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Summary

Deliverable 1/D34 (Updated State of the Art Report) updates the reports on policy areas covered within Cluster 1 of the NEWGOV consortium which formed the original State of the Art Report (1/D02). The aim of the report is not an overall description of the academic debate in the different policy areas and fields of interest as such – some of that might be included – but rather a reflection of the basic patterns, conditions and tools for decision-making and -implementation, as well as their dynamic development over the years. Thus, the report tries to provide a more subtle understanding of the basic problems of EU governance.

The different fields reveal a high heterogenity of concepts and views on new modes of governance. In some of them, e.g. Employment Policy, new modes of governance are at the core of the academic debate, particularly with regard to the Open Method of Coordination (OMC). In others, like the Common Foreign and Security Policy, there is actually no explicit discussion about new modes of governance, but a highly vivid debate upon insitutional reform and new forms of flexibility. These lines of argumentation might not correspond to the academic state in other policy fields, but they try to give an answer to similar problems. Under this perspective, it is highly useful and enriching to compare the reports delivered so far.

As a work in progress, the updated state of the art report reflects developments on the basic scientific problems related to EU governance which are adressed by the Cluster. It will provide the reader with the background to follow the lines of discussion which have emerged among cluster participants.

Project 1 has concentrated on the Common Foreign and Security Policy as well as fiscal, educational, environmental, social, economic and cohesion policy. It also encompasses an analysis of the Open Method of Coordination in the area of European Employment Strategy and Pensions. The second project has covered the European Information Society Policy and Research Policy, while project 3 treats processes of Constitutionalisation under the perspective of Treaty reform negotiations, the effectiveness of arguing and deliberation within the Convention. Project 4 analyses the debate on democracy and new modes of governance, sketching the debate upon traditional and alternative models of democratic rule, and the different expressions of new modes of governance, like soft law, auto-regulation, and delegation of decision-making powers.

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State of the Art Report
Project 1

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I. The Common Foreign and Security Policy[1]

I.1 The Nature of CFSP: From Intergovernmentalism to Transgovernmentalism

Literature on European foreign policy has become a booming industry particularly since the 1990s (White 2004; Zielonka 1998, Nuttall 2000; Hill and Smith 2000; Regelsberger, Schoutheete and Wessels 1998) A growing number of contributions describe, analyse and assess the EU's foreign policy system, its interplay with the external environment and the conceptual framing of the Union's international role, focussing to a large extent – albeit not exclusively – on the Common Foreign and Security Policy (CFSP). In this growing corpus of literature, is still rather difficult to find a consensus about how a European foreign policy can be defined, and which the shaping factors are. Theoretical and - even more - methodological questions are simply eluded in a great deal of CFSP-related contributions, while among the theoretically inspired literature there is no clear line visible about the very fundamentals of EU foreign policy. Different theoretical and conceptual approaches compete for explanatory hegemony; different research communities are engaged and apply their analytical tools: integration researchers tend to regard CFSP as the follow up to EPC and as a ramification of the European unification process, while experts of international relations adopt a more agnostic view on the integration process, regarding CFSP rather as a set of rules and principles, a regime of foreign policy cooperation, or even less - as a framework for organising diplomatic contacts.

Within the conceptual debate on the EU foreign policy, White (2004: 16ff.) distinguishes between an actor-based approach and a structure-based approach. While the first focuses to a high extent on outcome, the latter is more concerned with institutional set up and decision-making processes. Both approaches prioritise different methodological perspectives, levels of analysis and empirical fields of investigation. Different offers have so far been made to link both structures and agents, but so far no satisfactory solution has been found.

Furthermore, the debate and the discussion run across analytical perspectives; among the adherents of the "actor-based approach", it is contested if the EU represents an international actor at all, or if it merely reflects a "presence" on the international stage.

A state-centric perspective, followed by neorealists, intergovernmentalists, but also liberal institutionalists, would regard the Union's foreign policy as a special form of international relations, although organised in a dense and organisationally sophisticated manner. An opposite stream of thought would sustain that "(w)hatever 'European foreign policy' might mean, it cannot easily be contained within a state-centric analysis with relatively clear boundaries between internal and external policy environments" (White 2004: 11).

The juxtaposition between intergovernmentalism and supranationalism is rejected by a growing number of scholars, giving way to a conceptualisation of CFSP as a European form of governance in foreign policy: "EFP (European Foreign Policy, U.D.) as a system of foreign policymaking is a collective enterprise through which national actors conduct partly common, partly separate international actions" (Ginsberg 2001: 32). The notion of 'Europeanisation' is increasingly defined as a bridge linking different levels of analysis:" […] Europeanisation should also mean that the European political system is the unit of analysis rather than either the European level or national systems" (White 2004: 20). This use of the notion is however, rather peculiar and causes a number of problems as Europeanisation regularly refers to the impact of the EU on the national systems of policy-making. In CFSP conditions are so different from EC legislation that the concept of Europeanisation (Tonra 1996; Aggestham 2003)

[1] This chapter has been delivered by Udo Diedrichs.

becomes difficult to apply. There is no clear reference system in terms of legal oblications and commitments which member states would have to obey, so that the fit or misfit is nearly impossible to define; Europeanisation defined as a synonym of Brusselisation, i.e. the development of a coordination reflex and the increasing use of common practises, mutual information and exchange of views among national diplomats and policy-makers, and of a convergence of views, ideas and values, does not exactly correspond to a top down perspective, but also includes a focus on horizontal inter-state activities emerging at the national level.

In Roy Ginsberg's words, the system of EU foreign policy making is described as a "'multi-level' and mixed actor in character" (Ginsberg 2001: 33), or as a "multilevel diplomacy" (Hill 1998: 43) which can be viewed in different perspectives "as an equal and balanced system of mixed jurisdictions, national and EU, as a mishmash of confusing and conflicting competences, or as a system in evolution toward 'a' European foreign policy" (Ginsberg 2001: 33).

I.2 CFSP as a particular focus of research

Like European foreign policy in general, academic research on CFSP has undergone a process of dramatic expansion and differentiation during the last years, which however, has only slightly affected the formal rules of decision-making. In recent years, research on CFSP is in particular concerned with the following issues:

- the degree of Europeanisation of CFSP and its embedment in the process of institutionalisation and constitutionalisation of the EU; (Diedrichs 1996: 256ff.; Ifestos 1987); the institutional structure of CFSP, its consistency, efficiency, and democratic legitimacy; the impact of the Constitutional Treaty on CFSP represents in this respect a prominent issue.
- scope and substance of CFSP, with a view on political, economic, and military questions, the definition of crisis management and the nature of the Union as an 'alliance' (Regelsberger 2004: 14ff.); the evolution of ESDP marks a process whereby military tasks have been taken over and will acquire an increasing importance (Howorth 2001; Jopp 2000; 2001; Algieri 2001);
- the role of the EU in the world and the definition of this role by concepts and models, e.g. as a 'civilian power' or a 'normative power' (Duchêne 1973; Kohnstamm/Hager 1973; Maull 1997; 2000; 2002; Whitman 2002; Wagner/Hellmann 2003).
- the evolution of the European Security and Defence Policy (ESDP) as a particular and partially overlapping set of institutions, instruments and ideas which is officially described as an integral part of CFSP, but requires peculiar approaches and perspectives.

Many authors regard CFSP as well beyond classical intergovernmentalist patterns of decision-making, heading toward a "transgovernmental" mode of governance which could be described as a way of decision-making marked by regular and familiar contacts among the governmental actors of CFSP, based upon a coordination reflex and a high degree of trust which has been built up among them over the years (Schmalz 2004). CFSP is increasingly seen as shaped by processes of "Europeanisation" (White 2004: 20f.; Ginsberg 2001: 37ff), "Brusselisation" (White 2004: 21; Regelsberger and Wessels 2003; Allen 1998) or "institutionalisation" (M.E. Smith 2004: 17ff.) of actors that have traditionally not belonged to the framework of the EU. Still, these developments have not produced a European supranational authority in security and defence matters, but were built on the institutional logics of cooperation which had started with the European Political Cooperation (EPC) (Schoutheete 1986; Pijpers, Regelsberger and Wessels 1988; Nuttall 1990), following basically the lines of 'a path-dependency'. It is thus not to be expected that substantial communitarian elements will be

rooted in CFSP for the years to come, but more than classical intergovernmental cooperation has grown over the years as the dominant pattern of interaction (Howorth 2001).

However, in CFSP there is so far no broader explicit academic debate about "new" modes of governance, or about innovative elements in decision-making – except the introduction of flexibility as a third way offering a way out of the impasse created by the potentially paralysing effect of unanimity and the impossibility of introducing qualified majority voting (Diedrichs and Jopp, 2003). Instead, the two-level character of CFSP has been further developed. While EPC in the 1970s and 1980s was mainly dominated by the national level, leaving a rather parsimonious set of actors in Brussels or the capital of the Presidency (Nuttall 2000), it has well evolved into a differentiated structure consisting of the GS Council, the PSC as a permanent body, the EUMC, the High Representative, and the different CFSP-related services of the Commission and the European Parliament (Regelsberger 1999; Brandeck-Bocquet 1999; Howorth 2001), in order to underline the fact that it is not equivalent of supranational integration, but also to stress the increasing strengthening the European level.

Still, there is a widespread view in the EU that the institutional, political and military possibilities for shaping CFSP have so far not been fully exploited. Since the coming into force of the Treaty of Maastricht, reform is high on the academic agenda of CFSP. There has been a constant and intensive discussion about the need to render the CFSP institutional framework more effective, efficient and transparent. This debate can be regarded as part of the overall finalité debate regarding the European Union as a whole.Christopher Hill's famous diagnosis of a "capability expectations gap" (Hill 1993) belongs to the most frequent quotes in CFSP literature. There is a consensus within the research community that the institutional landscape still requires more clarity and rationalisation, making it necessary to avoid an “institutional overstretch” (Howorth 2001: 786; Jopp, Reckmann and Regelsberger 2002) and to render the existing set-up more coherent and consistent. Key issues to be settled concern the relationship between General Affairs Council, COPS and COREPER, the role and functions of the High Representative, the involvement of the Commission and the Parliament (Howorth 2001: 774ff.), but also decision-making procedures, in particular under the perspective of coherence, efficiency, effectiveness and democratic accountability (Jopp, Reckmann and Regelsberger 2002).

As long as unanimity prevails in decision-making, it would be difficult to make it work efficiently, in particular in view of enlargement. Flexible modes of governance seem to provide an answer to this problem, as they would allow a group of countries to move ahead without waiting for the rest of the member states (Missiroli 2000; 2002), but their inclusion into the Treaties had been blocked at the negotiations on the Treaty of Nice due to the resistance by some member countries (Diedrichs and Jopp 2003). On the other hand, flexibility within the Treaty could be a measure to prevent some EU countries from more closely cooperating outside the legal framework of the Union, totally out of reach for the other members. Against this background, it is of high interest to assess the recent reforms agreed upon in the context of the debate on the future of Europe.

Flexibility was intensively discussed during the Nice Treaty negotiations, and became a prominent issue at the debates in the European Convention and the subsequent IGC.

The Convention has triggered off a fresh dynamics in the debate on flexibility, and the outcome of the deliberations has been rich in new ideas and proposals (Wessels 2003; Jopp and Regelsberger 2003). The introduction of enhanced, structured and closer cooperation as well as the options for differentiation within the defence agency, the implementation of crisis management operations and in the building of multinational forces was surprising to many ob-

servers. In the end, the Convention has been regarded as an innovative element in the discussion on CFSP and ESDP, providing a substantial input to the reform debate.

I.3 ESDP and New Modes of Governance: Back to the Future?

The emergence and evolution of the European Security and Defence (ESDP) Policy has attracted considerable attention among of scholars, political actors, and the public in the last years. It represents a major "institutional innovation" (Stone Sweet, Fligstein and Sandholtz 2001: 18) of the EU system and has been described as "Europe's military revolution" (Andréani et al. 2001; Deighton 2002: 719), leading to the creation of a new arena for the "governance of European security" (Webber et al. 2004). Although it would be much too early to draw final conclusions on the importance and success of ESDP, it has undoubtedly fuelled a new dynamics into the debate on European security.

With the conclusion of the Constitutional Treaty by the European Council in June 2004, the development of ESDP has probably reached a new stage that will provide new institutional 'offers' to the member states. Although the ratification of the Constitutional Treaty is to be awaited, there is sufficient reason to assume that it will have a substantial impact on the future course of ESDP.

Among the key issues addressed by CFSP scholars, is in particular the creation of a foreign minister of the European Union that has inspired a considerable number of scholars. There is widespread scepticism among the research community on the feasibility and political viability of such a post, hinting at possible future coordination problems with the European Council President and the Commission President, and also questioning the hybrid institutional profile of the minister; on the one hand, he will be representative of the Council, charged with implementing decisions taken by the foreign ministers of the member states, and on the other he will act as a Commission member, independent from any pressure or influence from national governments.

Decision-making in ESDP is generally regarded as little innovative, representing a "hyper-intergovernmentalist" core within CFSP, in which questions with military or defence implications will not be amenable to majority decisions. The creation of new institutional structures in Brussels, nevertheless, might serve as an incentive for the establishment of new decision-making cultures in the EU, in particular through the interaction of military officers and representatives form the defence ministries. The EU Military Staff and the EU Military Council thus could become according to some scholars, the nucleus of an institutionalised military identity of the EU.

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II. Fiscal Policy[2]

II.1 The emergence of a mixed set of rules and procedures

Since the coming into force of the Economic and Monetary Union, the legal and institutional setup of fiscal policy in the European Union has attracted a high and still growing degree of academic and political interest (Begg and Schelkle 2005; Konow 2002; Sutter 1999). It is in particular the Stability and Growth Pact with its peculiar combination of political commitments and legally binding acts, including preventive and dissuasive elements, that has absorbed a considerable amount of EU-wide research. The "legal constitution" and the "living constitution" (Olson 2000) of EU fiscal policy, based upon primary and secondary law elements, hard and soft coordination, formal and informal procedures, represent a unique mixture of formal and informal provisions whose analysis, assessment and evaluation has become a core activity of EU-related policy research (Begg and Schelkle 2005).

However, there is disagreement as to what fiscal policy coordination de facto describes. Coeure and Pisany-Ferry distinguish between “fiscal discipline” and “fiscal coordination”, regarding the first as defined by the excessive deficit procedure (EDP), while the latter is organised mainly through the Broad Economic Policy Guidelines (Coeure and Pisany-Ferry 2003: 2ff.). Other authors define fiscal policy coordination as the process defined both by the EDP and the SGP.

An important feature of EU fiscal policy regularly targeted by the academic community consists in its embedment into a broader set of policy objectives located in the context of economic and monetary union, for which it should serve as a stabilising factor (Dyson 2000). Fiscal policy thus finds itself placed between the highly centralised area of monetary policy and the soft economic policy coordination - which also include a fiscal policy dimension: “These arrangements constitute a potentially contradictory mix insofar as the soft co-ordination procedures under the BEPGs can be flexibly interpreted and do not contain enforcement mechanisms, whereas even soft law elements of the excessive deficit procedure [...] constitute a legally enforceable process in which discretion is curtailed” (Begg and Schelkle 2005: 1047-48). Research on economic and fiscal policy coordination in the EU has regularly hinted at this mix and its virtually contradictory nature (Eichengreen 2004; Louis 2004; Buti et al. 2004; Hodson and Maher 2004).

Already the emergence of fiscal policy coordination in the broader context of the EMU has been a prominent area of investigation, focusing on the driving forces and prevailing interests (Heipertz and Verdun 2004; Dyson 2000; 2002, Konow 2002: 36ff.; Verdun and Christiansen 2000: 168f.). Institutional analyses stress the ideational convergence among member states, epistemic communities and public discourse (Dyson 2000; de la Porte et al. 2001), while other contributions stress national championship and negotiating power as well as intergovernmental bargaining (Moravscik 1999). The German model often represents a point of reference (Harrop 1998: 11). As Heipertz and Verdun point out, the contingency of the historical genesis of the SGP hints at the possibility of changing circumstances which may lead to the redefinition of national policy preferences (Heipertz and Verdun 2004). The current crisis and adjustment of the SGP might be a telling example for this assumption.

In a functional perspective, various explanatory approaches are used for explaining and justifying the existence of the SGP as a core element of fiscal policy coordination; it should serve to avoid negative external effects of expansive fiscal policy carried out by some member states, and at the same time it was designed to limit the national inclination towards incurring

[2] This chapter has been delivered by Udo Diedrichs.

debt through a set of incentives (Konow 1999: 39; Forder 1998: 38ff.). It was intended to counter external shocks, negative spill-overs and national inclinations for bail-out strategies once monetary policy has been centralised under the authority of the European Central Bank. However, the asymmetric construction of governance in Economic and Monetary Union, characterised by the highly centralised monetary policy on the one hand, and a rather weak set of rules for coordinating macroeconomic policy, has been widely regarded as an argument in favour of further strengthening fiscal policy coordination through the Stability and Growth Pact (Sutter 1999: 40). At the same time, the need for inter-policy coordination through a consistent mix of economic and monetary instruments is called for: "The need for coordination of national fiscal policies and euro-zone monetary policy arises from the need for a clearly defined aggregate policy stance and the potential costs of uncertainty regarding the direction of the policy mix in Euroland if such stance is not defined (Collignon, 2001: 25; Jacquet and Pisani-Ferry, 2001).

However, the precise composition and profile of such a policy mix remains a contested issue. The adherents of "monetary dominance" compete with the advocates of a "fiscal dominance" approach in deciding which policy should become instrumental to the other (Sutter 1999: 40f). In the political debate, the idea of a "gouvernement économique" (Verdun and Christiansen 2000: 168) carried a specific set of implications for fiscal policy which stood in tension with the idea of an independent monetary policy carried out by a technocratic ECB which would act as the key player in EMU. In a broader sense, these issues are seen as also related to more fundamental reflections on the legitimacy and accountability of EMU and fiscal policy in particular, an issue which is stressed especially by political scientists and sociologists (Hodson and Maher 2002; Verdun and Christiansen 2000; GOVECOR Final Report 2004). Hodson and Maher distinguish between two sets of relevant factors which are being discussed: common values (particularly with respect to inflation preferences), and the independence of the ECB. Both issues bear important implications for the coordination of national policies as they assume specific conditions for national autonomy in budgetary spending and fiscal discipline. Verdun and Christiansen regard the legitimacy of the EMU as a whole as comparatively frail and weak (Verdun and Christiansen 2000), as it is lacking the requirements of democratic accountability, while the technocratic legitimacy so far predominant in the ECB model is not regarded as sufficient (Hodson and Maher 2002). Meyer (2004) identifies some major gaps in creating a European public space for discussing and debating economic governance.

II.2 Governance in Fiscal Policy: Competencies, Rules and Performance

In more detail, the discussion of the institutional and procedural architecture of fiscal policy focuses on three different dimensions:

- the distribution of competencies and institutional architecture;
- the functioning of the specific set of rules and procedural provisions for fiscal policy;
- the output performance of fiscal policy coordination, in particular of the SGP.

The issue of competences is regarded as particularly crucial: “In what may seem at first glance like an important deviation from the theoretical model of fiscal federalism, which assigns the central level of government the responsibility for stabilisation, the model of fiscal policy coordination adopted in Maastricht tends to leave the responsibility for stabilisation policies prevalently up to the single member states and merely asserts the need for coordination of fiscal policies at the European level“ (Majocchi 2003: 31). As macroeconomic stabilisation in federations corresponds to the authority of the central government, not the subnational units, an asymmetry is identified which could cause serious difficulties (Hodson and Maher 2002), raising the question whether the EU should head towards the creation of a "fis-

cal federation" (Fatás 1998). Although that option is widely regarded with scepticism, the need to solve a complex and multi-levelled coordination problem is regularly underlined: "Stabilisation policy in Euroland gives rise to a twodimensional assignment problem. One is related to the fact that the European Central Bank targets union-wide aggregates, but there is no fiscal authority that determines the *aggregate fiscal policy stance* in relation to monetary policy. When fiscal authorities fail to internalise the area-wide effects of their policies, coordination failure is the result" (Collignon 2001: 24). Thus, the need for coordination between different actors in various policy areas adds up to the intra-policy coordination efforts among the member states: "In a highly integrated economic area like the EU, policy cooperation is likely to be of crucial importance because of the various interactions, spillovers and externalities from national macroeconomic policies and the complicated design and transmission of the common monetary policy of the ECB" (van Aarle et al. 2002: 230). Rational choice approaches have tried to identify the outcome of the 'cooperation game' among the member states and the ECB in fiscal and monetary policy, under conditions of full, partial or non-cooperation (van Aarle et al 2002: 230ff.), linking up to broader contributions on coalition-formation, voting power and veto players. In this complex interplay, the asymmetry arising from the different policy requirements is accompanied by an ambiguity resulting from different political audiences: "[…] there is an inherent tension in achieving a balance between credibility (with its audience of the markets) and legitimacy (with its audience of the general public) of the economic and monetary policy-mix, where credibility and legitimacy are conceptually distinct but causally related" (Hodson and Maher 2002: 392).

A second important aspect of research on fiscal policy in the EU concerns the rules of coordination with regard to their efficiency as well as the feasibility of the procedures the application of fiscal policy instruments. It has been pointed out that the “hard” dimension of fiscal policy coordination is rather a mixture of two elements: both a pecuniary charge, thus a material component, and a “loss of reputation” (de Haan et al. 2003), which, however, may affect larger countries in different ways from smaller ones. Interestingly, the research community has tried to identify factors which may influence the application of sanctions against member states; besides a small-big country divide, the sheer number of countries facing the perspective of being sanctioned, is a crucial factor; once some countries run the risk of violating the excessive deficit rules, they may become more inclined to accept a 'softer' interpretation of the rules, which could lead to a contagion effect (de Haan et al. 2003). The more countries are concerned by these effects, the more difficult could it become to enforce obedience, as “loss of reputation for all is loss of reputation for no one” (Buti and Pench 2005).

Furthermore, the asymmetry resulting from national adjustments to economic cycles is particularly being identified as a major factor of weakness in EU fiscal policy coordination, bearing the risk of generally too optimistic forecasts by governments and insufficient restraints in times of economic upswing (Mayes and Virén 2004). The theory of political business cycles tries to interpret government action as intentionally targeted at serving a range of partisan or opportunistic objectives, e.g. re-election or ideological purposes (Sutter 1999: 56ff.).

Another important factor lies in domestic institutional structures which may be appropriate or rather conter-productive for supporting the rules of the SGP (Hallerberg and von Hagen 1999). It is the domestic level of bindingness which accounts for the success of fiscal policy coordination; those countries facing delegation problems suffer from a structural disadvantage (von Hagen 1998). However, it cannot be denied that in many EU countries impressive institutional changes have been introduced with the establishment of the SGP, trying to strengthen discipline in taking fiscal policy decisions at different levels of governance, albeit with divergent degrees of success. Ever since the creation of the SGP, institutional change on the domestic level has become a prominent area of investigation, but research on this field was par-

tially misled by the early success of the SGP, drawing rather premature conclusions on the reliability of national compliance with the SGP (see some of the contributions in Dyson 2002).

A growing number of scientific contributions have focused on the impact of EU fiscal policy coordination on the national arenas (Louis and Komninos 2003). Here, it is observed that the acceptance and reputation of the SGP in most countries changed significantly with the economic situation deteriorating in the wake of late 2001 and 2002 (Linsenmann 2003; Chauvel et al. 2003; Mak 2003). The national debates on the SGP reveal a number of references to the situation in other countries; so, in Germany, in the first half of 2001, analysts hinted at the budgetary situation in Italy, France, Portugal, and Ireland, trying to defend the SGP principles against any attempt to water them down (Linsenmann 2003: 136). This attitude came to an end when the country itself turned into a sinner, and the discussion about the SGP became more critical and controversial. In general, the debate about fiscal policy in the EU varied highly across different countries, allowing only cautious assumptions on the existence of a European discourse on these matters. While media attention was comparatively high in those countries that revealed a 'deviant' fiscal policy behaviour, the emergence of a European-wide discourse has been regarded as still hampered by divergent mechanisms of public perception, filtering peer pressure through the lenses of national media systems (Meyer 2004), although the degree of Europeanization has been higher in fiscal policy than e.g. in employment policy (Meyer 2005).

The third important aspect dealt with by current research on fiscal policy coordination regards the policy performance in this field of governance. Here, it is stressed by some authors that results from the stability and growth pact have to be viewed in a differentiated manner, as national level outcomes have been quite heterogeneous (Buti and Pench 2005); some authors recognise that the SGP has indeed helped to establish a "stability culture" (Sapir et al. 2004), while on the other side, a “loss of credibility” generated in particular by an “amputation of the dissuasive arm of the pact” as a result of the suspension of the excessive deficit procedure in the cases of France and Germany has been observed (Buti and Pench 2005: 1026). Thus, rule application in this field of coordination has been viewed as rather frail and inconsistent. A broad range of contributions has been devoted to these weaknesses and failures, addressing the presumed crisis of the SGP.

II.3 The Debate on the Crisis of the Stability and Growth Pact: Reform or Replacement?

The debate on the stability and growth pact is marked by the strong perception of a crisis in the SGP and includes numerous proposals for reform or replacement stemming from academic as well as political actors (Annett, Decressin and Deppler 2005; Hishow 2005; European Commission 2004).

Key criticism targets the frail analytical basis, the excessive focus on the short term perspectives, wrong incentives, an insufficient concern for the quality of spending, the lack of differentiation by setting the same target for all, and the failing implementation, particularly in imposing sanctions (Coeure and Pisani-Ferry 2003: 4ff.). In institutional and procedural terms, the deficiencies of the SGP have been regarded as serious drawbacks: "The present arrangements are a *bricolage* of odds and ends; they do not ensure a coherent and sustainable optimal policy mix" (Collignon, 2001: 25).

From the very start already, a part of the economic community had attacked the SGP due to a perceived lack of consistency and frail rules (Eichengreen and Wyplosz, 1998). "Hence, in the last resort fiscal policy in Euroland is still guided by the principle '*chacun pour soi*' and not by

'common concern' as postulated by the Treaty. Although coordination failure in fiscal policy is of the strong form, the simple exchange of information is not sufficient to move to Pareto-improved policy mix equilibria – and certainly not to ensure optimal welfare states. What is missing is binding agreements on the aggregate fiscal policy stance. […] this fallacy is due to the institutional set-up of legitimating policy choices in Europe" (Collignon, 2001: 22). Other scholars arrive at slightly more positive conclusions, hinting at the partially successful performance of the SGP: "The widespread perception of a grave, possibly terminal, crisis of the Pact linked to the breakdown of its enforcement mechanism obscures a more mixed picture emerging from the actual fiscal behaviour induced by its rules" (Buti and Pench, 2005: 1026). In a mixed balance, the SGP is regarded to have led to cyclical stabilisation, while failing to tackle the problem of the national deficit bias in fiscal policy: "In sum, an early assessment of the performance of the Pact indicates that it has delivered a satisfactory degree of fiscal stabilisation, but it has not lived up to its promise to strengthen fiscal discipline" (Buti and Pench, 2005: 1026). Thus, Coeure and Pisani-Ferry arrive at the conclusion: "The question is thus not whether we need a SGP, but whether the design of the current one provides the appropriate incentives to national governments, while achieving the right mix between short-term flexibility and long-term constraint" (Coeure and Pisani-Ferry 2003: 4). The balance between long-term fiscal stability and short-term flexibility in fiscal policy appears as a core problem (Fatás, von Hagen, Hughes Hallot, Strauch and Sibert 2003), while the lack of fiscal dicsipline among the member states and the blunt instruments to enforce obedience has radically changed the appreciation among the expert community.

When it comes to concrete reform proposals, several schools of thought can be identified: the first approach sticks to the pact which is regarded as basically sensible and feasible; the problems are with the member states, who should solve their budgetary difficulties. A second approach is the radical opposite, i.e. the plea for abolishing the SGP, due to the unsolvable internal difficulties; a third set of proposals pleas in favour of reforming the SGP, in particular by sticking to the objectives, but modifying the rules, and a last strategy would consist in a pragmatic muddling through, changing not the rules, but their interpretations, and to smoothly adjust to the needs of daily economic and political needs (Coeure and Pisani-Ferry 2003: 7ff.).

Apart from those contributions that suggest a modification of fiscal policy coordination and the SGP in particular, there is a group of researchers advocating a total break-up of the SGP (Enderlein 2004). The death of the pact has become a regular subject of political and scientific debate: "Therefore, new forms of democratic legitimacy are needed that intergovernmental coordination cannot produce" (Collignon, 2001: 30), e.g. by strengthening the role of EU institutions (in particular the Commission, the EP and the Council), by more neatly separating the national and European competencies and by differentiating between different levels of budgetary decision-making, with the effect of creating a democratic dialogue about policy objectives in a multi-level context (Collignon, 2001: 30ff.) A divergent approach is followed by Enderlein who pleas for totally abandoning the SGP as a whole and strengthening instead softer forms of coordination, e.g. in the framework of the Broad Economic Policy Guidelines (Enderlein 2004).

The reform of the SGP in late March 2005 has triggered off rather heterogeneous reactions in the press coverage of the core EU member states. While in Germany the leading newspapers see the reform with a highly critical eye, in France the reaction seems to be more relaxed. Economic experts quoted in the German FAZ declared that the SGP is de facto dead, giving way to a "jog trot" in fiscal policy[3] and charging future generations with additional burdens,

[3] FAZ, 22.03.2005, "Ökonomen sehen Freibrief für Schlendrian"; FAZ, 22.03.2005 "Der Pakt ist am Ende"; FAZ, 22.03.2005 "Sorge um Generationsgerechtigkeit".

and even the centre-left Frankfurter Rundschau - while in principle not as harsh against the modifications introduced to the SGP – identifies a "regression in the integration process", and a bad example given by Germany to other EU countries.[4] As a general pattern of interpretation in German and British newspapers, the SGP is seen as a "paper tiger" (Financial Times) that has "lost its teeth" (Financial Times, Frankfurter Rundschau), causing a widening of the credibility gap (Guardian).[5] In the UK, there was at first sight uneasiness about the decisions taken by the finance ministers; while the Financial Times regarded it as more difficult for Britain to join the euro-zone under these conditions, the Guardian argued that in principle the decisions should be to the taste of the UK, as they stressed the role of the national capitals in the EMU, weakening Brussels at the expense of increased autonomy for the member states. French newspapers generally qualify the reform as "assouplissement" (Le Figaro, Le Monde) or a "relachement" (Figaro) of the SGP, while not being as blunt in rejection as German newspapers.[6] Scepticism prevailed in most of the newspapers ranging from the centre-right to the centre-left, while national differences in interpretation are probably most striking.

II.4 Conclusions: Hard Coordination - A Contradictio in Adiecto?

Fiscal policy represents a highly attractive case for the analysis of EU governance, as the provisions of the stability and growth pact have come under considerable pressure in the last years, leading to a debate about reforms or even replacement of the existing mechanism (Annett, Decressin and Deppler 2005; Hishow 2005). So far, the imposition of sanctions has been avoided by the Council, although a number of member states have maintained an excessive deficit over several years; the dog barked, but it did not bite (Heipertz and Verdun 2004).

The core of the problem seems to lie in the institutional design of fiscal policy coordination: “There are good reasons to believe that the issue of whether or not to allow for fiscal stabilisation in EMU is not an issue of technical effectiveness, but rather an issue of political feasibility The question is, how to achieve domestically stabilizing fiscal policies without creating a collective action problem based on free-riding deficit-spending by member countries’ governments. This question is of an institutional nature [...]” (Enderlein 2005: 1042).

The recent reform of the stability pact agreed by the finance ministers seems to hint at a softer version of the SGP, leaving more room for manoeuvre to the member states. Apparently, a model of hard coordination within the EU seems to have failed, at least in a strict interpretation of the rules. This could lead to the provoking question about the compatibility of coordination as a mode of governance and hard sanctions as a way for assuring compliance by member states.

The example of fiscal policy is telling in several ways: It can be seen as a case where the logics which dominated the emergence of a particular mode of governance – in this case the mode of ‘hard coordination’ particularly represented by the stability and growth pact – underwent substantial changes in the following years and led to a dramatic crisis: “The SGP now looks like a classic example of how an institution can miss its target, generate unintended consequences, and even result in negative consequences for its initial sponsor” (Enderlein 2005: 1046). This raises questions about the durability of policy ideas, ideational convergence and the power of norms. Much still has to be delivered on these issues.

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[4] See Frankfurter Rundschau, 22. 03.2005 "Pakt ohne Zähne".

[5] See also Financial Times, 22.03.2005, "Eurozone The Lex Column". Guardian, 22.03.2005 "How to widen the credibility gap: Notebook Pact is a bigger turkey than the original one".

[6] Le Figaro, 22. 03.2005 "L'Europe, l'ennemie de l'Europe"; "Déficit: Paris et Berlin imposent un relâchement de la discipline"; Le Monde 22.03.2005, "Berlin et Paris imposent un assouplissement du pacte de stabilité et de croissance".

It also highlights the methodological problems of defining short-term and long-term institutional effects of certain modes of governance, and of assessing the degree of compliance and deviation in fulfilling commonly agreed criteria.

Also, the example of fiscal policy coordination highlights the need for looking beyond the neat lines of a single policy, opening the perspective for addressing a mix of different, but inter-linked and mutually important policy areas. Thus the requirement for coordination is multiplied: based upon a fragmented legal basis, a mix of policy instruments in different areas has to be achieved, involving actors at several levels (European, national, subnational). In this case, asymmetry has been a prominent factor that plays an extremely important role in the research community. The asymmetries of fiscal policy coordination in the context of EMU has not been solved with the latest reform decisions, they could even gain in importance and lead to fresh pressure upon the member states.

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III. Education Policy: Latecomer in Coordination[7]

III.1 The emergence of education policy coordination: latecomer with new dynamics

Education policy officially became a field of application for the method of coordination with the decision of the March 2000 European Council in Lisbon, although de facto coordination in this area had started earlier (Halász 2003). The emergence of this particular process has been attributed to different factors, like a neofunctionalist spill-over (Halász 2003) based upon the blurring of borderlines between policy fields (in particular economic, structural, employment and social policy), which made singular isolated measures rather useless, and turned education into a key element for improving the Union's efforts for competitiveness and economic growth.

So far, actual research identifies a particular role for the European Commission in promoting a coherent education policy approach, in the establishment of the rolling agenda, and in the cyclical focus on a defined set of priorities, independent from the special political preferences of each EU presidency (Hingel 2001: 9). Hingel (2001: 18ff.) distinguishes four factors which have promoted the establishment of the EU education policy coordination: historical evolution – in theoretical terms path-dependencies; internationalisation of education – here Hingel relies very much upon a functionalist and interdependence-theoretical argumentation; preparing for enlargement; and finally the politicisation of initiatives, as a result of a top dowm approach designed by the heads of state and government and the education ministers.

The impact of the European and international context on national education policy also represents a growing field of research; in particular the 'Europeanization' of national education policy, as in the field of higher education, plays an ever more important role (de Rudder 2000), the role of transnational actors in the creation of an "educational governance" (Lawn and Lingard 2002), and the creation of a European area of education (Hackl 2001; Hingel 2001). However, much research still has to be undertaken, in particular regarding theoretical analysis on research policy (McLendon 2003). So far, a more profound insight into the limits of overwhelming pressures for harmonisation of national education structures or policies due to divergencies in national educational institutions, cultures and values has been gained (Tauch 2004; Welsh 2004).

III.2 European governance in education policy under global pressure

Halász distinguishes between harmonisation of education systems – which was not intended in education policy, and harmonisation of education policies – which is actually underway. These efforts are undertaken inside and outside the formal EU context, in cooperation with non-member countries. The education ministers meetings in Paris (1998) and Bologna (1999) has defined the establishment of a "European space for higher education" including 28 countries and to be reached until 2010 (Tauch 2004: Wächter 2004). So far, there is numerous and substantial research on this broader process of education policy coordination, in addition to the analysis of the EU specific set of institutional and procedural arrangements. The EU itself is only slowly evolving into a featured field of interest in terms of education policy. In addition to these processes, it is the OECD-led schedule for international comparative assessment of education policy results which attracts a growing number of scientific as well as political contributions. This whole discussion is mainly about the quality of education in an output-based perspective. Starting from comparing the "results" of national education policy – per-

[7] This chapter has been delivered by Udo Diedrichs.

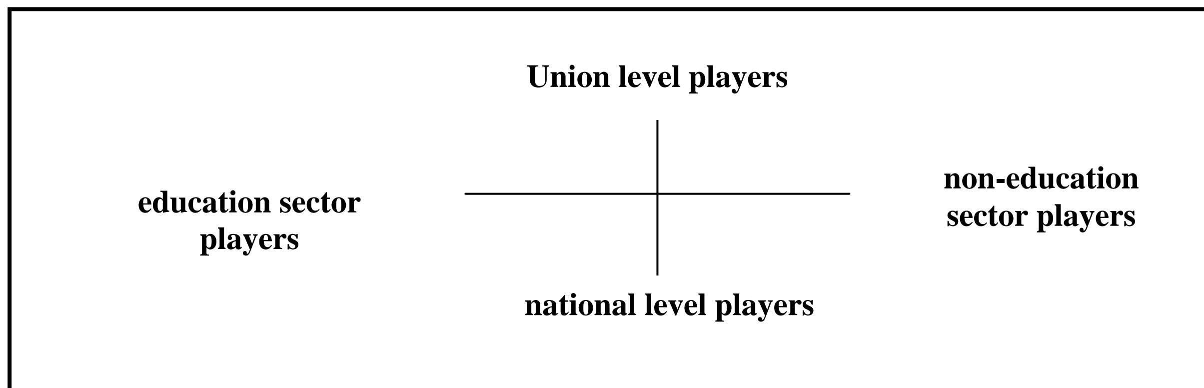
formance by selected groups of students – conclusions are drawn as to the underlying causes and factors for explaining different levels of success the national contaxt. So far, the public debate in the member states puts much less emphasis on the issue of governance and on the method of how to arrive at political decisions within the EU, than on the output and success of (national) education policy.

Thus, it comes as nor surprise that many academic contributions have to a large extent tried to feed the Bologna process by proposing measures to implement the recommendations spelled out by the education ministers (Keeling 2004). Research on education policy stresses the enormous international pressures and interdependencies which transcend even the larger EU boundaries. The intensive discussion about the emergence and growing importance of information and communication technologies (ICT), coupled with the emergence of a knowledge economy (Coulby 2001; Chan Kim and Mauborgne, 1999; European Commission, 1997; Neef, 1998; Roos, 1999; Stewart, 1997), similar to the industrial revolution, seem to require in particular an "internationalisation of higher education" (Keeling 2004; Teichler 1996, Callan 2000, Stier 2004).

Another strand of thought has been mainly critical with these developments in education policy, arguing against a too narrow interpretation of education and its relevance for the field of economy (McLaughlin 2000; Edwards 2002, Nóvoa 2002:142; Castells 1998:341). In a similar fashion, the close link of EU education policy to the Lisbon summit objectives appears as a flaw and an ideological bias. Again, these disputes are centred on the policy content of education, and leave those questions related to the mode of governance at the margin.

Some authors express sceptisicm about a purely European approach in education policy: "However, although the new 'space' as a policy objective has been declared, and follows a powerful drive towards lifelong learning and a knowledge economy in Europe, it looks unlikely that it will be delivered within a 'europeanization' process controlled by the Commission and the member states" (Lawn 2001: 1). Instead, it is underlined that the construction of an EU education policy will be undertaken in a tension between national, European and global challenges:"The contrast between the cultural strategies of a constructed 'Europe', evolved from earlier national policies, used as a deliberate policy of identity and mission construction, and the globalized space which flows across imagined land and myth with displacing educational discourses and processes, is the point of focus for the problem of 'constructing the European Education Space'" (Lawn 2001: 1).

Table III.1: The field of forces of the development of community level policy co-ordination



Source: Gábor Halász, European co-ordination of national education policies from the perspective of the new member countries, available at: http://www.oki.hu/article.php?kod=english-art-Halasz-Euro-pean.html, 2003.

So far, efforts are spent to define the peculiar features of the education policy coordination process in contrast to other cases of OMC, although much still has to be done in this regard (Hinge 2001; Halász 2003); it is stressed that education policy is characterised by a rather conflictive view of reporting needs among the member states; furthermore, observers hint at the fact that “education misses the highly developed culture of follow-up and policy evaluation characterising the employment sector and some other areas” (Halász 2003). Potential for overcoming national borders and authority by developing conceptions of “human learning” are identified by some authors (Halász 2003), while others hint at the continuing tension between international educational benchmarking and national – or subnational – responsibilities in this policy area.

“The attitude of the actors of the educational sector towards OMC may depend also on the similarity of the community policy co-ordination techniques with those applied within the national context. If the regulation techniques of OMC – based on communicative pressures through measurable indicators and mutual learning through benchmarking – are similar to those that are applied domestically, the domestic players may feel more familiar with the community method. They may also think that the OMC method learnt at community level will help them manage their own national systems” (Halász 2003).

The creation of networks at different levels and in different composition including universities, education agencies (at European and national levels), the European Training Foundation; EURYDICE as a network approach has contributed to the process of Europeanisation of education policy (Keeling 2004: 3) for gathering, monitoring, processing and circulating reliable and readily comparable information on education systems and policies throughout Europe.

Moreover, research on the education sector hints at particular problems of governance, many of them calling for aproaches that cannot be designed exclusively within national boundaries. The changing relationship between the education system and the labour market is regarded as a plea for new regulatory tools that differ from those applied in hermetic systems. The application of OMC is widely regarded, not only as a question of how far the Europeanisation of national education policies should go, but also as affecting national education systems. The fact that "OMC is designed not only to deliver new policy outcomes but also to act as a process for improving policy formation" (Hodson and Maher, 2001) can be regarded as an important contribution to the discussion about new policy instruments.

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IV. Monetary Policy[8]

IV.1 Introduction

The introduction of a common currency and the transfer of responsibility for monetary policy to a supranational level constitute, as authors in the field agree, a 'remarkeable leap forward for integration' (Verdun 2004: 85). Accordingly, this part of EU research has attracted a high degree of interest both among academics and practitioners since the early 1970s.

European Monetary Union is, from the point of view of academic disciplines, a field of high relevance for economists, lawyers, and political scientists (de Grauwe 2005, Louis/Komninos 2003; Meyer/Linsenmann/Wessels 2006 forthcoming; Torres 2003; Dyson 2002). Necessarily, the different disciplines focus on different aspects, or explore one aspect from differing angles. This report attempts an overview on the most prominent features of European Monetary Union and the main theoretical debates which have evolved around them in the three fields.

IV.2 Key features of Monetary Union and ongoing debates

IV.2.1 Overriding aim of the ECB: Price level stability

The definition of the ECB's aim is an deeply economic issue and has been the subject of vivid discussion among economists (Gaspar/Smets 2000; Smets 2000; Svennson 1999). Contrary to a model which assigns a more extensive objective to central bank policy-making (sometimes referred to as the 'anglo-french model' of central banking), the ECB is explicitly charged with the primary aim of price level stability. This is often described as legacy of the german Bundesbank policy (hence also attributed 'german model'). The 'support [of] the general economic policies in the Community' is only admissible 'without prejudice to the objective of price stability' (Art. 105 TEC). A number of authors have criticised the ECB's stance to limit its agenda to this narrow goal and argued that the wording of the Maastricht treaty leaves room for a broader support of economic policies in the Community (de Grauwe 2005: 207). The conduct of such an actively supportive policy is, for example, attributed to the US Federal Reserve.

Concerning the way towards achieving price level stability, two different debates can be distinguished:

On the one hand, there is a controversy which strategy is best suited to achieve the price level stability goal. While some authors favour a direct inflation targeting approach, others promote the role of money supply. In May 2003, the ECB announced a revision of its monetary policy strategy (ECB 2003a; 2003b) which was, up to then, formed by a compromise between the two paradigms: the so-called 'two pillar strategy' comprised economic factors as well as indicators for money supply (e.g. M3), the focus being, however, on the money supply. The strategy revision's result was interpreted by most authors as a turning back towards equally considering both the 'monetary pillar' and the 'economic pillar': money was no longer explicitly assigned a 'prominent role' (ECB 2003a; Belke et al. 2003, 2004, de Grauwe 2005). Albeit the changes implemented by this revision and during the preceding years were relatively small (Fendel/Frenkel 2006:108), the monetary pillar has lost much support among scientists because, as Gerlach (2004: 392) puts it, 'observers have failed to detect any relationship between the growth rate of M3 and interest rate decisions taken by the Governing Council of the Eurosystem'.

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[8] This Chapter has been delivered by Udo Diedrichs and Tobias Kunstein.

On the other hand, it is equally controversial among academics how to best implement either of these alternative monetary strategies.

A vast amount of literature in the field has focused on monetary policy rules as described by Taylor (1993). Particularly, these works investigate the dichotomy between rule-based and discretionary policy decisions (see, for example, Barro/Gordon 1983). Both approaches have advantages: while the former enhances transparency and reliability, the latter allows for flexibility. There has been much discussion on which approach is theoretically better suited for EU Monetary Policy. Furthermore, it is one of the most prominent questions of research for economists in this domain to determine whether the ECB relies – at least in part – on a stable policy rule (Fendel/Frenkel 2006:109) in its decision-making process.

Whatever the different viewpoints on theoretical models and strategies, most authors agree that the ECB was successful in terms of ensuring price level stability for the eurozone since 1999. (Verdun 2004: 98; Baldwin/Wyplosz 2004: 375).

IV.2.2 The central bank enjoys a high degree of independence in pursuing its goal

Independence, accountability and legitimacy are issues of high interest for political science. As the world's 'probably [...] most independent central bank' (Baldwin/Wyplosz 2004: 372), the ECB has been accused of lacking transparency by some authors. Compared to other central banks, it is true that the ECB acts less transparent by not revealing any minutes of the meetings of its decision-making committees, or information on individual instead of collective voting behaviour.

The central bank's high independence has sometimes been alleged of violating the democratic principle of accountability. However, this stance has lost prominence during the last years for several reasons: some authors have highlighted that ECB independence is only *instrumental* (how to attain the goal), whereas the goal definition itself remains outside the ECSB's responsibility (Eijffinger/Hoeberichts 2000:1). Others see the annual reporting obligations to the European Parliament and diverse periodical publications (voluntary in part) as sufficient to retain democratic legitimacy. Still, a number of political scientists reject the concept of central bank autonomy as arcane and undemocratic.

The opposite view – more influenced by economic thought – claims that by limiting ECB independence, effectiveness of monetary policy would be restrained. It is the more or less prevailing opinion among economists that the ECB can only accomplish price level stability because of its isolation from political influence: otherwise, governments might, for instance, succumb to the temptation of monetarising public dept.

This controversy has gained a new dynamics with the establishment of the informal 'Euro Group', which is seen by some commentators to act as a counterweight to the ECB by fostering coordination in interrelated sectors to Monetary Policy, e.g. fiscal and economic policies. The objection was raised that such a coordination (as proposed, for example, by Collignon *et al.* 2005: 13; see also below) might constitute a threat to ECB independence due to a 'pooling of fiscal sovereignty by national governments, which would increase their bargaining power over the ECB' (Hodson 2004: 234).

IV.2.3 Monetary Policy in the extended EU framework

There are two main spheres of interest in the broader framework of Monetary Policy: first, interrelated policy fields, and second, accession of new member states to the eurozone.

Although EU Monetary policy making is flanked by some coordination measures such as the Stability and Growth pact for fiscal policy or the Broad Economic Policy Guidelines, interre-

lated policies (e.g. fiscal policy, wage policy, economic policy) remain largely in the hands of national governments. Numerous authors have contrasted this present dismemberment with the (French-inspired) notion of an 'gouvernement économique' (EU economic government), where a supranational body disposes of competencies in fiscal policy, economic policy and taxation (cf. Wessels/Linsenmann 2002; Collignon 2005; Linsenmann/Meyer/Wessels 2006).

Why was Monetary Policy so extensively supranationalised, while those other policy areas were not? A line of argument asserts that while external developments such as globalisation exert adaption pressures on nation states, fiscal, monetary and political union are seen by many countries as intrusion into their sovereignty and therefore hardly desirable. If one has to choose, monetary union probably is the least problematic and easiest to achieve politically (Crowley 2006: 11).

Accordingly to that last point, coordination in those interrelated fields has often been organised in ways which have been coined 'new modes of coordination'. This is an aspect which the NEWGOV project will particularly address within Monetary Policy.

A contrary set-up to this intergovernmental approach can be witnessed in exchange rate policy. Exchange rate policy decisions vis-à-vis third countries are by and large the Council's responsibility. Despite affirmations that these decisions shall not run counter to the goal of price stability, a conflict of goals between the two policies is conceiveable. Accordingly, the influence on exchange rate policy excerted by the Council is believed to constitute an 'Achill's heel' for the ESCB (Görgens/Ruckriegel/Seitz 2004: 433).

Research on the accession of new EU member states to the eurozone deals with similar questions as before 1999 with respect to the original eurozone members: Does the enlarged Union form an Optimum Currency Area, are the national economies prepared for transformation, etc. The incentives for new EU member states to adopt the Euro (and in turn give up their ability to independently pursue a monetary policy appropriate for their domestic economy) are analysed by a number of publications (cf. Verdun/Croci 2005; Ca'Szorzi/De Santis 2003; Hefeker 2003). For instance, Ravenna (2005: 5) concludes that a 'credibility gain derived from committing to a fixed exchange rate can be larger than the loss from giving up independent monetary policy'.

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V. Environmental Policy[9]

V.1 State of the Art in EU Environmental Policy

The aim of environmental policy is to protect the natural environment. Environmental policy embraces several different issue areas. On its website the European Commission names – among several others – such different environmental issue areas as land use, climate change, and chemical production. Empirical studies in political science reflect that diversity by analysing special issue areas like water policy (Munro 1993), clean air policy (Héritier/Knill/Mingers 1996) or packaging waste (Haverland 2000). Moreover, studies on environmental policy use different analytical and theoretical perspectives and focus on different levels of state organisation. Vice versa, policy processes in the field of environmental policy are used as empirical material in order to develop theoretical approaches. The following sections will illustrate different research perspectives in environmental policy, with a specific focus on the European level.

V.2 The Theoretical Background: Regulation in the Face of Economic Competition

European environmental policy is generally discussed in the context of the debate on regulation and the changing functions and capacities of the state in the face of economic internationalisation. By regulation, state actors try to determine the behaviour of private, and especially economic, actors (Francis 1993: 1f; Eisner 2000: xiii). The goal of environmental policy or environmental regulation thus is to change the behaviour of economic and societal actors so as to guarantee a higher level of environmental protection than would have been possible in the absence of state intervention. Like social policy, environmental policy thus belongs to the area of market-correcting policies (see Scharpf 1999 for more details).

Against the background of increasing economic integration both at the European and global levels, political scientists have addressed the question of whether the ensuing process of regulatory competition leads to a convergence of environmental standards at a low level (race to the bottom) or whether state actors are induced to pursue high environmental standards (race to the top). This research has given rise to various conditions which facilitate either the former or the latter (Vogel 1995; Scharpf 1999; Holzinger 2002; Vogel 2001, 2003; Holzinger/Knill 2004). Another kind of regulatory competition was observed in a study on EU policy-making in the area of clean air policy. Adrienne Héritier and her collaborators argued that member states strive to transfer their national policy models onto the European level in order to save costs of adaptation to the resulting EU policies (Héritier et al. 1996; see also Börzel 2002).

V.3 Research on EU Environmental Policy

Environmental policy is one of the EU policy fields that has received most attention from EU scholars. Research on EU environmental policy has concentrated on policy-making at the European level and on the effects of European environmental policy at the domestic level. Studies of environmental policy analyse specific mechanisms of policy formulation, the actor constellations involved in policy-making and the problem-solving capacity of EU environmental policy (Héritier 1999: Chapter 5; Lenschow 1999; Eichener 2000). The number of studies on European environmental policy increased during the 1990s(Johnson/Guy 1990; Liefferink 1993; Andersen/Liefferink 1997). Several recent monographs and edited books deal with European integration and European policy-making in environmental policy

[9] This chapter has been delivered by Oliver Treib, Holger Bähr and Gerda Falkner.

(McCormick 2001; Lenschow 2002a; Wurzel 2002; Jordan 2002; Zito 2000). Moreover, most textbooks on EU policy-making include a chapter on environmental policy (see e.g. Peterson/Bomberg 1999: Chapter 7; Sbragia 2000). A recent textbook on EU environmental policy, which embraces both perspectives of European policy-making and national adaptation is provided by Knill (2003).

Effects of European integration on the member states are subject to the debate on Europeanisation (Jordan/Liefferink 2004b). Environmental policy has been one of the major objects of this strand of literature. Two different clusters of research can be discerned: The first set of studies addresses the question of whether and to what extent European integration transforms national environmental policies and whether this change results in a convergence between the member states (Knill/Lenschow 2001; Jordan/Liefferink 2004a; Weale et al. 2000). If scholars observe changes in domestic policies or even a process of convergence, it is still necessary to examine whether these observations were caused by European integration or would have occurred even in the absence of European Integration, e.g. as a result of globalisation or processes of transnational policy diffusion (Tews/Busch/Jörgens 2003; Kern/Jörgens/Jänicke 2000; Zito 1998). The second type of studies explores the conditions under which European policies are implemented effectively in the member states. Again, environmental policy was the focus of many such studies. Scholars from this strand of literature frequently discussed two causal factors: the degree of compatibility between European und national policies and the number of veto points in domestic political systems (Börzel 2000, 2003; Bailey 2002; Haverland 2000, 2003; Knill/Lenschow 1998, 2000).

Besides these implementation studies in the context of the Europeanisation debate, there is a number of contributions that are more strongly in line with national implementation research conducted in the 1970s. These authors focus less on the relationship between member states and the EU. Instead, they emphasise the organisational characteristics and resources of domestic implementation agencies and the role of different policy types (Collins/Earnshaw 1993; Heinelt et al. 2001; Demmke/Unfried 2001). Finally, there are also studies that approach the implementation and enforcement of European environmental policy from a legal perspective (see e.g. Hawke 2002).

V.4 Research on Modes of Governance in EU Environmental Policy

European environmental policy is characterised by a broad variety of different modes of governance (Héritier 1996). For the purpose of the NEWGOV project, we think that governance may be best understood as political steering. Modes of governance can thus be seen as different types or styles of political steering. On the basis of the two dimensions of "flexible or rigid implementation" and "binding or non-binding legal instruments", we have distinguished between "coercion", "framework regulation", "targeting" and "voluntarism" (Treib/Bähr/Falkner 2004: 9, 12f.). Golub (1998) distinguishes old and new modes of governance in environmental policy. Old modes of governance consist of EU directives and regulations characterised by a command-and–control style of intervention. This type of governance mode is grasped by our concept of "coercion" (binding legal instruments and rigid implementation). In contrast, new modes of governance, as they are discussed in EU environmental policy, comprise a broad variety of empirical phenomena, including economic and persuasive instruments. New instruments of environmental governance (Knill/Lenschow 2000, 2003; Jordan/Wurzel/Zito 2003a) may thus be found within the three remaining categories of our typology.

EU framework directives and economic instruments belong to what we have called "framework regulation" (binding legal instruments and flexible implementation). Economic instruments operate on the basis of market-based incentives rather than coercion. Eco-taxes, trad-

able emission certificates, provisions of free access to information, and liability schemes are among the examples for this type of policy instrument (Holzinger/Knill 2003). “Targeting” (non-binding legal instruments but precise goals with limited flexibility in implementation) includes voluntary agreements between the Commission and industrial branches or eco labels like the Eco-Management and Audit Scheme (Jordan et al. 2003b). EU Environmental Action Programmes are part of the “voluntarism” type (non-binding legal instruments and flexible implementation). Whether a non-binding policy-instrument belongs to either voluntarism or targeting is an empirical question which has to be examined on a case by case basis. For this distinction it does not matter if new modes of governance develop substantive targets like the open method of coordination or define procedural norms (Héritier 2002).

Research on different modes of governance in EU environmental policy seeks to mainly answer four questions. The first question is about the quantitative relation between different modes of governance. Although the Commission propagated new modes of governance since the Fourth Environmental Action Programme, traditional command-and-control instruments still seem to prevail in quantitiative terms, revealing the discrepancy between declarations and actual policy-making (Holzinger/Knill/Schäfer 2002; Rittberger/Richardson 2003). The second question asks why new modes of governance are chosen by political actors. In this context, scholars have highlighted the role of policy diffusion (Jordan et al. 2003b; Tews et al. 2003). Closely related are the third and fourth questions, which analyse the effectiveness and legitimacy of new modes of governance (Lenschow 2002b; Knill/Lenschow 2003; Theys 2002).

VI. Social Policy[10]

Compared to environmental policy, the field of EU social policy has received less attention by scholars, although it is still one of the more popular policy areas in EU research. In the meantime, a considerable amount of literature on EU social policy has emerged (for an overview, see e.g. Leibfried/Pierson 1995a; Shaw 2000). Moreover, many textbooks on EU policy-making nowadays include a chapter on EU social policy (for example, see Leibfried/Pierson 2000; Falkner 2003a, b). Like environmental policy, social policy is mostly concerned with market-correcting intervention, although the free movement of workers, one important sub-field of EU social policy, primarily strives for the creation of a European-wide market for workers. Still, the main benchmark for assessing the success or failure of EU social policy is its ability to secure or even improve the "living and working conditions" of workers throughout the EU (Article 136 TEC) in the face of pressures to lower existing social standards exerted by competition among member states within the Internal Market (for a broader discussion of different criteria to evaluate EU social policy, see Falkner 2000b).

VI.1 Research on EU Social Policy

Research on EU social policy in many ways paralleled the development of the field itself. In the first phase, from the foundation of the European Economic Communities to the late 1980s, the interest in EU social policy was as modest as the overall significance of "social Europe" within the whole process of European integration. The liberal bias of the Treaties of Rome subordinated social policy to economic integration. Only few fields of social policy were thus explicitly mentioned in the Treaties, and some of them even concerned market building in the field of social policy rather than market correction. This was true for the free movement of workers, where the Community soon became active and adopted a number of wide-ranging regulations to co-ordinate the national social security systems with a view to securing the status of internationally mobile workers and their families. In the meantime, a wealth of case law by the European Court of Justice has evolved to support these efforts at eliminating welfare-state barriers to the free movement of workers. This dynamic field of EU social policy has also attracted the interest of European integration scholars. Thus, Leibfried and Pierson (1995b: 63) argued that the Community's measures to co-ordinate national welfare systems cuts deeply into the sovereignty of member states (see also Pierson/Leibfried 1995; Ireland 1995).

A few studies also focused on the operation of the European Social Fund (ESF), the only noteworthy spending programme in the field of supranational social policy (see e.g. Collins 1983; Laffan 1983). However, the overall resources of the ESF are rather small, at least if compared to agricultural policy or the structural funds. Moreover, as scholars like Anderson (1995) or Lindley (1996) have shown, the integration of women or young persons into the labour market is only one goal of the ESF. Especially since the reform in 1988, it has been the primary objective of the ESF to give money to poor regions. Therefore, the ESF is more an instrument of regional than of social policy (for this differentiation, see also Majone 1993: 163-64).

Much more interest has been devoted to the field of gender equality. The Treaties of Rome already laid down the principle of equal pay for women and men. In the 1970s and 1980s, a number of far-reaching directives on gender equality followed. Considerably strengthened by the ECJ's extensive case law in the field (Shaw 2001), the area of non-discrimination of women and men has meanwhile developed into one of the most significant examples of mar-

[10] This chapter has been delivered by Oliver Treib, Holger Bähr and Gerda Falkner.

ket-correcting intervention in the EU (for an overview, see Mazey 1988; Mazey 1998; Ostner/Lewis 1995; Hoskyns 1996; as well as several contributions in Shaw 2000).

Significant progress in the areas of social security and labour law was long hampered by the lack of explicit legislative competences. Hence, the Community could only become active in these fields if such intervention was necessary or functional for market integration (Arts 100 and 235 EEC Treaty). Since this required unanimous agreement among member state governments, the legislative output in these areas remained tightly circumscribed. The few measures adopted in the first phase concerned issues of collective labour law, such as consultation rights of worker representatives in the case of company mergers or insolvencies.

After the proclamation of the Single Market project, the lack of Community intervention in social policy became a matter of growing concern among politicians, trade unionists and scholars. The plans to create a Community-wide market by eliminating existing barriers to the free movement of goods, capital, services and labour gave rise to debates about "social dumping", a process where member states with high social standards would try to attract foreign companies by competitively lowering their levels of social protection. In the absence of common European standards, it was argued that this could develop into a "race to the bottom" resulting in a widespread dismantling of domestic welfare systems and workers' rights (see e.g.Breit 1988; Brok 1988; Däubler 1988, 1989; Deubner 1990; Deppe/Weiner 1991; Falkner 1993). The minimum function of EU social policy was thus seen in the prevention or at least mitigation of these negative effects of market integration (for more details, seeFalkner 2000b).

After the Single European Act had introduced an explicit competence to regulate, issues regarding the health and safety of workers and the field of labour law more generally saw significant progress through qualified majority voting. In the aftermath of the Single European Act, a raft of directives on occupational safety and health in a narrow sense were adopted. Eichener (1997; 2000) interpreted the rather progressive standards of some of these directives as evidence for the weakness of intergovernmental models of EU policy-making. Instead, he advanced a historical institutionalist argument stressing the role of the Commission and the European Parliament in pressing for far-reaching European standards and the inability of member state governments to properly assess the real effects of such complicated proposals in the decision-making process.

The new option to decide by qualified majority voting, however, did not only further Community regulation in health and safety as such. The loose wording of the respective Treaty article (Art. 118a EECT) was exploited by the European Commission to get other proposals adopted. On the basis of what Rhodes (1995: 99) has called the "treaty-base game", the Commission stretched the limits of Article 118a as wide as possible and tabled more general labour law proposals on this legal basis in order to circumvent the notorious veto of the British Conservative government.

The Maastricht Treaty can be seen as the constitutional milestone in the development of social policy. The Treaty revisions since then (Amsterdam, Nice) only brought about comparatively minor improvements. The basic institutional framework has remained stable ever since.[11] The Maastricht reforms significantly expanded the legislative competences of the Community, as well as the scope of qualified majority voting in the area of social policy. Moreover, Maastricht introduced an innovative procedure that allowed the European peak management and

[11] A significant exception is the Amsterdam Treaty's employment chapter. However, we will not go into details about research on employment policy co-ordination here, as this is the specific focus of other members of the cluster.

labour associations to conclude agreements which could then be transformed into binding Community law by the Council. As the British government was not willing to agree to these wide-ranging reforms, it opted out of the new rules. Therefore, the revised social chapter did not replace the old one, but was included in a protocol that only applied to the remaining eleven member states without the UK. In Amsterdam, the British opt-out was ended after the Conservatives had been voted out of office and a Labour government had assumed power.

This new institutional set-up attracted the attention of many scholars. The new social partner procedure has, in particular stimulated a number of studies and also has resulted in several directives that were exclusively negotiated by the EU-level social partners. The controversial results of these studies, in turn, gave rise to a lively debate over the assessments of the new procedure. Some argued that the Maastricht innovations had created a "corporatist policy community" (Falkner 1998, 2000a) that succeeded in unblocking some of the controversial legislative projects and even created partly significant policy outcomes in material terms (Dølvik 1997; Hartenberger 2001). Others were more sceptical, stressing that the agreements largely represented no more than the lowest common denominator of existing domestic standards and that the road towards significant progress in the field was still blocked by the heterogeneity of interests among member state governments and the opposition of employers (Rhodes 1992; Streeck 1997; Keller 1997, 1999; Keller/Sörries 1999). Streeck (1998) argued that employers agreed to enter into negotiations only in order to have an effective veto over any unwanted proposal that might otherwise pass through the Council by qualified majority.

The controversies over the post-Maastricht developments in EU social policy in essence were controversies over the proper assessment of a new, more flexible style of policy-making that had succeeded earlier efforts at harmonisation. This debate thus brings us to the research on different modes of governance in EU social policy.

VI.2 Research on Modes of Governance in EU Social Policy

While the regulatory approach in the 1970s had been marked by attempts to comprehensively harmonise national standards, most of the measures adopted in the 1990s were marked by a new regulatory method based on compulsory minimum standards, possibilities for derogations and soft law. Since then, social policy directives typically only define a common floor of minimum standards but leave it open to the member states to uphold or establish more far-reaching policies. This is often accompanied by opportunities to exempt or derogate from specific provisions. Moreover, some of the directives also included non-binding recommendations that may or may not be adopted by member states in implementation. Hence, this new style is a combination of what we have elsewhere (Treib et al. 2004) called "framework regulation" (binding standards with leeway in implementation) and "targeting" (clearly specified recommendations which may be adopted on a voluntary basis).

There are two opposing interpretations of this new mode of governance in the literature. Following Fritz Scharpf's seminal article on "community and autonomy" (Scharpf 1994), this development could be interpreted in a rather optimistic way, as a response to "a need for co-ordination techniques which impose minimal constraints on the autonomous problem-solving capacities of member states" while improving the policy-making capacities of the European Union (Scharpf 1994: 219 and 20). Hence recent EU social directives might be appreciated as a form of "multi-level policy-making in which central authority, instead of weakening or displacing the authority of member states, accepts and strengthens it – and in which member states, for their part, will respect and take advantage of the existence of central competencies in devising their own policies" (Scharpf 1994: 227).

A pessimistic interpretation has been advanced by Wolfgang Streeck, who has criticised the new style as a form of "(neo-)voluntarism" (Streeck 1995b). This mode of governance is characterised by its low capacity for imposing binding obligations on market participants and its, in practice, deregulatory effects due to ungoverned competition between national regimes. Neo-voluntarism thus "stands for a type of social policy that tries to do with a minimum of compulsory modification of both market outcomes and national policy choices, presenting itself as an alternative to hard regulation as well as to no regulation at all" (Streeck 1995a: 424). It "allows countries to exit from common standards where their polity or economy will not sustain them, […] gives precedence to national practices and contractual agreements between market participants [...], [and] offers actors, public and private, menus of alternatives from which to choose" (Streeck 1995a: 45-46; see also Streeck 2000; 2001).

It was the aim of a collaborative research project headed by Gerda Falkner to shed new light on the real consequences of this flexible regulatory mode. As all judgements about the probable effects of certain legal provisions must remain open for different interpretations, the project turned to actual implementation in the member states. Hence, the area of implementation was discovered much later than in environmental policy. The results of this project, which are based on 90 case studies on the implementation of 6 directives in 15 member states, are as follows:

Despite serious implementation problems in many member states, the directives actually led to a successful approximation of the working conditions at the domestic level in relative terms, that is without producing full convergence of the different domestic rules and regulations. Clearly, these EU laws did not give rise to a level playing field for workers and employers across Europe. Nevertheless, the diversity of domestic labour law regulations is now less than it would have been without the directives. Moreover, the directives served as a safety net guaranteeing a lower floor of employment rights. Despite flexibility in implementation, therefore, they fulfilled the minimum function of preventing or mitigating social dumping tendencies, at least in the specific areas covered (Falkner et al. 2005: Chapter 16).

In contrast, the consequences of the non-binding recommendations have to be judged more cautiously. Although the recommendations were taken up and even transformed into binding law by certain member states quite regularly, the overall picture is very patchy. Hence only governments who were favourably disposed towards the recommended goals actually responded to the soft law provisions, whereas those who were opposed felt no need to take them into consideration. Moreover, those recommendations with the most far-reaching effects in terms of costs were mostly ignored. In other words, soft law may have an effect in the member states, but its fate depends completely on the willingness of domestic actors. If the goal is to reach a "level playing field" across Europe, this is hardly an appropriate method of regulation (Falkner et al. 2005: Chapter 10).

Finally, the project produced an overview of the quantitative development of binding and non-binding policy instruments in EU social policy from 1974 to 2002. Based on Celex data, this analysis revealed that the actual development of both types of instruments has been approximately parallel. The non-binding social acts have very slightly dominated the binding acts ever since 1984 but have not grown faster than the binding ones in recent years. In other words, although there is a steady growth of soft law in the field, there have been no indications so far that voluntary measures actually replace binding ones (Falkner et al. 2005: Chapter 3).

VI.3 Conclusions

This short literature review of research on EU social and environmental policy has shown that both fields have attracted a considerable amount of scholarly attention. In quantitative terms, environmental policy is certainly in the lead, but interest in social policy has also grown considerably since the 1990s. Both fields predominantly deal with market-correcting interventions that have the aim of counteracting race-to-the bottom tendencies resulting from regulatory competition within the liberalised Internal Market. This similarity makes them ideal candidates for a cross-policy comparison.

Much of the existing research on new modes of governance in the European Union dealt with either of the two policy fields. This is all the more true if we include in our analysis research on the open method of co-ordination, which largely deals with issues belonging to the field of social policy as well.[12] In both fields, there have also been attempts to quantify the significance of traditional, rigid and binding policy instruments vis-à-vis more flexible or non-binding ones (for a quantitative snapshot of old and new modes of governance covering all policy measures published in the Official Journal between January 2000 and July 2001, see also Héritier 2002).

However, what is still missing is a clear conceptualisation of (different types of) old and new modes of governance. Without such a clear conceptualisation, all quantitative analyses must remain incomplete or open to challenge since different scholars might use very different notions of old and new modes of governance. It is therefore of utmost importance to come to a generally accepted clarification and operationalisation of the basic terms underlying the NEWGOV project. We have elsewhere described the different conceptual approaches to be found in the literature as well as our own suggestion of a fourfold typology of different modes of governance (Treib et al. 2004). In our view, this typology represents a good starting point for further debates. On this basis, we should be able to conduct a more fine-grained comparison of the quantitative development of various governance modes in both policy fields.

What is also missing in the literature are theoretically founded explanations of the emergence and evolution of old and new modes of governance. It is our contention that we also need a comparative perspective to answer these questions. More precisely, we think that a comparison between the EU and the domestic levels could enhance our understanding of why new modes of governance have emerged and how they evolve over time. This is especially true if we want to find out whether more flexible modes of steering are a reaction to a general failure of the traditional top-down model of intervention or whether they are specific to (or at least much more frequent in) the EU, e.g. because they are a reaction to impasses in the decision-making process which preclude the adoption of more binding modes of steering (see our three hypotheses included in a separate file).

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[12] Note again that we have deliberately left out the OMC literature in our overview as other project partners focus on these issues.

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VII. Economic and Cohesion Policy[13]

VII.1 Cohesion Policy and the New Member States

With the simultaneous accession of ten new member states into the European Union in 2004, cohesion policy underwent a decisive break, which was reflected in intensive academic discussion. In addition to effects at the European level, adaptation pressure led to changes within the national policy areas tangent to EU structural policy and cohesion policy. Due to the fact that these developments took place relatively recently, much research still needs to be done in order to deepen the present discourse and to substantiate it both quantitatively and qualitatively.

As a first measure of classification, a form of 'Latecomer statehood-advantage' has been identified by many contributions: The new member states of the EU had to establish institutional frameworks, which can serve the cohesion policy. The central European countries are grouped into two categories: first, those countries, which had their independent statehood before the systemic change (Poland, Hungary, Czechoslovakia) and second, those countries, which regained their independent statehood when the systemic change started (the three Baltic states and Slovenia). The Czech Rep. and Slovakia are special cases in certain sense. We suppose that the second category of countries could implement the institutional framework required by the EU more easily than the first category of countries because the countries having regained their independence had more institutional flexibility at that time. Those countries, which had their independent statehood even prior to the systemic change may have faced with institutional rigidity, vested interests, rivalry among domestic institutions (ministries, offices, agencies, etc.)

This institutionalisation process can be characterised as hard one in the case of the first category of countries, whereas it can be characterised as soft or flexible one in the case of the second category of countries.

However, the presence of foreign capital (FDI of multinationals, big foreign companies or in certain cases even the SME) urges the application of flexible or new forms of governance. The realisation of interests of these interests groups and that of the institutions of the host countries take place very often through informal channels on the basis of mutuality or individual treatment. The competition for new investments and later the endeavour of maintaining them in the country on one hand and demands by companies for preferences and favourable investment conditions on the other lead towards these practices. On this basis, one may make the following hypotheses: the larger the share of the FDI in a new member state the stronger the endeavour to implement new modes of governance in the development policy including the realisation of cohesion policy

As a result, the existence of 'Negative interests' can be expected: Both the levels of standard of living and development in the new member states could influence the process of implementation of the required institutional structure of the cohesion policy. The more developed a country was the less interest it had in the realisation of this process.

Concerning the prospective recipients of cohesion policy means, the following remarks can be made:

The ability of social groups to assert their interests in the realisation of the cohesion policy depends on the available policy means. In the new member states there are different condi-

[13] This chapter has been delivered by Kálmán Dezséri.

tions than in the former member states. E.g.: The civil society is a much less developed, which hinders it to express and effectively defend its interest.

Given this, one can anticipate a ‘Learning-by-doing effect’ The gradual evolution and implementation of cohesion policy in the former member states brings about different conditions than the new member states actually experience and will experience in the future.

VII.2 Major instruments of governance between 1988-2002

The major legally binding instruments governing Regional/Cohesion Policy are Council Regulations on the establishment, tasks and functioning of the Structural Funds and the Cohesion Fund (and lately establishing the Solidarity Fund); e.g.:

- Council Regulation (EEC) No 2052/88 of June 1988 on the Tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments
- Council Regulation (EEC) No 4254/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund
- Council Regulation (EEC) No 792/93 of March 1993 establishing a cohesion financial instrument
- Council Regulation (EC) No 1164/94 of May 1994 establishing a Cohesion Fund
- Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund

As regards execution, the most widely used legal instruments (representing the greatest part of the nearly 1000 relevant documents) are Commission Decisions, such as:

- Commission Decisions approving Integrated Mediterranean Programmes for the Southern Member States
- Commission Decisions establishing Community Support Frameworks for NUTS II regions under Objectives 1, 2, 5/b
- Commission Decisions approving Single Programming Documents for the Structural Funds
- Commission Decisions approving individual projects for the Cohesion Countries under the Cohesion Fund
- Commission Decisions approving (or modifying) Community Support Frameworks, Single Programming Documents and the Community Initiative Programmes in respect of a Member State

As non-binding but highly informative documents from the point of view of our research are the Reports of the Court of Auditors on the implementation of the Regional Policy, such as:

- Court of Auditors Special Report No 15/98 on the assessment of Structural Funds intervention for the 1989-93 and 1994-1999 periods together with the Commission’ replies (98/C 347/01)

VII.3 National documents on regulation and strategy issues

VII.3.1 Czech Republic

National Strategy of the Czech Rep. for the EU Cohesion Fund – Sector of the Environment - Prague, May 2003

National Strategic Document of the Czech Rep. for EU Cohesion Fund – Transport Sector (period 2004-2006) - Prague February 2003

VII.3.2 Estonia

Ministry of Environment: Reference framework for the Cohesion Fund 2004-2006 in environment sector - November 2003

VII.3.3 Hungary

Magyar Köztársaság Kohéziós Alap Keretstratégia Környezetvédelem 2004. és 2006. közötti tervezési időszakra - Budapest 2003. április

Kohéziós Alap Keretstratégia Közlekedés 2004. és 2006. közötti tervezési időszakra - Budapest 2003. április

Kohéziós Alap Keretstratégia 2004. és 2006. közötti tervezési időszakra - Budapest 2003. április

VII.3.4 Latvia

Reference Framework for Assistance from the Cohesion Fund for the period 2004-2006 - Riga November 2003

Ministry of Transport of the Republic of Latvia: Cohesion Fund Strategy: Transport sector 2004-2006 - Riga 2003

Ministry of Environment of the Republic of Latvia: Latvian Cohesion Fund Strategy: Environmental Sector 2004-2006 - Riga July 2003

VII.3.5 Lithuania

Minister of Finance of the Republic of Lithuania, Minister of Environment of the Republic of

Lithuania and Minister of Transport of the Republic of Lithuania Order No 1K-054/D1-79/3-99 of 20 February 2004 : Cohesion Fund Strategy for the years 2004-2006 - Vilnius 2004

VII.3.6 Poland

Ministry of Economy, Labour and Social Policy: Poland Framework reference document for Cohesion Fund – National Development Plan for 2004-2006 - Warsaw, December 2003

VII.3.7 Slovakia

Ministry of Construction and Regional Development, Ministry of Transport, Post and Telecommunication: Slovakia Cohesion Fund Strategy for the 2004-2006 Transport infrastructure - Bratislava December 2003

VII.3.8 Slovenia

Republic of Slovenia Ministry of Environment, Spatial Planning and Energy: Strategic Reference Framework for Cohesion Fund Assistance - Environmental Sector - Dec 2003

Ministry of Transport Strategic Reference Framework for Cohesion Fund Assistance - Transport Infrastructure - December 2003

VII.4 Further selected literature

VII.4.1 Hungary:

Government regulations:

117/2001. (VI. 30.) Kormányrendelet a SAPARD Többéves Pénzügyi Megállapodás kihirdetéséről.

80/2003. (VI. 7.) Kormányrendelet az Európai Uniós előcsatlakozási eszközök támogatásai felhasználásának pénzügyi tervezési, lebonyolítási, számviteli és ellenőrzési rendjéről.

81/2003. (VI. 7.) Kormányrendelet a Mezőgazdasági és Vidékfejlesztési Hivatalról.

124/2003. (VIII. 15.) Kormányrendelet az Európai Unió által nyújtott egyes pénzügyi támogatások felhasználásával megvalósuló programok monitoring rendszerének kialakításáról.

196/2003. (XI. 28.) Kormányrendelet a Nemzeti Fejlesztési Hivatalról.

233/2003. (XII. 16.) Kormányrendelet az Európai Unió Strukturális Alapjai és a Kohéziós Alap támogatásainak fogadásához kapcsolódó pénzügyi lebonyolítási, számviteli és ellenőrzési rendszerek kialakításáról.

1/2004. (I. 5.) Kormányrendelet az Európai Unió strukturális alapjaiból és Kohéziós Alapjából származó támogatások hazai felhasználásáért felelős intézményekről.

92/2004. (IV. 27.) Kormányrendelet az Európai Unió Európai Mezőgazdasági Orientációs és Garancia Alap Garancia Részlegéből finanszírozott intézkedések pénzügyi, számviteli és ellenőrzési lebonyolítási rendjéről.

119/2004. (IV. 29.) Kormányrendelet az Európai Uniós előcsatlakozási eszközök és az Átmeneti Támogatás felhasználásának pénzügyi tervezési, lebonyolítási, számviteli és ellenőrzési rendjéről.

VII.4.2 Baltic states:

Vanags, Alf (2005): The governance of employment and economic development in the Baltic States. In: Employment, economic development and local governance in Latvia. 18 January 2005 (OECD, LEED Programme)

Association of Local Authorities in Lithuania (ALAL) http://www.lsa.lt

BSSSC position on the European Commissions White Paper European Governance (KOM (2001) 428 final) March 25th, 2002M; http://www.cbss.st

Jauhiainen, Jussi S. (2005): Local Governance in Estonia. Employment, Economic development and Local Governance in Latvia. OECD LEED Programme. Conference 18 January, 2005, Riga. Latvia

Latvian Association of Local and Regional Governments (LALRG): http://www.lps.lv/start.php?lang=en&s1=1&id=1

Statement of the Union of the Baltic Cities by Per Boedker Andersen, President of UBC at the Conference "Baltic Sea Region - Perspective 2010", Brussels, 23 November 2004

VII.5 First conclusions

When examining CELEX-sources covering the indicated 14 years, no important change in the use of legal tools can be perceived. In this context the bulk of “primary” legislation governing

Regional/Cohesion Policy is made up of Council Regulations, while the "secondary" legislation in this respect is represented by Commission Decisions. The ratio between the former and the latter would be around 15-85%.

Hypothesis 1: Because of the high amount of money at stake (entailing strict audit rules) and because of the high – and ever increasing – number of actors (beneficiaries) it seems to be unlikely that the governance of Regional/Cohesion Policy would swing towards the use of soft law and flexible implementation.

Hypothesis 2: Notwithstanding Hypothesis 1, there might be some "niches" inside this policy – both on the regulation and on the implementation side – where the emergence of New Modes of Governance cannot be excluded. This presumption can be based on the various shortcomings in the implementation of Regional/Cohesion Policy the Court of Auditors mentions in its Report.

The question arises: do these shortcomings lead to more stringent rules or – on the contrary – do they lead to the use of NMG? In other words: is it increased strictness or increased flexibility (or the combination of the two) that enhances efficient implementation of Regional/Cohesion Policy of the European Union?

VIII. Budgetary Policy and Redistributive Modes of Governance[14]

VIII.1 Evaluation

This research work is exploring the development of the open method of coordination in certain areas of economic policy. The first task is the identification of the relevant economic policy fields because the governance issues of the fiscal and monetary policies are tackled by another research team. The second task is the mapping of the development of the new modes of governance on these economic policy fields. The third task is the evaluation of this development process.

The research work analyses the relevant regulations of the Council and focuses on the experience of implementation and practice of the governance in the new member states. The research work pays particular attention to the selected fields of the economic policy which have particular importance in the Lisbon Strategy.

The research work addresses some questions. First, to what extent can the new modes of governance be effectively applied in the selected areas of the economic policy? Second, will it lead to policy transfer to the EU and hence act only as a transitional mode of governance? Third, whether the new modes of governance can offer a new approach to governance of the EU in the selected fields of economic policy as a heterarchial, decentred and dynamic process. Fourth, what kind of impact of the new modes of governance may have on such issues as the principle of subsidiarity or alternatives to the treaty rules and enhanced cooperation as well as legitimacy issues in the selected fields of economic policy.

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[14] This chapter has been delivered by Kálmán Dezséri.

IX. The European Employment Strategy and the Open Method of Co-ordination[15]

IX.1 The European Employment Strategy and the Open Method of Co-ordination

From the 1990s some key events at the European level (e.g. the launch of the EMU, the Amsterdam Treaty, etc.) has contributed to move new procedures of policy-making on social issues at the top of the agenda (of both political and academic actors) (Hartwing et al., 2002; Pochet, 2005; Zeitlin, 2005a; 2005b). The following pages will briefly review the main lines of argument proposed in the scientific literature on new modes of governance in the social policy field. In particular, we refer to the European Employment Strategy (usually considered the prototype of the OMC) with some reference to the open method of co-ordination on social inclusion and pensions (this last field will be investigated in the next part of the present deliverable).

In the literature on the OMC, the dominant analytical approach is explicitly or implicitly situated in the multi-level governance literature. The starting point of this perspective is that the European Union is increasingly complex (Kooiman, 1993), and that traditional top-down regulatory mechanisms are insufficient to adequately deal with this complexity. What is required are ‘new modes of governance’ able to respond to the challenges created by increased complexity. The OMC is frequently characterised as a ‘new mode of governance’ in a multi-level European Union which exhibits overlapping competencies assigned to multiple levels of government, and interactions of political actors which cross those levels (Marks et al., 1996). New modes of governance can be referred to as “…the range of innovation and transformation that has been and continues to occur in the instruments, methods, modes and systems of governance in contemporary polities and economies, and especially within the European Union (EU) and its Member States (both current and prospective)”. In contrast with “traditional” modes of governance, they are “only marginally – if at all – based on legislation and/or rely on the self-regulation of private actors, the co-regulation of private and public actors as well as the delegation of tasks to new public actors (regulatory agencies) in policy formulation”. The distinctiveness of this analytical approach is its focus on the meso and micro levels of policy-making.

A vast literature has focused on the functioning of single OMC processes. There are numerous accounts of how the EES – as the precursor the OMC – works as a process (Goetschy, 1999, Jacobsson, 2001a and 2001b; Szyszczak, 2000a and b; Trubek and Mosher, 2001; de la Porte and Pochet, 2002). Some were written prior to the coining of the OMC concept. In these accounts, the process is described as being based on guidelines that provide a margin for adaptation at national level, but which also involve processes of benchmarking, multilateral surveillance and peer review. Member States are encouraged to transpose specific policy objectives in the Employment Guidelines to national level programmes in ways which accord with their particular socio-economic circumstances. To illustrate their efforts, Member States submit a National Action Plan (NAP). The Commission and the Labour and Social Affairs Council in turn synthesise the national reports and make an annual assessment of progress of the individual Member States and the Union as a whole. Since 1999, the Commission has issued individual recommendations, to be endorsed by the Council, to the Member States for corrective action. In this light, the Labour and Social Affairs Council adapts the guidelines and decides on new initiatives at Community level. This process is repeated on an annual basis (de la Porte et al., 2001; Adnett, 2001).

[15] This chapter has been delivered by David Natali.

The example of the EES was then followed in other social policy sectors, notably those of social inclusion and pensions policy. While the main procedural traits were maintained, some peculiarities characterised each single co-ordination process (Peña Casas et al., 2001; Ragaglia, 2001; Ferrera et al., 2002 on social inclusion; de la Porte and Pochet, 2002; de la Porte and Nanz, 2004 on pensions).

These accounts of the OMCs also provide details of the institutional set-up, where the Committees (e.g. Employment Committee, Social Protection Committee, Economic Policy Committee), the Council, and the Commission are key players. These studies most often point to the continuous shift in the balance of power between the Member States, in an intergovernmental logic, and the Commission, in a supranational logic. However, these approaches are not used as fully-fledged explanatory frameworks. They focus on the macro level, and are above all useful to explain "history-making moments such as treaty revisions or major crises" (Rosamond, 2000: 106).

As regards the EES, some accounts suggest that although the Council has the final veto point, the Commission plays a key role as a norm entrepreneur. As a norm entrepreneur, it would not only have the capacity to set the agenda, but also the capacity to influence the preferences of Member States throughout the policy process (Schmidt, 2000). Through its role as the secretariat in the Employment Committee, it is an important actor in setting the agenda of the Committee's meetings. It has been argued that it has significant capacity to orient debates, to propose indicators and benchmarks, to advance new ideas, and to pressure Member States to comply with the guidelines, benchmarks and recommendations it issues to individual Member States (de la Porte and Pochet, 2003). It could thus be conceived as an important norm entrepreneur in the implementation of the OMC (Goetschy, 1999; de la Porte, 2002; de la Porte et al., 2001). However, there have been no empirical tests on the extent of the Commission's influence as a norm entrepreneur. In the same venue, contributions on social inclusion and pensions OMCs stressed the role of different key actors and institutions both at the national and European level (de la Porte and Pochet, 2002; Friedrich, 2002; de la Porte and Nanz, 2004). In particular, the analysis of the co-ordination process on pensions has clearly identified the interaction of different networks usually identified as the 'socially-oriented' and the 'economically-oriented' actors. In that respect, different studies have focused on the internal articulation of both the Commission (between the Ecfin DG and the Employment and Social Affairs DG) and the Council (between the Ecofin Council supported by the Economic Policy Committee; and the Council of Employment and Social Affairs Ministers supported by the Social protection Committee). They have defined this confrontation as one of the dynamics leading to the development of the co-ordination procedures (de la Porte and Pochet, 2002; Pochet, 2003).

Aside from the dominant focus on process in a multi-level governance logic, analyses of specific aspects of the EES and OMCs are sparse and mostly exploratory. It is worth examining these aspects in more detail, as it is arguably these which differentiate the EES and the OMC from pure intergovernmental bargaining. These specificities include the indicators and benchmarks that have increased in number and in political status throughout the lifetime of the strategy (Vandenbroucke, 2001 on social inclusion; De Deken, 2003; Peña Casas, 2004; and Casey, 2004 on pensions; Salais 2004, on the EES).

The official peer review session on best practices that accompanies each round of reporting has also not been analysed in detail. In the EES, it is a two-day process, whereby member states present their NAPs and respond to prepared critiques made by other Member States.

The peer review programme on active labour market policies, which is of a more voluntary nature than the peer review of the whole NAP, is also under-analysed. Peer review in this con-

text is supposed to involve national experts seeking to respond to a specific and targeted problem that has successfully been combated elsewhere through a particular initiative (Bisopoulos, 2003). However, a first assessment of the peer review programme has concluded that the possibilities for policy or initiative transfer are limited, due to significant structural and practical differences between Member States. Such reviews have – at best –sparked national level discussions on certain aspects of active labour market policies). In addition, the relationship between the EES and the European Social Fund, which although theoretically are linked, in practice follow separate dynamics (Hartwig, 2002) has yet to be the subject of detailed analysis. Finally, one EES tool, which as it is discussed in the literature might be expected to lead to policy change, is that of public 'naming and shaming'. However, while this may take place within the process itself, Meyer (2003) has recently demonstrated that media coverage of the EES has decreased since 1997. There are thus notable gaps in the literature regarding particular dimensions of the EES and how they might be integrated more fully into existing analyses. The same argument can be proposed for the other processes of co-ordination. As proved by Natali and de la Porte (2004) and Larsen et al. (2004), other OMC processes than the EES have shown a lack of transparency and a more specific lack of media and public opinion interest.

IX.2 The OMC Literature at the crossroads: Learning, Democracy, Participation and the European Social Model

The bulk of the literature on the EES and OMC is linked to broader questions associated with the governance of the EU. This section reviews three of these on: policy learning, democracy, and the European social model.

IX.2.1 Learning

For political scientists and sociologists, many of whom analyse the EES from a multi-level governance perspective, the strategy and the OMC operate theoretically in a completely different way than top-down governance – in a more co-operative and participative spirit and with the use of different tools that should lead to policy change through learning. Thus it is argued that the learning process engendered by one or several OMC instruments could lead to changes adapted to national contexts (Eberlein and Kerwer, 2002: 3; Ferrera et al., 2000 and 2002; Hemerijck, 2001; Trubek and Mosher, 2003; Knill and Lenschow, 2003; de Búrca and Zeitlin, 2003: 2; Overdevest, 2002; Biagi, 2000: 159; Jacobsson, 2001b: 1; Scharpf, 2002; de la Porte and Pochet, 2002). This focus on learning reflects that the interest in the OMC has above all been driven by the ideational dimension, i.e. the possibility that it could lead to changes in ideas and discourse among national actors. These are mainly derived from a sociological institutionalist approach and focus on the cognitive effect of the EES (Jacobsson 2001a and b; Goetschy, 2003; Trubek and Mosher, 2001). "Effects may include… more subtle impact on national debates and discourses, changes in ways of thinking policy (policy principles), and collective understandings and identities" (Jacobsson, 2001a: 3).

Trubek and Mosher (2003) have analysed the EES according to its "learning capabilities" – i.e the features and instruments – which, they maintain, embody "mechanisms for learning". They drew up a list of such mechanisms from the literature of organisational learning and deliberative democracy. These are "mechanisms that destabilize existing understandings, bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of good practice and experimental results; encourage actors to compare results with those of the best performers in any area; and oblige actors col-

lectively to redefine objectives and policies" (Trubek and Mosher, 2003: 46-47). They judge that the EES contains all these elements, in one degree or another. They identify the EES' overall objectives, re-enforced through quantitative benchmarks, as the most powerful learning instrument, because definition and measurement of objectives could destabilise prior understandings of issues and thus lead to incremental changes (Trubek and Mosher, 2003). This has also been suggested elsewhere (de la Porte et al., 2001; de la Porte and Pochet, 2002), but it has been recognised that thus far the learning capabilities of the EES have been weak in many instances.

Learning can at the same time be conceived as a functional feature of the EES, as well as an important dimension of its output. When the EES was first launched, it was decided that it should be evaluated after a five-year period. This evaluation process does not support the thesis of an important learning dimension, and little evidence of learning processes can be found in the national evaluations. In fact, the adoption of the new strategy was driven by political bargaining rather than by learning from the weakness and successes of the last five years.

IX.2.2 Democracy

Theories of deliberative democracy have been influential in recent debates on governance and democracy in the EU. Two approaches in particular have been associated with specific EU processes. The first approach is that of *deliberative supranationalism*, where political deliberation is designed to foster mutual learning among experts; here the focus has primarily been on the role of comitology committees (Joerges and Neyer, 1997; Joerges, 1999). Yet there is considerable scepticism concerning this form of deliberation. For example, Dehousse (2004) argues that "*…in the eyes of public opinion, cooperation between experts within more or less obscure networks is not necessarily the best form of legitimation (…) Space for debate and mechanisms of control are thus necessary*". Second, the EES (and the OMC), especially in terms of input – participation, transparency and openness – are also being analysed through the theory of *directly deliberative polyarchy* that stresses the importance of the participation of different citizens in a bottom-up logic (Cohen and Sabel, 2003). The ambition of the latter theoretical perspective is normative, and the importance of the participative dimension of the EES is arguably over-stated, yet does have an important place in the EES.

In the framework of the EES, the social partners in the national arena are encouraged to participate in all stages of the process and are in particular called upon to take an active role in the adaptability pillar. Participation is also emphasised in the framework of the OMC (Telò, 2002). Current research indicates that in practice, participation in the EES has proved to be uneven, especially among trade unions (Winterton and Foden, 2002; Raveaud, 2001 for the French case). The European Foundation for the Improvement of Living and Working Conditions conducted a cross-national survey on the participation of social partners. Without presenting an exhaustive account of the results, several observations are worth mentioning. First, in all countries but one (Luxembourg), the national action plans are characterised as governmental, rather than jointly-produced documents (de la Porte and Pochet, 2005). This point is worth emphasising, as theoretical accounts of the OMC characterise its dynamic as bottom-up. In seven out of fifteen countries, the social partners have, however, made a direct contribution to the national action plan. Such contributions were mainly to the adaptability pillar, where the responsibility of the social partners is strongest. A high level of satisfaction of the participatory conditions is correlated with a direct contribution to the NAP in six out of the seven cases, the exception being Denmark. It therefore seems that the level of satisfaction of the social partners increases with the quality – more active – of their participation.

Participation of local actors in the EES process is another emerging area of research (Schmid, 2002; Zeitlin, 2002; Jacobsson, 2004). Recent empirical findings for Sweden suggest that lo-

cal policy-making for matters covered by the EES takes place independently from the EES. In Sweden, "local action plans" (LAPs) are drawn up on the basis of the political objectives agreed under the EES by actors at local level (financed by the Commission, the actor pushing hardest for increasing participation – Pochet, 2003). However, the LAPs are to a great extent developed independently of the NAPs. As put by Jacobsson (forthcoming): "*The EES has so far in much developed as a superficial and centralised process* in parallel *to the existing structures, instead of linking up systematically with these locally and regionally*".

Recent analyses suggest that there is a move towards greater involvement in the EES, but that this differs according to country and to the type of non-state actor. Schelkle (forthcoming: 12) suggest that government officials are not always keen on involving more actors: "*If OMC is predominantly concerned with domestic reforms in a situation of deep uncertainty, participation of non-state actors – and thus a stronger EU leverage – is sometimes but not always appreciated by the government*".

IX.2.3 European Social Model

The theme of the European Social Model must be considered in conjunction with the consequences of EMU, which shaped both the objectives and institutional design of both the EES and the OMC. Rather than being seen as a classical spill-over, however, the EES should be viewed, in Dyson's words (1994: 295), in terms of "*pollination, whether the seeds of integration germinate successfully in proximate sectors, like labour markets and budgetary policy, depends on the fertility of the soil there; in integration, fertility requires a critical mass of actors with the will and the capacity to act*". This approach makes explicit the importance of the politics of the process. In this respect, the work of van Riel and van der Meer (2002), explaining the emergence of the EES through advocacy coalitions, is interesting. It suggests that the role of certain ideas are supported by specific groups of actors in the definition of the EES's policy content at European level, as well as the implementation of its different components in Member States.

There are some analyses that seek to establish the precise nature of the link between EMU and EES (Hodson and Maher, 2001; Wessels and Linsenmann, 2001; de la Porte and Pochet, 2003 and Jenson and Pochet, forthcoming). Indeed, the EES is linked to the over-arching objective of the European Union to increase its competitiveness and economic performance. The EEG is subordinated to the objectives of the Broad Economic Policy Guidelines (BEPG) that define the general economic policy of the Union. In this respect, Begg (2003: 6) points out that the EES has not sought to make a "*broader contribution…to steering the economy*". Indeed, the more fundamental parts of labour market reform, such as wage and regulatory flexibility, are not part of the strategy, and receive more attention in the BEPG.

Begg (2003) has argued that the EES is characterised by Third Way type ideas, including equity (see Rubery, 2002) and activation. The form and effect of activation policies has been discussed particularly in welfare state literature but also by political actors. While some criticise the notion of activation, others act as spokespersons/advocates of welfare state reform (Scharpf, 2002; Hemerijck, 2001; Ferrera *et al.*, 2000). From a reform perspective, the EES can be seen as an additional instrument with which to enhance the social dimension to the European Union. (Rodrigues, 2002; Ferrera, 2001; Pochet, 2002). Others, however, remain sceptical of its real added value to compensate the European Social Model for the liberal bias of EU integration (Scharpf, 2002).

Among the issues debated regarding the European Social Model is that of activation's actual impact on the employment rate of the European Union and on Member States' employment policies more generally (Barbier, 2001). While the employment rate of the Union has in-

creased since the launching of the strategy, this is attributable to many factors. It is virtually impossible to single out the influence of the EES *per se*. What can be affirmed is that most of the pressure to converge towards the EU's objectives under the EES – of which activation is an important component – is on countries with continental and southern welfare state arrangements, with male-breadwinner, female carer model and differentiation of social protection according to occupational class, and dominance of passive policies (de la Porte, 2002). However, besides the general move from passive to active policies that the EES implies, there are few specific thematic analyses of the EES (on entrepreneurship, see Foden and Magnusson, 2000). Nonetheless, it appears from the five-year evaluation of the EES, confirmed by Rubery (2002: 550), that "*...in the recent period by far the most important EU influence on equal opportunities policies has come from the employment strategy*".

The EES, where agreement on strategic objectives and benchmarks is above all decided by consensus, has recently been raised in political status. It is now synchronised in terms of timing with the more politically salient (at least at European level) Broad Economic Policy Guidelines (BEPG). Yet from a normative perspective, the implications of having a social policy built around employment need to be explored. Some headway has been made in this direction (Visser, 2002). Indeed, some of the most interesting national studies of the +5 EES assessment adopt this approach (http://www.europa.eu.int/comm/ employment_social/news/2002/may/eval_en.html).

IX.3 Conclusion

As a final note, we would like to highlight the eminently political nature of the EES, that appeared in the five-year evaluation of the strategy (see JESP, Digest, 13.2.1 and 13.3.1 for more details), as well as in the fact that no clear status was agreed in constitutional convention for the OMC (see de Búrca and Zeitlin, 2003 for more details). It appears, especially after having analysed the development of the EES and its recent re-politicisation, that these questions need to be addressed directly and systematically. Politicisation does not necessarily lead to a prioritisation of the most efficient solutions, especially if these have resulted from negotiation among the 15 Member governments of the EU. It could lead to selecting proposals that meet the lowest degree of resistance, but which are not necessarily the most efficient or to prioritise the solutions that are in line with the ideological majority. As Hemerijck and Visser underlined (2001: 9) "*There is often a tension between a valid policy analysis, with its emphasis on precision and clear objectives, and a reliable policy analysis, with its emphasis on shared understanding and consensus in the face of political opposition*". It goes without saying that European compromises render the possibility of attaining an effective policy analysis even more difficult.

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X. Pensions OMC: Between Weakness and Closeness[16]

X.1 The OMC on Pensions: its emergence and peculiarities

Notwithstanding the persistent pre-eminence of national governments, the European Union has a growing interest and role in the debate on pension reforms (Dudek and Omitzigt, 2001; IPSE, 2003; Natali, 2005). In the last few years, the interplay of national and supranational actors has become a key aspect of academic literature.

According to the Lisbon Strategy, the "pension issue" is dealt with by the EU according to three different (but complementary) dimensions (Pochet, 2003). The first axis concerns the development of integrated, transparent and efficient financial markets by eliminating obstacles to investments in supplementary pension funds. In that respect, the community method is used to implement such a strategy. The second axis aims to face population ageing through the co-ordination of macro-economic policy (and especially budget policies). In that sense, the Stability and Growth Pact and the Broad Economic Policy Guidelines represent the main instruments to be adopted. Finally, the third axis consists of the modernisation of social protection programmes through the improvement of their financial sustainability and the promotion of social integration and equality in an "active" welfare state. The Open Method of Co-ordination (OMC) on Pensions is the specific process introduced to favour a co-ordinated response to common challenges. All these procedures, introduced at different times, now coexist in the European policy-making process (Pochet, 2003; Esposito and Mum, 2004).

X.1.1 The Emergence of the OMC on Pensions

As far as the Open Method of Co-ordination on Pensions is concerned, it is one of the youngest and lightest forms of *soft law* implemented in the social policy field. The literature is much less developed in this sector than in the case of the European Employment Strategy (EES) and (to a lesser extent) the Social Inclusion co-ordination. In this brief state of the art, we adopt the same lines of argument we have introduced above for the Open Method of Co-ordination in general. First, we refer to the main contributions that have focused on the pecualiarity of imputs, procedures, and institutions involved in the process. Then, we will center our analysis on the dominant analytical approaches to the Pensions OMC. Many authors have outlined the potential for *learning* related to soft low, its hypothetical contribution to reduce the *legitimacy gap* of the European Union, and then its main contribution to a more *participatory* decision-making process.

In the not so wide literature on pensions and their coordination at the European level, much of contributions have been centred on the reasons why social protection reforms receive the increased attention of the EU (Liebfried and Pierson, 1996; Berghman, 1997a and 1997b, 1998). Numerous accounts have stressed that European economic and monetary integration, the adoption a common legislation for the creation of a single market, and the jurisprudence of the European Court of Justice all have created a favourable context for the co-ordination of old-age programmes (Bosco, 1997 and 2000; Chassard, 1998, 1999 and 2001; Comaille, 2001; Begg *et al.*, 2001).

What is more, the introduction of procedures for the exhange of information has been proposed as a further tool to modernise social protection programmes in member states. The concept of benchmarking, originally developed to improve the performance of business enterprises by learning from others, is now increasingly applied in the areas of employment and social policy. Rising internal and external pressures on national welfare states, sometimes re-

[16] This chapter has been delivered by David Natali.

inforced by supra-national institutions, a rapid growth of modern communication technologies and an ongoing process of ideological liberalization drive this development. Just as benchmarking between companies benchmarking between national social policies is seen as an instrument to reduce the costs of pure trial and error (Schludi, 2003).

In the EU contect, in particular, as argued by Sharpf (2002), this novel procedure had to be increasingly applied in the sphere of social policy where a large-scale harmonization of country-specific arrangements was de facto precluded by great differences in levels of economic development within the European Union as well as by the wide institutional diversity of national welfare states.

In line with the words of Vandenbroucke (2001a, 2001b and 2002), the OMC on pensions would provide benefits, in terms of its cognitive impact (allowing countries to learn one from the others) and in promoting the idea that no European citizen will be excluded and left to take care of themselves, which means the ability to reinforce the European social paradigm.

X.1.2 Peculiar traits of the Pensions OMC

A second group of authors have then focused on the functioning of the Pensions OMC (de la Porte, 2002 and 2003; de la Porte and Pochet, 2003). On the one hand, procedures in this domain share common traits with the other soft modes of governance. As well as the other strategies, the OMC on pensions consists of four main stages:

- the first is to agree upon guidelines for the Union;
- the second is to establish (when appropriate) quantitative and qualitative indicators and benchmarks as a means of comparing best practice;
- the third is to implement the common guidelines into national and sub-national policies through the definition of targets, measures and taking into account national and sub-national specificities;
- the fourth step is finally represented by the periodic monitoring, evaluation and peer review in order to create the favourable condition for mutual learning.

On the other hand, some key peculiarities have been proposed as the expression of the particular weakness of that process. First of all, as stressed by de la Porte (2002) and Larsen *et al.* (2004), the legal basis of the process is much weaker than that of the EES. While the latter is based on the Amsterdam Treaty, and thus employment has the status of a 'common European concern' (Daguerre and Larsen, 2004); the former relies only on mandates of the European Council. The emergence of that OMC was thus determined by the decisions of the European Council.

The European debate on recasting pension systems, through the OMC, began in March 2001, when the Stockholm Council suggested that the Economic Policy Committee (EPC) and the Social Protection Committee (SPC) should define a European policy line on the reform of pension systems. The Council confirmed that '*the ageing society calls for clear strategies for ensuring the adequacy of pension systems (…) where apropriate the potential of the open method of co-ordination should be used to the full, particularly in the field of pensions*' (de la Porte and Pochet, 2002: 225)

The following Council of Goteborg endorsed the three broad principles (or pillars) (originally proposed by the Social Protection Committee) for securing the social and financial long-term viability of pension programmes. They were defined in terms of the need to grant the social adequacy, the financial sustainability, and the modernisation of pension programmes (both public and private) according to the changing social and economic challenges and risks. The

Laeken Summit finally defined the eleven objectives and the time schedule for the first 'round' of the process (Cornilleau *et al*., 2003; Natali, 2004).

The second specificity of the Pensions OMC concerns the definition of a three-year cycle since the starting point of its procedures in 2001, while the EES rounds were originally articulated in one year. This elements was related to two different aims: on the one hand, that of creating a new process where the expertise at the European level (e.g. in the Commission) was not completely built at the beginning of the OMC on pensions; and on the other not to put an excessive administrative burden on national bureaucracies (for example, in terms of reports to prepare) (Natali, forthcoming).

Other specific traits stressed by the literature are all consistent with the softer nature of that OMC (see Table 1 about the key features of OMC and EES by de la Porte and Nanz, 2004). The co-ordination on pensions makes no reference to common indicators (not yet defined by the Social Protection Committee and the Economic Policy Committee). Moreover, recommendations are not explicitely proposed and there are no attempts to rank members by the extent to which they achieve the common broad goals. As stressed by Casey (2003), quite paradoxically, more precise recommendations on pensions are issued within other strategies: the Broad Economic Policy Guidelines (where a chapter is devoted to old-age programmes) and the European Employment Guidelines both refer to that field.

According to Schludi, 2003; Larsen *et al.*, 2004; and Casey, 2003; 2004b, this is consistent with a softer overall aim related to stimulate national debates more than to concretely impact national reforms.

Table X.1: Key features of the OMC in Employment and Pensions

Features/Process	**European Employment Strategy (EES)**	**Pensions OMC**
Started	1997	2001
Cycle	Yearly	Tri-annual
Number of cycles undergone	Five	One
Key Participants – those who make the actual decisions	European Commission; Ministers of social affairs and employment	European Commission; Ministers of social affairs and ministers of finance
Mandatory Consultative participants	European and national social partners	None
Legal or political basis of process	Employment Chapter of Amsterdam Treaty, 1997	Stockholm Summit, 2001
Technical dimension of process	64 indicators in 2003	No indicators

Source: de la Porte and Nanz, 2004.

The national documents to be proposed by each member state are consequently defined National Strategy Reports rather than National Action Plans (like in the EES). More than the proposalsof the strategy to adopt to comply with the European guidelines, national reports only seeks to describe policies undertaken by single countries in a more static perspective.

A further key aspect of the Pensions OMC is that it is at the centre of a multitude of policy-making processes each affecting at least one or more aspects of old-age policy. The first is represented by the *Broad Economic Policy Guidelines* which co-ordinate policy responses to the economic and budgetary impact of ageing (concerning pension costs but also taxation of

private benefits). The *Stability and Growth Pact* is the second process mainly focused on the financial dimension of ageing. The *EES* is a further process related to pensions: the defined targets of employment rates are consistent with the explicit attempt to reduce early-retirement and to 'active ageing'. Finally, the *Social Inclusion Process* deals with the role of pension provisions to reduce the risk of poverty and social exclusion. Moreover, other methods and actions are explicitly and/or implicitly related to pension policy. For instance, the European Central Bank in their action for a common monetary policy has intervened in different occasions to comment the 'state' of pensions in the 'EURO countries' (Dufresne, 2001). Other relevant links are between pensions and the internal market strategy, health and long-term care, education, immigration and entrepreneurship policies (Casey, 2003). More than a sum of equally important processes, pensions was (and is) at the center of a hierarchical set of measures where the Broad Economic and Policy Guidelines are at the top (Casey, 2003 and 2004a). As noted by Pochet (2003), '*if free movement and the impact of EMU have contributed to the shaping of the community discussions, this has happened without the national ministers in charge of pensions pronouncing on the subject*'. This was the result of no clear legal responsibility for social ministers in the Treaty, and of the wide diversity of national systems, and reforms already implemented or under way.

As Schludi (2003) and Natali (2004) put it, the OMC had the ambition to improve the coherence between these strategies more than substitute them.

A large number of contributions has does focused on the the competition (if not confrontation) between 'socially-oriented' and 'economically-oriented' actors as the driving force of the launch and the evolution of the OMC Pensions (Math 2001a, 2001b and 2001c; Math and Pochet, 2001; de la Porte and Pochet, 2002). While the 'economic' bodies were the first to deal with the "pension issue", in the end, a negative reason has forced 'social' actors to address the question: the risk that the problematic nature of pension reform could be shaped by actors other than themselves. As Chassard (2001: 317) notes "*It is important that the 'social experts' should make their voices heard in this concert, so as not to leave the field open to those who view social protection from an exclusively financial angle*".

In that respect, both the Commission and the Council of Ministers are internally divided along the social/economic cleavage (Math, 2001a; de la Porte 2002 and 2003). Within the Commission, the Directorate General for Employment and Social Affairs is active through communications on social protection, its common challenges, and the room for its revision. The Council of Social Affairs Ministers is the other *player* trying to shift the attention of the Union towards the adequacy and the social sustainability of old-age schemes in the member states. Its action is supported by the Social Protection Committee (SPC), whose role has been central to provide technical information (alternative to those of the Economic Policy Committee). The Directorate General on Economic and Financial Affaris, on the other hand, put forward the argument of the balance of public finances and the need to face the negative demographic trends through a restricitve budget policy. The Ecofin Council is supported by the Economic Policy Committee (EPC) that legitimise its discourse for recasting pensions (see de la Porte and Pochet, 2002; and Natali, 2004 for a more in-depth definition of the role of each actor).

X.2 Learning, democracy, and participation

This section reviews three main issues related to Pensions OMC: its effectiveness as a learning process; its impact in terms of increasing the EU legitimacy and the democratic nature of the policy-making on pensions; and finally, its first outcomes on national old-age programmes.

X.2.1 Learning

As well as the other modes of soft governance on social policies, the OMC on pensions has been first analysed as a form of *contextualised benchmarking* (Hemerijck and Visser, 2003; Schludi, 2003). In this particular field, political scientists and sociologists have focused on two issues: the comparison of different types of benchmarking activated by international organisations; and the definition of common indicators.

X.2.1.1 *Benchmarking by International Organisations, a brief comparison*

As described by Schludi, 2003 and De Deken, 2003, the EU action in this field is not new but it is consistent with a broader praxis. Organizations such as government agencies, international foundations, and supra-national institutions adopted at different times that practice to improve the functioning of their structure or to exchange information within and between national experiences. At the beginning of the 1990s, in the USA and then in Canada, the governments established national forums to develop a set of performance indicators to assess social policy performances (De Deken, 2003). At the same time, in Europe, the *European Round Table of Industrialists (ERT)* started to propose benchmarking as "a tool for guiding EU policies" (De Deken, 2003: 6). The ERT is a group of about forty senior industrialists that set up a working party which produced a document entitled: '*European pensions, an appeal for reform—Pensions schemes that Europe can really afford*' published by the De Benedetti Foundation (ERT, 2000) and widely publicised in the media (Pochet, 2003). As Math (2001b) describes it: "*The Foundation has links with leading edge researchers and university personnel, in which one party may not know, or may not seek to know, the close working links between this research centre and the ERT. Its work is presented as inde-pendent research, brings a scientific legitimacy to political recommendations, and is widely disseminated notably within a sympathetic financial press*".

Schludi (2003) and Casey (2004a and 2004b) have analysed and compared the efforts by internatonal organisation to guide pension reforms by promoting 'good practice'. In the first part of the 1990s, the World Bank influenced the debate on recasting welfare states through the publication of the report 'Averting the Old Age Crisis' that described the main challenges to the long-term viability of old-age programmes and the need for innovate them. What is more, the WB proposed a general blueprint (the so-called *three pillar* model) not only to the emerging markets of Asia and South America but to the transition countries in Central and Eastern Europe and to the rest of Europe too (World Bank, 1994, Holzman *et al.*, 2003).[17] The International Labour Organisation (ILO) has acted as a global player often in combination with the International Social Security Association (ISSA) with rather different prescriptions directed especially to the developping countries (ISSA, 1998; Gillion *et al.*, 2000; Sarfati and Bonoli, 2002). Finally, the OECD has adopted an approach in between those of the WB and the ILO. Since 1988, it has published a number of reports and publications directed to its members (OECD, 1988, 1998, 2000 and 2005).

If compared to other interventions by international institutions, the OMC has been characterised by a more contextualised form of benchmarking (see Table 2). The OMC seems much

[17] Yet, recent contributions have stressed that Eastern-European reforms in the last two decades were influenced by the WB, but they were still fundamentally home-made (Rutkowsky, 2004: 323-324). The 1994 publication was highly influential world-wide, however while all reforms moved towards a multi-pillar structure, the shape of the renewed pension systems differ substantially. Thus, the WB model emerged as a 'benchmark' more than a 'blueprint'. A more open interaction between the international organisations and single countries is thus to recognise. Not only the WB had an influence on the reform process and content, but the concrete implementation of new measures (especially in Eastern Europe) changed its thinking on pensions as well (see also Holzmann and Hinz, 2005).

more aware of negative effects from following examples of 'best practice'. It counsels caution and is less assertive with respect to the desirable direction of pension innovations.

Table X.2: International Organisations Active on Pension Reforms

	World Bank	ILO/ISSA	OECD	EU
Audience/ Clientele	Developing countries, emerging economies, advanced economies	ILO - Primarily developing countries, emerging markets. ISSA – all countries	Members, plus selected non-members (emerging markets, transition countries and others)	Member states and accession countries
Country appraisals	Yes	ILO Yes	Yes	Yes
Information Echange procedures	Mainly ad hoc (experts meetings) plus Pension Reform Primers	Mainly ad hoc (experts meetings)	Mainly ad hoc (experts meetings)	OMC
Recommendations	Yes	ILO Yes	Yes	Indirectly
Standards	No	ILO yes	Indirectly (mainly with respect to codes for private provision)	Yes (limited to rights of EU citizens of one EU state working in another EU state)
Technical assistance	Yes	Yes	No	Only for candidate countries and non-members
Budgetary assistance	Yes	No	No	No

Source: Casey, 2004.

As argued by Schludi (2003: 15) *"(…) this illustrates that a high degree of openness , i.e. great sensitivity towards the diversity of national systems and consequently a reluctance to launch 'one-size-fits-all' recommendations has emerged as the central characteristic of the open method of co-ordination*".

X.2.1.2 *The definition of Common Indicators*

A second line of analysis about the cognitive impact of the Pensions OMC has then focused on indicators. As demonstrated by recent contributions to the literature (Natali and de la Porte, 2004; Peña Casas, 2004; Caussat and Lelièvre, 2004), their definition is decisive for the assessment of the sustainability and the adequacy of pension provisions. In particular, solidarity objectives, mainly of a qualitative nature, are difficult to quantify, assess and compare (Eckardt, 2005). These difficulties are mainly due to structural differences in pension systems and to the multitude of factors that would need to be taken into account, many of them outside of the pension system, such as (the adequacy of) health care provision (Lodge, 2005).

According to the agenda proposed in the co-ordination process, the Indicator Sub-Group (ISG) of the Social Protection Committee (SPC) has published a series of interim reports dealing with this challenge. Much of the effort of the ISG focused on the definition of theoretical

replacement rates (the ratio of an individual's average pension to his/her average income before retirement), as a correct indicator to measure the income situation of the elderly population. A further aspect has been related to assessing the role of supplementary pillars in improving the adequacy of pension systems. As argued by Peña Casas (2004), the long-running debate on the definition of viable data on pensions has taken on some particular aspects. On the one hand, the action of the SPC has been highly related to national procedures. On the other, hypotheses for the definition of projections as to the adequacy of pension programmes have been heavily based on statistics from EU bodies other than the SPC. The Commission proposed partly overcoming these difficulties through the compilation of the latest available data and indicators from EU sources used for the National Strategy Reports. This is expected to allow Member States to assess their own position relative to the others and to explain differences. Summing up, the argument proposed by some authors is that the inability of the technical committees to define common indicators proves as a potential explanation of the weakness and lack of effectiveness of the entire process (Schludi 2003; Cornilleau *et al.*, 2003).

Some political factors have contributed to that lack of commonly agreed indicators as well. As shown by Natali (2006), the issue has been at the centre of huge confrontation between representatives of member states in the interested committees. The first struggle was about the definition of common objectives at the core of the Pensions process: the 'adequacy' principle was not uncontested. While Anglo-Saxon countries did define it in terms of 'poverty prevention', continental European countries (those with Bismarckian roots) proposed a broader interpretation of that goal and did reference to the aim of public programmes to grant pensioners the same living standard and of that of the active part of the population. Both statements were introduced in the common objectives (1st and 2nd sub-objectives). France, Belgium, Germany and Italy coalesced to add a broader interpretation to the adequacy principle.

All along the first cycle of the process implementation, a related contrasted issue concerned the identification of the right indicators linked to the 'adequacy' goal mentioned above. The ISG easily agreed on context indicators (e.g. on population ageing) and on those to assess the risk of poverty for the elderly (on the base of the work done in the Social Inclusion OMC). Yet, it was more difficult to find a compromise on indicators linked to objective 2. Again, Anglo-Saxon, Scandinavian, and Continental European countries confront each other (Caussat and Lelievre, 2004).

A further emblematic example of the 'political' importance of indicators is then represented by the process of elaboration of the SPC report on 'Current and Prospective Pension Replacement Rates' at the beginning of 2004. Replacement rates are the ratio between the first benefit received by pensioners and the last revenue they earned in the labour market before retirement. They consist of a measure of the relative generosity of public pensions and are particularly interesting if they are calculated for the future. They allow for the assessment of recent reforms' impact. That is why the German government in the first weeks of 2004 seemed to block the publication of that SPC report: to avoid an open debate (and the consequent political costs) on the precise effects of cutbacks introduced through the 2001 pension reform. In the same period, in fact, Germany witnessed huge mobilisation against the welfare reforms proposed by the Schroder Government. As shown by Natali (2006), this made the German government particularly sensitive to the potential public opinion reaction to such data.[18]

[18] See also Radaelli (2005) about the political nature of learning in the OMC process.

X.2.2 Democracy through Participation

The "democratic" dimension of the Open Method of Coordination (OMC) has been an issue of intense and controversial debate among policy-makers and academics (from a normative as well as an empirical perspective, de la Porte and Pochet, 2003b). The OMC theoretically seeks to be a participatory method, in which all concerned actors should participate at different levels in a multi-level logic. Participation would improve democracy as the decision-making process should be more open in order to improve the quality of regulation and then implementation. In other words, the new form of governance by involving more actors and interests should lead to better decision-making and better implementation. In this context participation is a necessary condition for democracy: "*It is one dimension of the whole issue of accountability, democratisation and legitimacy of the new mode of governance*" (Radaelli, 2003: 45).

The discourse of the EU has drawn increasing attention to participatory dimensions of democracy, which is meant to refer to the involvement of civil society and social partners in the policy making process, rather than direct citizen participation. In the template of the OMC it is assumed that the involvement of civil society organisations and social partners at different levels of government is important for its democratic quality in so far as they give voice to citizens' policy concerns. Telò (2002: 265), an academic supporter of the OMC, has warned that: "*If the actors of civil society are not concerned, consulted, involved at the level of partnership and negotiation, one of the aspects of the 'openness' of the new method will be belied*".

In that sense, the process of co-ordination of national pension programmes proves a research area of particular interest because of its limited openness. In the field of pensions, there are in fact, with the exception of national officials, no mandatory (consultative) participants. In particular, the OMC has not enhanced the participation of social partners (de la Porte, 2002 and 2003). They do not have any formal role to play in the writing of the National Strategy Reports and the extent to which they participate in the national pension reform processes is dependent on national tradition. As to the involvement of civil society organisations, it is reduced too. At the national level, pensions politics is usually based on state bureaucracies, political actors and institutions and social partners, while NGOs have no role at all. At the European level, by contrast, transnational non-profit civil society organisations, (e.g. the European Older People's Platform, AGE) are active (but still at the margin of the policy-making process). Its expert working group on social protection, made up of representatives from the 15 Member States, includes the mandate of expressing the concerns of AGE for pensions OMC (de la Porte and Nanz, 2004; Natali, 2004).

The reduced openness is related to the low visibility of the Pensions OMC at the national level. As argued by de la Porte and Nanz (2004: 278), while the reform of (national) pensions is often a focal issue in national media, the European discussion under OMC pensions is not mentioned. Concerning parliamentary involvement, there is no requirement to keep the EP informed and the role of the European Parliament in relation to the OMC is unspecified. At the national level, there is no evidence of political debate on the OMC pensions. There is, apart from those involved, little awareness of its existence (Natali and de la Porte, 2004).

Some further analysis has compared the *soft* modes of governance adopted on pensions with the *community* method to establish the precise nature of actors and institutions active in different policy networks. Pochet, 2003; Esposito and Mum, 2004; and Natali, 2005 all proved sceptical on the effectiveness of the open co-ordination to extend the number of actors in the European policy-making process on pensions.

X.2.3 The OMC Outcomes

Recent analyses have centred on the impact of soft modes of governance on pensions reform at the national level. For the moment, all these contributions share preliminary efforts requiring additional research. One of the first attempts was that of Anderson (2002) that explicitly compared four different countries (Germany, Italy, The Netherlands, and Sweden) and the potential impact of the European integration. In that case, the study focused on a mix of pressures coming from the EU level: not only from the soft law on pensions, but also from the European Employment Strategy, and EMU. That contribution has adopted a theoretical perspective consistent with the concept of *adaptational pressure* already introduced in the literature on the *Europeanization* process (Green Cowles *et al.*, 2001). Pressure from the EU, in other words, is expected to depend on the policy distance between the European requirements and the key traits of national systems. Anderson concludes that despite "*it is difficult to state with a high degree of certainty*" that EU policies have pushed national systems in a certain direction, "*(…) the similarity between all four countries' policy reforms and EU Employment Guideline article 14 (…) as well as the goals outlined for the application of the OMC to pensions is striking*" (Anderson, 2002: 279).

In the same venue, the analysis by Dudek (2003) on the EU impact (through the OMC) on pension reforms introduced in Spain seems to agree on the existence of concrete outcomes. Based on the analysis of the long-term evolution of Spanish pensions policy since the Franco dictatorship, Dudek founds that last pension reform in 2001 was a turning point towards a more 'active' social protection consistent with the European agenda. New issues like the flexibility of retirement, gender equity, and the modernization of pensions to include less favoured groups, all were identified as the result of the EU influence. To sum up, "*the EU with its institutions and policy ideas has had a great deal of influence upon the reform of pensions within Spain*" (Dudek, 2003: 19).

More recent contributions, by contrast, have proposed a different more pessimistic interpretation of the interaction between supranational policy co-ordination and national reforms. As argued by Casey (2004b: 8), *path dependency* is probably stronger in the pension field than in any other social policies and consequently, it seems unlikely that simply by observing the others, countries are likely to make major transformations. This more sceptical perspective has been first related to the particular weak aim of the Pensions OMC (if compared to the other OMCs). As states by Larsen *et al.* (2004), the main ambition of the coordination procedures on national pension systems is to stimulate national and European debate more than to design an optimal practice to follow. The National Strategy Reports adopted by different member states, thus, described single systems but did not put forward measures to meet the common objectives. The absence of reference to the OMC in national debates (even where the pension issue is high on the agenda) is proposed as a further proof of the lack of concrete outcomes (Natali and de la Porte, 2004).

These authors have then introduced a first debate on present shortcomings and the potential to overcome them. Larsen *et al.* (2004) have found the main limit of the European strategy on pensions in the lack of communication from the EU to the single member states. In that respect, it is recognised that the *'EU needs the capacity to promote its policies more effectively at the national level and with the general public'* and that *'this need will become more pressing with enlargement'* (Larsen *et al.*, 2004: 34). A new communication strategy less based on national policy makers is thus proposed.

For Casey (2004b: 11-12) the first problem of the Pensions OMC consists of the *'bad teaching*' related to a reduced room for discussion and learning. This is related to the under-development of the peer-review process. A more top-down process based on the key role of

politicians and opinion formers is proposed to improve the knowledge of pension systems. A second shortcoming, is then represented by the isolation of the OMC on pensions and the lack of connections with the Employment strategy. The ongoing streamlining process is assessed as a partial solution. Natali and de la Porte (2004), finally, stressed the limits related to the limited *cognitive impact* of the co-ordination cause by the excessive complexity of procedures (especially after the Eu Enlargement): a 'reinforced co-ordination' between countries facing similar challenges is identified as a possible solution.

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XI. EU Justice and Home Affairs[19]

XI.1 JHA: state of the art

Justice and home affairs (JHA) emerged only in the 1990s as an EU policy-making area. Initially it attracted only rather limited academic attention. This can be explained by the relative lack of substance of the EU's policy output during the existence of the old "Third Pillar" (Title VI TEU) which suffered from weak competences, instruments and decision-making procedures. The extensive reforms introduced by the Treaty of Amsterdam and the decisions of the Tampere European Council have since 1999 not only led to a rapid expansion of EU JHA objectives and measures under the heading of the "area of freedom, security and justice" (AFSJ), but also to a parallel increase in academic studies in this domain. Nevertheless, having regard to the now quite significant output of the EU in this domain – on average ten new texts adopted by the Council each month – and the wide range of policy issues covered – from asylum over immigration and borders to judicial cooperation in civil and criminal matters as well as police cooperation –, the academic literature can still be considered to be comparatively limited. Three reasons can explain this:

1. From the point of view of academic disciplines this is quite a "hybrid" area which does not easily lend itself to mono-disciplinary studies: Political scientists, for instance, feel not necessarily comfortable with the substantial legal issues in core areas such as civil and criminal justice cooperation, and lawyers are not necessarily any more comfortable with the strong security rationale and the immigration policy discourses which are driving much of the policy-process forward, and - although security lies at the core of this policy-making domain, security studies specialists have struggled to conceptualise the EU as actor in the traditionally purely "national" domain of internal security. The result has been that comparatively few academics have ventured into a domain which cuts across traditional disciplinary boundaries.
2. The JHA domain is also a quite diverse domain of policy-making as the rationale, objectives and instruments of policy-making are obviously rather different, for instance, in the area of asylum, civil law cooperation or police cooperation. Policy-making trends, for instance as regards the use of binding or non-binding instruments of governance, vary sharply from one area to the other. The same applies to olitical discourses which can have as diverse foci as the guarantee of rights of asylum seekers, the fight against organised crime or the facilitation of commercial transactions through civil law cooperation. This makes it rather difficult to arrive at a comprehensive view and assessment of the entire JHA domain, the result being that there is a dearth of literature on the domain as a whole, most studies focusing on one of the main areas or even only on single issues in one of those.
3. Finally JHA policy-making has also been far from a model of transparency: Many relevant Council texts continue to be classified, special agencies such as Europol have adopted much of the culture of secrecy similar national structures are shrouded in, and the responsible national ministries - in particular the ministries of interior – belong traditionally to the least open. The strong remaining intergovernmental features – especially in the "Third Pillar" add to a certain opaqueness of the domain which does not encourage ambitious research designs.

Yet in spite of the above mentioned difficulties research in the JHA domain and continuously expanded during the last few years, and three main trends can be observed:

[19] This chapter has been delivered by Jörg Monar

1. The first of those trends is the emergence of studies which investigate certain aspects the **foundations and/or framework of EU policy-making** in the JHA domain. Examples are investigations of the institutional framework (such as Berthelet 2003), of the evolution of political and legal integration in this domain (such as Müller 2003) or Garcia-Jourdan 2005) and of the overall legal framework (such as Peers 2006). While these monographs may offer elements of theoretical interpretation, they do not attempt to constructing a specific theoretical framework for the JHA domain.
2. The second trend is the increase of **area specific** monographic studies which investigate the foundations, specificity and main patterns of EU policies in the individual areas. Examples are to be found especially in the asylum and immigration areas (such as Berger 2000 and Geddes 2003). In the case of some areas, however, such investigations take primarily the form of articles in scholarly journals and to edited volumes, mainly based on of conference proceedings or specialised courses (such as de Kerckhove/ Weyembergh 2002)
3. The third trend is the rapid expansion of **issue specific** monographic studies or journal or edited volume contributions which investigate specific issues in the main JHA policy-making domains. Here the literature has already become quite extensive. Typical examples are the fight against terrorism, organised crime and money laundering (such as Davin 2004 or Mitsilegas 2003). A lot of relevant studies also find their way into specialised journals (such as the *European Journal of Crime, Criminal Law and Criminal Justice* (Nijhoff) and edited volumes (such as Lavenex/ Ucarer 2002).

Overall the main emphasis in research in the JHA domain has so far been on the challenges and responses of the EU in the areas concerned as well as on relevant legal and institutional issues. In comparison to some of the other domains of EU integration the AFSJ has been clearly less subject to systematic theorising, which could be the result of some of the disciplinary and diversity problems mentioned earlier and may not necessarily be a loss. Major deficits, however, continue to exist as regards the analysis of the political factors and obstacles in this domain (especially in a comparative perspective), the progress and limitations of interaction between the national structures, the implementation deficits of EU policies and of the specificities and mechanics of certain areas of EU action, such as police cooperation. Research on the “AFSJ” can therefore be regarded as being as much of a construction site as the “area” itself.

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State of the Art Report
Project 2

Brigid Laffan, Ulrika Mörth and Colin Shaw

XII. European Information Society Policy[20]

XII.1 The Information Society between Vision and Nightmare

The emergence of the concept of an 'Information Society' is rooted post-war reflections on the coming post-industrial society. Whereas the production system of industrial societies had been based on the mass production and consumption of durable consumer goods such as the motor car and household appliances, the post-industrial information society was thought to herald the coming of an age of intellectual creativity, where knowledge, not machines, would be the source of all productivity.

The twinned concepts of Information Society and Knowledge-based society are not readily distinguished as Commission texts do not present them distinctly;

Our society is now defined as the "Information Society", a society in which low-cost information and ICT are in general use, or as the "Knowledge(-based) Society", to stress the fact that the most valuable asset is investment in intangible, human and social capital and that the key factors are knowledge and creativity.[21]

The Kok report mentions the Information Society once within an extended discussion of the Knowledge-based society.[22] Although neither concept has an established definition, IS literature generally focuses on the impact of information technologies on society whereas KWS studies focus on the wider implications of changing work practices on society.

Academic accounts of the IS are similarly vague in defining the object of their analysis. Perhaps because of this methodological flaw, authors have generally veered between early optimistic *visions* (see Bell 1974) of the liberating potential of information and communication technologies (ICT) in uncoupling of human creativity and more recent *nightmare* accounts of the impact of using ICT to introduce capitalistic relations into ever increasing realms of human society (see Putman 2000).

A turning point in the debate on the impact of ICT on economies and societies was the downturn in the dotcom sector from late 2000 on. For example, as late as 1997, the Irish Information Society[23] web page presented the case for ICT is messianic terms:

> It is an action by all Irish, people and Government, to prepare the country for the changes, even revolution, that is coming. This revolution had its origin in Technology, in fibre optics that can carry vast amounts of information and silicon chips that can process all that information in a jiffy. Suddenly, it has been realised that information is the bedrock of all commerce, industry and services that a society employs to underpin its existence.

The consequences of neglecting the importance are described in correspondingly stark terms. If the revolution

> (…) occurs abroad and not in Ireland, we will find that our commerce and industry is no longer competitive, that there were will be an accelerated decline, increasing unemployment, even dearer and worse services generally, and a deteriorating environment.

[20] This chapter has been delivered by Brigid Laffan and Colin Shaw.

[21] http://europa.eu.int/comm/employment_social/knowledge_society/index_en.htm (consulted 31.01.05)

[22] Report from the High Level Group chaired by Wim Kok (2004) page 19.

[23] http://www.ispo.ie/iteiso.htm

Hysterical accounts of impending environmental and societal collapse created a sense of urgency, prompting governments to, at least discursively, embrace the third technological revolution with both arms.

The heady promises of a new information age were shadowed by a creeping fear of being left behind. A 'winner takes all' scenario was painted where the USA and Japan were seen as having moved first leaving Europe with societies, industries and mentalities unadapted to the new age.

XII.2 ICT and International Competitiveness

XII.2.1 Winner takes all

It was during the 1980's that the notion 'global competition' became dominant in discussion of the use of ICT. The idea that European economies had fallen behind and therefore imperilled by competition from Japan and US economies pervades EU IS documents.[24] Others were exploiting the technological inferiority of EU firms.

Based on the study of US national accounts, Machlup in his influential *The Production and Distribution of Knowledge in the United States* (1962) argued that an increasing proportion of national GNP derives from knowledge production. In advanced societies workers were no engaged with the production of things but working, in some way or another, with information. He estimated the size of what he termed the 'knowledge sector'[25] was 32% of the US workforce in 1959. Marc Porat (1977) divided the economy into 'primary', 'secondary' and 'non-information' sectors. He estimated that more than 46% of the US GNP was accounted for by the information sector. The division of labour between manual and intellectual was shifting with the replacement of blue-collar by white-collar workers. Bell (1974) predicted that these changes in society would lead to an end to traditional class cleavages, the end of ideology and the triumph of liberalism.

A European version of this thesis whereby the information sector will revolutionise working conditions was proposed by Nora and Minc (1976). Echoing Jean Jacques Servan-Schreiber's "Le Defi americain," the authors saw the domination of American firms in the sector of ICT as a danger for French industrial development. They encouraged government intervention in the production of machines (Bull) and infrastructure (minitel). They also analysed the social impact of changing labour conditions and saw the state as a necessary agent in the management of change.

Paradoxically, the beginnings of the information age coincided with a prolonged downturn in productivity from 1972 on. Even though computers, themselves evolving to the rhythm of Moore's law[26], were speeding up data processing and communications, Solow, in 1987, noted in a famous aphorism "You can see the computer age everywhere but in the productivity statistics." (New York Review of Books, July 12, 1987).

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[24] For example, Commissioner Miert's exhortation; 'Given rapid technological change and pressure from competitors in the US and Japan/SE Asia in the context of the information society, we cannot afford to let unnecessary delays block progress in liberalisation (http://europa.eu.int/ISPO/docs/intcoop/g8/IS_conf_95_miert1.doc)

[25] Education, media, computing, information services (including insurance, law and other information based professions), R&D.

[26] 'Law' enunciated by Intel cofounder Gordon Moore; every twelve to eighteen months the density of transistors put onto a silicon wafer is doubled

The causes of the productivity slowdown of 70's on remain mysterious (see Bradford DeLong 2002) but from the 80's to the late 90's American productivity grew strongly with most economists crediting the ICT sector as being the motor for the growth. Between 1995 and 2001, GNP grew by 4.2 percent per year.

Investment in information technology capital rose from about one percent of GDP in 1960 to about two percent of GDP by 1980 to about three percent of GDP by 1990 to between five and six percent of GDP by 2000. As spending increased, the cost of data processing fell creating the impression that increasing returns on investment were practically guaranteed.

The euphoria surrounding the dotcom revolution cumulated in 2000 when many projects with the whiff of 'e-commerce' were funded without due attention to their long-term viability. Financial markets rapidly corrected the trend and the valuation of NASDAQ stock fell 64 % between March 2000 and March 2002 ($3 trillion per year).

The coming of the information age was meant to be a 'market-led' revolution. The role for governments (e.g. Bangemann report) was to free up markets by undoing state monopolies, creating markets, and providing favourable investment conditions. However the recent spasms in the sector have lead to a reappraisal of the role of governments in ICT. Firstly, the volatility of markets can undermine long-term investment of the type governments excel. Secondly, the adjustment of society to the new technologies is not automatic and requires intensive government intervention.

XII.2.2 Redesigning IS Policy After The Dotcom Bubble

Ten years ago, the Bangemann report began with the following divison of labour between markets and public authorities;

> 'This Report urges the European Union to put its faith in market mechanisms as the motive power to carry us into the Information Age. This means that actions must be taken at the European level and by Member States to strike down entrenched positions which put Europe at a competitive disadvantage:
>
> it means fostering an entrepreneurial mentality to enable the emergence of new dynamic sectors of the economy
>
> it means developing a common regulatory approach to bring forth a competitive, Europe-wide, market for information services
>
> it does NOT mean more public money, financial assistance, subsidies, dirigisme, or protectionism.' (CEC 1994)

The Commission's 'Five-Year Assessment: 1999-2003 Research and Technology Development in Information Society Technologies' of January 2005 reiterates the proposal that 'ICT contributes to productivity growth and job creation' (CEC 2005). And in a recent speech the Commissioner Reding stated that 'Information and Communication Technologies (ICTs) are crucial to European competitiveness, and they provide important tools to ensure social cohesion'[27] She called for massive investment in ICT and the need for a renewed and more intensive effort in ICT research applies to both private and public investment.

[27] "i2010: The European Commission's new programme to boost competitiveness in the ICT sector" speech to Microsoft's Government Leaders Forum in Prague on 31 January 2005

The faith in market mechanisms has perhaps been tempered by the dotcom fiasco and reliance on public spending, along with regulatory measures to encourage private investment, is again on the policy agenda. Commissioner Reding also stated that 'we need private-public partnerships to keep Europe in the vanguard of developments'.

XII.2.3 Recent Governance Literature

To date, Information Society policy has not received scholarly attention of the type and intensity reserved for employment policy or monetary policy. The lack of clear policy definition, the difficulty in attributing political authorship to policy initiatives (is the EU promoting something member state would de doing in any case?) and the novelty of the policy area may account for this. IS policy mainly gets mention as part of new governance initiatives. This inherent 'newness' means that its potential in a mutual learning processes, policy transfer etc. is more alluded to than demonstrated.

At worse, the policy is portrayed as a window-dressing exercise operated by the Commission;

> Initiatives in areas such as `information society' may be regarded as encouraging `placation' effects given underlying, more substantial problems in European economies that are unlikely to be solved by adopting the rhetoric of emulating US-type economic policies (as was done by the chief initiators of the Lisbon process) (Chambers and Lodge 2003).

Delaporte and Pochet (2003) question the inclusion of Information Society under the rubric 'new governance'. 'In terms of labelling, it appears not to be an OMC that is at hand, but a benchmarking exercise' (Delaporte 2003). For the authors, the policy seems to possess only a symbolic reference to the OMC. It is in the associated policy area of communications that 'Information Society' can be said to have an impact but in this are, precisely, traditional law making in the form of directives hold sway. In sum, benchmarking is for the vague, hard to govern areas (computer usage, number of broadband lines etc.) and hard laws for the important areas such as market-making, liberalisation of ownership, etc.

De Burca (2002) places information society policy in the context of traditional EU law making. Remarking that certain OMC's have appeared in areas where political consensus is hard to achieve due to high domestic political salience or radically differing national preferences, she argues that

> in the case of issues such as the information society and aspects of electronic commerce, the rigidity and pace of the traditional lawmaking processes under the Treaties and their perceived lack of adaptability have been suggested as reasons for trying the potentially more fluid, iterative and responsive OMC method instead (de Burca 2002).

She goes on to point out that the 'second-best' approach to policy making that OMC can typify, 'for some, it represents a weak and insufficient form of action for achieving the broad strategic goal articulated by the Lisbon summit'.

Borras (2003) places OMC Information Society within group of relatively new fields of public involvement, where traditional regulatory or distributive instruments are not viable. Failure to co-ordinate would represent a failure of public actors to make a true impact on society and the economy. This, she argues, is the case with employment policy and policy concerning the information society.

> Regulation at EU level might mitigate some of those negative effects, but it will certainly be unable, on its own, to achieve the political goal of bringing the information society to all EU citizens (Borras 2003).

For the author, only the mobilisation of social actors partners and sub-national authorities can achieve policy goals. She goes on to question the nature of OMC, asking whether the process is one of mutual learning or simply that of a 'beauty contest' or 'exercise in statistics'.

Goetschy (2001) situates Information Society in the context of the dominant discursive trope of the Lisbon Strategy; 'catching up with the USA'. Information society policy, the European Research Area (ERA) and the liberalisation of telecommunications were the three pillars of the structural reform of EU economies. Grande (2000) demonstrates how once prevalent 'technology wars' between European nations have been transformed into collaborative strategies by the EU. The transformation has been provoked by the erosion of state capacity to implement successful IT policies. Within the national government, competencies were concentrated within a single ministry. The inherent complexity of projects makes them ill suited to this traditional hierarchical governance.

This new 'competition state' in the EU attempted to coordination policies at a supranational level in order to avoid policy failure. Grande argues that this strategy has restructured European technology policy but maintains that policy success will be possible only if coordination is aimed at solving horizontal, organizational problems. Vertical coordination is doomed to failure for the same reason national programs failed; 'deliberate strategies based on a full-scale "steering" of public policies and industrial activities are unsuited for a highly fragmented and decentralized institutional setting' (Grande 2000). A European strategy designed to achieve certain pre-defined objectives (see Lisbon goals) will fail.

The solution for Grande is to be found in 'emergent strategies' that "are the product of a process. In the course of this process, the individual or collective aims and interests of the participants in a widespread debate are generated, formulated and transformed. The final, composite result of these independent efforts may be said to be rational" (Grande 2000).

A similar conclusion is reached by Tuomi (2004). Reviewing existing research on the productivity impacts of ICT, he suggests that current economic analysis cannot clearly demonstrate the impact of ICT on productivity. However,

> [a]nother outcome of the present study is that policy matters, perhaps in more fundamental ways than we usually think. Policy is not only a constraint or enabler for economic growth and the generation of welfare. The policy process itself is a core element in the creation and articulation of the dimensions that define what welfare means. ICT-related policies therefore cannot only be formulated by focusing on the instrumental impacts of ICT. Information and communication technologies are both developed and used in a continuous process of societal and economic transformation that also redefines the underlying value systems (Tuomi 2004).

XII.3 Conclusions

- Governance of IS can be characterised as a combination of hard (directives package) and soft (weak OMC-style exercises).
- The emergence of IS policy is contemporaneous with many of the so-called new modes of governance making historical analysis hazardous.

- Policy failure (and it externalities) is difficult to identify as member states often pursue identical policies at domestic level.
- Policy success might not be measured in direct ‘benchmarkable’ impacts but in the elaboration of new ICT strategies.

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XIII. Research Policy[28]

XIII.1 Review of Community Policy Documents

The two recurrent themes of Commission and Council policy documents have been
- the relative *weakness,* as measured by level of funding, of the European research compared to 'its main competitors'[29] (USA and Japan)
- the spatial *fragmentation* of the European research arena

Since 2000, the Commission's policy formulations have systematically promoted the European Research Area as the answer to the problem of fragmentation. The FP's tackle the structural causes of the weakness:
- Cross-national researcher mobility
- Infrastructure
- Patenting
- Co-ordination

The 3% objective[30] is designed to bring Pan-European R&D spending up to best practice levels. This single target is a blunt instrument requiring national implementation that varies widely across Europe. The R&D *needs* for different countries vary. Some countries, e.g. Finland, have chosen to specialise in high-tech sector that require intense investment. Others like Ireland have research budgets that reflect other strategic economic choices (Ireland's preparation-for-market/commercialisation activities are an important stage in the exploitation of knowledge). The goal of two-thirds investment from industry sources means that the fiscal and financial environment surrounding R&D investment has to be modified in certain cases.

No model for R&D investment is proposed by the Commission and there is no consensus on how exactly to increase private spending. Wider questions of fiscal policies, considered essential by the Commission, are the preserve of national governments and policy mix depends on local circumstances (current architecture, size of exchequer, ideology).

A first policy document "Towards a European research area" - COM (2000) diagnoses that "fragmentation, isolation and compartmentalisation of national research efforts and systems and the disparity of regulatory and administrative systems only serve to compound the impact of lower global investment in knowledge" (p7). The ERA is proposed as a series of measures (amongst others);
- Networking of existing centres of excellence in Europe and the creation of virtual centres through the use of new interactive communication tools.
- A common approach to the needs and means of financing large research facilities in Europe.
- Better use of instruments and resources to encourage investment in research and innovation: systems of indirect aid (within the Community rules on State aid), patents, risk capital.
- Establishment of a common system of scientific and technical reference for the implementation of policies.
- More abundant and more mobile human resources

The communication concludes with an appeal for urgent action and the creation of "an area where the scientific capacity and material resources in Member States can be put to best use,

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28 This chapter has been delivered by Brigid Laffan and Colin Shaw.

29 EU Commission (2003) ERA Action Plan: A Call for Action

30 Barcelona European Council, March 2002

where national and European policies can be implemented more coherently, and where people and knowledge can circulate more freely" (p24).

In October 2000, the Commission published 'Making a reality of The European Research Area: Guidelines for EU research activities(2002-2006)' COM(2000) 612 final. It proposed several research priorities chosen in function for their 'European added-value'. These priorities are broadly in line with the Lisbon strategy of achieving a knowledge-based economy. The industrial sectors those most exposed to intense international competition (hence the need for concentration): biotechnology, nanotechnology, aeronautics and space.

It also suggest implementing measures:
- "programmes of activities" connected with the operation of the networks of excellence
- large-scale targeted research projects
- "collective research" projects carried out for the benefit of many SME's
- activities relating to research infrastructures carried out in the context of association
- agreements with the Community
- mobility grants for researchers

Lastly it presented a timetable for short and mid-term action up to December 2001.

In its 'The Regional Dimension of the European Research Area' COM(2001) 549 final, the Commission studies the spatial aspects of research in Europe. In a break with the theme of fragmentation as a source of weakness, it focuses on "the "motor" role that regions may play in the overall context of economic growth based on research, technology and innovation" (p5).

Regions are described as conveyors of innovation from centralised knowledge producers to the socio-economic fabric of Europe. They are also the site of research proper thereby stimulating economic growth locally. Regions can 'bridge the gap' between the producers and users of knowledge.

The aim of the European approach is to encourage investment in clusters. Regions "form the spatial basis of groupings of research and innovation operators which have come to be known as "clusters", often considered as the main drivers of regional development". (p.8)

Subsequent to the March Barcelona Council Summit, More Research For Europe: Towards 3% of GDP[31] was produced in response. Reminding member states of the 'massive, growing investment gap' and 'lagging high tech performance' it reiterates potential methods to reverse the trends. These include measures to stimulate private investment established through 'best practice'. Specifically, the Commission sees IPR and risk management as areas for exploration.

Building on the feedback on the first Communication, the Commission published a second, more comprehensive Communication "Investing in research: an action plan for Europe", and a first action plan. This action plan sketched out initiatives to reach the 3% objective. It also fleshed out new actions to be undertaken at national and/or European level.

> 'A first set of actions aims at supporting the steps taken by European countries and stakeholders, ensuring that they are mutually consistent and that they form an effective mix of policy measures.' (p3)
>
> 'The second set of actions aims at improving considerably public support to research and technological innovation.' (p4)

31 COM(2002) 499 final

> 'A third set of actions addresses the necessary increase in the levels of public funding for research.' (p4)
>
> 'Lastly, a fourth set of actions aims at improving the environment of research and technological innovation in Europe: intellectual property protection, regulation of product markets and related standards, competition rules, financial markets, the fiscal environment, and the treatment of research in companies' management and reporting practices.' (p4)

The communication does not propose any new concrete implementation (mostly calling for increased awareness, promotion, consideration, negotiation, support, progress etc.). The Commission ends with a call for action:

- Analysis of trends in research
- Encouragement of measuring and reporting
- Encouragement of inclusion of R&D management in science, engineering and business schools curricula

In 2003, Commission commissioned five independent groups to examine different policy instruments designed to increase private sector R&D investment. The reports were direct expenditures by governments on R&D-related activities (Direct Measures), tax incentives (Fiscal Measures), risk capital, and loan and equity guarantees. A fifth group studies adequate policy combination to optimise R&D investment.

The reports concluded that beyond simply increasing the level of R&D resources available to the economy, other policy choices shape the effectiveness of research: human capital investment, innovation incentives, cluster circumstances, and the quality of policy linkages. The reports also underlined the importance of *market failure* in private sector R&D and the need for direct fiscal measures (tax credits, grants and loans). They recommended clustering of R&D efforts around major territorial technology platforms. Where regions already perform well, they should benefit from increased investment. For those who are behind, the emphasis should be on transmission of technology rather that innovation. Finally, they suggest the open method of co-ordination as being of benefit in the area.

The CREST reports on OMC and R&D policy of June 2004 made several key recommendations on data collection, national reporting, monitoring, peer reviewing and governance. Other key recommendations on the redirect of State aid from potentially problematic areas under competition rules to horizontal activities such as basic research.

The creation of the European Research Council (ERC) has for two years been the subject of intense investigation by scientific organizations, both European (ESF, ELSF, Eurosciences...) and national (Max Plank Society, ..).

XIII.2 Review of Academic Studies

Academic approaches dealing more or less directly with the constitution of a European Research policy centre on its political governance and economic optimisation aspects.

These overlapping approaches differ in their degree of abstraction, the latter dealing with formal questions of knowledge production and exploitation, the former operating at the level of real world examples and country-specific studies.

XIII.2.1 Economic optimisation studies

Few studies centre on research policy per se, but place the production of knowledge in the broader context of innovation systems. National innovation systems, i.e. the institutional,

geographical, legal and political context under which a nation's or firm's resources are allocated to knowledge production, are seen as determining the optimal policy-mix defining a nation's research policy.

As mentioned in section 1, the realisation that total factor productivity is a key determinant to economic development goes back to the 1950's. This so-called X-factor or Solow residual highlighted the importance of organisational and governmental aspects of economic management. The absolute level of capital or physical endowment is a poor indicator of wealth in an economy and only the correct type and amount of regulatory intervention can foster growth.

Government provision of research funding, especially into 'fundamental' areas such as nuclear science or telecommunications, was a feature of post-war reconstruction in Europe and most of the bigger member states have a major state-sponsored research sector. The commercialisation of scientific findings as a core concern of government policy only emerged since the 1980's when the emphasis in research shifted from one of discovery of new knowledge (at which some countries, such as the U.K, excelled) to diffusion of knowledge (which includes its marketisation at which some countries has failed).

National research policy, once a source of national prestige, has become strategically positioned as a source of national wealth. In an era of globalisation and modification of state functions in the economy, the issues of optimal policy choices have inevitably revolved around questions of business-friendliness, state-aid, funding sources, Multinational corporations (MNC's) etc. Evidence from cross-country analysis showing that spending on research linked to establishing technological platforms can provide economic growth (with the USA as state-of-the art) lead governments to mainstream research policies with broader economic policies.

European research policy has had to content with several additional structural hurdles. The EU is an ever-changing political and geographical entity. No commentator has ever suggested that the EU is an 'optimal research area'. Whereas economic analysis encourages clustering and regional specialisation, the additional political goal of European cohesion means that regions that would not receive any investment because they are too far behind are inevitably included in investment plans. This linked to sovereign national preferences has meant that the distribution of research resources across European does not respond to purely economic planning.[32]

These themes of optimisation and politicisation are recurrent throughout or short literature review.

XIII.2.2 Research and Economic Growth

Studies analysing the impact of research policy on economic growth face the difficulty of measuring knowledge output, the imprecision of data on R&D inputs and the lack of consensus on the returns on investment. The traditional proxy for knowledge output is patents, trade in R&D intensive sectors and publications (Bottazzi 2004). The standard input measure (OECD) is the Gross Domestic Expenditure on Research and Experimental Development (GERD), which covers all R&D carried out on national territory in the year concerned. Other inputs from the Business Enterprise sector include data on total Business Enterprise R&D (BERD) carried out by the major industries concerned. Data for R&D carried out in the Higher Education and Government sectors and human resources are also included in studies.

[32] The rationalisation of, say, fundamental research in nuclear physics might call for the relocation and concentration of research laboratories across Europe, political reaction to which would certainly be hostile.

Keely and Qual (1998) provide an economic analysis of the assumption underpinning the Commissions model for growth, namely that there is a direct link between a county's R&D input and its economic output. Summing up theirs and others' findings they state that

- All analyses recognize that technological progress (or, one concrete manifestation; R&D) is an important engine of growth.
- All analyses acknowledge the significance of economic incentives for determining growth outcomes.
- Knowledge is the accumulation of R&D output, broadly interpreted.

They concentrate only on private R&D as a motor for growth and underline the importance of economic incentives in promoting the production of knowledge. They provide no country-specific data although the message is clear: a well defined system of intellectual property rights ensures returns on investment for knowledge producers and thereby increases in the stock of knowledge. If economic growth is achieved through technological progress, knowledge growth is achieved through regulation and allocation of resources. Policy matters therefore.

Without being able to identify 'best practice' in R&D policy, in an attempt to identify 'best practitioners' Furman et al. (2001) submit R&D output (patents) to quantitative analysis and conclude that factors such as the extent of IP protection and openness to international trade, the share of research performed by the academic sector and funded by the private sector, the degree of technological specialisation, and each individual country's knowledge "stock" play an extremely important role in the differences between country performance. Among the countries analysed, Japan, Sweden, Finland and Germany merit special mention as having 'implemented policies that encourage human capital investment in science and engineering (e.g. by establishing and investing resources in technical universities) as well as greater competition on the basis of innovation (e.g. through the adoption of R&D tax credits and the gradual opening of markets to international competition)' (Furman et al. 2001:931).

They conclude that *policy learning* is at least as important as funding in R&D output and that consequently countries hitherto at the margins of R&D can, through judicious policy choices, converge towards optimal innovation capacity. 'This convergence suggests that the commercial exploitation of emerging technological opportunities (from biotechnology to robotics to Internet technologies) may well be less geographically concentrated than was the case during the post World War II era.' (2001:931).

Mytelka and Smith (2002) plot the shift in emphasis in the EU from underwriting the demand for R&D outputs in the quest for better competitivity (through the early framework programmes) to a more holistic approach where R&D is part of a wider search for innovation. Streamlining and pooling resources in R&D initially was a cipher for lowering production costs and beating competitors at their own game. According to the authors, the 1980's brought on a realisation there was no linear relationship between research and growth. Several groundbreaking papers by Nelson and Winters (1982) and Rosenberg (1982), Lundvall (1992) challenged contemporary assumptions and emphasised the unpredictable nature of research, the importance of markets for R&D output and the role of post-discovery adaptation to market.

These findings undermine any argument for increased R&D as an aim in and for itself. They argue that the EU incorporated this idea through successive FP's and commend the it for providing an institutional setting for the dissemination of innovation theory. They note the consensus in the Commission for linking R&D to a variety of other mutually reinforcing policy areas and the explicit use of policy learning as a goal for research policy.

Bottazzi (2004) agrees substantially with the aforementioned authors. She states that direct measures to increasing R&D output has there place in research policy but R&D in Europe

should also focus on the level of knowledge of workers and the capacity of entrepreneurs to translate scientific excellence into viable technological innovation.

Her diagnosis, based on quantitative analysis, of the weakness in R&D in Europe generally reinforce that of the Commission. Low research intensity leads to lower accumulation of knowledge, a smaller stock of knowledge and lower productivity. However, the essential problem in Europe is not the output of R&D as measured by publications and citations (the so-called European paradox) but its exploitation. She goes on to focus on the main obstacles to innovation: competition, intellectual property rights, taxation, legal barriers, bankruptcy laws, financial factors and education.

In most of these fronts, the EU is lacking. Competition is still curtailed by state protectionism (public procurement laws). There is still no single European patent system. Bankruptcy in Europe results in unlimited personal liability thus dissuading risk taking. Risk capital is relatively scarce in Europe and lender are mostly institutions rather that persons who, presumably know their creditors better. She concludes that wider policy issues than R&D funding must be tackled if innovation is to be obtained.

What of actual firm behaviour? Much has been made of the internationalisation of business practices, footloose MNC, and the demise of any unique national solution to economic progress. Miotti and Sachwald (2003) studied co-operation between firms in the area of R&D and found that firms are indeed blind to national borders when it comes to looking for partners to develop new ideas. The discomforting news for European-level policy makers is that existing actor resources and capacity determine who co-operates with whom and why. Analysis is of vertical (client-seller) and horizontal (between firms) forms of co-operation. Firms are influenced by other firms' research capability, profile, complementarity, and market access. Partnerships are mutually advantageous and "firms must have resources to get resources" (Miotti and Sachwald 2003:1497).

By studying the behaviour of French firms in the high-tech sector, they demonstrate these firm seek transatlantic partnerships because of the comparative advantage of US firms in the sector. Indeed, firms who do successfully form partnerships with US firm are more productive (patent output) and the authors go on the conclude

> According to this discussion and our results, transatlantic co-operation is more efficient in terms of innovation than intra-European co-operation. This should be considered as part of the assessment EU programs, which have promoted co-operative research among European firms in sectors where catching up with American or Japanese competitors was considered as an important objective. (p1497)

To summarise, R&D output is a factor in economic prosperity. The organisation, funding and wider legal and financial context determine the effectiveness of inputs. Although governments control public spending and can provide favorable environments for R&D investment, firms seek comparative advantage of the type provided, in certain sectors, by transatlantic partners.

XIII.2.3 Governance-Based Approaches

While governance studies of EU policymaking have dealt extensively with say, economic, monetary, and employment policy, research policy has only recently become object for individual analysis. Starting from the premise that the EU has failed in its goal to co-ordinate its research resources Banchoff (2002) puts the blame squarely on European institutions.

Rejecting the traditional intergovernmental explanation for this failure, Banchoff draws on institutionalist accounts of the resistance of established institutions to change (Pierson 2000).

Although national preference is acknowledged as a source of inertia, he highlights the deleterious effect of the institutionalisation of EU research policy through the FP's. Pointing to noteworthy examples of intergovernmental co-operation (ESA, EUREKA, CERN…) it was, he argues, the *distributional* nature of these framework programmes that undermined the ultimate goal of *regulatory* co-ordination. Granting the Commission a substantial budget for promoting both the co-ordination and creation of research projects meant duplication of research, clientelism, and vested interests for the status quo. This situation persisted until the Commissioner Busquin's proposal for ERA in 2000 broadened the policy agenda.

By shifting emphasis from 'more research' to 'better co-ordination of research', ERA seeks to address issues of researcher mobility, patenting, public tendering, and other national structural obstacles to co-ordination. Banchoff concludes that the ERA initiative stands in good stead to improve R&D in Europe but warns of the potential and perennial dangers of institutional inertia at all levels.

Writing a little later (Banchoff 2003) and with better hindsight, the author is more enthusiastic about ERA's chances of success in the face of entrenched interests and procedural hurdles. The Commission's political entrepreneurship is, he concludes, combining with national agendas for structural reform. ERA has successfully provided the EU with a regulatory and distributive arm . The key to ERA's initial success is precisely its role in reorganising European research space.

Grande (2001), dealing with the 'technology policy' departs from the unstated assumption that co-ordination of European research is 'a good thing', and argues that

> technology policy in Europe has been characterized by two developments running in opposite directions. On the one hand, the concepts and strategies guiding public R&D policies have become more and more complex, resulting in encompassing programs for national and European "innovation policies". On the other hand, as a result of the globalization of technologies, markets and companies, and of changes in the internal structure of the state, the state's capability to successfully implement these ambitious strategies have been eroding. (p.916)

In the light of these developments, he calls for a decentralisation of technology policy and a redesigning of European policy instruments including FP's, to stimulate, intensify, promote and guide the self-coordination of independent actors and organizations in order to make European technology policy a joint effort, instead of relying on purposeful policy-coordination by a supranational institution (p.917).

ERA-style initiatives are futile at a time when the needs for innovation are met by increasingly complex and ad hoc structures. Overarching, over complex and over ambitious projects to tighten links between national, European and industry actors of the type the Commission has designed in the FP's are therefore, futile. Grande sees the role of the EU in enabling 'grass roots' regional and local responses to innovation needs. Using the management of the structural funds as an example of good governance the recommends an innovation policy framework that promotes action at the local level.

Kuhlmann (2001) portrays three scenarios for the future of innovation policy in the EU. Centralisation, decentralisation, and co-evolution. The first scenario — strong centralisation of innovation policy governance, he states 'will quite probably fail' (p.972), for many reasons, not least because of the number of member states and the resistance of national political systems and innovation systems, and also as a consequence of an inherent policy complexity.

He predicts that 'decentralisation, increased competition of regional actors and finally even disintegration of political and innovation systems — could come true' (ibid.). The risk is that less well performing regions will fall behind and that normative goals of cohesion between member states will be sidelined as investment in successful regional projects beget more investment. EU enlargement may provide the scene for the playing out of this scenario.

Although the author admits to having no immediate evidence yet, he argues that 'there some degree of probability that some variation of this third scenario — co-evolution of "postnational" political and innovation systems towards centrally mediated policymaking for distributed but inter-related innovation systems — will come into existence' (ibid.). Citing the EU Commission's recent attempt to facilitate the creation of an integrated "European Research Area" he interprets this as a step in this direction. The chances of success of ERA will be improved if it is embedded in a governance of "shared responsibilities" between various types of actors and levels of hierarchy.

He concluded that an 'ideal post-national policy' would include normative goals of cohesion and equity in the distribution of source across regions, however the economic imperatives of globalisation and intra-European competition might be the graveyard of these good intentions.

Neither Grande nor Kuhlmann evaluate the potential of OMC in research policy although his recommendations are close do the aims of the method. Prange & Kaiser (2002) specifically addresses issues of governance surrounding research and innovation policy.

He concludes that 'for reasons of efficiency and legitimacy in an expanding Union, the OMC seems to be an appropriate procedure only in policy areas characterized by a high degree of decisionmaking powers and a significant amount of financial resources at different territorial levels, considerable differences in societal subsystems (such as the research or education system) between member states as well as in the performance of these subsystems' (Prange & Kaiser 2002).

In a more recent article (Kaiser and Prange 2004), the issues of policy learning in a situation of intense diversity are addressed. Clearly, European member states possess different innovation capacities necessitating soft instrument with flexible implementation. If OMC is to fulfill its potential then it must enable local actors to define targets and lever resources. The bottom-up approach is the right one but if experience is to be shared the dangers of the 'uninformed transfer, the incomplete transfer and the inappropriate transfer' (p.262) of best practice are potential risks. Adding to these dangers are normative problems of legitimacy, parliamentary involvement and civil participation which cannot be sidelined. However, if anything is to work, OMC stands the best chance of succeeding.

XIII.3 Conclusion

- The difficulty of co-operation and co-ordination of research policy at EU level is noted by all authors. Its value as a goal is disputed by those studies that take into account the behaviour of firms and the competitive market conditions under which they operate.
- ERA is a political entity and therefore does not necessarily respond to the economic logic of returns to scale, optimal spatial distribution of markets and resources, etc.
- The resources devoted to co-ordination of such diversity as can be observed in the EU could conceivably be infinite if convergence of performance is the ultimate goal of European research policy.
- While the advantages of co-ordination (avoidance of duplication, pooling of resources, policy transfer etc) are evident, its cost might outweigh its hypothetical value.

State of the Art Report
Project 3

Mareike Kleine and Thomas Risse

XIV. Constitutionalisation[33]

XIV.1 On Treaty Reform Negotiations

Analyses of the big bargains in the EU, i.e. the treaty reform negotiations, have largely been modelled as bargains between rational actors. Especially Andrew Moravcsik's (1998) liberal intergovernmentalist (LI) "opus" on Intergovernmental Conferences from Messina to Maastricht has evolved as the focal point of criticism. LI rests upon the assumption of the analytical priority of state preferences and tries to explain issue-specific transfers of sovereignty. After a stage of preference generation on the domestic level, national preferences are assumed to be fixed on the interstate level. In a highly stable negotiation system as the EU where ideas and interests can be assumed common knowledge, final results are thought to reflect pattern of asymmetrical interdependence – translated in different preference intensities – as well as opportunities for issue-linkages and side-payments (Moravcsik 1993, 1998, 1999; Moravcsik and Nicolaïdis 1998, 1999). This approach has been critizised for blackboxing the actual process of negotiations: since initial preferences are almost always kept secret by negotiators, explanations based upon preference intensities run the risk of presenting mere tautologies and ignoring processes of deliberation and (supranational) entrepreneurship.

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XIV.2 On the effectiveness of Arguing in Multilateral Negotiations

Our research question is related to a debate in International Relations about the role of material and ideational factors and the emergence of norms in international politics (e.g. Goldstein and Keohane 1993). Especially it ties up to studies that try to model communication in multilateral negotiations (Keck 1995, Morrow 1994) or trace the causal mechanisms of arguing and bargaining (see Müller 1994, Risse 2000, Checkel 2001c, Ulbert et al. 2004, Risse and Ulbert 2005). These studies try to integrate elements of social interaction and agency in the constructivist research program (see Checkel 2001a, b; for a critique see Moravcsik 2001a, b).

[33] This chapter has been delivered by Mareike Kleine and Thomas Risse.

Pure arguing as a communicative mode (Saretzki 1996: 32) can be defined as reason-giving in order to alter actors' choices and preferences (cf. Keohane 2001: 10). Reason-giving, however, is all pervasive in international negotiations, and it is therefore necessary to ask, under which circumstances it really matters, that is, when does reason-giving become effective by changing the process and outcome of a deliberation. We can indirectly investigate the effectiveness of arguing on the basis of its outcome. Whereas bargaining rather leads to a compromise between diverse preferences, arguing is expected to lead to a reasoned consensus because actors take arguments into account and may change their preferences accordingly. We will know a consensus when the result is a) surprising, b) beyond the lowest common denominator, and c) when actors give the same reasons for its achievement (Risse 2004: 302).

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XIV.3 On Deliberation in the European Convention

The hitherto most detailed description of the negotiations in the European Convention has been written by Peter Norman (2004). However, the descriptive literature on the diverse aspects of the European Convention is too broad to sum it up here. A very good overview is given in Brückner et al (2004) and by Andreas Maurer and Daniela Kietz (2004). Yet, analyses that ask for processes of deliberation are still rare.

While most analysts consider the attainment of the Proposal of the Convention as puzzling, there are different assessments on whether this surprise can be ascribed to the Convention method as such. Paul Magnette and Kalypso Nicolaïdis attribute some achievements of the single text to processes of deliberation. But deliberative dynamics only played a role on marginal constitutional issues concerning simplification, where the initial preferences of the Conventioneers "that mattered" were less intense and the consequences less predictable. But when it came to the crucial issues, the hands of the member states' representatives were strengthened and the pendulum "moved back to classic forms of diplomatic bargaining" (Magnette and Nicolaïdis 2004: 394). The "shadow of the IGC" hence led to the dominance of state representatives, so that "the Convention reproduced, by extension, the logic of intergovernmental bargains" (Ibid: 381). The results are therefore mainly explained by the initial distribution and intensity of preferences as well as by the non-obligatory status of the Convention's proposal. So "despite the originality of its composition and procedures, the European Convention did not substantially differ from previous rounds of treaty reform in the EU, except in areas marked by a high level of formalism that could be fitted under the rubric of simplification" (Ibid: 399).

Besides, Andreas Maurer and Daniel Göler regard the inclusion of the new actors as an essential innovation of the Convention method. But this crucial innovation only came to play on "Convention-suitable" topics (Maurer and Göler 2004: 22, Göler 2006). The dominance of state representatives in the last Convention phase automatically constrained the role and influence of the new actors on the debate and this key position of state representatives favoured the dominance of IGC-like bargaining (Ibid: 19).

From a more normative point of view, it is also claimed that by the inclusion of parliamentarians and the openness of the debates, the Convention method constituted a forum that can be considered as more representative and legitimate because it deviates from pure intergovernmental bargaining (Maurer 2003a, b). The Convention is even seen as an alternative to IGCs and as a qualitative change in the constitutionalisation of the EU (Pollack and Slominski 2004: 218).

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State of the Art Report
Project 4

Anne Peters and Stefan Griller

XV. Democracy and New Modes of Governance[34]

XV.1 The "traditional" meaning of democracy

The term democracy dates back to ancient Greece describing a "mode of governance" where the power lies in the hands of the majority. Since that period, democratic theory and democratic reality have changed periodically and considerably. But the core meaning of democracy and the central points of discussion have not changed that much. The basic principles of a democracy are and have always been "freedom" and "equality". The basic ideas of democracy are therefore the identity of the governing and the governed and the equality of citizens as carriers of democracy. Modern constituencies try to guarantee these fundamental democratic principles in an optimal and balanced way.

The citizens are the subject of a democratic polity, they are the ultimate bearer of public authority. This means that the exercise of political authority, the performance of public tasks, needs to be legitimised by the citizens themselves. In a democracy authority can never be justified in itself, it always has to be derived from the citizens. Consequently, the decision-makers have to be politically accountable to the citizens of that polity – directly or indirectly (via the Parliament). A democratic executive is ensured by the rule of law and the principle of administrative (or ministerial) responsibility.

In a traditional way, democracy can therefore be described as government by the people, either directly or indirectly through elected representatives with Parliament as the central political institution on which all other public authorities depend in a certain way.

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XV.2 Democracy and the EU

XV.2.1 Transformation of democratic systems and Europe's democratic deficit

Today's democratic systems are undergoing transformations – due to globalisation and global governance, but also "purely internal" challenges. Important decision-making powers are transferred to supranational (EU) and international bodies (e.g. WTO). This development enhances the rise of the executive branch and the creation of new modes of governance. The growing complexity of issues leads to a certain dominance of – democratically not legitimate – technical experts in various forms of decision making. Soft law, networks as pluralistic forms of governance and forms of "horizontal" negotiation are also of increasing importance. The "horizontalisation" of governance therefore is a major trend in modern-day administration.

Arguably, however, this trend towards increased horizontalisation does not meet with the "traditional" understanding of accountability and the concept of ministerial responsibility. This means that Europe's pluri-centric forms of governance do not fit with the traditionally understood and applied modes of accountability in the Member States of the EU. As a consequence, the problem-solving capacity of governance gets more and more important and effectiveness is increasingly placed on an equal footing and sometimes even identified with democratic concerns. Consequently, "soft" methods of accountability like ex-post reviews or reporting requirements tend to replace the "classic" accountability-modes. Another aspect is the lack of transparency in the decision making process of the European Union. Deficiencies in transparency automatically lead to a lack of democracy, as the citizens are hampered in discussing and criticising or giving their consent to government action in a well-founded manner.

To sum up: The core of the current democratic deficit within the European Union is the remoteness of decision-taking from the citizens as well as the fragmented democratic accountability of the decision-makers.

XV.2.2 Europe's obligation to preserve the basic ideas of democracy

Democracy is a constitutional principle in all Member States of the European Union and an integral principle of EU law (Art 6 TEU, CT: Art I-2; Title VI "The Democratic Life of the Union"). It is not by chance, and cannot be ignored in the debate on new modes of governance, that the Constitutional Treaty stipulates -- under the heading: the principle of democratic equality -- that the Union "shall observe the principle of the quality of its citizens" (Article I-45) and that the functioning of the union "shall be founded on representative democracy" (Article I-46 para. 1).

Consequently, Europe is under an obligation to preserve the basic ideas of democracy. While some authors stress that this can only be realised through the "traditional" structures and mechanisms (see above under A), others argue that a modern democracy needs new structures, mechanisms and alternative modes of accountability. The most important "alternative" conceptions are deliberative and associative models of democracy and output-oriented democracy approaches.

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XV.3 "Alternative" models of democracy

Various conceptions and models of democracy try to give answers to the changing conditions of governance. The emergence of these "alternative" models is linked to the difficulties of representative democracy in providing for effective decision making in an increasingly interdependent world. Some of these conceptions are not really compatible with the "classic" ideas of democracy, others do not need to be perceived as an alternative to the traditional mechanisms, but rather as valuable supplements.

The interconnected models of associative and deliberative democracy put their emphasis on participation in decision making by all interested parties and civil society. Associative models stress the importance of intermediary structures (interest associations, political associations) in a society. Deliberative theories of democracy put the main emphasis on European-wide political communication and opinion formation and the engagement in public discourse. These two conceptions are compatible with modern representative democracy; it can be argued that the development of a European public sphere is crucial to the conceptualisation of democracy at a European level. Therefore, a European wide civil society with interest associations, non-governmental organisations and other mechanisms enhancing the participation of citizens has to emerge and make a European public debate possible.

Output-oriented democracy models focus on efficiency, the quality of the achieved results and the degree to which policies satisfy the preferences of the individuals. It is argued that fulfilling these criteria is legitimising in the sense that the problem solving capacity would be enhanced; the conditions established are to a certain extent less demanding than those of input-oriented legitimacy. While input-oriented democratic thought emphasises "government by the people", output-perspective emphasises "government for the people" (*Scharpf*). Some authors argue that these output-oriented models are deficient in that they tend to downgrade to an unjustified extent the input aspect of democracy, namely the will of the people as a decisive element of democracy. They contend that in a democratic system input and output oriented legitimacy should coexist, reinforce and complement each other. Others highlight the advantages of the output-oriented models for a European democracy and try to develop "alternative" legitimisation mechanisms like peer review, judicial review or reporting requirements.

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Majone: see next block

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XV.4 The delegation of policy-making powers to agencies

One of the most significant developments in the administrative structure of the EU (and the Member States) is the growing number of agencies. The development of these agencies can be seen as a response to the growing number of highly technical tasks on the European level.

Though most European agencies are informational "only" (due to the restrictive "Meroni-Doctrine" of the ECJ), there are still agencies that can take decisions independently, such as the Office for Harmonisation in the Internal Market, the Community Plant Variety Office, the European Aviation Safety Agency and to some extent the European Agency for the Evaluation of Medicinal Products. But also purely "informational" agencies are powerful, because information is a key element in policy making, and networking (networks of European and Member States agencies) is an important force in European-wide opinion-forming.

Some authors (eg *Majone*) stress the importance of independent agencies in the governance system of the European Union. They argue that there is a serious mismatch between the increasingly specialised functions of government and the administrative instruments at its disposal. They further point out that specialised agencies (with neutral experts) can carry out policies with a higher level of efficiency and effectiveness than the "ordinary" administration. The recommended mechanisms to hold these independent agencies "under control" are reporting requirements, reviews, judicial control and public discussion.

Other authors are more sceptical concerning the degree of independence of agencies. They argue that the trend of delegating important policy making powers to non-majoritarian institutions operating outside the line of hierarchical control raises problems of democratic legitimacy and accountability. It is objected that the above-mentioned "soft mechanisms" of accountability (reviews, reporting requirements...) are means of "managerial accountability" that cannot replace those of "democratic (political) accountability". As a consequence, there have to be, within a democratic system, limits to the independence of agencies; delegation should be subject to strict restraints (eg in the sense of the Meroni-Doctrine).

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XV.5 Soft law

XV.5.1 Soft Law in Public International Law

XV.5.1.1 *Concept*

Instead of creating formal, compulsory hard law, governments increasingly rely on soft law. The trend towards soft law has been described as the **deformalization of international law**. Soft law is normally understood to be not as such legally binding, but a commitment in the grey zone between law and politics. In a widely received article, Abbott/Snidal (2000) distinguished "soft" from "hard" law along the parameters of obligation, precision, and delegation, which means that there is a sliding scale between harder and softer norms.

XV.5.1.2 *Classic and more recent examples*

XV.5.1.2.1 State-authored soft law

- Helsinki Final Act of 1 Aug. 19975, Basket I, Questions relating to Security in Europe: Declaration of Principles Guiding Relations between participating States, Principle VII on human rights and fundamental freedoms. http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm, visited on 1 June 2004.
- The International Code of Conduct against Ballistic Missile Proliferation (ICOC) of 26 November 2002 with 109 subscribing States (summer 2004).

XV.5.1.2.2 Soft Law issued by Private Actors

- The Wolfsberg Statement on the Suppression of the Financing of Terrorism of January 2002, issued by the so-called Wolfsberg group of leading international banks (http://www.wolfsberg-principles.com/standards.html.

XV.5.1.2.3 Arguments against resort to soft law in the international realm

- Conceptually: Misleading concept. Either law or not law.
- Erosion of the normative power of the international legal order as a whole (Weil (1983)).
- Soft law is window-dressing and an excuse for not pursuing hard legalization.

- Deformalization risks to freeze the status quo of power constellations: “fig leaf for power” (Klabbers (1998)).

XV.5.1.2.4 Arguments in favour of soft law

- Conceptually: Blurry boundaries between harder and softer norms, especially in international law, where centralized sanctions are lacking.
- Soft law lowers sovereignty and transactions costs and therefore facilitates agreement (Abbot/Snidal (2000)).
- Soft law may pave the way for hard law.
- Soft law can integrate transnational actors which are not (yet) formal subjects of international law (TNCs, NGOs).
- The degree of compliance with soft law may be very high (for other reasons than the norm’s enforceability), and that is what counts.

Some insights on soft law in public international law might be transferred to the Union’s soft law.

Soft law in public international law is widely discussed. The extensive literature concentrates on the question whether soft law is a source of public international law, on its legal nature, and on the issue of compliance with soft law.

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XV.5.2 Soft Law in European Community Law

XV.5.2.1 Aquis académique

Soft law in European Community/Union law is less thoroughly explored than in public international law. Some important articles date from the 1980es and 1990es (Bothe; Wellens/Borchardt; Snyder).

Textbooks and general courses on European Community law either do not mention soft law at all or only treat it in an extremely cursory fashion with some few standard examples.

However, as “soft law” is becoming increasingly important as a new mode of governance (see in particular the documents by the European Institutions, e.g., “alternative regulation”, …) academic interest has increased as well (see notably Senden (2004)). *Senden (2004)* is the most important and comprehensive monograph which provides an actual categorization of soft law instruments. She uses the content and function as indicators for classifying EU soft law into (1) preparatory and informative instruments, (2) interpretative and decisional instruments, and (3) steering instruments (formal and informal). Senden analyses the functions of EU-soft law and notably asks to what extent soft law functions s an alternative to hard law. She analyses the legal effects (direct and indirect ones) and discusses the implications of the use of soft law for democracy and the rule of law. The approach is basically a positivist ad technical one. Questions of legal theory are not posed, and the issues of legitimacy are treated only briefly.

Among the previous literature, the following articles are noteworthy: *Bothe 1981* gives an overview of existing practice until 1980 (not very detailed) in the European Community and provides a legal analysis. Bothe distinguishes the soft law instruments according to their authors, (Council/Member States or Common acts of EU institutions) and according to their contents (policy programme/area or institutional function). Bothe describes as soft law as acts all acts which are not legally binding, including the non-binding Acts mentioned in the EC Treaties. Most of the Member State Acts are not binding treaties between states (lack of intention to be bound) and mere political declarations/“gentlemen’s agreements” (*e.g.* the so-called Luxembourg Accords of 1966. For the same reason, most common acts of European institutions are also not legally binding. However, these acts are politically binding norms. Bothe also criticizes the term “soft law” as used first in public international law. He discussed the causes for the choice of non legally binding norms, and compliance with non-legally binding norms which are not enforceable with legal means before courts.

The legal significance of non-legal norms might be to protect legitimate expectations, to create an estoppel, and to be binding on the basis of the principle of good faith.

Bothe also discusses whether non-legal norms may be transformed into legal obligations. A process of legalization may take place by means of the enactment of formal binding acts, the emergence of customary law. Non legal norms my also serve as a means of interpretation of legal norms.

Another issue are the legal limits for the adoption of non-legal norms. Bothe opines that they are allowed only *praeter legem*, not *contra legem*. A problem arises if non legal norms force a renouncement on legal options, such as the Luxembourg Accords 1966. Bothe summarizes: „Dieser Rückgriff [auf nicht-rechtliche Regelungstaktiken] stellt damit ein Element des vielfach beklagten Abdriftens der Gemeinschaften aus der Supranationalität in die Internationalität dar. Indem sich die Gemeinschaften den Stil internationaler Organisationen zu eigen machen, indem auch sie den Kompromiss zwischen Souveränität und Ordnung schliessen, den sie kraft ihrer supranationalen Befugnisse nicht zu schliessen brauchten“ (Bothe, at p. 774 et seq.).

Another important paper is *Wellens/Borchardt (1989).* The authors first examine the concept of soft law in public international law:

- Need and function of the concept; description of the concept; definition.

- Forms of international soft law: resolutions, codes of conduct adopted within/by an IO in order to influence either State behaviour or the behaviour of TNCs; joint communiqués or declarations, gentlemen's agreements.
- Use of soft law in public international law

It is important that Wellens/Borchard very much along the traditional line consider **only texts issued by State actors** or of International Organisations, not acts by private actors.

(2) Analysis of the concept of soft law in Community law:

- Necessity and possible functions.
- Characteristics of the Community legal order which may have an impact on the resort to soft law (in comparison with its use in public international law).
- Use of a specific concept of Community soft law.
- Community Soft Law in operation – legal scope of legally non-binding rules of conduct.

Wellens/Borchard conclude that in general the use of Community soft law is justified. However, the **protection of individual rights** calls for a cautious use.

The third more recent paper is *Snyder*, Working Paper *(1993).* Snyder analyzes first the inter-institutional relations within the in EC (Commission and ECJ), and then some of the implications of the increasing use of soft law for the institutional structure of EC. Snyder highlights the importance of the **principle of subsidiarity** which implies that the least intrusive legislative acts should be used.

Snyder, Effectiveness (1993) analyzes soft law as a tool for **enhancing effectiveness** of Community law.

Hummer (2004) is an in-depth analysis on **inter-institutional agreements**. It contains an empirical analysis and suggests a classification (**indicators: chronological order, actors, denomination, content**). It also discuses the admissibility, the legal nature and the impact of soft law.

XV.5.2.2 The EU-Concept of Soft Law

EU practice has produced a wide range of instruments which are not as such legally binding. They may be gathered under the heading of "soft law". This notion was developed in general international law (see *supra*), and appears *prima facie* transferable to the EU realm. Official EU documents themselves do not provide any definition of "soft law".

As a working definition, we might simply distinguish hard and soft law according to the latter's lack of legally binding force. This is a broad definition which leaves room for many instruments.

EC soft law is very heterogeneous. Among it range soft law instruments which have already gained a specific Community meaning. Two explicitly named instruments provided for in Art. 249 TEC, the Recommendation and the Opinion, lack binding force and may therefore also be considered as "soft law", albeit a special, "formalized" type of soft law.

In scholarship, soft law has been, *inter alia*, defined as follows (see for an overview Senden 2004, pp. 111 et. seq.): "Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects" (Senden, at pp. 112 and 456).

> "…whether the concept of soft law carries the same meaning when the term is transplanted into the EC…The term soft law may, therefore, serve as a convenient description for these [recommendation and opinions, art. 249 ECT] and other EC actions which enjoy an uncertain legal status. Alternatively the concept of soft law may be used to embrace those features of a mature legal system which give that system its flexibility and dynamic character…." Beveridge/Sue (1998), pp. 289 et. seq., 290.

"Community soft law concerns the rules of conduct which find themselves on the legally non-binding level (in the sense of enforceable and sanctionable) but which according to their drafters have to be awarded a legal scope, that has to be specified at every turn and therefore do not show a uniform value of intensity with regard to their legal scope, but do have in common that they are directed at (intention of the drafters) and have as effect (through the medium of the Community legal order) that they influence the conduct of Member States, institutions, undertakings and individuals, however without containing Community rights and obligation". Wellens/Borchardt (1989) at p. 285.

XV.5.2.3 Classification of Soft Law Instruments

Soft law instruments can be classified according to their primary function. Along this line, Senden (2004), at p. 457 suggests three major categories which will also be provisionally be relied on here. (An alternative approach is the Court's approach focusing on **contents** and **intention** of an Act).

XV.5.2.3.1 Preparatory and informative instruments

(a) Preparatory instruments

Among these range *Green Papers* (issued by the Commission), *White Papers* (Commission) and *Action Programmes* (Commission and in a later stage also Council), for example environmental action programmes.

(b) Informative instruments

Under this heading, informative, interpretative and decisional *Communications* can be gathered. Their objective is to provide information on Community action. They do not enshrine general rules of conduct. A noteworthy type are *Inter-Institutional Communications*. These are authored by the Commission, but sometimes the Communications are followed by an inter-institutional agreement of all the EC institutions. They are the most frequent of all informative communications. The addressees are other EC institutions. Their objective is the stimulation of an inter-institutional dialogue. They contain an evaluation of existing policy or summarize the outcome of a public debate. They may eventually have a pre-law function. They do not indicate any legal basis upon which they are founded. They are usually published only as COM Documents, but sometimes also in the C Series of he OJ.

Purely Informative Communications are issued by the Commission. They give a factual account of Community action. The addressees are any interested party (broad personal scope), e.g. the general public, also Member States, economic operators. They are therefore external acts/directed to outside parties, sometimes both external and internal acts. Their objective is the information of the general public. Their function is merely publicity, a legal basis is not indicated. The Commission does not follow any specific adoption procedure. Publication is effected generally only as a COM Doc, sometimes in the C or even L Series of the OJ.

Individual Communications are issued by the Commission, eventually with involvement of other institutions). They give notice on the (proposed) application of Community law in a

concrete case. The addressees are often not further specified, such as the "interested parties" Sometimes they are specified, by reference to the Member States, importers, producers or users. Their scope is limited. They are issued only in areas in which the Commission has the competence to enforce Community Law directly that is to apply. Publication: In the C Series of the OJ. The subject areas are state aid, competition law, anti-dumping.

XV.5.2.4 Interpretative and decisional instruments

The objective of these instruments is to provide guidance as to the interpretation and application of Community law. An important sub-group are *administrative rules,* which relate to existing Community law and are therefore distinct from other steering instruments. Examples are two Communications concerning the application of (ex) art. 85 first paragraph (the so-called "Christmas Communications" of December 1962. They are generally held to be the first manifestation of administrative rules in EC law.

a) Interpretative instruments

The decisive feature of the interpretative instruments is that they relate to existing primary or secondary EC rules, which are conditio sine qua non of the interpretative instruments. To thee belong Interpretative Communications and Notices, issued by the Commission, and occasionally by other institutions. They are most frequently called "Communications". Their objective is to interpret existing rules in a certain area or sector. The addressees are those affected by the implementation or and the application of the Treaty or secondary law provisions at issue, *e.g*. the Member States, the economic operators, EU citizens and consumers. The interpretative can thus have both an internal or an external nature. They are not intended to be legally binding. Their function is to increase transparency, e.g. by clarifying legal situations in a certain economic sector. This is a post-law function. Their legal basis appears simply to be assumed by the Commission. They are published in the C Series of the OJ, rarely to those concerned.

b) Decisional instruments

Among these range *Decisional Notices* and (less frequently) *Communications*, issued by the Commission. Their objective is to generate rules regarding the way in which implementing powers will be exercised, hence rules of conduct. A precondition for them is that the Commission has implementing and discretionary powers. This is present in limited areas, most frequently in areas of competition law, merger control, state aid, and common commercial policy. Existing Treaty provisions are Art. 81, 82, EC and secondary law provisions (regulation 17/62). The addressees are the EC institutions, *e.g*. the Commission (internal nature), those affected by the application of Community law, *e.g*. the Member States or enterprises (external nature). Their function is clarification, transparency, effectiveness, greater legal certainty (interests of economic actors, also self-interest of Commission). This is a post-law function. The legal base is not specified by Commission. Publication is effected in the C Series of the OJ. First, a draft version is adoption and published. Another type is *Decisional Guidelines, Codes and Frameworks* by the Commission). Their objective is to furnish decisional rules in areas where the Commission is entrusted with the power to decide on individual cases. Addressees are the Member States (as a third party), and potential beneficiaries. They are probably not intended to be legally binding. However, they are often highly detailed and impose concrete obligations on the Member States. They are published in the C Series of the OJ or/and are notified to the Member States. They are primarily adopted in the area of state aid.

XV.5.2.5 Formal and non-formal Steering instruments

a) Formal steering instruments

"Steering instruments" are instruments which steer or guide action in some way or another, bit which are not legally binding. Steering instruments lay down rules that are not necessarily linked to existing legal framework. Formal steering instruments are those which Art. 249 EC Treaty provides, *i.e*. the *recommendation* and the *opinion*. Art. 249 TEC clearly states that these two instruments are non-binding. Recommendations may be issued by the Council or by the Commission. Opinions are usually issued by the Commission.

b) Non-formal steering instruments

"Non-formal" means that no legal provision exists which provides for these steering instruments. To this group belong Council Conclusions, Council Declarations, Member State Declarations, Joint Declarations, Inter-Institutional Agreements (between various institutions), Council Resolutions, Mixed Conclusions, Declarations and Resolutions, and finally Council and Commission Codes of Conduct or Practice. The informal steering instruments may have internal addressees (EC institutions) or external addresses, such as the Member States, companies, industries. Example are the Code of Conduct on arms export, the EEC Code of Conduct for companies operating in South Africa (external nature); or the Code of Conduct concerning public access to Council and Commission documents (internal nature).

XV.5.3 Functions of EU-Soft law

Following Senden 2004, 457-461, a triad of functions can be established:

(1) **Pre-Law function**: An instrument is adopted with view to the elaboration and preparation of future Community legislation and policy and soft law acts.

(2) **Post-Law function**: Instruments that complement and support existing primary and secondary Community law.

(3) **Para-Law function**: Use of soft law instruments instead of/as alternative to legislation

XV.5.4 Distinctions

XV.5.4.1 The Open-method of coordination (OMC):

The OMC has been used since the European Council of Lisbon 2000. Its legal basis is Art. 99, 128 TEC.

OMC is explained in *Commission of the European Communities, European Governance, A White Paper, COM (2001) 428 final, 25 July 2001,* at pp. 21-22: "The open method of coordination is used on a case by case basis. It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion. It relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others".

In some areas, such as employment and social policy or immigration policy, it sits alongside the programme-based and legislative approach; in others, it adds value at a European level where there is little scope for legislative solutions. This is the case, for example, with work at a European level defining future objectives for national education systems.

The Commission plays an active co-ordinating role already and is prepared to do so in the future, but the use of the method must not upset the institutional balance nor dilute the achieve-

ment of common objectives in the Treaty. In particular, it should not exclude the European Parliament from a European policy process. The open method of co-ordination should be a complement, rather than a replacement, for Community action.

Circumstances for the use of the open method of co-ordination: The use of the open method of co-ordination must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions. It should not be used when legislative action under the Community method is possible; it should ensure overall accountability in line with the following requirements:

- It should be used to achieve defined Treaty objectives.
- Regular mechanisms for reporting to the European Parliament should be established.
- The Commission should be closely involved and play a co-ordinating role.
- The data and information generated should be widely available. It should provide the basis for determining whether legislative or programme-based action is needed to overcome particular problems highlighted.

The link between soft law and OMC is explained by Senden as follows: “Such a link can, however, certainly be established. (…) establishing (open) coordination in a legally non-binding way is in certain situations clearly preferred over establishing common policy or harmonisation of national laws through the use of legislation, for being a less intensive or coercive form of Community intervention in the national legal orders. Soft law instruments, in particular certain recommendations and guidelines, are thus used as tools for shaping this co-ordination and in fact in applying the open method of coordination” (Senden 2004, at p. 22).

Literature: See below.

XV.5.4.2 *Contracts/Agreements*

Further legal instrument to be distinguished from soft law are agreements between institutions or between institutions and Member States which do not fit into the Community/Union framework, but which are, however, legally binding. An example is the Tripartite Agreement between European Commission, Italian Government, Lombardy Region, 15. Oktober 2004, http://europa.eu.int/comm/governance/docs/texte_convention_tripartite_en.pdf

XV.5.5 Problems and Research Questions

XV.5.5.1 *General questions of legal theory*

(1) What are the exact **legal effects (if any)** of soft law? Can, *e.g.*, legal effects be created via the legal protection legitimate expectations, estoppel, or the basis of the principle of good faith - or is this a circular reasoning? Is self-bindingness a form of legal obligation (distinction to self-regulation?) Another source of a legal obligation to take soft law into account in some way or the other might be the general duty to cooperate (Art. 10 TEC). It is most often assumed that sot law typically has the “soft” or “indirect” legal effect to constitute a guide-line for the legal interpretation of had law. This assumption must be tested against the fact, notably against the ECJ practice of interpretation.

Senden (2004), at p. 462 distinguishes between “inherent” and “incidental” legally binding force. This distinction must be tested. Does soft law bear the danger of creating legal obligations “through the back-door”?

(2) Are there **sanctions for non-compliance** with soft-law? A frequently used mechanism is the threat to enact hard law in the event of non-compliance. Can this be called a sanction in

legal terms? Merely soft steering instuments may incite the Member States to pick and chose and thereby foster diversity, which might run counter to the objective of a uniform application of EU-law.

XV.5.5.2 *Soft law in relation to constitutional principles.*

On the one hand, soft law seems at least facially to improve the **efficiency** of European governance and may contribute to **subsidiarity**. On the other hand, the most important European constitutional principles appear *prima facie* to discourage an excessive use of soft law. Among these count the **rule of law** (including the protection of legitimate expectations, legal certainty), **transparency**, and **democracy**, the **institutional balance**, the **external division** of powers between Member States and the Union and the **independence of the judiciary**.

The exact relationship between the use of soft law and compliance with European constitutional principles will be the core issue of the paper (see working hypothesis 3).

The following issued will have to be explored:

(1) Among the constitutional principles which are at stake, the principle of **democracy** is probably the most complicated one. The **involvement of the European Parliament** and suggestions for the extension of its role is crucial here. In this context, we must distinguish between various phases: The choice between hard and soft law, choice of the type of soft legal instrument, and finally the adoption process of soft law instruments. These must be examined separately in order to assess whether resort to soft law by necessity handicaps the Parliament and in order tom make recommendations for the strengthening of Parliament in this respect. Additionally, it must be asked whether **other forms of democratic foundation** of soft law may substitute parliamentary involvement.

(2) Soft law and **transparency:**

With regard to transparency, both the procedures, and the modes of notification and publication of soft law must be scrutinized. Also, the plethora of forms and denominations contributes to intransparency. Presumably, soft law rather obscures regulation and thereby runs counter to the principle of transparency, which I turn serves both the rule of law and democracy. In order to remedy this situation, suggestions for labelling, for procedures and for notification can be made.

(3) Soft law and the institutional powers/**institutional balance**: Under what conditions is an institution competent to enact soft law? Must it be linked to the power to enact hard law or is it independent? In the later hypothesis, there is the danger that soft law undermines the institutional balance of powers. Concretely: Most European soft law is issued by the Commission. Thereby the Council and the Parliament might be unduly marginalized. The danger to circumvent the European Parliament by reliance on soft law also touches the issue of the democratic justification or legitimacy of soft law.

(5) The constitutional admissibility of soft law with view to the **external division of powers**. Under what conditions is Member State sovereignty potentially infringed by reliance of soft law? In this context, the scope of the **principle of conferral** must be examined. One pertinent question is whether the concept of **“implied powers”** may allow for resort to (some types) of soft law even if this power is not explicitly granted to the EU.

(6) A further probably competing principle is the **independence of the judiciary**, which may be called into question by the imposition of strict interpretative guide-lines on form of soft law. This is an issue both for the Community courts and for the Member States’ courts.

(7) Building on the analysis of the impact of general principles in the context of soft law, the overall question arises **in which instances the enactment of soft law is constitutionally inadmissible?** Are there instances in which institutions are obliged to enact hard law and thus may not limit themselves to the adoption of soft law only? There even might be a duty to transpose soft law into hard law at some point. Such an obligation may stem from the concrete enabling provisions in the Treaty or from general European constitutional principles. The principles mentioned under B. rather pull towards the enactment of hard legislation. In specific circumstances, these principles might give rise to an obligation to choose hard, instead of soft regulation. Put differently: In specific circumstances they might even categorically prohibit the use of soft law.

XV.5.6 Literature on EU soft law

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XV.6 Auto-Regulation

XV.6.1 Concept

Self-regulation can be defined as rules which political or economic actors impose on themselves. They commit themselves to comply with these norms. Although the commitment is usually published any may be pronounced vis-à-vis other actors, the commitment itself is a unilateral act. The result may in theory be legally binding or not.

As a legally binding act, the product of auto-regulation would be a separate category besides the two-ideal typical legal instruments: contract and legislation. Put differently: Its binding force (if any) does not flow from an agreement with others or from any meta-rule governing the legislative procedure.

As a non-binding act, the result of auto-regulation may fall into the broader group of soft law texts.

As a working hypothesis, we will **classify auto-regulation according to its author**. Today, private actors such as companies, enterprises or industry federations make frequent use of auto-regulation. However, also European institutions issue acts which may have the effect of binding the institution itself to its terms. For example, there are Commission decisional acts in the field of competition law and state aid in part has self-binding effects.

XV.6.2 References to auto-regulation in EU-Documents

The European Constitutional Treaty mentions auto-regulation in Art. II-88; III-1212; and in indirectly also in Art. I-12(5) and I-17 CTE.

Commission of the European Communities, European Governance, A White Paper, COM (2001) 428 final, 25 July 2001: The White Paper does not define **Self-Regulation**, but mentions it (at p. 20): "…legislation is soften only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework. This highlights the need for close coherence between the use of different policy instruments and for more thought to be given to their selection".

Communication from the Commission, Action Plan Simplifying and improving the regulatory environment, COM (2002) 278 final, 5 June 2002, 11-12: The Commission would also stress that appropriate use can be made of **alternatives to legislation** without undermining the provisions of the Treaty or prerogatives of the legislator. There are several tools which, in specific circumstances, can be used to achieve the objectives of the Treaty while simplifying lawmaking activities and legislation itself (co-regulation, self-regulation, voluntary sectoral agreements, open coordination method, financial interventions, information campaign).

Self-Regulation: "*Self-regulation* concerns a large number of practices, common rules, orders of conduct and voluntary agreements which economic actors, social players, NGOs and organised groups establish themselves on a voluntary basis in order to regulate and organise their activities. Unlike coregulation, self-regulation does not involve a legislative act.

The Commission can consider it preferable not to make a legislative proposal where agreements of this kind already exist and can be used to achieve the objectives set out in the Treaty. It can also suggest, via a recommendation for example, that this type of agreements be concluded by the parties concerned to avoid having to use legislation, without ruling out the possibility of legislating if such agreements prove insufficient or inefficient. These voluntary agreements constitute one form of self-regulation. Voluntary agreements can also be concluded on the basis of a legislative act, i.e. in a more binding and formal manner in the con-

text of co-regulation, thereby enabling parties concerned to implement a specific piece of legislation. The Commission will continue to inform the legislator of the choice of instruments which it favours by including information to this effect in the annual Work Programme and/or through existing procedures for dialogue with the legislator. Finally, as the Commission is aware that Community legislation has become increasingly detailed — which sometimes make it difficult to understand and put into practice — it intends to avoid making its legislative proposals unwieldy, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality."

The Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Environmental Agreements at Community Level, Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM (2002) 412, 17 July 2002 explains the concept of "self-regulation" in the field of environmental policy, http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0412en01.pdf .

An important document is European Parliament, Council, Commission, *Inter-institutional Agreement on Better law-making*, O.J. 2003 C 321/1-5:

On the **Use of alternative methods of regulation:** "16. The three institutions recall the Community's obligation to legislate only where it is necessary, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. They recognise the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms."

On **Self-Regulation:** "17. The Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular the publicising of agreements) and representativeness of the parties involved. It must also represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market."

"22. Self-regulation is defined as 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). As a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the Union has not hitherto legislated. As one of its responsibilities, the Commission will scrutinise self-regulation practices in order to verify that they comply with the provisions of the EC Treaty.

23. The Commission will notify the European Parliament and the Council of the self-regulation practices which it regards, on the one hand, as contributing to the attainment of the EC Treaty objectives and as being compatible with its provisions and, on the other, as being satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the commitments given. It will, nonetheless, consider the possibility of putting forward a proposal for a legislative act, in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices."

Report from the Commission on European governance, COM (2002) 705 of 11 December 2002, at p. 26:

"4. Against a background of discussions on regulatory alternatives within EU policy making, the Commission has also examined **the scope of soft law approaches at international level**. Initial results are causing the Commission to assess the global environment and policy domains as less secure and less transparent than the EU environment, and in greater need of "hard law" providing the necessary security and transparency. The Commission nevertheless considers that soft law instruments could be examined as an innovative completion of hard law, not as a substitute. This is notably the case with corporate social responsibility, a concept which could be further developed as a potential successful business option."

See also the *Report on European Governance* (2003-2004), SEC (2004) 1153, 22 September 2004 (currently only Commission Staff working document), at p. 10.

XV.6.3 Research Question on Auto-Regulation

The core question of the paper will be under what conditions and which types of auto-regulation are **admissible in a constitutional system**. Auto-regulation will be related to the constitutional principles discussed with regard to soft law (*supra* 5.5.2.).

XV.6.4 Literature on Auto-regulation

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