



Project no. CIT1-CT-2004-506392

NEWGOV

New Modes of Governance

Integrated Project
Priority 7 – Citizens and Governance in the Knowledge-based Society

Policy Memorandum on the Emergence and Evolution of the Governing Modes in the Areas of Social and Environmental Policies

reference number: 1/D24

Due date of deliverable: 31 January 2006
Actual submission date: 31 January 2006

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:

Institute for Advanced Studies, Vienna: Holger Bähr, Oliver Treib, Gerda Falkner

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	X
PP	Restricted to other programme participants (including the Commission Services)	
RE	Restricted to a group specified by the consortium (including the Commission Services)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

How does the European Union (EU) reach its decisions and which instruments does it employ to achieve its political goals? This paper sheds light on the evolution over time of different governing modes in two policy areas that are in many ways crucial for the everyday life of EU citizens: EU environmental and social policy. In order to explore the emergence and evolution of governing modes in European social and environmental policy, the present paper analyses the quantitative development of legally binding and legally non-binding policy outputs. It gives an overview of the quantitative development of binding and non-binding policy-outputs in European environmental and social policy, and presents two alternative hypotheses to explain the emergence of hard law and soft law. The paper describes changes in the decision rules in both policy areas because decision rules are regarded as a potential explanatory factor by one of these hypotheses. It then discusses the empirical findings against the background of the theoretical arguments and summarises the results of the analysis and considers their implications for future research.

Contents

1 INTRODUCTION.....	3
2 QUANTITATIVE DEVELOPMENT OF BINDING AND NON-BINDING POLICY-OUTPUTS IN EUROPEAN ENVIRONMENTAL AND SOCIAL POLICY.....	3
3 EXPLAINING THE EMERGENCE AND EVOLUTION OF GOVERNING MODES.....	4
4 CHANGING COMPETENCES AND DECISION RULES OVER TIME.....	5
5 ASSESSING THE HYPOTHESES ON THE EMERGENCE AND EVOLUTION OF GOVERNING MODES.....	5
6 CONCLUSION.....	6
7 REFERENCES.....	7

Table of Figures and Graphs

FIGURE 1: COMPARING INCREASE I: ENVIRONMENTAL POLICY AND SOCIAL POLICY (N = 590).....	4
---	---

1 Introduction

How does the European Union (EU) reach its decisions and which instruments does it employ to achieve its political goals? This paper sheds light on the evolution over time of different governing modes in two policy areas that are in many ways crucial for the everyday life of EU citizens: EU environmental and social policy. For the purposes of identifying change over time, we distinguish two ideal-typical modes of policy-making: The first type is often referred to as the “Community Method”, where the responsibility to issue legislative and policy proposals rests solely in the hands of the European Commission, the European Parliament and the Council of Ministers act as co-legislators, and the Council of Minister decides on the basis of qualified majority voting (Commission of the European Communities 2001: 6). On the other hand, there are governing modes that involve less supranational obligation and give more weight and autonomy to the Member States, like the Open Method of Co-ordination, which is based on the principles of flexibility, subsidiarity and voluntarism, and forms of policy cooperation between national actors in the realms of justice and home affairs or foreign, security and defence policy (Wallace 2000: 28-34; Borrás/Jacobsson 2004: 186-189; Schäfer 2004: 1). Although there are exceptions to the rule, the Community Method usually leads to policy outputs in the form of “hard law”, which is legally binding on all Member States and may be sanctioned by the Commission and the European Court of Justice. This feature usually is absent or less strongly developed outside the realm of the Community method. Here, we typically find “soft law”, which consists of rules of conduct that are not legally binding. Instead, soft law rests upon recommendations that target actors are expected to take into account on a voluntary basis (Senden 2004: 112).

In order to explore the emergence and evolution of governing modes in European social and environmental policy, the present paper analyses the quantitative development of legally binding and legally non-binding policy outputs. The following section gives an overview of the quantitative development of binding and non-binding policy-outputs in European environmental and social policy. Section 3 presents two alternative hypotheses to explain the emergence of hard law and soft law. Section 4 describes changes in the decision rules in both policy areas because decision rules are regarded as a potential explanatory factor by one of these hypotheses. Section 5 then discusses our empirical findings against the background of the theoretical arguments. The conclusion summarises the results of our analysis and considers their implications for future research.

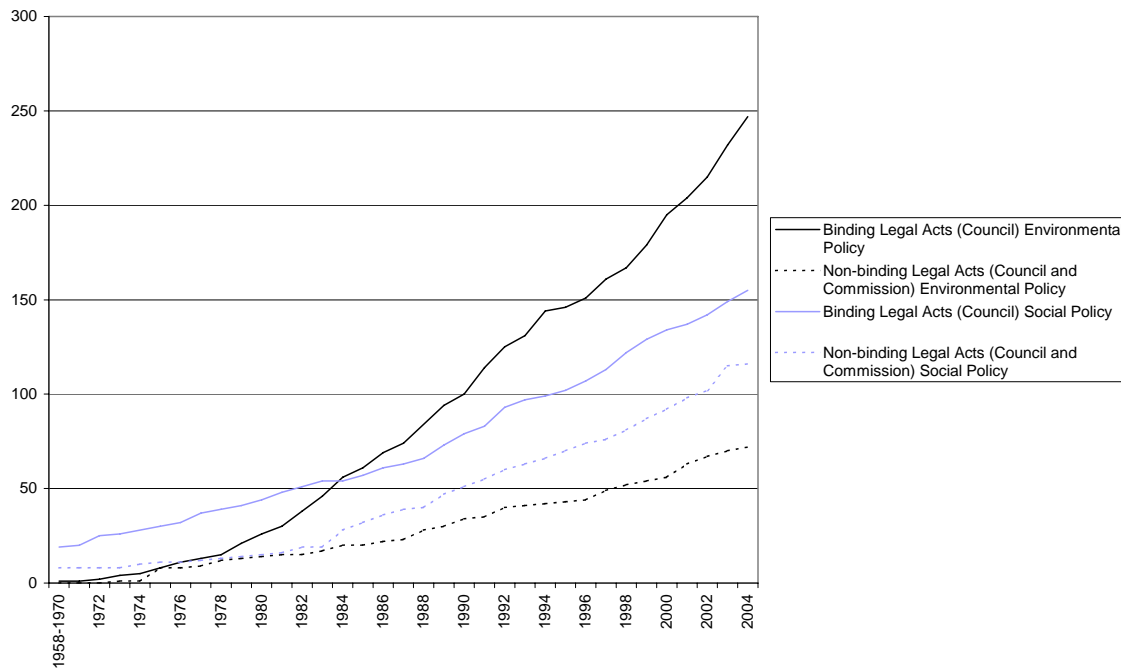
2 Quantitative Development of Binding and Non-Binding Policy-Outputs in European Environmental and Social Policy

In order to describe the quantitative development of binding and non-binding policy-outputs in European environmental and social policy, we counted all legal acts in the two policy areas as recorded in the Celex database. Regulations and directives are counted as hard law. Non-binding policy outputs include recommendations, resolutions, declarations and conclusions. The result is shown in Figure 1.

In both policy areas, the number of legal acts has steadily increased. In 2004 there was a total of 590 policy outputs in both policy areas – 319 in environmental policy and 271 in social policy. However, two different patterns of quantitative development can be observed. In environmental policy, binding legal acts show a stronger increase than non-binding legal acts. The gap between binding and non-binding policy outputs is widening in favour of the former. In contrast, legal acts in social policy show a parallel development. Both binding and non-binding policy outputs increase at roughly the same rate. Hard law shows a stronger increase

in environmental policy than in social policy, whereas soft law increases more strongly in social policy than in environmental policy. Although in both policy areas there are more binding than non-binding policy outputs during the period of examination, soft law has a more prominent role in European social policy than in environmental policy.

Figure 1: Comparing Increase I: Environmental Policy and Social Policy (N = 590)



3 Explaining the Emergence and Evolution of Governing Modes

How can we explain these patterns? Current debates among both scholars and practitioners are marked by two contradicting arguments. One school of thought argues that soft law is more effective in solving policy-problems. The argument goes back to the findings of the implementation research of the 1970s, which revealed shortcomings in the implementation of hard law that uses hierarchical and inflexible regulations (for an overview, see Püzl/Treib 2006). Hence, the expectation is that policy-makers will learn from past failures and increasingly switch to more flexible policy measures such as soft law. A similar argument has been voiced in the debate about the “Open Method of Co-ordination”. Due to the diversity of national institutions and policies in the member states, uniform regulation by hard law is regarded as inappropriate and regulation by soft law as more effective (Zeitlin/Trubek 2003). The other camp posits that hard law is more effective than soft law, especially if it comes to problems that involve redistributive conflicts and issues that would require major changes to national institutions and traditions. However, decision rules, actor constellations, and national interests can prevent the adoption of hard law. Since non-binding regulations are regarded as better than no regulations at all, soft law emerges as a second-best solution in situations where more binding solutions are politically infeasible (Héritier 2003; Schäfer 2004). While the first argument expects a steady growth of soft law at the expense of hard law, the second hypothesis points to the relevance of competences and decisions rules, which are therefore described in the following section.

4 Changing Competences and Decision Rules over Time

Both in European environmental policy and in European social policy, explicit policy competences have been successively extended at the European level and qualified majority voting has increasingly gained in importance. The Treaties of Rome did not provide explicitly for competences in environmental policy. Environmental measures could only be taken if they contributed to the completion of the internal market. Those measures had to be adopted by unanimity. In 1987, the Single European Act introduced an explicit legal basis for the adoption of legislation that seeks to protect the natural environment, and it changed the decision rules. Policy outputs that affected the common market could be passed by qualified majority, whereas the adoption of all other environmental measures continued to require a unanimous vote in the Council. In 1992, the Maastricht Treaty introduced qualified majority voting for all environmental measures regardless of whether they affect the common market or not. There are only a few exceptions, like fiscal provisions, decisions about land use or the structure of the national energy supply which still require unanimity (Krämer 2003: 72-84; Knill 2003: 28-36).

In social policy, the Treaties of Rome provided for legislative competence with regard to the free movement of workers and social security co-ordination. However, qualified majority voting only applied to measures referring to the free movement of workers. As in environmental policy, further social legislation could be adopted by unanimity if it was related to the common market. Both competences and qualified majority voting were extended by the Single European Act and subsequent treaty revisions. However, the extension of qualified majority voting was much more protracted than in environmental policy. The Single European Act made provisions for the health and safety of workers and introduced qualified majority voting in this realm. The largest institutional change came with the Maastricht Treaty, which provided a legal basis for the regulation of social security, employment, working conditions, and gender equality. While regulations of social security required unanimity, policy outputs referring to gender equality could be passed by qualified majority voting. Measures referring to employment or working conditions had to be adopted either by unanimity or by qualified majority voting depending on the specific policy issue. In 1997, the Amsterdam Treaty provided for the adoption of legislation to counter discrimination on the grounds of sex, race, ethnic origin, belief, disability, age and sexual orientation, albeit on the basis of unanimity.

5 Assessing the Hypotheses on the Emergence and Evolution of Governing Modes

The data on the quantitative development of environmental policy outputs does not unambiguously support any of the two opposing expectations outlined above. On the one hand, one cannot observe a decline in the number of binding legal acts in favour of non-binding policy outputs as it is suggested by those who argue that soft law is more effective in problem-solving than hard law. On the other hand, the argument that soft law is used as a second-best solution in situations where political conflicts and unfavourable decision rules preclude agreement on policy instruments with more teeth cannot be confirmed either because even after the introduction of qualified majority voting, we do not observe soft law being increasingly replaced by hard law. However, the aggregate data at the level of the whole policy domain might conceal institutional effects in individual issue areas. Therefore, we also looked at areas like noise pollution, waste management and water protection. This analysis, however, did not change the picture. In European environmental policy, therefore, neither decision-making rules nor more general trends towards soft law seem to have an impact on the choice of either binding or non-binding policy instruments.

As in environmental policy, aggregate data at the level of the whole policy area do not support any of the two hypotheses in social policy. However, in contrast to environmental policy, a different pattern of development can be observed at the level of issue areas. In order to analyse whether changing decision rules have an impact on the development of hard law and soft law, we take a closer look at those issue areas where the decision rules changed for a substantial amount of measures in the course of the last 30 years. This applies to the issue areas of health and safety of workers and working conditions. In health and safety of workers, qualified majority voting was introduced by the Single European Act in 1987. In working conditions, the Maastricht Treaty changed decision rules from unanimity to qualified majority voting for a substantial amount of issues covered by this category. In both issue areas, the adoption of binding legal acts increased after qualified majority voting was introduced. These observations lend support to the argument that soft law is regarded as a second-best option, which is replaced by hard law if it is made possible due to changing decision rules. The introduction of qualified majority voting boosted the adoption of binding legislation in both sub-areas, whereas soft law either decreased or remained constant.

Further evidence suggests that competences and decision rules do have a decisive impact on the choice of policy instruments in EU social policy: In areas where the EU does not have explicit competences to adopt binding legislation (and the adoption of hard law would thus require unanimity, and could be challenged on subsidiarity grounds), we actually find a fair amount of soft law, but no or almost no hard law. This is true for measures relating to family, youth and elderly people, to disabled people and to horizontal social policy provisions. In these issue areas, hard law is absent and all existing regulations are non-binding.

6 Conclusion

This paper provided an overview of the evolution of different modes of policy-making in EU environmental and social policy. In particular, we looked at the quantitative development of binding and non-binding policy instruments in both policy areas over the last 30 years. This analysis revealed that soft law plays a prominent role in social policy, whereas environmental policy is dominated by hard law. How do we account for these developments? First of all, our data does not lend support to the argument that softer policy instruments are more effective than rigid ones and that policy-makers will thus increasingly revert to soft law. We cannot observe such a general trend in any of the two policy areas. With regard to the effect of institutional conditions, our findings are different for each of the two policy areas. In EU social policy, our data support the argument that legislative competences and decision rules affect the choice of different types of policy instruments. Where the adoption of hard law is prevented by unfavourable institutional arrangements such as unanimous voting rules in the Council, we find that actors revert to soft law as a second-best solution. However, this argument does not hold true for environmental policy, where the amount of hard law increased steadily regardless of changes in decision rules.

One of the factors that might explain the different developments in environmental and social policy is the different level of political conflict in both policy domains. The fact that the expansion of explicit legislative competences and the proliferation of qualified majority voting was a much more protracted process in social policy than in environmental policy leads to the conclusion that member states have been more reluctant to cede sovereignty in social policy than in environmental policy. It seems that social policy is more deeply rooted in national institutions and domestic traditions than environmental policy, which makes for a different level of political conflict associated with policy problems addressed in both areas. Further research

will focus on the role of such factors in explaining how the European Union tries to reach its goals in different policy areas.

7 References

- Borrás, Susana/Kerstin Jacobsson, 2004: The Open Method of Co-ordination and New Governance Patterns in the EU. In: *Journal of European Public Policy* 11(2), 185-208.
- Commission of the European Communities, 2001: European Governance - A White Paper. Brussels: Commission of the European Communities.
- Héritier, Adrienne, 2003: New Modes of Governance in Europe: Increasing Political Capacity and Policy Effectiveness. In: Tanja A. Börzel/Rachel A. Cichowski (eds.), *The State of the European Union*. Vol. 6: Law, Politics, and Society. Oxford: Oxford University Press, 105-126.
- Knill, Christoph, 2003: *Europäische Umweltpolitik: Steuerungsprobleme und Regulierungsmuster im Mehrebenensystem*. Opladen: Leske + Budrich.
- Krämer, Ludwig, 2003: *EC Environmental Law*. London: Sweet & Maxwell.
- Pülzl, Helga/Oliver Treib, 2006: Policy Implementation. In: Frank Fischer/Gerald J. Miller/Mara S. Sidney (eds.), *Handbook of Public Policy Analysis*. New York: Dekker (forthcoming).
- Schäfer, Armin, 2004: Beyond the Community Method: Why the Open Method of Coordination Was Introduced to EU Policy-making. In: *European Integration Online Papers* 8 <<http://eiop.or.at/eiop/texte/2004-013a.htm>>.
- Senden, Linda, 2004: *Soft Law in European Community Law*. Oxford: Hart.
- Wallace, Helen, 2000: The Institutional Setting. In: Helen Wallace/William Wallace (eds.), *Policy-Making in the European Union*. Oxford: Oxford University Press, 3-37.
- Zeitlin, Jonathan/David M. Trubek (eds.), 2003: *Governing Work and Welfare in a New Economy: European and American Experiments*. Oxford: Oxford University Press.