokespersons of voluntary associations stress the need for a more prominent role of civil society. The increasing integration of civil society bodies in decision-making processes has a number of positive consequences: Expertise is made available, measures can be attuned to specific needs, societal demands can be articulated early, European bureaucracy is met with countervailing powers, complementary opportunities are offered outside the representative institutions, etcetera. Although, on the negative side, the prospects for patronage, ‘closed shops’, and corruption are also evident, the resemblance of the ideas of EU policymakers and civil society organisations are too strong to hamper a further integration of these organisations in EU decision-making processes.
The third conclusion is based on the different expectations about the benevolent aspects of citizens’ engagement in democratic decision-making processes among EU policymakers and civil society bodies. For EU policymakers the need to mobilize ordinary citizens is an important pillar of their pleas for a stronger position of civil society. But as we have seen, these organizations stress their role as collective actors and are, in practice, virtually under no pressure to mobilize members of supporters – a strategy that is nicely met by the apparent lack of eagerness among citizens to participate. Consequently, civil society organizations and ordinary citizens will be content with the dual process of strengthening the position of civil society and not increasing the participatory demands on citizens. The EU policymakers are left behind with their ideas about civil society as a means to integrate ordinary citizens and to close the gap between citizens and the EU.

The common aspects of the three perspectives on the images of a ‘good [European] citizen’ are summarized in Table 1. From this sketchy overview it is clear that only the idea that civil society bodies should play an important role in democratic decision-making processes is explicitly supported from the perspectives considered here. The consequences of three of the remaining aspects are unclear, because the importance attached to these points appears to vary. Two aspects, however, seem to be problematic. From a top-down perspective, the strong expectations among EU policymakers that integrating civil society bodies in decision-making processes will eventually result in (more) positive attitudes towards the EU is not met by similar ideas among civil society bodies or ordinary citizens. Frustration is likely to accumulate at both sides: Policymakers will not reach their goal and citizens will be constantly reminded of something they don’t care much about. Form a bottom-up perspective, the core elements of the image of a ‘good citizen’ among the population – law-abiding, opinionated, and solidary – are not very important for the ‘good citizen’ as conceptualized by EU policymakers and civil society bodies. Frustration is likely to accumulate here especially among
ordinary citizens, whose ideas about citizenship are not met with similar ideas from other actors. Clearly, citizens do not get what they see.

Table 1: Images of the ‘good citizen’ from various perspectives

<table>
<thead>
<tr>
<th>A ‘good European citizen’ is somebody who:</th>
<th>EU Policymakers</th>
<th>Civil Society Bodies</th>
<th>Ordinary Citizens</th>
</tr>
</thead>
<tbody>
<tr>
<td>uses opportunities of representative democracy</td>
<td>idea supported</td>
<td>not considered</td>
<td>strongly supported</td>
</tr>
<tr>
<td>supports civil society organizations</td>
<td>strongly supported</td>
<td>strongly supported</td>
<td>partly supported</td>
</tr>
<tr>
<td>supports role of civil society organizations in decision-making</td>
<td>strongly supported</td>
<td>strongly supported</td>
<td>strongly supported</td>
</tr>
<tr>
<td>develops (more) positive orientations towards the EU</td>
<td>strongly supported</td>
<td>not considered</td>
<td>not considered</td>
</tr>
<tr>
<td>is not concerned about inconsistencies between electoral and social participation</td>
<td>implicitly accepted</td>
<td>not considered</td>
<td>not relevant</td>
</tr>
<tr>
<td>is law-abiding, opinionated, and solidary</td>
<td>not considered</td>
<td>not considered</td>
<td>strongly supported</td>
</tr>
</tbody>
</table>

People do take their rights and duties as citizens seriously, and they strongly support norms of law-abiding, the expression of opinions, solidarity, and casting a vote. Ordinary citizens will not, however, develop (more) positive orientations towards the EU as a consequence of the increased involvement of civil society bodies in democratic decision-making processes. EU policymakers and ordinary citizens seem to emphasize different aspects of a ‘good citizen’ – as a result, neither of them will get what they see. Consequently, pleas for “reconstituting democracy in Europe” (Eriksen and Fossum 2007) can only be successful if these very different images are taken into account and cultural and structural approaches are integrated.
Notes


2 See for a brief overview of ‘top down’ vs ‘bottom up’ approaches: van Deth and Maloney (2008).

3 A clear indicator of the prominent position of the White Paper is the fact that it will be difficult to find a CONNEX-paper that does not refer (extensively) to the arguments presented in this paper.


5 See for extensive overviews of approaches to the role of civil society organisations in European democratic decision-making processes: Eising (2000), Mair (2005), Kohler-Koch (2007), and especially Finke (2007). Haug (2008: 4) recently stressed the need to include “less institutionalised transnational spaces of communication”.

6 See for an extensive overview of the arguments linking “civil society to participatory democracy in EU affairs”: Finke (2007). Vibert (2007: 138–43) presents a very interesting discussion about “fundamental failures” resulting from an “incompatability” of existing power-sharing arrangements in the EU and the role of civil society associations. Case studies of actual decision-making processes usually show that contacts are mainly concerned with the exchange of expertise in advisory bodies and written consultations (cf. D browska 2007; Sánchez-Salgado 2007).

7 See Finke (2007: 6–7) for a detailed overview of the debates about governance, participation, and legitimacy that lay behind these lines of argument.

8 These types of claims are not restricted to “good government”. To quote Putnam once more: “... social capital makes us smarter, healthier, safer, richer, and better able to govern a just and stable democracy” (Putnam, 2000: 290).

9 For an evaluation of this last part of the argument virtually no empirical research is available. Van den Berg (2006) presents a highly original study of the ways Dutch voluntary associations enable their members to (further) develop attitudes towards Europe.

10 As Sánchez-Salgado notes: “No matter whether voluntary organisations approve European politics or not, what is significant is that they consider the EU to be a legitimate operator” (2007: 262).
Alternatively, one can focus on the potential and desired opportunities, which are presumably offered by various kinds of contacts and associations and simply neglect actual expectations and demands (see, for instance, Haug 2008).

Furthermore, empirical information about activists and volunteers in several European cities is collected as part of the CID-Activist Study (cf. van Deth 2008).

Members of the European Commission Governance team also expressed their concern about the tension between efficiency and citizen participation: “We simply do not have the resources to deal with all civil society organisations … Perhaps the most effective way to link with the citizen … is by more effective results … The issue about bringing in the citizen is for speeches, for the rhetoric” (Sudbery 2003: 91-92).

As participation research shows, highly active civil society groups can erode the willingness of people to become involved in political decision-making rapidly (cf. Fiorina 1999).

The network ‘Citizenship, Involvement, Democracy’ (CID) was funded by the European Science Foundation; see: www.mzes.uni-mannheim.de/projekte/CID and van Deth, Montero, Westholm (2007) for further information. For the European Social Survey see: ess.nsd.uib.no/2003.

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References


Chapter 17

Does Participatory Governance Hold its Promises?

Beate Kohler-Koch
MZES, University of Mannheim

The constitutional principle of participatory democracy

With the ratification of the Reform Treaty, the European Union will be based on two complementary principles: the principle of representative democracy and the principle of participatory democracy. Even though the two respective sub-headings in the draft Constitutional Treaty (Article I, 46 and Article I, 47) have been omitted, the Intergovernmental Conference did not introduce any change in substance. Article 11 of the Reform Treaty pledges to give citizens and representative associations a voice “in all areas of Union action”, and to “maintain an open, transparent and regular dialogue with representative associations and civil society”, and it demands that the Commission “carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent”. With Clause 4, it now also endows citizens with the right to initiate an action. However, first, that action is of one type only, i.e., “where citizens consider that a legal
act of the Union is required for the purpose of implementing the Treaties”. Second, that action is valid only when “not less than one million citizens who are nationals of a significant number of Member States” engage in it. Third, and most importantly, that action is only an invitation to the Commission, one which the Commission is not obliged to accept.

Aside from citizens’ limited right to initiate action, no new rights are conferred on anybody. The Treaty is only asking of the institutions that they, “by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views”. This sounds like stating the obvious. It is current practise to provide fora for discussions and to engage in active and extensive consultations. For years, the Commission has been very active in developing instruments of communication and extended consultations. In order to assess the relevance of this Treaty provision and its potential impact on future developments, one need read it in the context of EU governance discourse and the governance policies of recent years and in light of what interested parties may make of it.

To start, we should spell out what is meant by “participatory democracy”. The respective article was introduced without extensive deliberation and, moreover, the Constitutional Convention was not a body that engages in theoretical reasoning. Therefore, it seems more appropriate to ask what meaning is attributed to “participatory democracy” by those who strongly promote the concept. The EU Civil Society Contact Group (CSCG), a network of European NGO networks embracing a large array of non-governmental organisations active in the field of environment, social affairs, development, human rights, lifelong learning, public health, culture and gender, is “committed to the advancement of the principles of participatory democracy” (CSCG 2006). The representatives of the CSCG came forcefully out in favour of the inclusion of the article in the Constitutional Treaty calling it “a milestone in the development of participatory democracy and civil dialogue” (Beger 2004: 9). On the occasion
of the inter-governmental negotiations of the Reform Treaty the CSCG and many of the member organisations put great emphasis on their lobby activities on just that article (CSCG 2007): “The EU Civil Society Contact Group promotes the concept of participatory democracy and places a particular focus on the implementation of article 47 of the draft constitution. We believe that NGOs across Europe should form part of a regular, structured, and guaranteed dialogue with the EU Institutions.” All such statements reflect an understanding of participatory democracy that is synonymous with the participation of civil society organisations in civil dialogue. To quote the internet presentation of the Social Platform—a large and influential network of NGOs in Brussels—on the issue of participatory democracy and good governance: “The Social Platform is committed to promoting a structured civil dialogue between civil society and the EU Institutions. This involves establishing regular consultation of NGOs, in order to provide channels for citizens to influence EU policy – a concept which has become known as participatory democracy.” Nicolas Beger, at that time Coordinator of the Civil Society Contact Group, put it in a nutshell: “This participation is called civil dialogue—or as I prefer participatory democracy.” (Beger 2004: 1) From this perspective, participatory democracy has two core components: (1) NGOs, which constitute organised civil society and (2) civil dialogue, which enables them to participate in public policy making. This vision reflects the discourse on improving EU governance that became prominent in the last decade.

In order to assess the value and the future potential of the institution of participatory democracy in the EU, Research Group 4 scrutinized the conditions for the success of the concept, the present state of affair and the democratic credentials of EU–civil society relations. When we want to know why the notion of civil society succeeded in becoming the “idée directrice” of EU governance discourse, it does not suffice to trace the history of the concept at the EU level. Only a broad and comparative analysis bringing out
the varied and changing images of civil society can explain the success. Civil society is a construction rooted in divergent world views and it is a contested political concept that is used and misused in times of legitimacy crises. The incantation of civil society by EU institutions was part of designing a new governance regime that would make the EU more efficient and more responsive to European citizens. Consequently, Research Group 4 was interested in exploring the change in policies and the ensuing patterns of EU-society relations. The focus was on the European Commission for several reasons: Firstly, participatory democracy is meant to complement the political process of representative democracy and, consequently, has mainly been propagated to establish more participatory elements in the process of governance. Secondly, in the political system of the EU, the Commission occupies a central position in governance due to its many roles in initiating, mediating and monitoring legislation. Thirdly, the Commission has been very active in recent years in structuring EU-society relations by developing an elaborate consultation regime. The new consultation regime quite evidently had an impact on the interaction with citizens and civil society organisations.

But how can we assess the democratic value added? Normative theories of democracy provide us with distinct though divergent criteria. Accordingly, researchers in Research Group 4 debated the relevance of different approaches and what they can tell us about the appropriateness and effects of participatory engineering in the EU.

The following paragraphs will first summarize the main findings concerning civil society as pillar of participatory democracy; it will then portray the institutional shaping of EU-society relations; and finally, it will assess the democratic value of civil society involvement in EU governance.
Civil society ranks highly in academic and political discussions on democracy. The positive image of civil society has many roots: In Europe’s collective memory civil society takes a prominent place thanks to the peaceful transformation to democracy in Central and Eastern Europe. ‘Civil society’ was a “collective action frame” that empowered civic movements across Eastern Europe to mobilize public support and take advantage of changing political opportunities (Glenn 2008: 25). Civil society is appreciated worldwide as the opponent force to authoritarian rule and the hope for sustainable democratic change. Whenever the European Union becomes engaged in external democracy promotion, it makes great effort to strengthen civil society; a strong NGO sector is considered both an end in itself and a device to bring about political reform (Knodt and Jünemann 2008).

But also in well-established democracies, civil society receives a positive rating. Civil society organisations are perceived as standing up for weak interests and acting both at home and abroad as advocates of general values and of rights based interests. Civil society conveys the image of grass-roots activism and the voice of the people in governance. It gains attractiveness when citizens are disenchanted with existing forms democracy. Underlying this is the idea that civil society safeguards democracy, and comes into action at times of perceived legitimacy crises. If parties and parliaments are perceived as deficient, civil society is called upon to take up the role of compensating those weaknesses. In this affirmative view, civil society is seen as an autochthonous oasis, with responsive citizens contributing to a vibrant social sphere. Civil society organizations are crystallizing points for political activation, they share the conviction that citizens should speak up and become engaged, but they differ with respect to the causes that call for activism and the appropriate forms of remedy. From this perspective, civil
society organisations are not synonymous with civil society; rather, the latter is constituted by ‘citizens-on-call’ (Amna 2006: 11).

Though this image of civil society is very present in public discourse, it presents only a partial view. It focuses on attributing to civil society the role of defending the political rights of citizens. An equally important role is for civil society to secure common welfare and good governance. At the nation state level it is incorporated in the image of the Scandinavian model, which combines a widespread associational life devoted to the idea of an egalitarian citizenship and close cooperation between an engaged civil society and a benevolent state. Self-management and the provision of social services by local organisations go together with energetic demands on the state to deliver collective goods. (Wollebæk and Selle 2008)

The discourse on good governance that is prominent at the European level also propagates the idea of a close involvement of civil society to improve policy output. Governance discourse, however, assigns civil society a more instrumental role. Civil society organisations, emerging from below, are perceived as representing a wider diversity of interests than the institutions of representative democracy, as being closer to stakeholder interests and, therefore, as being better equipped to contribute to efficient problem-solving. Good governance, accordingly, may be achieved by drawing on the resources of civil society.

Hence, the usually opaque concept can acquire some clearer contours if we ask what functional role is attributed to civil society. We would hardly ever find such differentiation in political discourse— and discourse on participatory democracy in the EU is no exception. It draws, mostly implicitly, on many divergent concepts and, consequently, promises to cure all kinds of ills: The involvement of civil society as propagated by EU institutions, above all by the Commission, is meant to foster input and also output legitimacy; and it also promises political rights and welfare. But for analytical reasons and also to improve policy it is essential to make a
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If civil society is supposed to first and foremost act as guardian of the political rights of citizens against the encroachments of government, attention has to focus on conditions of social mobilisation, inclusiveness and publicity. If, on the other hand, civil society is appreciated as co-producer of public welfare, the capacity to deliver is of far greater importance. The organisations that present themselves as organised civil society have to develop a clear perception of their role and to get their priorities right. Furthermore, the choice of governance instruments also entails a choice between different participatory regimes and attributes distinct functional roles to civil society organisations. The EU is a laboratory for designing new instruments of participation and though the Commission is in the driver’s seat, civil society organisations have a say in it. Without a clear role perception on both sides, concurrent expectations will not materialise.

Equally important is a realistic assessment of the constraints of the multi-level governance system of the EU and of the social fabric of Europe’s societies that condition the life of civil society organisations at the EU level. It is widely acknowledged that the diversity of political cultures, languages and national allegiances in Europe are obstacles to the emergence of a transnational civil society. Less noted are the effects of changes in civil society at member state level. Even in Scandinavia, which used to be the model of associational democracy, the organisation of civil society has been moving from mass member associations, which served as transmission belts of collective interests to government, to a more pluralist associational life serving individual interests (Wollebæk and Selle 2008). Given that the Scandinavian model is itself in decline in the countries of origin, we can hardly expect its re-invigoration in the EU. Rather, the EU is faced with a pluralist system of highly professional organisations in which value and rights based civil society organisations compete with a wide range of social and economic interests groups.
The Institutional Shaping of EU-Society Relations

Participatory discourse has clearly raised awareness for the need of input legitimacy. The huge number of interest groups and the pluralist composition of the intermediary political space surrounding EU-institutions were not considered satisfactory with respect to democratic input. Rather, the Commission became engaged in ‘participatory engineering’, setting up norms and standards of consultation, and designing new instruments and procedures of interaction with citizens and civil society organisations.

The engagement of EU institutions in participatory engineering is not a singular phenomenon. Interventions by those political institutions that provide citizens with more opportunities to participate effectively in policy-making have mushroomed in recent years (Zittel 2008). Comparative research yields insights into the variety of approaches, the different uses of instruments, and the divergent effects at different levels of government. EU institutions have experimented with new methods and technologies in citizens’ consultations, profiting from professional advice and experience gathered at other levels of government. But since the instruments of participatory engineering have largely been developed for local democracy, a transposition to the EU level is not without risks. The distance between grassroots levels and the Commission, which is centrally positioned to engineer the participatory exercises, undermines the claim to ‘giving people a say’.

This is not the only reason why the Commission’s approach to directly addressing the European citizen has met with reservations. Above all, the White Paper on Communication (Commission 2006a) was criticised both by academics (Brüggemann 2005) and by NGOs (Social Platform 2006a) as an ill conceived attempt to “sell” Europe and as an exercise in propaganda instead of communication. Such could hardly contribute to political participation.

A more promising approach, even from the Commission’s point of view, is to involve representative organisations in the policy-making process.
The Commission has always maintained intensive relations with non-governmental organisations, and, since the time of the Delors Commission, has striven to also target non-market actors. The White Paper on European Governance (Commission 2001) did not mark the beginning of the Commission’s concern about the dwindling “permissive consensus”, rather, it made this concern (shared also by the Council and the European Parliament) public. Though the White Paper did not present a ‘master plan’ (being far too incoherent, ambivalent and sometimes outright contradictory), it set the framework for the regime which is now governing EU-society relations. The involvement of civil society was a “Leitmotiv” and five principles were to underpin good governance: openness, transparency, participation, accountability, effectiveness and coherence. Each principle was said to be important for “establishing more democratic governance” (Commission 2001: 10).

The empirical question addressed by Research Group 4 was whether or not the new governance approach brought about change and, if so, whether the new regime brought us closer to participatory democracy’s aspirations. The use of the term “regime”, borrowed from theories of International Relations, offers us an analytical advantage. We need benchmarks to mark change and to assess the relevance of that change. This is what the regime approach can offer: First of all, it makes us aware that relations are not just governed by rules and procedures but also by principles and norms which give those rules and procedures a distinct meaning. Principles channel expectations and constrain or fuel demands with respect to what ought to be done. Secondly, when we want to understand the dynamics of change and stability, not just one single component but rather the interdependence of the components is relevant. A regime is robust if the components are attuned to each other. Stability increases when rules and regulations are compatible and translate the established principles and norms in a coherent way. Changing one component may not just induce friction, but also trigger change. Thirdly,
a regime is effective if it fits the environment. Again, the fit or mis-fit may result from the congruence – or lack of congruence – of the principles, the norms, the rules or the procedures that govern relations in the environment.

Over the years, EU-society relations have been governed by quite different principles. In the early days of economic integration, the overriding principle governing consultations was respect for the Treaties and the efficient transposition of Treaty provisions. With the growth of market regulation and direct interference by the EU in sub-national governance in the 1980s, a new orientation gained ground acknowledging the political character of EU policies and the need for additional mechanisms for gaining legitimacy. In place of hierarchy partnership became the new core principle. It put public and private actors on a new footing, but its application to specific policy areas was circumscribed. The far more ambitious principle of participation was introduced with the White Paper on Governance (Commission 2001). This reflected the growing concern that the mechanisms for representative democracy might not adequately support the emerging political system of the EU and, therefore, should be complemented by the direct involvement of civil society in EU governance. Consequently, the principles of participation, openness, transparency, and accountability were endorsed.

Principles concurred with norms. In older days, it was an established consensus not to question the ‘acquis communautaire’ and not to challenge the political authority of public actors. Experts and interest groups were invited to contribute their knowledge to efficient policy making. Under the principle of partnership, public actors accepted that cooperation with stakeholders was crucial in order to learn about and respect the broad array of interests affected. But though the right to consultation was acknowledged, it was only applied to selected policy programmes at the initiative of the Commission. With the changing image of the EU as a polity in the making, the unconditional right of voice became a norm. Not only directly affected stakeholders but civil society organizations representing general interests were
to be involved in consultations, and the exercise of this right was not to be conditioned on grounds of functional expediency.

Though extended consultations with non-public actors started early, exchange was for a long time informal and ad hoc, and the selection of participants was at the full discretion of the Commission. Only recently, with the acceptance of a greater say for civil society at large, have rules and procedures become more formalised; criteria for granting access, providing information, and organizing the consultation process have been developed and made public. Codes of conduct and regulations concerning standards of consultation now define the rules of the game. However, the Commission still has authorship of the institutionalization of consultation rights and of the handling of consultation practices, and such authorship includes defining who qualifies as stakeholder in a given policy area. This discretionary power is circumscribed nevertheless by the commitment to the principle of openness and participation.

The shift in principles and norms over the years is more apparent than the changes in rules and procedures. Nevertheless, when taking the change in all four components together they make for distinct regimes. In a stylized form they can be represented by three ideal type models: an ‘expert model’, a ‘partnership model’ and a ‘participatory model’. The three regimes did not emerge in strict sequence, they rather grew like generations. The generational metaphor is here useful for it reminds us that each regime is built on the achievements of the former while also adding new components. Several generations live and develop parallel to each other in distinct policy areas; they are at odds with each other due to their individual profiles but they are not mutually exclusive.

Today’s reality presents a mixed picture. Comparative research by Research Group 4 provided evidence of considerable variation between policy areas and even more so between the pillars of the Union. The difference between the first and the second pillar of the EU is not as marked
as usually assumed. Civil society involvement in foreign and security policies is less in the spotlight but it is, nevertheless, very present (Dembinski and Joachim 2008). Institutions and governance styles in the two pillars make a difference, but policy issues and types of conflicts have a more discernible impact on the ways, means and on the degree of civil society involvement. All things considered, it looks like a new consultation regime is reaching maturity, one characterised by features of the ‘participatory model’.

The Commission is undoubtedly the most influential actor, but other interested parties are active players in the game. General interest groups have joined forces to push for a fully-fledged participatory civil dialogue putting a premium on general interest associations. Trade union organisations are less enthusiastic as they are concerned that an expanding civil dialogue may downgrade the importance of social dialogue and encroach upon their privileged position in that dialogue (Michel 2008). Business interests have also been calling for a distinction between social and civil dialogue, and demanding that the responsibility of the social partners for certain political decisions not be extended to other areas or other actors (Pérez-Solórzano Borragán 2007: 275). Market related interest groups are on record as saying that stakeholders should be the main target group; above all those who are directly affected and who command issue specific knowledge.

The Draft Constitutional Treaty quite evidently pushed the principled discourse towards a participatory model. Though explicit mention of the principle of participatory democracy was dropped by the Intergovernmental Conference, the retention of the original phrasing in Article 11 (2) strengthens the position of those who understand it as a pledge to participatory democracy and as a general commitment to enhancing the role of civil society in EU governance. Critics, by contrast, refer to Article 11 (3) to emphasise the Commission’s duty to carry out consultations with “parties concerned”. By their alternative reading, dialogue with civil society ought to complement existing mechanisms and be used in a circumscribed way. The
controversy is framed by an underlying though not very articulate principled discourse: Whereas general interest groups make it a discourse on input legitimacy and consequently put the principle of democratic participation first, other intermediary organisations take output legitimacy as their point of reference and thus give priority to the principle of efficiency in policy-making.

The difference becomes even more pronounced at the level of norms: General interest groups strive to make it the norm that all institutions – including the Council and the Council Presidency – entertain regular and formalised civil dialogue (Fazi and Smith 2006: 31). They claim that the involvement of civil society organisations should be extended to all policy fields and to all phases in the policy-making process. Furthermore, to maximise the chance of voicing their view and being heard, they seek support for capacity building, and for this the provision of funds is considered appropriate to lower the threshold of access. General interest groups justify their call for privileged treatment by emphasising their specific role in the promotion of participatory democracy: They argue that they (1) represent public interests, (2) play a key role in the empowerment of people, (3) raise a voice for marginalised groups whose interest would otherwise not be represented and (4) raise public awareness and thus help to increase transparency (Social Platform 2006a). For these reasons they deem it necessary to “ensure an equitable balance between public and private interests” and to receive public funding “to counter-balance existing power imbalances within society; (...) public funding of civil society is a necessary and positive guarantee for the development of civil dialogue” (ibid). It goes without saying that this is not a consensus view; even the Commission, which provides financial support to most of the EU level platforms and to umbrella organisations of general interest associations, is of two minds: Public funds further the integration of fragmented and weakly represented interests, but they can also breed clientelistic relations (interviews).
Only one norm is not controversial among all kinds of different interest
groups, namely that consultations should be meaningful. “Consultation
fatigue” (Fazi and Smith 2006: 43) has spread with the expansion of
consultation instruments that offer little more than a “ticking exercise”. But
when it comes to translating this demand into rules and procedures, opposing
views, which reflect different role perceptions and institutional constraints,
become apparent. The institutional architecture of the EU makes it
mandatory that the Commission preserve a high degree of autonomy in its
dealings with societal actors. Its overriding concern is policy-making and to
this end it must have the flexibility to accommodate the interests of the
Council (and the European Parliament). From this perspective, participation
becomes instrumental to efficient governance, i.e., not just offering promising
problem-solving strategies but also lending the Commission additional
support to induce the Council to decide at all.

Under the Barroso Commission “better legislation” has become the key
concept of EU governance, emphasizing output legitimacy rather than input
legitimacy (which is seen to be strengthened by participation). In the abstract,
input and output legitimacy are mutually supportive. But when it comes to
organising the interaction of EU-society, opinions split: General interest
groups want to strengthen a rights and value based discourse, whereas the
policy oriented departments of the Commission are more inclined to strive
for “evidence based decision-making”. Consequently, they prefer a
“stakeholder dialogue” that includes those who have an immediate interest
and specialized knowledge.

The present consultation regime reflects these contradictions and
competing interests. That regime is far from a uniform set of principles,
norms, rules and procedures. The differences across General Directorates are a
sign of the dissimilarities of governing principles in different policy fields and
the respective constellation of actors. However, from a bird’s eye view similar
patterns are observable (Quittkat and Finke 2008; Kohler-Koch et al. 2008).
Over the last years, the Commission has become more committed to open consultations and has developed instruments that facilitate access. Conferences and online-consultations address a wider public and have attracted a large number of respondents. With the exception of the special issues of animal welfare and REACH (Registration, Evaluation and Authorisation of Chemicals), with more than 40,000 and 6400 contributions respectively, online consultations opened to the wider public will have between a hundred and several hundred contributions. Online-consultations have multiplied since the turn of the century from less than a dozen to over a hundred in recent years. Some General Directorates are pace-setters and others are laggards, but the instrument is now used across the board. It is, however, worth mentioning that during exactly the same period expert groups increased significantly both in number and frequency of meetings (Gornitzka and Sverdrup 2008). This ambivalence is also apparent when one compares the use of instruments in the course of the policy-making cycle. Agenda setting and initial policy formulation are linked to online consultations and conferences with wide ranging civil society participation, while subsequent stages of policy formulation and decision-making are supported by meetings of advisory groups with limited civil society representation and expert groups.12 Quite obviously: “the Commission’s ‘participatory strategy’ is accompanied by a ‘strategy of knowledge collection’ (Quittkat and Finke 2008).

Assessing the democratic value of civil society involvement

When trying to assess the democratic value added by the move towards a more participatory consultation regime, we have to take into account that normative benchmarks vary by theoretical approach (Hüller and Kohler-Koch 2008). Theorists of liberal democracy rank equal representation,
effective participation and political accountability first. From this perspective civil society involvement enhances the democratic quality of EU governance when it gives citizens a voice, redresses biased representation, and exerts a watchdog function so that citizens can hold decision-makers accountable.

But notwithstanding recent efforts to become more open, inclusive and participatory, equal representation has not been achieved (Persson 2007; Quittkat and Finke 2008). Even the easily accessible online consultations show asymmetries: market-related organisations such as business and professional associations are far more numerous than general interest organisations. Equally pronounced is the distortion in territorial representation: The old and large EU member countries are over-represented when compared to the smaller member states and the recent accession countries. However, it is worth noting that the geographical distribution of civil society associations is significantly wider than that of market actors and market related associations.

Numbers are a proxy and not a reliable indicator of democratic participation. We rather follow Dahl (2006) that the relevant criterion ought to be “effective participation”, and that this is not achieved by filling out a questionnaire designed by the Commission. Online-consultations come in different formats: (1) multiple-choice questionnaires; (2) semi-standardised questionnaires providing structured, yet open questions; (3) calls to answer open questions on a specific issue; (4) invitations to voice opinions regarding more general matters. Noting that multiple-choice questionnaires have the highest response-rate, quite obviously, widespread involvement does not signify effective participation.

The increasing use of expert groups and their growing relevance when the policy-making process approaches the decision-making stage are a concern for civil society groups. The General Directorate SANCO (Health and Consumer Protection) recently introduced some new procedures to redress the technocratic bias that comes with involving expert and advisory
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groups. The Stakeholder Dialogue Procedure\(^\text{13}\) is intended to facilitate a “structured dialogue” between stakeholders and the three scientific committees supporting GD SANCO. Currently a pilot project, this procedure is being monitored with a view to establishing, if successful, a permanent modus operandi.\(^\text{14}\) Furthermore, GD SANCO has established a Stakeholder Dialogue Group to advise the General Directorate on processes that can facilitate stakeholder involvement (SANCO 2007a). This includes helping external parties understand, and, where appropriate, engage with comitology processes (SANCO 2007a: 15), addressing procedural questions that concern the advisory groups as well as those related to the asymmetry and representativeness of stakeholders.

Precisely because effective participation comes with accountability, interest groups put pressure on the Commission to provide feedback, including giving reasons why certain stakeholder views were or were not taken on board. Synthesis reports are now common though not universal practice; but they vary somewhat in style and detail, and are sometimes only circulated to those who were consulted rather than to a wider public via the internet.\(^\text{15}\) The legal commitment to transparency, the obligation to submit impact assessments on major policy initiatives and to provide road maps to better track the consultation and decision making process together with feedback procedures are a step towards greater accountability, but they do not institutionalise an accountability mechanism in EU-society relations. The Commission is not subject to any legally binding obligation to give account, and the political commitment to do so is at the Commission's discretion. That discretion, however, is not exercised by the Commission at will, but is rather in response to institutional constraints: The Commission has to retain autonomy because it would be ill advised to negotiate with the Council and the European Parliament with tight hands. Furthermore, political accountability in the full sense of the term (Bovens 2007) does not work since the Commission does not have to face any consequences. It cannot be
exposed to political sanctions, and soft sanctioning through blaming and
shaming has limited impact due to an underdeveloped trans-national public
sphere that limits publicity.

Thus, when assessing the present consultation regime from the
perspective of theorists of liberal democracy, we see an improvement in
democratic participation but the system does not live up to the set normative
standards. The Commission has succeeded in widening participation by
lowering the threshold of access; it has increased transparency and has lent
support to the representation of weak interests. Feed-back mechanisms have
improved responsiveness, and the readiness of a General Directorate to
subject its communications with stakeholders to scrutiny by an external peer
review group reflects a concern with accountability. All this amounts to
participatory governance; but this is not one and the same as participatory
democracy.

The picture looks different though not brighter when benchmarks
relate to theories of deliberative democracy. In recent years, the discourse on
EU-civil society relations has been heavily influenced by normative theories
advocating deliberative democracy for governance beyond the nation state.
The benefits of deliberation and the potential contributions of civil society
organisations to enhance the epistemic quality of decisions are well argued in
theory. Rather than expanding the theoretical argument, researchers in RG 4
set out to explore the validity of these assumptions through empirical
research. The results, again, are sobering. Instruments of participatory
engineering aimed at directly involving citizens—through, for example,
“citizens’ forums” or “Café debates”—at worst reach only a small number of
groups and at best raise awareness for European issues in general.
Consultation instruments that attract the most responses, such as multiple-
choice based questionnaires in online consultations, provide no space for
deliberation. The same is true for stakeholder fora, such as the EU Health
Open Forum, which is organised over long intervals, gathering several
hundred participants for a one day event. The minimum requirement for deliberation—namely continuity and regular meetings in settings that allow for direct, preferably face to face communication and time to exchange arguments—are rarely met. However, a few network and umbrella organisations—such as the Social Platform, the consumer association BEUC, the confederation of development associations CONCORD, and the Green 10—enjoy continuous working relations with the Commission in their field of interest. They participate in meetings when NGOs are invited to discuss different community matters; they sit on advisory committees; and they are regular consultation partners in issue specific fora. But they are also involved in action programmes funded by the Commission. Given that they are also recipients of institutional funding, further empirical investigation is required so as to ascertain whether this makes for effective participation or for a Commission-biased policy community. What is obvious, however, is the limited reach of civil society participation. Case studies, such as those on EU regulations on GMO, document enhanced societal participation and an intensified exchange of views between EU institutions and NGOs, but this new approach does not “support the emergence of a larger engaged public and deliberation in the general public sphere” (Dabrowska 2007: 299; emphasize as quoted).

Changes in the environment push and pull patterns of interaction into different directions. The pledge to involve civil society and make EU governance more participatory has invited even more groups to seek access, and Brussels has turned into a highly competitive market of interest representation. In order to get ear-time, associations cannot simply point to their impressive number of members; they must also prove that their members take issue with the policy under discussion. The recourse to public campaigning is aimed at boosting the political weight of civil society organisations, but the appeal to the heart and emotions of a constituency does not match well with deliberation. Civil society organisations can hardly
escape the trend towards strategic behaviour and elitist professionalisation. The positive effect is that a plurality of voices is present in the debate, but again, this does not constitute deliberation. When civil society representatives want to reach down to grassroots activists, arguing across the many layers of the multi-level system is time and resources consuming. Basic messages travel more easily.

The actors may agree about the virtue of participatory governance, but the rules of the game work against the principled belief. When comparing the Regional Advisory Councils (RAC) set up for the governance of the EU fishery policy with the Civil Society Dialogue at DG Trade, the shortcomings of the latter become quite obvious (O’Mahony 2008). Whereas the participants in the RACs act together and are mainly engaged in horizontal communication, the Civil Society Dialogue in GD Trade has never lived up to a genuine forum. Rather, it has been used as a vehicle for briefings by the Commission (Dür and De Bièvre 2007: 86) and for interest representation by the non-governmental groups. Thus, as Joan O’Mahony notes, communications “(...) run predominantly on vertical lines between individual forum members and the Commission rather than between the forum members themselves.” (2008: 226) O’Mahony attributes the dissimilarities to the two bodies’ different reasons for being: The Civil Society Dialogue in Trade is an instrument used simultaneously by the Commission to rally support and by the NGOs to gain influence. “In the case of the RACs it is not just about influence in terms of an Actor A trying to influence Actor B. For sure, it is about power, but often a power to, rather than power over.” (O’Mahony: 231) This brings out a main feature of participatory governance; it is not just about opinion formation it encompasses decision-making.
Conclusion: Will participatory governance hold its promises?

When I summarise the distinctive features of EU-society relations in EU governance and scrutinise them according to standards of democracy, four distinct characteristics stand out:

Pluralism

The participatory discourse and its ensuing changes in the EU consultation regime have promoted the representation of a diversity of interests. The groups present in Brussels have not just expanded in number but have also extended the range of interests represented. The increase in number is true for market and non-market related interests groups. But the “value and rights based” groups, representing public and weak interests, have become far more visible. Their voice became ever more present, not so much because of growing numbers but because they managed to join forces in encompassing platforms and networks. Though we should not forget that their co-operation was often stimulated by (and supported with funds from) the Commission, nor that they sprang out of quite mundane interests (uniting against a severe cut of EU funds), they have enriched the agenda: It is no longer simply about growth and competitiveness, but also about the rights of minorities, social inclusion, gender balance, etc.

An elite system

Civil society and participation have high currency value in EU rhetoric. However, they are conceptualised in distinct ways. Civil society is thought of in terms of *organised* civil society; and participation takes the form of involving organisation officials. Correspondingly, participation is not seen as a “purpose in itself”, but as instrumental for promoting the realization of
particular interests. These may well be on behalf of others, nevertheless, participation is not autochthonous but is rather accomplished by a (benevolent) elite group. These advocates are part of the Brussels circuit. In each policy field it is a rather small number of players (well known to each other and to the responsible Commission officials) who struggle to get their message across and to have impact on policy outcome. Given that success requires professionalisation, civil society organisations adopt the organisational features and lobbying strategies of interest groups. In order to increase their political clout, they cooperate in large networks and form issue specific alliances (Kohler-Koch et al. 2008). Horizontal intra- and inter-network communication takes up time and resources, and constrains policy options. Both might work to the detriment of open and intensive vertical communication with members or constituencies, especially in mass based organisations such as trade unions or rights based NGOs with a large and fluid constituency of supporters. In order to be efficient they are lured into campaigning rather than communicating in a deliberative fashion.

Such an elitist system is equal to representation for the people, but not by the people and this has an upside and a downside. It might be yet another manifestation of the “iron law of oligarchy”, which only allows for a Schumpeterian type of democracy, or it might tend towards Willke’s “smart governance”.

A self-regulatory system

A characteristic of an elite dominated system is the lack of democratic accountability. Though the system is not controlled by citizens, it is not a system without control. It is subject to self-regulation, which resembles institutionalised cooperation in international relations. EU institutions and NGOs settle on principles and norms, and negotiate the appropriate transposition in administrative rules and procedures. Even though the
Commission has the right and the competence to regulate EU-society interactions as it sees fit, it is quite obvious that the present regime has been strongly influenced by the principled discourse on participatory governance and civil society. Interested parties within the Commission, the European Parliament and the EESC, together with civil society organisations pushed this principled discourse and linked it to an on-going debate. Had there not been the positive resonance of the value loaded key concepts of civil society and participation in a wider public, it would not have turned into an “idée directrice”.

This principled discourse, however, is not uncontested. Those who advocate a greater emphasis on output legitimacy rank the principles of effectiveness and coherence higher. The White Paper on Governance was ambivalent, speaking in favour of both wider involvement and better legislation. To concede that principles are contested and thus that regimes may change depending on the outcome of political competition does not, however, weaken the argument that this elite system operates under self-created constraints.

Bridging issue fragmentation

An outstanding characteristic of the EU is its pronounced fragmentation of policy making. When compared to representative democracy, a participatory regime of governance with the direct inclusion of stakeholders in the policy process adds to that segmentation. The opening of EU governance to general interest groups and the vivid debate on new approaches to participation has had an opposite effect. Even though the so-called “value and rights based” associations seek to influence issue specific policies and – when relevant – defend the interests of narrowly defined stake-holders, they mostly deal with cross-cutting issues. Furthermore, the on-going debate on the best forms of consultation and good governance stimulated reflections on meta-
governance—it raised questions of procedural legitimacy, and, along with this, questions related to the fair and just accommodation of interests across policy sectors.

In view of these findings, we may ask whether participatory governance really does aim at finding a new form of and path to democracy or whether there is a hidden agenda. The present EU (EC) system is based on a system of “composite representation” (Benz), with the Council representing the European peoples and the European Parliament representing the citizens. Participatory governance adds the functional representation of stakeholders and general interests. Civil society is expected to reach out to citizens and to pave the way for direct participation - or rather representation - in EU policy making. With this strategy the supra-national EU institutions are outflanking member state governments. The latter lose their capacity (and their legitimate claim) to aggregate citizens’ interests within their territory and to represent “national” positions. If successful, it would bring about political integration and create a single political space just as economic integration has created a single market. So far, the incantation of European civil society is more symbolic than real, but the rhetoric already stipulates that the EU and not the national state is the realm of democratic participation.

From this perspective, participatory governance is not so much about democratic participation than about integration; it is about system building and system transformation. This supposition fares well with the observation that despite all commitments to pluralism, civil society organisations in Brussels have one trait in common: they are putting Europe first, as they are supposed to do from the perspective of the Commission. But what does putting Europe first mean? It means strengthening the European system as the primary locale of societal engineering, and at the expense of the national state and sub-state social systems.
Notes

2 http://www.socialplatform.org/Policy.asp?DocID=8104 (22.02.2008)
3 References will mainly include publications that emanated from RG4 research.
6 The incoming president, R. Prodi set the tune already in his inauguration speech before the European Parliament in 2000.
7 See the contributions in Joerges et. al. (2001)
8 Regimes are institutions structuring cooperation among autonomous but interdependent actors by spelling out principles, norms, rules, and procedures around which actors’ expectations converge.
9 Except for the advisory groups with socio-economic participation laid down in the Treaties or set up by inter-institutional agreement.
10 See above all the general principles and minimum standards for consulting (Commission 2002) and the Transparency Initiative (Social Platform 2006b).
11 For a more extensive presentation see Kohler-Koch, Humrich and Finke 2006.
12 These findings are based on a thorough analysis of GD Employment (Quittkat and Finke 2008) and supported by research on GD Trade from researchers within (Dür and De Bièvre 2007) and beyond (Slob and Smakman 2007) RG4.
15 Also GD SANCO, perceived as a front runner in participatory governance only committed to distribute and not to publish their reports (SANCO 2007: 10).
16 O’Mahony point out that the preconditions are manifold: consensus on what the object of regulation is, policy characteristics that call for self-management, a significant degree of independence from the Commission, the pressure to find consensus and make dissenting voices public.
References


Contrary to much of the literature on European civil society, which is often confused on what precisely is its object of study, the papers for this session are excellent examples of a cleared-headed way of framing and analysing the problem. The definitions chosen are not entirely unproblematic, but they offer something precise on which to discuss. I fundamentally agree with the central contentions of both papers, though I have a number of questions I wish to raise and several qualifications to make. I therefore propose to outline first what I take to be the central contentions of the papers, and then to move on to my own comments.

The nature of governance and civic orientation in the EU

According to Beate Kohler-Koch, civil society is a key player in what she describes as a third-generation ‘regime’ in the European Union. This regime she characterizes as based on ‘participatory governance’, and follows on
previous regimes, which she identifies as the ones relying on either ‘experts’ or on a form of ‘partnership’ between the EU institutions and stakeholders. I think the use of the concept of ‘regime,’ in the way in which Kohler-Koch uses it, is important, since it captures different aspects of governance, comprising rules, practices, norms and principles; and also allows for systems of governance to evolve and overlap. The third-generation regime of participatory governance is something that has evolved as a result of pressure for more in-put legitimacy, but such an evolution has been channelled within an already established pattern of EU governance characterized by the central role played by experts (within and in support of the EU administration) and by a conception of participation biased through non-political forms of representation.

Kohler-Koch’s analysis of the White Paper on Governance shows how the regime of participatory governance is meant to shape the relationship between the EU and society by providing a framework through which the demands of European society can be filtered through to the European institutions. Interestingly this way of framing the relationship partly bypasses the other, more traditional ways in which European society is represented in the political system, that is the member-states Governments and the European Parliament. The regime of participatory governance, in which the ‘civil society organizations’ play a prominent role, is the main way in which EU institutions conceive European society’s participation in governance.

How has this regime of participatory governance fared from either a functional or normative perspective? Kohler-Koch’s judgment is mixed. She believes that this regime has enriched pluralism in EU governance and enlarged it; but has not changed the fundamental nature of EU governance, which remains fundamentally elitarian, characterized by a sort of self-appointed enlightened elite. The way in which the system of participatory governance embodies representation and accountability, through self-regulatory devices, has also strengthened its autopoietic character.
Nonetheless, it has the merit of having developed a system of cross-cutting representation of interests at the EU level, which partly avoids domination.

In sum, however, Kohler-Koch’s view is, as she suggests in her conclusions, that the regime of participatory governance in the EU should be seen as mainly functional to the integration process, rather than to the democratization of the EU institutional system. Integration is both its (perhaps not fully declared) scope and effect. But as a way of addressing the issue of input legitimacy at the European level, the participatory governance based on civil society organization is wanting.

While Kohler-Koch’s analysis is focussed on the regime level, Jan van Deth’s is concerned with the character of European citizens. In particular, he is interested in the investigation of the kind of ‘civic orientation’ that applies at the European level. Although the object of his analysis is the normative attitude that is required of European citizens as citizens: the idea, that is, of the ‘good’ European citizen; his method of investigation is empirical. His aim is to identify the prevalent views of civic orientation as they are understood by those operating at three different levels: at the political/institutional level, at the civil society level, and at the level of the common citizens. The underlying hypothesis of van Deth’s analysis is that there must be a certain level of congruence between these different perceptions of what is to be a good European citizens in order for civic orientation to be effective in society. In other words, there must be an alignment of expectations between the three levels.

Van Deth’s analysis shows, however, that expectation and subjective convictions are very different at these three levels, and that the discrepancy between the views of different social actors is particularly significant with respect to the role played by civil society, and by that of the citizen within civil society. Whereas institutional actors tend to see civil society organizations as a place for social activism, citizens seem to have a more instrumental view of their role, as independent transmitters of citizens’ views.
and instances. Indeed, this latter function, as substitutes (rather than ‘delegates’) for the citizens in the decision making process at the European level, seems to be the main point on which the subjective perceptions of the various social actors converge. The idea of the ‘good citizens’ that prevails amongst the European citizens is one that emphasizes participation in elections and law-abidingness.

What van Deth’s analysis tends to show is that traditional ideas of citizens’ participation do not seem to apply at the European level, and that the expectations of the institutional and political actors in Europe are misplaced in this respect.

**Four questions**

As it should be clear from my summary, the papers by Kohler-Koch and van Deth paint an interesting picture of how the EU institutions and the European citizens respectively see the role of civil society in EU governance. There are, however, four questions that I wish to raise that may qualify this analysis. The first, obvious, question regards the definition of ‘civil society’ in the European context. The definition explicitly adopted by Kohler-Koch and implicitly underlying van Deth’s analysis is one that has become dominant in the literature, identifying ‘civil society’ with those ‘civil society organizations’ (or more often referred to as NGOs) whose declared scope is to concern themselves with issues of public interest, and who approach such issues from a moral or principled perspective, that is, one that does not reflect a particular interest, or an economic interest. Most of these organizations are advocacy organizations, who aim to represent the interests of the public in general or of disadvantaged groups, who have no particular bargaining power at the political and institutional level. From an analytic perspective, the adoption of such a definition of civil society is useful in so far as it allows to identify with some precision the kind of organizations comprising civil society. But it poses two
interrelated problems. It is indeed questionable whether civil society organizations can be identified on the basis of their own self-description, particularly when part of this description contains normative characteristics (public-mindedness, for instance), which are open to contestation. It is also problematic whether the limitation of the definition to a particular set of organizations may still be able to carry the array of normative functions that democratic theory often attributes to civil society in relation to state organization.

This first question leads us to a second issue concerning the nature of civil society organizations in Europe. An important element of the civic education and social capital literature is the emphasis they give to voluntary associations as the seedbeds of civic virtue and, in Tocquevillian terms, as the school-of-democracy. The basic intuition is that coming from the idea that socially-oriented behavior is best learned by doing. However, as European citizens seem to recognize, the nature of European civil society is not that of member-based organizations, but of professional organizations, with fee-paying members. Can such organizations fill the democratic gap at the European level?

The third question is strictly connected to the latter point. It would seem that in the discourse on European civil society, the inclusion of the latter in the European regime of governance is presented as guaranteeing social ‘participation.’ In truth, the kind of ‘participatory governance’ described by Kohler-Koch and, as van Deth tell us, largely acquiesced by the European citizens, looks more like an informal process of ‘representation.’ The obfuscation of such a distinction is telling in two senses. In one sense, the substitution of ‘participation’ for ‘representation’ simply hides the fact that civil society organizations lack both structures of authorization and accountability in order to represent European civil society, or sectors of it. By describing them as the channels of ‘direct participation’ of the citizens simply begs the question. In another sense, the very substitution of participation for
representation misses the important issues that participation and representation in democratic governance are not opposite, but in some sense complementary parts of the same process. The real question is that of the specific forms in which participation and representation should be connected at the European level.

My final point wishes to raise the question of the way in which civil society organizations can contribute to the formation of the public interest. The definition of civil society organizations as those that have the public interest as their scope, besides being self-serving, risks presenting the public interest as something objectively identifiable and outside democratic politics. As Kohler-Koch notices, this reflects the elitarian character of the discourse of participatory governance in Europe. The real role for civil society, at European as at a national level, is not that of claiming to be the true depository of the public interest, but that of providing some of the conditions (and the checks and balance) for the political and institutional system to construct the public interest in a way that reflects, with a certain amount of fairness, the complexity and plurality of modern society. Civil society is therefore one – albeit an important one – of the instruments for interest formation, transformation and intermediation.
Civil society has emerged in recent years as an overarching concept that frames the relations between state institutions and non-state actors. It is both an ideal - a super-ordinate concept that stands for the increased and broader political participation of citizens - and a descriptive concept, including several entities, such as churches, social movements, think tanks, and NGOs. In policy arenas, shifting the emphasis on the more comprehensive concept of civil society signals a normative turn in regard to the legitimacy of non-state actors addressing the political environment. Several bodies of literature have explored why this concept has emerged so prominently, producing a rich debate. New research has recently been conducted which has shed light on various aspects of the relationship between civil society and EU governance.

In this contribution to the debate, I would like to address the papers of Beate Kohler-Koch and Jan van Deth.

The Kohler-Koch paper reflects on the findings of Research Group 4 which examined patterns of EU-society relations, and sets out to examine
whether the intentions of increasing the agency of European citizens, which are implicit in the keyword ‘participatory democracy’ are met by the structures and practices through which participation has been institutionalised at EU level. It discusses the distinctive features of EU-society relations and scrutinises them according to standards of democracy, identifying as distinct characteristics its pluralism, elite system, self-regulation and fragmentation.

The van Deth paper documents the hiatus between the citizenry and the values and expectations of EU institutional actors on the further democratisation of the EU and the expected role of citizens in that process. In light of these findings, it is argued that the present consultation system does not live up to the normative standards it set for itself in key policy documents and that the emphasis on civil society is used to foster an integrationist agenda. In commenting these findings, I will discuss the roots of the discursive prominence of civil society at EU level and of the relation between civil society and its component parts, as I think that this can contribute to clarify the implicit EU normative standards and the confines of the use of ‘civil society,’ both as an ideology and as a set of policy practices, and as a consequence can clarify the various components of the agenda and practices that are investigated. These comments are meant to be a first step in this direction.

The Kohler-Koch paper argues that in EU discourse and in its policy practices, civil society has become a key element which links two overarching and complementary principles on which the new Lisbon treaty is based: participation and representation. A better inclusion of civil society in policy making is then recurrent in EU political discourse and is meant to address concerns with both principles.

The paper proceeds to address what is meant by participatory democracy and its use in relation to civil society at EU level. It examines why civil society as a discourse has emerged as a favourite term in the EU policy environment and points to a set of functions it performs within the different
constituencies of the EU system, its affinity to historically validated institutional practices – such as extended consultations – and its positive resonance with widespread preoccupations about the quality of EU democracy. Looking at all these aspects of the relation between state and non-state actors, the paper utilises and organises a wide body of literature.

Explaining the prominence of the discourse on civil society, it argues that the term is vague enough to be successfully employed by different constituencies; it resonates with other currently dominant political discourses, such as the widespread aversion against some of the institutions and practices of representative democracy. One could argue that it performs these functions precisely because it is a superordinate concept, whose breadth allows a continuing contests over its actual meaning and accommodation to different world views, as Kohler-Koch duly underlines.

The historical roots of ‘civil society’ are old but the tree has turned green again recently in Europe. The term has an ideological dimension which is connected to its successful role in contemporary Eastern European history of mobilisation against state oppression. However, its appeal has broadened.

The ideological role of civil society is not limited to a political part or to an institutional domain. With Freeden (Freeden 1996) we can identify the various forms the emphasis on civil society takes. Like other ‘weak ideologies’, its definition is still under way and pliant. Thus, in the EU policy milieu, as in other arenas, it has been employed by a variety of actors. However, one should not necessarily utilise such an ideologically charged concept in order to assess policy practices. Its appropriateness should therefore be reassessed. I propose to use the term only when referring to the more comprehensive concept and not in relation to the component parts (associations, social movements, churches etc.). It can be used to assess the overarching prominence and diffusion of all state-society relations, whilst reference to the features of specific modes and types of organisations should be retained.
In the following, I will therefore put forward a different set of reflections on (1) civil society as an ideology, the reasons for its prominence and the variety of uses, and on (2) civil society as the asserted common denominator of a set of consultative policy practices. Of course, the latter are justified in terms of the former. Policy events are processes whose outcomes are based on narratives rooted in what is considered as legitimate at specific points in time and in specific environments (Schon and Rein 1994). It is then to be expected that the participation of non-state actors will be justified in terms of the attributes given to civil society as an ideology – such as better and more inclusive representation, and better information provided to the policy process. However, other features of the activities of non-state actors involved in participatory interaction with policy-makers need also to be identified and discussed.

These two concerns – improved representation and the legitimacy that it carries, and improved information and the additional effectiveness of policy making that it could provide – are at the basis of how the literature on civil society in the EU has explained the prominence of civil society at EU level.

Here some reflection of how the concept of representation is utilised in relation to the role of civil society is necessary. Political representation, as the activity of (re) presenting opinions and interests to the policy making process, can take place by representatives holding elected office or by others. Representation can take place in several arenas. Whilst democratic theorists often focus on the activities of office holders in democratic arenas, representation activities of interest groups of different kinds are increasingly the focus of analysis (Plotke 1997; Warren 2001). Their activities are examined in a broad set of arenas – including EU institutions. They present some of the same organisational and political dynamics studied by theorists of democratic representation. The literature on representation in such more varied contexts has grown in recent years and has often focused on the representative activities of associations, social movements and other informal
groups. These social formations experience the same tensions that occur in elected institutions, such as the tensions between acting as delegates or as trustees. The often examined multiple meanings of the concept of representation, and the related internal tensions apply to all of the various arenas and agencies engaged in representative activities. However, as Pitkin and others have pointed out, the contexts in which the concept of representation is deployed colours which dimensions are more salient. Prevalent political practices make different usages of the concept of representation more or less relevant and specify its analytical and normative context (Pitkin 1967; Plotke 1997). In this sense, processes such as the growing relevance of supranational integration and the prevalence of governance structures have broadened what is topical in relation to issues of representation (Warren and Castiglione 2004). At present, non state actors of different kinds and bureaucracies such as the EU Commission are important actors and loci of distinctive representation activities. In those contexts many activities of representation can be regarded as independent from territorial references (Rehfeld 2005). We can then for instance posit at EU level a role for civil society organisations of non-territorially based representation of social groups, as for example ethnic minorities.

With Rehfeld (see p. 6), representation activities can be characterised in terms of the identity of representatives (who have to be members of a qualified set of potential representatives); a selection agent; the functions required from the representative; the decision rules utilised to select a particular representative. In the case of associations in Brussels, the selection agent – often Commission Officials (or other member of a EU institutional body) – selects whom to consult and therefore attributes a type of representativeness. They might select business lobbies and NGOs as members of distinct but differently relevant communities of representatives. Within the EU-based communities of civil society organisations, they might select according to a set of decision rules, which ideally include codified values such
as ‘internal democracy, openness, transparency, accountability, representativeness of the NGOs constituency’. They also select representatives on the basis of their perceived ability to perform in a set of functions. Among the various functions that public and private interest groups could perform, Urbinati points to the functions that the representative performs as an advocate. As Urbinati emphasises, conceiving the representative as an advocate helps to highlight the two main political functions of representation, as a means both for expressing political opinions and choices and therefore exercising self-government, and for resisting exclusion and therefore achieving security (Urbinati 2000: 761).

In several key documents EU institutions such as the Commission have implicitly and explicitly articulated the view that the activities of public interest groups serve the function of redressing the unbalance present in a system of consultation that excludes or limits diffused interests from proper representation. And they have similarly stressed the importance of non-state actors in providing information useful to the policy-making process. Accordingly, the contribution of civil society to European governance is mainly framed through the conceptual lens of input-output legitimacy (Scharpf 1999). It is argued that civil society can enhance European legitimacy by providing, on the one hand, broader and different forms of citizens’ representation and, on the other hand, valuable information.

Briefly then, the issue of the presence of civil society in policy arenas is connected both to issues of policy effectiveness, of legitimacy and of representation. Information can be provided by experts who are not necessarily representative of the citizenry (although they could be) or by grassroots members. One should then differentiate between information that requires belonging and/or an interpretation of the experiential knowledge of particular social groups (as for instance membership of discriminated minorities) and is therefore connected to exercising self-government as a type of representation (see Urbinati as cited above), or the representation activities
of a member of a conscience constituency (Oberschall 1995: 23), technical information (which only requires technical knowledge but raises important issues of expertise representation, its quality and sources), and as a different category, representation as right of participation which could be unrelated to information but that under certain conditions could also enhance participation outside elected institutions.

In practice, on the basis of these multifarious roles of civil society organisations, political actors formulate and diffuse an implicit and simplified theory of the role of non-state actors in influencing policy processes. This implicit theory merges the different kinds of contributions of civil society actors (including business interests) and technical actors in an often unrefined but usefully comprehensive conceptualisation. We could summarise this view as 'the information-representation theory of civil society'. This theory constitutes a useful way to frame the multifarious role of civil society at EU level, and the connections between EU legitimacy and concerns with different types of representation deficits. This simplification is at least in part due to the fact that the different categories are difficult to disentangle and often merge into each other, as actors play multiple and overlapping roles.

This theory of the role of civil society as providing a voice for the excluded and information for better policies is the standard that recurs in interviews with EU actors and is echoed in scholarly work. However, I would like to argue that there are additional ways of framing the interaction between policy-makers and civil society that should not be neglected. I will argue that interpreting the prominence of civil society in the EU only through the conceptual lens of the expertise-representation theory results in a view of EU policy making as too detached from other societal ideologies and practices. It also portrays EU policy making from what I consider to be an excessively realist perspective, whereby EU policy-makers as a whole appear excessively driven by self-serving preoccupations of legitimacy acquisition, which in the EU system is at the basis of the typical bureau-shaping and
budget-maximising strategies of administrative environments (Dunleavy 1991). My contention is that although important, legitimacy acquisition is only one goal of the set of complex organisations that constitute the EU system of governance - other variables are also relevant. As a relatively indeterminate value and set of practices, ‘civil society’ is conceptualised best in relation to more than one perspective.

**Civil society as an ideology**

As the Kohler-Koch paper points out, the ideology of civil society provides legitimacy to the EU because it draws on the anti-state and anti-bureaucratic representation that civil society organisations have acquired in various contexts in recent years. The ideology of civil society posits that associational participation is a very inclusive form of political participation. It includes, for instance, migrants and other minorities that are marginalised by conventional politics. In this respect, the participation of civil society in the policy-making process addresses well known preoccupations within the EU system that some societal groups are marginal and therefore do not have easy access to conventional politics. It also redresses the criticism that the EU Commission is too responsive to vested interests, particularly business interests.

In addition, it could be argued that civil society is useful for providing legitimacy to the EU system of governance because it can be framed as a way of shortening the long chain of representation from communities to the supra-national level. It provides an alternative chain of representation through a parallel system of vertical interconnections of civil society organisations, from grass-root associations to EU umbrella groups. Of course, this potential role is not necessarily actualised. And research conducted in the context of the activities of Research Group 4 show that the chain of delegation in CSO tends to be even longer from the EU CSO platforms/umbrellas to the grass roots associations.
As previously mentioned, these considerations fit well with the emphasis on the dual role of input and output legitimacy, which is often posited for civil society at EU level. The Kohler-Koch paper notes that if civil society is supposed to first and foremost act as guardian of the political rights of citizens against the encroachments of government, the attention has to focus on the conditions of social mobilisation, inclusiveness and publicity. If, on the other hand, civil society is appreciated as co-producer of public welfare, the capacity to deliver is of far greater importance. However, both concerns are relevant at EU level and can be combined in a single standard that defines the ideal contribution of civil society organisations. Of course, this holds only true in abstract; when it comes to define the conditions and the properties of CSOs, efficient input performance demands other qualities than effective output performance.

Whilst this approach is useful, we need to go beyond the concentration on expertise-representation (and also service-delivery/representation). A concentration on this aspect obscures other important dimensions, such as for example the alliances between state and non-state actors aiming at changing citizens’ behaviour. State actors might well enlist civil society to improve the representation of under-represented groups, and in doing so they might pursue a strategy of acquiring reflected legitimacy. But they also need to change citizens’ behaviour to implement several policies. For instance, anti-discrimination policy and many areas of environmental policy require changes in citizens’ behaviour. If citizens do not recycle waste, a fundamental objective of EU environmental policy is not achieved. Aware of this, EU institutions fund media campaigns and also the work of NGOs in order to reach and influence citizens. This effort cannot simply be framed as an exercise in legitimacy acquisition.

To frame this joint state-associations activity, one has to conceptualise the role of civil society as an ally for social reform, and as part of a redefinition of the relation between institutional politics and society. In this
context, a theory of societal guidance seems implicit and needs to be brought out (Etzioni 1967; Etzioni 1968). To subsume activities of joint social guidance under a search for legitimacy seems reductionist. There might well be elements of this strategy at times and in certain contexts and for certain EU actors, but present empirical evidence does not only point in the direction of consistent wilful instrumentality on the part of EU institutional actors. Rather, as the van Deth paper points out, EU elites share the goal of stimulating forms of active citizenship and mobilise ordinary citizens as a useful component of processes of governance, which include social governance.

The van Deth paper points to the manipulatory undertones of key EU documents, such as the White Paper on Communication (Commission 2006), which are seen as an ill conceived attempt to “sell” the European idea, and as an exercise in propaganda instead of communication. But behind it there appears to be more than manipulation; there is a conception of politics in times of European governance. In this conception there is an implicit theory of societal guidance as a response to the crisis of representative institutions and to destructive anti-EU populism. Accordingly, under the direction of EU elites, civil society is recruited as a popularised monitor of lifestyle changes – changes in a direction that is compatible with EU policy goals. The reproach of a manipulatory intent might then still be justified, but it is not simply orientated towards gaining legitimacy for the EU. Rather, an implicit theory of multi-actor societal steering could be posited, conceptualising the attempt to recruit organised civil society in order to pursue the EU’s constitutionalised values.

Such an attempt would be justified by the generalised awareness that political actors have lost some of their credibility as role models. In this sense, EU institutional actors’ emphasis on civil society is part of an anti-political reaction to frequent and well publicised episodes of political corruption. However, anti-political sentiments have emerged in several countries and
possibly have become relevant at EU level without necessarily being connected to the issue of EU legitimacy (Norris 2002). Also frequently aired but not necessarily connected to EU legitimacy is the concept that civil society constitutes a channel for attributing special relevance to certain issues that are not adequately thematised by conventional politics, despite their relevance for the citizens.

One could then argue that ‘civil society’ at EU level is an ideology with some self-serving features that are used to shore up a weakening European project, but also has several other elements that are derived from a wide and fragmented set of views of what civil society is and what it should be. In Brussels, all these views find an echo, though different ones will be dominant in different contexts. Thus, the question remains whether civil society is mainly an instrument for inclusion – as the left often argues – or a way of doing politics outside of the state – as the right often prefers to emphasise. Both positions are part of the vocabulary of justification for civil society. The issue of legitimacy of the EU project is yet another aspect, but it should not necessarily be the main concern on which a theory of civil society at EU level should rest. The contributions of Kohler Koch and van Deth are especially useful precisely because they are not limited to these perspectives, but are aware of the wide range of meanings that civil society as an ideal can hold for different actors.

In this line of thought, I would then like to argue that the ideology of civil society finds much political currency in Brussels simply because at the EU level some ideological views are echoed that are also present in Member States. Isomorphic processes of different kinds are likely to emerge between the EU and other organisational environments it interacts with (Powell and DiMaggio 1991; Peters 2000). Associational participation has grown exponentially in recent years for a host of reasons and that fact alone will spark legitimacy and attention within all political and social organisations. Ideologies and practices that prevail in society will also find an echo in
Brussels. So, in addition to the views of civil society already indicated, when reading EU documents on civil society, one can also find references to the integrative role of civil society organisations – a role identified in the van Deth paper as recurrent among European citizens. Of course, as the van Deth points out, social and political actors endorse the existing visions of civil society in different ways.

The Kohler-Koch paper recognises this plurality of ideologies and mechanisms of inclusion of non-state actors and it provides the conceptual tools to go beyond the expertise-representation theory. The paper notes that over the years, EU-society relations have been governed by quite different principles. In the early days of economic integration, the overriding principle governing consultations was respect for the Treaties and the efficient transposition of Treaty provisions. With the growth of market regulation and direct interference by the EU in sub-national governance in the 1980s, a new orientation gained ground, acknowledging the political character of EU policies and the need for additional mechanisms for gaining legitimacy. In place of hierarchy, partnership became the new core principle. It put public and private actors on a new footing, but its application to specific policy areas was circumscribed. The far more ambitious principle of participation was introduced with the White Paper on Governance (Commission 2001). It reflected the growing concern that the mechanisms for representative democracy might not adequately support the emerging political system of the EU and, therefore, should be complemented by the direct involvement of civil society in EU governance.

Different regimes are posited as surviving and operating at the same time. In this identification of a variety of coexisting models, the emphasis lies on the ideological fragmentation of the EU – an issue that has been well documented over the years, and relates to a variety of dimensions which cross-cut all institutions and their personnel, such as pro-market/pro-state and pro-integration/anti-integration (Michelmann 1978; Cini 1996; Hooghe
2001). If the overarching principle of a system based on extensive consultation has characterised the EU throughout its existence, the practice of consultation and the organisations that are consulted have changed somewhat over the years. Defining them as civil society is the present way of selecting and drawing attention to certain topics. Consequently, the values of participation, openness, transparency, and accountability are particularly endorsed now. However, this endorsement does not imply that these ‘democratic goods’ are not self-contradictory in many ways and that an easy reconciliation and a cohesive paradigm is likely to emerge or is even possible in the near future.

Through the lens of the expertise-representation theory, the Kohler-Koch paper is able to effectively point to some of these conflicts. Thus, there are conflicts within civil society organisations on whether NGOs should be representative – a quality emphasised by large organisations – or should privilege the quality of their policy expertise, as think tanks and smaller organisations often do. Interestingly, the Kohler-Koch paper notes that a similar controversy on the scope of participatory democracy is echoed in the new Lisbon treaty and is framed by an underlying, though not very articulate, principled discourse. It is noted that whereas diffused interest groups frame it as a discourse on input legitimacy and consequently put the principle of democratic participation first, other intermediary organisations take output legitimacy as their point of reference and thus give priority to the principle of efficiency in policy-making. The Commission’s ‘participatory strategy’ is then accompanied by a ‘strategy of knowledge collection’. Thus, in this case as well as in other cases, the expertise-representation theory provides a useful framing of the role of civil society, but it needs to be integrated with other approaches, such as a theory of societal regulation, which also should allow an identification and possibly a ranking of the diverse contributions of different civil society organisations.
‘Civil society’ as a set of participatory practices

‘Civil society’ as an all encompassing term (whose precise confines are often not clear and shared) is useful for describing the entire category of non-state actors. It can be used as a general concept to investigate, for instance, the willingness of state actors to involve non-state actors in consultations. However, this willingness must then be qualified by the specific features, power bases, allies and contributions to policy-making that characterise different types of organisations of civil society. Given the ambiguity of the concept, the fact that policy makers may use the term ‘civil society’ - or more frequently ‘associations’ - is not necessarily relevant. Policy practice involves processes in which actors identify and utilise approved key societal views (or frames such as ‘civil society’) to ‘match policy problems and available solutions’ and to pursue a wide range of goals (March and Olson 1989). At present, approved perspectives include references to civil society involvement. But analysts must evaluate the extent and identify the contexts in which such terms retain their analytical value.

We need a classification of the different types of civil society organisations and how they relate to each other in the context of interest group politics. Also necessary is an empirical definition of what all interests have in common in a particular environment. This is a problem that has not been sufficiently addressed by the literature so far. There is a general theoretical literature on civil society and a set of specific literatures on different kinds of organisations. However, we need to examine empirically in specific contexts what is common to all civil society organisations and what pertains only to some of their organisational forms. At EU level such comparisons are still in their infancy.

Different kinds of organisations differ in terms of tactics and strategies. I suggest that a crucial variable that needs to be examined is the action repertoire utilised by different kinds of organisations. Although all
organisations engage in activities of deploying influence and persuasion, they do so from different standpoints. For instance, in addition to institutionalised repertoires, social movement organisations and social movement-inspired organisations, such as certain environmental groups or antiracist groups, can engage in non-conventional protest repertoires. They can utilise the potential threat of disruption as a strategy to achieve impact, and subordinate its use to strategies of maximisation of access and influence, but still retain the choice of disruption as a last-resort strategy – or in other cases use contentious and non-contentious repertoires at the same time (Ruzza 2004). This option then differentiates social movement organisations from other types of organisations, such as service delivery organisations whose strength could be based on the threat of interfering with state-approved modalities of service delivery, and affect politically sensitive outcomes. Churches could mobilise their member base through cross-nationally co-ordinated actions, the moralisation of key issues and the use of sympathetic media in order to appeal to conscience constituencies, etc. Participatory practices are therefore oriented towards the power base of different organisations, and thus impacted by the aims of consultations which also vary in different policy fields.

The democratic contribution of each type of association can be assessed from multiple standpoints and is likely to be considered differently in relation to its contribution to different ‘democratic goods’. They differ, for instance, in terms of how they can engender democratic attitudes in their participants; in how democratic they typically are internally; in terms of transparency, accountability and openness and the impact this has on specific institutional features such as subsidiarity, mechanisms of cooperation and resistance to governments’ justificatory strategies (Warren 2001: 108). For instance, social movement organisations often need to be de-facto hierarchical and charismatic, as democratic procedures are too time consuming and divisive to allow for effective mobilisation, but they have often been effective at broadening the political space. It has been noted that an important
contribution of associations is to give voice to groups that only successively have acquired electoral power (Warren 2001: 81). Thus, they play a role in terms of how effective they are in broadening the political space by moving issues into public communication – an aspect also connected to processes of democratisation (Maier 1987). They also differ in the way they can contribute to the EU project of social co-regulation described above.

Similarly, different kinds of organisations enjoy relations with different institutional allies and the impact of their activities of representation depends at least in part on the mix of allies they can mobilise, and therefore their broadening of representation and overall democratic impact will vary. For instance, certain organisations enjoy special relations with certain political parties (such as women’s organisations connected to sections of labour parties) or movement-parties (such as the green parties) (Ruzza 2004; Wessel 2004). Likewise, some public interest groups are better able to join efforts in multi-actor coalitions or operate mainly through umbrella groups, which might very well exhibit different traits from single issue area organisations.

I suggest to disentangle the general category of civil society and to examine both its functioning as a system and the contribution of its component parts. The different types of civil society formations are subject to different constraints and are often engaging in different practices at EU level in terms of their action repertoires, funding mix, and relations to institutional allies. With Warren (Warren 2001), I think that in assessing the role and impact of organised civil society we should consider the field as composed of a set of different types of organisations which provide different democratic goods, and that the field is then characterised by a distinctive associational ecology that varies in different contexts according to the mix of types of associations and their specific features in specific locations and policy arenas.

These considerations suggest ideas for future research. I think that in the future we should build on the work already conducted and focus more directly on the variables predicting types of associational interconnections
across levels of governance, as the distinctive multi-level interaction of associations benefitting from EU funding and advocacy opportunities reflects the distinctive EU architecture. We need to interpret the political opportunities of organised civil society at EU level in relation to their contributions to the legitimacy of the European project, the resonance with public opinion of different issue domains, types of institutional allies and their resource base. In this light we need to examines mechanisms of organisational selection, institutional channelling, and the role of discursive compliance as predictors of impact, inclusion and resource allocation in EU institutional arenas.

An analysis of the organisational mix and the contribution of each type of organisation will help us to give a more articulated answer to the question of whether participatory governance holds its promises.

I have suggested that the ‘interest-representation’ theory tends to accentuate the depiction of EU actors as solely concerned with legitimacy and to downplay their interest and concerns with societal regulation. It then comes to be easily interpreted as merely criticised as guided by a technocratic and justificatory perspective. While I agree that these motivations are relevant in the strategies of EU actors, I also think that they more generally reflect societal concerns that are relatively unrelated to the project of European construction. We need to look in greater detail into the issue of representation.

For instance, at the EU level, representatives of associations of weaker or marginalised social groups, such as migrants or discriminated sexual minorities have (to some extent) been included in the policy-shaping process. With Urbinati (2000) I have argued that this inclusion amounts to these groups ‘exercising self-government’, and that this can be seen as a representational activity. In particular, when representatives of these groups are members of a marginalised minority themselves, their presence in the policy process can be regarded as fulfilling the category of representation
because they symbolically actualise the presence of minorities in a policy arena instead of merely acting on behalf of the minority community (see Rehfeld 2006: 17). However, the legitimacy benefit for the EU that is derived from the inclusion of these minorities would presumably vary with to the popularity of the concerns represented.

Granting an even modest decision-making power to popular groups, such as environmental associations, could well be seen as an attempt to vicariously increase the legitimacy of the EU (as the ally of legitimate actors). Environmental groups are generally more popular than green parties and environmental ministries. However, if power is given to marginal and often less popular groups, e.g. antiracist associations (Ruzza 2004), one can no longer necessarily uphold the accusation that the EU is mainly acting on the desire to acquire legitimacy.

Rather, with Rehfeld (2006: 4), I believe that here we should distinguish representation from legitimacy. The EU might have implicitly decided that some of the spokespeople for these groups are representative of certain social groups, but not that they are legitimised in sociological or normative terms (Rehfeld 2006: 3). EU political actors might well believe that legitimacy is missing (or that it is severely limited to some circumscribed functions of the process of representation). But, as Rehfeld (2006) argues, representation need not be legitimate, equal or fair. Thus, the inclusion of these groups can be motivated not by legitimacy considerations, but by the fact that it seems appropriate, even if not expedient, to have a representative to ‘complete’ an implicit view of the constituency of reference – i.e. the European people in all its components – and/or by other considerations, such as the previously mentioned desire of EU political actors to engage with civil society actors in a process of co-regulation.

On the other hand, to the extent that it engages in projects of societal regulation or, as argued, co-regulation with civil society organisations, it expresses a networked view of governance that might well be inspired by a
search for new functions and new forms of legitimation, but in ways that have yet to be fully understood and analysed.

I would like to argue that we should theorise more broadly the reasons why references to civil society are so frequent in various arenas, and we should clarify the reasons why in some cases the concept of civil society should be preferred as an analytical tool to its component concepts and their related literatures, and why we should revert to a more nuanced classification and theorisation of the types of non-state actors’ participation in other cases. In order to do so, we should first examine the literature on the prominence of civil society as an ideology and then articulate the relation between the overarching concept of civil society and other formations. Then we should specify what all non-state actors have in common when interacting with the state and its institutions and what distinguishes each of them.

Conclusions

This commentary has argued that in the context of the European system of governance, civil society has come to play a central and multi-dimensional role. While the current emphasis on civil society is instrumentalised by several actors - including EU political and bureaucratic actors – no single theory can adequately explain its relevance at EU level. The view that civil society is particularly endorsed at EU level because it provides forms of input and output legitimacy is accurate but insufficient. This view can be conceptualised as the dominant theory on the relationship between interest groups and EU institutions, i.e. the ‘expertise-representation theory’. It is argued that civil society is also important at EU level for other reasons beyond the acquisition of legitimacy for the EU system of governance.

It is pointed out that the EU system of governance reverberates the values of European politics, for which a thriving civil society is a means to promote active citizenship, and modify citizens preferences in the direction
advocated by Member States and the EU. Civil society is also a component of a plan for social regulation of European societies which encompasses the collaborative work of social and political organisations. EU institutions are part of an attempt to promote active citizenship and to enlist citizens and civil society organisations for this purpose. ‘Civil society’ then indicates an ideal of participatory policy making, to which a variety of social organisations can contribute on the basis of their differing interactions with state actors and on the basis of their distinctive political and cultural opportunities. Equally important is that EU institutions continue with their recent efforts to consult citizens directly and put in place effective structures to do so, such as internet-based open consultations. This, however, also requires that the present difficulties with internet-based consultations be resolved (Bozzini 2007). Opportunities for the expression of citizens’ opinions need to be better publicised, and the processes of aggregation of opinions needs to be streamlined and made more accountable.

References


Chapter 20

The Living Constitution of the EU

Sverker Gustavsson
Uppsala University

Among American lawyers and political scientists (Gillman 1997; Winkler 2001; Rockford 2005) the question according to what principle the U.S. constitution should be interpreted is the subject of continuous debate. On the one hand are those who emphasise the original meaning of the basic text at the time of its ratification. On the other hand are those who argue that the constitution is a living document and that interpreting it requires not just taking the original intent into account, but later historical experiences as well. The abolition of slavery in the 19th century added new meaning to the original text, as did the extension of the suffrage to women, the policies of the New Deal, and the implementation of civil rights in the 20th century. Proponents of this second view base their argument on more than just the pragmatic notion that some of the original formulations have become politically unacceptable. They also believe the constitutional framers deliberately intended the text to be flexible enough to meet future needs. Indeed, according to this view, such flexibility is necessary if the constitution is to remain legitimate.
In the present context I shall not go any further into the U.S. discussion. The purpose of mentioning the American debate is simply to stress that the corresponding European problem would benefit from an analysis in terms of original intent and a living constitution. Only recently, in a seminal article from 2007, our Leiden colleague Jan Erk laid out the challenge of trying to grasp the real as distinct from the formal European constitution. Concluding an overview of federal structures in Austria, Belgium, Canada, Germany, and Switzerland, he pointed out

“that there is nothing terribly unique about the current constitutional crisis in the European Union. Evidence from comparative federalism shows that these types of crises frequently visit multination unions. And quite often, such unions find a way out by concluding constitutional deals that implicitly recognize the competing political visions. Europe does not need an idealist formal constitution, it needs a workable arrangement that reflects its real constitution composed of multiple demoi” (Erk 2007: 647).

In my view, this distinction between the formal and the real constitution — a distinction well-known from our national contexts, but nevertheless new in relation to the overall European environment — offers a promising way to organise the main answers given to the normative problem of “what is wrong with the European Union and how to fix it” (Hix 2008).

Life and history of the European constitution

Let us try to summarise what gives life and history to the real European constitution. I would hypothesise that mainly there are two dimensions at work here. We might call the first the horizontal dimension, in reference to the tension between capitalism and socialism within each of the member states. All member states of the Union consider themselves to be “mixed economies” (or “welfare states”, should one prefer that phrase). Within each of these “mixed economies” or “welfare states”, the fundamental pattern of
authority is basically the same. As voters, citizens decide who is to represent
them in parliament and to exercise legislative and executive powers on their
behalf. As consumers of goods and services (including media services), they
decide for themselves. As investors and trade-union members, citizens decide
the distribution of market powers — a distribution which functions in a
countervailing fashion vis-à-vis the preferences expressed in general elections
based on universal suffrage and freedom of information.

The optimal “mix” between capitalism and socialism is neither
established in the formal constitution, nor laid down by God or History. It is
the concrete result of the continuous struggle between different political
forces. The real constitution is “living” in the sense that citizens are never
entirely satisfied with any of their respective roles, not as voters, nor as
consumers, nor as investors. They accept the actual outcome as something
second-best; an acceptable balance, as they see it, that has been struck. Citizens
inclined towards the left do not find all their preferences fulfilled, nor do
citizens on the right spectrum. All of them feel, however, that they can live
for the time being with the equilibrium that has emerged. They accept the
formal constitution as something given, and go on pushing for a different real
balance by lobbying and working for another result in the next election.

The second basic dimension of the living European constitution is what
we might call the vertical dimension. This refers to the tension between the
suprastatist principle of free movement of capital, goods, services, and labour
on the one hand; and the principle of national self-determination on the
other. In theory, the suprastatist principle has precedence; it could be used to
trump every conceivable piece of national legislation and every single
instance of fiscal redistribution. In practice, however, the European Union
does not work that way.

It is true that most markets for capital and goods have been
Europeanized in the sense set out in the formal constitution. The markets for
services and labour, however, have not been treated in the same way at all. In
practice, the suprastatist principle is only partially applied to them. This is because the markets for services and labour are much closer to the individual needs of citizens and families. The legislation promulgated by democracies is based on universal suffrage. Accordingly, freedom of information and freedom of organisation cannot be “suppressed” by the free-trade doctrine as easily as regimes for capital and goods. In obvious defiance of the suprastatist free-trade regime, member states have license-financed public-service media, tax-subsidised public housing, tax-subsidised public and private hospitals, public selling of liquor and pharmaceuticals, public control of rents, and national policies for the production of nuclear energy. The four freedoms have only been adopted up to a point. In areas where EC law is unable to reproduce its own legitimacy, they yield to other considerations.

In other words, what we have is a two-dimensional living European constitution, within which actors try continuously to strike a reasonable balance between capitalism and socialism on the one hand; and between national self-determination and a constitutionalised free-trade regime for capital, goods, services, and labour, on the other.

**Accept or re-structure?**

Two questions can and should be asked in relation to this. The first one is about the actual constellation of this double mix. What does it look like in different policy sectors? The second one bears on the corresponding normative issue. Is this (more or less) stable equilibrium in two dimensions something that we can and ought to accept? Or are there strong arguments for trying to re-structure the living European constitution?

I shall refrain from any extensive analysis of the empirical aspect. For the sake of my argument, I take the actual workings of the living European constitution for granted. It is ruled by a two-dimensional constitutional “balance of terror”. Horizontally, market agents are well-aware that they can
easily destroy the democratic order. Likewise, politically responsible politicians know they can easily destroy capitalism by legislations which drive private enterprises out of the country. Correspondingly, in the vertical dimension, the European Court of Justice understands that it can easily destroy citizens’ trust in the living European constitution by applying the principle of the precedence of EC law too rigorously. The electorates of the member states, and hence their governments, can only be expected to remain loyal to the suprastatist regime as long as that regime respects the principle of national self-determination in areas of the common market which are politically more sensitive. According to the standard view, EC law on the four freedoms is not and should not be implemented within a larger sphere than that within which it can reproduce its own legitimacy. Moreover, in the vertical dimension, too, this notion of political sensitivity as to the legal aspect has resulted in a fundamentally living and unclear constitution. European lawyers and political scientists agree on the empirical fact of a living European constitution in two dimensions, characterised by the monetary union without fiscal union and by double asymmetry. Neither democratic accountability nor social legislation has been Europeanized to the same extent as the power to regulate free trade (Gustavsson 2006).

However, it is the normative side of the matter that is more interesting and controversial. Many scholars take the same empirical view on the questions adumbrated above. To a striking degree, however, their views diverge when it comes to the level of evaluation and practical recommendation. The question put by Simon Hix (2008) — “what is wrong with the European Union and how to fix it?” — has prompted a good many different answers.
Three main positions

In the great debate on the future of the living constitution of the European Union, there are essentially three positions. The manner in which their champions have engaged in the debate is very promising from the standpoint of further clarification. The core assumptions of these three schools of thought can be presented schematically in the following way:

- Our founding fathers made a historical mistake, which can be gradually repaired through deliberate politicisation in terms of left and right (Hix 2008).

- Our founding fathers created something historically admirable, and there is nothing to worry about (Laffan, O’Donnell & Smith 1999; Majone 2005; Moravcsik 2008).

- Our founding fathers made a historical mistake; the appropriate response, however, is extreme constitutional caution, which is necessary if devastating outbreaks of right-wing populism are to be avoided (Bartolini 2005; Scharpf 2007).

Deliberate politicisation in terms of left and right

Among advocates of the first view, we meet those who argue that the practical consequences of this lack of clarity in the vertical dimension can only be handled through deliberate politicisation in terms of left and right. Due to the weak political contours of the European level, no one knows for sure where EC law applies; nor is it clear where member states can decide for themselves. Unless EC legislation is adopted after regular confrontation and deliberation along party lines at the European level — in the same way as it is now done nationally — citizens will be unable to trust it. Thinking in terms
of left and right is suppressed at present, but under the political surface it does indeed exist. It should be brought out into the open.

In his 2008 book, Simon Hix presents a program for encouraging “limited democratic politics” at the Union level. His main points include a “winner-takes-more” model in the European Parliament. This implies a president of the Parliament chosen on a full-time basis for five years, and the replacement of the purely proportional system for allocating committee chairs with a system giving larger political groups a greater number of chairs. Correspondingly, the Council should be re-structured into a proper and fully transparent legislature. In addition, there should be an open contest for the Commission presidency, with candidates having declared their political affiliation in terms of left and right. Taken together, Hix argues, these changes will have a dynamic effect, and be followed by long-term development in the direction of a totally politicised European Union. If the “life” component of its living constitution comes to resemble that of national-level politics more closely, the system as a whole will work much better.

**Status quo works wonderfully**

Hix is critical of those who defend the constitutional status quo. Its defenders, however, are of two different kinds. These two groups justify their defence of present-day constitutional arrangements — marked as they are by double asymmetry, monetary union without fiscal union, and a constitutional “balance of terror” — in very different ways, and according to opposite political temperaments.

According to Brigid Laffan, Giandomenico Majone, and Andrew Moravcsik, we should emphasise the fact that historically speaking Europe has been highly innovative. In the course of one-hundred years, Europe has produced two political innovations of great historical importance. One is the
mixed economy, in the horizontal dimension; the other is the mixed polity, in the vertical dimension. The mixed economy has enabled us to avoid totalitarianism, and the mixed polity has made it possible to combine a truly free market with democratic arrangements in respect to social legislation and fiscal redistribution within each member state. From the standpoint of market liberalism, the Europe-wide constitutionalisation of the free market is a far better solution than the risky business of a mixed economy country by country.

In other words, double asymmetry, monetary union without fiscal union, and a constitutional “balance of terror” should not be considered as problematic. Those who do consider them as problematic thereby display their democratic and federalist bias. Instead, we should be happy that such a well-functioning constitutional settlement has been reached. The only thing that seems risky in the long run is the tendency of European intellectuals and politicians to discuss the issue in terms of a democratic deficit. The status quo works wonderfully, and it should not be disturbed by philosophical considerations of that kind. We should rather concentrate on understanding our own system, with an eye to making it work even better and to demonstrating its advantages to the rest of the world.

The status quo is not as bad as its alternatives

When Stefano Bartolini and Fritz Scharpf, by contrast, defend the constitutional status quo, they do so on the basis of a diametrically opposed analysis. The combination of double asymmetry, monetary union without fiscal union, and a constitutional “balance of terror” does not fill them with enthusiasm. However, they see no feasible alternative to the status quo. Nothing else is available which would be better or even as good. These scholars argue in a way familiar from environmental policy. That is, they plead for a precautionary principle designed for vertical politics. We cannot
think just in terms of costs and benefits. We must also keep a worst-case scenario in mind.

In the horizontal living constitution left and right measure their powers against each other. In practice, both sides benefit from an element of mutual trust which is self-reinforcing within the historically given constitution and the historically given borders. But, as we are cautioned by Bartolini and Scharpf, a politicisation of the vertical dimension will not work that way. As soon as Union questions lose their Pareto-optimal status, citizens will start asking a politically sensitive and potentially explosive question, namely “Why and on what basis are people living in other countries entitled to legislate on ‘our’ behalf?”

Politicians find it hard to give a good answer to that question. It is for this reason that European legislation and European adjudication should remain apolitical. Horizontally speaking, citizens can accept majority rule, because the minority has been active in the preceding preparations and can imagine becoming a majority after the next election. Vertically, citizens cannot be active in the preparation of legislation in the same way. Since the most important legislative issues — especially the trumping principle of free movement — are constitutional ones, citizens will not as easily consider majority decisions to be legitimate.

This is why Bartolini and Scharpf are so afraid that a system of European majority rule will provoke outbreaks of devastating right-wing populism in the electorate. Such tendencies will arise, in their view, if the suprastate goes too far towards legislating and adjudicating in a way detrimental to feelings of national self-respect. It is therefore critical, in connection with vertical European legislation and adjudication, that we never lose contact with the underlying informal principle that vertical loyalty upwards is bought at the price of respect for national self-determination downwards.
Our understanding benefits from considering two dimensions

The debate between these three schools of thought serves to illustrate two main observations. One is how our understanding of the living constitution of the European Union is furthered if we interpret the question in two-dimensional terms. Considering the elements of life and history of the constitution both vertically and horizontally, enables us to see the main options in the debate more clearly than does an exclusive focus on the question of left and right.

In other words, it is not to be taken for granted that the juxtaposition of free trade and national self-determination is of the same kind as the traditional confrontation between left and right within each member state. The horizontal dimension bears on the tension between capitalism and socialism — a matter over which a balance can easily be struck without the losers becoming negative towards the system as such. The vertical conflict, on the other hand, refers to the tension between national self-determination and the suprastatist regime of free movement for capital, goods, services, and labour. The losers in this conflict might easily, as Bartolini and Scharpf argue, turn their opposition to particular outcomes into opposition to the system as such.

There is a tendency towards non-classical opposition

This leads me to my second main observation, namely that the concept of opposition has a different meaning in the living constitution of the European Union as compared to the American context. Due to the fact that the United States is a symmetric federation, opposition at the state level has the same within-the-system confrontatory meaning as it has at the federal level. The fight between left and right proceeds on both levels at the same time, and is considered legitimate on both levels. By contrast, our European system of
suprastatism, which is only applied partially, leaves us with a living constitution based on the principles of monetary union without fiscal union, and of double asymmetry. Consequently, the prospects for instituting democratic accountability in the vertical dimension are not as good as they are in the horizontal dimension — within each nation-state or full-fledged federation.

Horizontally and within each country, opposition is classical, in the sense Otto Kirchheimer described long ago as being the legitimate “right of the defeated group to publicly maintain its principles after they were rejected by the majority to be the foundation of the opposition’s functioning”, provided that “the participants in the political game consist of moderate elements” (Kirchheimer 1957: 128f). Vertically, the debate between Hix on the one hand, and Bartolini and Scharpf on the other, about the legitimacy of federal rulings by the institutions of the European Union, calls into question the classical premises that Hix takes for granted. Instead, Bartolini and Scharpf warn us, politicisation in the vertical dimension will bring about Kirchheimer’s two alternative concepts of opposition (Kirchheimer 1957: 134ff): opposition of principle, which will in turn call into being cartel arrangements aiming at the waning of opposition.

Put differently, Laffan, Moravcsik, and Majone see no difference between controversy and flexibility in the vertical dimension, and what takes place in the horizontal dimension within each country. A mixed polity is basically the same thing as a mixed economy. Hix concedes there is a difference. He believes, however, that it can be overcome by European party politics. If left-right controversies are let loose in the vertical dimension as well, he argues, confrontatory activities of a moderate kind will flourish.

Bartolini and Scharpf take an entirely different view. Instead of pointing to the possibility of neglecting or overcoming the difference, they emphasise the difference between, on the one hand, classical opposition, discourse, and power struggle in the horizontal dimension within each country; and, on the
other, what is likely to result if the vertical dimension is politicised. Within each country, they argue, parties and people can fight each other in a moderate way, because their opposition is considered legitimate, and it takes place within the same borders and in accordance with the same national constitution. Vertically, however, it is a question not just of politics but of constitutional politics. People with differing views have to answer a more difficult question, namely “Why should people living in other countries be entitled to legislate in ‘our’ country?” When the living constitution is flexible and unclear (as it is in the vertical dimension), striking a reasonable balance is likely to be trickier and more explosive than it is when the task is to balance political forces within a single mixed economy or welfare state.

**Why are EU affairs outsourced from national politics?**

This leaves us with the puzzling question with which Peter Mair confronted us in his 2007 article on political opposition in the European Union. Why are EU affairs outsourced from national politics into special referenda and elections to the European Parliament? Why is it these matters are not part — as ideally they should be — of the regular public debate and regular national election campaigns in any of the member states?

The explanation, as Mair sees it, is that national politicians think intuitively along the same lines as Bartolini and Scharpf. It is too explosive to let constitutional politics loose in national politics. Laffan, Moravcsik, and Majone, for their part, would say there is no need for outsourcing. There is nothing to fear, they would probably argue, from mixing regular politics with constitutional politics. Hix would probably give a similar answer. He believes very strongly in the ability of European political parties not only to overcome the tension between left and right in domestic politics, but also to overcome the tension between national self-determination and the principle of free trade. Indeed, he seems to believe such tensions could be overcome even
when the policy is implemented from above, and no room is left for legitimate opposition or disobedience.

Notes

1 I was inspired to write this essay against the background of a debating session I chaired at the final CONNEX conference in Mannheim, on 8 March 2008. The title of the session was “The Living Constitution of the European Union – Which Are the Main Options?” Stefano Bartolini, Simon Hix, Brigid Laffan and Fritz Scharpf were the panelists.

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Chapter 21

Distributed Governance: The Changing Ecology of the European Union

Alberta M. Sbragia
University of Pittsburgh

The literature on “governance”—however defined—is voluminous and expanding rapidly. The terms economic governance (Campanella and Eijffinger 2003), multi-level governance (Hooghe and Marks 2001), informal governance (Christianson and Piattoni 2003), “new governance” (Hix 1998), plurilateral governance (Zielonka 2007), new modes of governance (Heritier and Lehmkuhl 2008), global governance (Koenig-Archibugi and Zürn 2006), network governance (Coen and Thatcher 2008), and experimentalist governance (Sabel and Zeitlin 2007) — are found in numerous books and articles. The concept has been so discussed that some authors contrast the “old” and the “new” world of governance (Paquet 1996). Mark Pollack in his presentation referred to the “second generation” of governance studies.

The literature, in fact, is so extensive and covers so much intellectual territory that it would be easy to assume that a discussion on governance could be organized at just about any conference concerning any part of the world which brings together political scientists, students of public policy, and/or scholars concerned with the private sector and/or civil society. In fact,
one is forced to ask: Does anything happen anywhere which is not subsumed in some fashion or other under the term “governance”?

I would like to begin my discussion with two anecdotes relevant to the current fascination with governance. David Brooks, one of the most prominent columnists in the United States, has described Senator Barack Obama as being emblematic to many of “a non-hierarchical, collaborative leader who can inspire autonomous individuals to cooperate for the sake of common concerns” (Brooks 2008). Obama therefore seems to be campaigning to be the leader of a system of governance as opposed to campaigning to be the leader of a government.

Stereotypical Obama supporters (and I obviously exaggerate here) would be delighted to hear that description, for it fits their mental map of how things should get done - through coordination and collaboration among public and non-governmental actors who agree on a common purpose and are simply trying to achieve their goals through mutual adjustments, rather than through the exercise of power, authority, commands, and control. Steering might be acceptable, but certainly not power, partisan conflict, or backroom deals which are closed to civil society.

By contrast, Senator Hillary Clinton’s supporters would just shake their heads. Governance is fine as long as you do not forget that it is government that exercises power, raises taxes, spends money, fights wars, chooses winners and losers, and protects the borders. In their view, politics in a democracy is about conflict with those who disagree with you, conflict which is waged by political parties and political coalitions. Such conflict, they would argue, cannot be successfully won by those who do not understand or accept that political divisions and basic political choices about the shape of a society are intrinsic to democracy. Such divisions, from their perspective, cannot be overcome by focusing on spellbinding rhetoric, elegance, and charisma.

My second anecdote concerns my son who is carrying out his dissertation research in Sri Lanka. That (beautiful) county is now under a state
of emergency and, since 1983, has been involved in a bitter civil conflict which has killed between 70,000 and 80,000 civilians and internally displaced many hundreds of thousands. He has carried out interviews in army barracks where his interviewees live surrounded by 24-hour armed guards because of threats against their lives. He has had many interviewees tell him the real expert in a particular subject area unfortunately would not be able to meet him because he had just recently been killed, had two residents of his guesthouse arrested for being spies, and had the director of the Ford-Foundation funded think-tank with which he was to be affiliated accused of treason and deported. Most recently, an interviewee fled into exile the day before my son was to interview him, and an “interrogation/torture chamber” was discovered near the rather expensive guesthouse in which he is living.

I bring up these anecdotes because I think they represent some of the basic dilemmas which accompany the governance debate. The question of governance as we understand it within the context of the European Union is clearly not a major concern in Sri Lanka. There, terms such as power, control, hierarchy, and force would be the coin of the realm. In fact, in very many countries of the world, the term governance may be used but it refers to what we would typically call good government. Good government is lacking in so many places that much of the existing literature on the need for governance actually refers to the lack of good government.

In the United States, by contrast, the promise of Barack Obama as analyzed by David Brooks stems from the view that the US is facing a crisis of authority, of a lack of belief in what Brooks terms “the entire set of leadership institutions.” Obama’s view that uniting across both societal and partisan divisions is possible, doable, and within reach, represents a definition of how to govern which brings in societal actors that have traditionally been in conflict. By contrast, the sceptical Clinton supporters think, and again I quote David Brooks — “there’s only one politics, and, tragically, it’s the old kind, filled with conflict and bad choices” (Brooks 2008). The tension
between governance and government, between coordination and problem-solving on the one side, and partisan conflict and the pursuit of self-interest on the other, is a deeply rooted tension — a tension difficult to ignore when discussing the current political scene in the United States.

The ambiguity of “governance”

Three major debates in the academic and policy literature have contributed to the complexity and ambiguity of the concept of governance. Those have been triggered by the World Bank, the Organization for Economic Cooperation and Development (OECD), and by scholars of the European Union, as well as by the European Commission in its White Paper on European Governance (COM 2001).

The World Bank, in particular, has contributed in important ways to the global discussion of governance. It has framed much of the debate outside of the EU by establishing quantitative worldwide governance indicators which examine 212 countries and territories over the period 1996-2006. Voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption constitute the six indicators which define the World Bank’s view of governance.

This dataset shows Luxembourg and Finland as being significantly less susceptible to being destabilized or being overthrown by violent means than are Germany and Denmark. Luxembourg and Finland’s margin of safety from violent overthrow is even greater when they are compared to France, the UK, or the US (World Bank 2007). I think most of us would argue that while Luxembourg and Finland are certainly unlikely to face destabilization or a violent overthrow of their governments, so too are Germany, Denmark, France, the UK, or the US. I make this point simply to indicate how difficult it is to develop meaningful comparisons and meaningful indicators about even
The World Bank does not use the EU as a category. Rather, it either views the EU member-states as individual states or classifies the EU-15 along with Poland, Hungary, the Czech Republic and the Slovak Republic (the EU-19) as members of the OECD region. They are not viewed as the EU within the OECD; rather they are viewed as states within the OECD region.

The OECD, for its part, is a crucial multilateral institution for the diffusion of concepts, ideas, and analytic categories. Within Europe, it has been important, for example, in diffusing the idea that entrepreneurship needs to be supported and encouraged by national governments. In the area of governance it has coined the term “public governance”. Public governance includes activities related to e-government, regulatory reform, public sector budgeting and management, citizen participation in policymaking, and fighting corruption. Public governance in this context is associated with protecting the public interest.

The discussion of governance within EU Studies has clearly taken a different turn from that in the literature in which the EU members are discussed as individual countries within the so-called OECD region. The European states viewed from the World Bank’s perspective are quite different from those same states when viewed from the EU governance perspective. In a similar vein, the World Bank’s definition of governance is significantly at variance with the general concept of governance as understood in EU studies. Generally speaking, the literature on EU governance begins from a different starting point; it does not mesh easily with the World Bank’s discussion of governance. Within EU studies, the “governance turn” as Kohler-Koch and Rittberger (2006) put it, essentially involved a concern with the linkage between public and private actors acting in a non-hierarchical context in their quest for problem-solving. By contrast, the OECD’s version of governance is linked to what might be termed the “old style” administrative system which
governance has seemed to displace. Again, the EU studies debate on
governance does not find much resonance with the OECD discussion.

The lack of congruence between the World Bank’s debate on
governance, the OECD’s debate, and the EU’s debate is noteworthy. It is
especially striking in the case of the OECD. After all, roughly 2/3 of the
OECD’s members are EU members. One would have expected that at least
some of the themes associated with the EU debates would have figured rather
prominently at the OECD level. Yet one finds that the OECD and the EU
have institutionally collaborated most closely in the area of public governance
relative to the Central and East European states as well as those in the
Western Balkans. Thus, the first step in moving toward EU denominated
governance seems to be to insure that “public governance” (i.e. protecting
the public interest) is in place.

A focus on the institutional profile of public governance as defined by
the OECD in fact underlines the thrust of my (necessarily telegraphic)
remarks here today. Essentially, I argue that the EU debate on governance
makes certain assumptions about the nature, the character, and the profile of
“public governance.” The “public” actors in the governance debate seem to
be viewed as less interesting, less exotic, than the private actors which are
either business firms or civil society actors such as non-governmental
organizations.

Are public actors less interesting because they are assumed to belong to
the “hierarchical”, “traditional”, public sector which engages in the “top-
down” allocation of values? There is often an unstated assumption that such a
traditional public sector has been, if not incompetent, relatively ineffective at
coping with the variety of challenges facing societies in a rapidly globalizing
world. It was that weakness that led to the new arrangements which EU
scholars have found so interesting.

The European Commission’s White Paper on European Governance
received widespread attention among EU scholars. There is, however, a
paradox - the paradox of the Commission working very hard to institutionalize the traditional Weberian hierarchical model of public administration in the new accession states and those working toward accession. Boring it may be, but apparently in certain situations the traditional hierarchical public sector still has its uses. “Public governance”, it seems, cannot be taken for granted; it must be constructed if it does not exist.

The paradox becomes even more interesting if one argues that the challenges facing the new accession states and the Western Balkans are far greater than those facing the EU-15. If one argues that the new governance structures in the EU-15 were driven by the inability of the old style system to cope with the challenges of globalization and societal change in general, why not try to institutionalize these new governance structures in those states which have been forced to re-shape their administrative structures? Why not try to construct in the EU-12 the new networks and patterns of decision-making which seem to characterize the world of governance as discussed in the EU literature? If governance is better able to deal with modern complexity in the EU-15 than are traditional structures, would the same not hold for the EU-12 where the challenges of modernity and globalization are far greater?

The answer seems to be that governance, however understood now in the EU-15, is actually underpinned in some fashion by the old style hierarchical form of public administration. Such a structure seems to be necessary even if the roadmap calls for the eventual emergence of so-called governance. Old-fashioned hierarchy seems to be necessary, albeit perhaps not sufficient.

Although the literature on the new accession states’ public sector is still sparse, recent work indicates that the construction of the public administration in those states is still very much an ongoing process (O’Dwyer 2006). Such construction does vary across those states in important ways. Nonetheless, it is quite likely that the kind of relationships which governance
emphasizes — those in which public actors are incorporated in extra-administrative relationships in legally acceptable ways — are much more likely to be found in the EU-15 than in the EU-12. The administrative actors in the new members are unlikely to be strong enough to participate in the kinds of arrangements governance emphasizes—if they are involved in extra-administrative relationships, such relationships are likely to involve corruption rather than the kind of governance traditionally of concern to EU scholars.

Secondly, the shape and dynamics of EU governance have been constructed and shaped in crucial ways within the national eco-system. The literature on Europeanization has taught us about the member-states' importance in shaping EU policies on the ground. In a similar fashion, national eco-systems are the key arenas in which networks and public-private partnerships, even those which operate at multiple levels, are anchored and interact with public actors.

Given the importance of the national level in the Brussels' decision-making system, in the implementation and execution of EU legislation, and in the new modes of governance, the national system is crucial. Further, the national public administration plays a key role in that national eco-system. Here I am drawing on Gilles Paquet (2000), the noted French Canadian scholar, who, while analyzing what he calls the “learning socio-economy”, points to the existence of an “ecosystem”. Within that eco-system, one finds the networks, the private actors, the public-private partnerships and the new modes of governance which scholars of governance have found so intriguing. But so too, within that eco-system, exists the public administration. And that public administration seems to me to have been slighted in our analyses of governance.

That slight is particularly significant, I would argue, because the public administration itself has been undergoing a major transformation in at least some of the EU-15. That same transformation in turn may well be correlated to the emergence of “governance” in the EU. It may also be linked to the
Differential appearance of governance within the member-states. At the very least, those would be plausible hypotheses.

Here I turn again to the OECD. The OECD has argued that “public administration is a constituent pillar of governance … public governance and public administration are intrinsically linked” (OECD 2005). Thus, when the OECD uncovered the existence of multiple national agencies and authorities within the public sector, agencies and authorities which deviated from the standard hierarchical model of central ministries, the OECD coined a new term “distributed public governance.”

“Distributed public governance” refers to the existence of multiple national agencies and authorities within the public sector broadly defined. In other words, the national public administration itself has become segmented and fragmented. “Agencification” is the term often used to describe the proliferation of new agencies detached from central ministries. Interestingly, information about such bodies is quite thin. As an aggregate, they have not attracted the attention of scholars, although individually they may have been analyzed by scholars of the relevant policy sectors. To quote the OECD report, “it is poorly defined territory. These bodies are all part of national government. They are defined by exception, excluding all traditional, vertically integrated ministries” (OECD 2002). Within the academic literature, Matthew Flinders argues that the concept of distributed public governance was “less insular than traditional approaches in the field” and was linked to the concepts of “multilevel governance existing at one remove from state structures” (Flinders 2004).

The implications of distributed public governance extend beyond the well-known EU debate on the regulatory state and its associated regulatory agencies (Majone 2000; 1999; Coen and Thatcher 2008). The national systems which form such an important part of the EU’s eco-system have been reallocating public authority horizontally by distributing power and authority in ways which are new to the public administration. We may therefore
expect to find national systems which are far more permeable to precisely the kinds of private and civil society actors which figure so prominently in the governance literature. The existence of such multiple public agencies, little studied, little noticed, may in fact have been the structural pre-condition for the emergence of what we might call “executive governance” (Curtin and Egeberg 2008). As Kohler-Koch and Rittberger (2006) point out, legislatures and other representative forums find themselves faced with a complex organizational universe which hamstrings them in multiple ways.

The transformation of the traditional public administration into a system of distributed public governance may thus be linked to the emergence of those patterns of collective decision-making which EU scholars describe as governance. These public administration organizations have become more numerous, often more autonomous, are at times governed by governing or advisory boards which include representatives from the private sector and civil society, and may be able to hire more flexibly than their more traditional ministerial brethren.

If we think of the EU as an eco-system, we think of ecology. If we think of the EU as a multi-level system, we are thinking in architectural terms. Ecology is far more fluid and penetrating than is architecture. Thus, my argument would lead to the question of whether the existence and the seeming growth of such public organizations, detached from national hierarchical ministries, has been linked to the increasing prominence of those relationships which we term governance.

The New Public Management (NPM) has provided a recent impetus for the emergence of distributed public governance. NPM’s actual content is very fluid—in that sense it resembles the concept of governance. However, the concept of NPM does incorporate the idea of differentiation from the standard hierarchical model of public administration. It carries with it the goal of “deregulating” the public sector, of making it more linked to societal actors, of using new instruments such as “contracting out”, and of using
concepts drawn from the private sector, rather than standard civil service legalistic models to organize its activities. How far NPM can take the disassembling of the traditional public administration is still unclear, partially because the problems of horizontal coordination become magnified. In fact, the advent of “joined up government” in states which had religiously implemented the New Public Management raise doubts about how far such a process can go (Perri 6 2004).

While the literature on NPM is nearly as voluminous as that on EU governance, the two streams of literature have rarely intersected. Even though the Kinnock reforms to the Commission were inspired by NPM, EU scholars, with a few exceptions, have discussed governance without much attention to the internal dynamics of the public sector. The intersection of government and governance has not been at the forefront of the research agenda. The role played by public sector actors in the shaping of governance has been, by and large, of less interest than that played by civil society and private sector participants.

From “distributed public governance” to “distributed governance”

The emergence of such a fragmented public sector has implications for the nature of governance as understood within EU studies. The most clear cut implication would be that the greater the number of public sector units, the higher the number of potential partners potentially available to societal actors. Distributed public governance, therefore, would be linked to distributed governance in general. Secondly, it is quite possible that at least some of these public agencies and other government bodies would in fact search out partners from either the business sector or civil society. In a world of many public units, the ability to form coalitions with societal actors can serve to
enhance the competitive position of the public actor within the public sector environment. In that case, public and private actors would exist in a symbiotic relationship, one in which the public actors would be using their private counterparts to strengthen their own position within the universe of public governance.

The nature of the public actor would also help shape the nature of the public-private relationship. Conceptually, it would seem likely that an agency which was what the Swedes would call an executive agency would be more likely to have non-hierarchical relationships than would an agency which had policy-shaping power. The latter would more likely “steer” the relationship while the operational agency would be likely to interact in a more collaborative fashion as its own mandate would not be a policy-making mandate.

However, the nature of the policy sector would likely be important, as well. If the sector involves the delivery of public services, the relationship would be different from one that focused on a regulatory agency or one that was given the task of enforcing certain limits within for example environmental policy. The policy sector and the type of administrative organization would both be important in shaping the exact nature of the governance system.

If in fact, the organization of the public administration matters to governance, we would expect that the dispersion of public sector authority at the national level would in fact lead to distributed governance throughout the EU. The linkages between the EU’s own institutions, including its own various agencies which have been expanding at a rapid rate, and those at the national level have become ever more complex as the EU’s range of policy responsibilities have expanded. We seem to be witnessing “agencification” at both the EU and national levels.

In that case, we are witnessing the proliferation of potential “public” partners for the non-governmental actors, the existence of which is often
subsidized by EU or national funds. Multi-level patterns of relationships are actually being shaped by the transformation of the public administration. In this view, then, the role that the external participation of the public administration plays in the “intra-public sector” game of bureaucratic politics needs to be examined. Such bureaucratic gamesmanship can proceed at different levels; in the German case, I would expect to find it at the Länder and local level, for example, given the way German federalism operates in the public administration arena.

Distributed governance would suggest a rather fluid ecology of public-private relations and thus a fluid notion of governance within the EU as a whole — at both the national and EU levels. Given the state of the public administration in the new member-states, however, it is likely that such distributed governance would be less pronounced in the EU-12 than in the EU-15. The possible role of corruption, however, could lead to a different version of distributed governance in at least some of the new accession states.

Just as scholars who are studying the role of insurgents, criminal gangs, paramilitaries, and militias are arguing that such groups represent the flip side of the way Europeanists conceptualize civil society, so too corruption may lead to a different type of distributed governance than would be common in the EU-15. The EU literature on civil society has a remarkably benign view of how civil society is organized, which even a casual discussion with a European Commission official in the Directorate-General Justice, Freedom, and Security would quickly dispel.

Clearly, such an argument will be more applicable to some countries than to others and to some policy sectors in some countries than to others. The German case does not depend on NPM and it may be less fluid. As Kohler-Koch and Rittberger (2006) point out, the German literature for the last 20 years has focused on the complexities of the “cooperative” state. One explanation for that state of affairs argues that the German administration was “ahead of the times” if you will, was more modern than those public sectors
which had to be transformed before they could be non-hierarchical and cooperative. The German federal system, the comparatively strong local governments within the Länder, and the traditionally strong role in the delivery of personal social services of what Hellmut Wollmann (2003) terms “non-public not for profit (NGO-type) welfare organizations” may help account for the difference in the literature on Germany when compared to say the UK and in some cases to Italy and the Nordic countries.

Let me conclude by saying that the concept of distributed governance should help us focus on national systems viewed as eco-systems. Within national systems, the organization of the public administration may well be important in explaining why the patterns we categorize as belonging to “governance” have come into existence. In this view, the trigger for the kind of state-society relations we are now seeing at both the national and EU levels may have been driven by changes in the organizational structure of the public sector as much as or even more than the demands of globalization and societal change. The move from a hierarchical centralized ministerial structure to that of agencies, authorities and other types of administrative bodies may well prove helpful in understanding why this phenomenon we call governance has emerged in Europe with particular force and with particular characteristics. It may also help us better understand the boundaries within which accountability can actually become operative, as well as the constraints within which civil society must necessarily develop. The study of administrative elites and of administrative structure, as well as their linkages to both civil society structures and elites, therefore, may be the next step we need to take in order to understand the new Europe of the 27.
Notes

1 For a discussion of the debate over such indicators, see Kaufmann, Kraay, and Mastruzzi, 2007.
2 I am grateful to Thomas Schott for this insight.
3 See also Morton Egeberg, “Europe’s Accumulated Executive Order,” in this volume.
4 For an exception see Bauer and Knill 2007.
5 I am grateful to Bartosz Hieronim Stanislawski of Syracuse University for this insight.

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