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NEWGOV New Modes of Governance

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

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PP	Restricted to other programme participants (including the Commission Services)	
RE	Restricted to a group specified by the consortium (including the Commission Services)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

The ‘Practitioners Forum’, held in Brussels on Friday, November 3rd, 10 am – 6 pm, took place at the premises of the Fondation Universitaire and brought together researchers and EU officials in a workshop focusing on Justice and Home Affairs, Common Foreign and Security Policy, and Social Dialogue and Pensions Reform. An interesting aspect of the meeting was that all projects presented are working in a very empirical manner. This should be further stressed to exploit the comparative perspective NEWGOV offers. Focusing on the Emergence and Evolution of Governing Modes, typical patterns and specificities of sectors will form a framework to comparatively assess different modes in terms of their legitimacy, effectiveness and efficiency. Adding together the results of the single policy fields, NEWGOV will provide deeper insight in the evolution of the whole EU system.

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I. Report

Welcome and Introduction

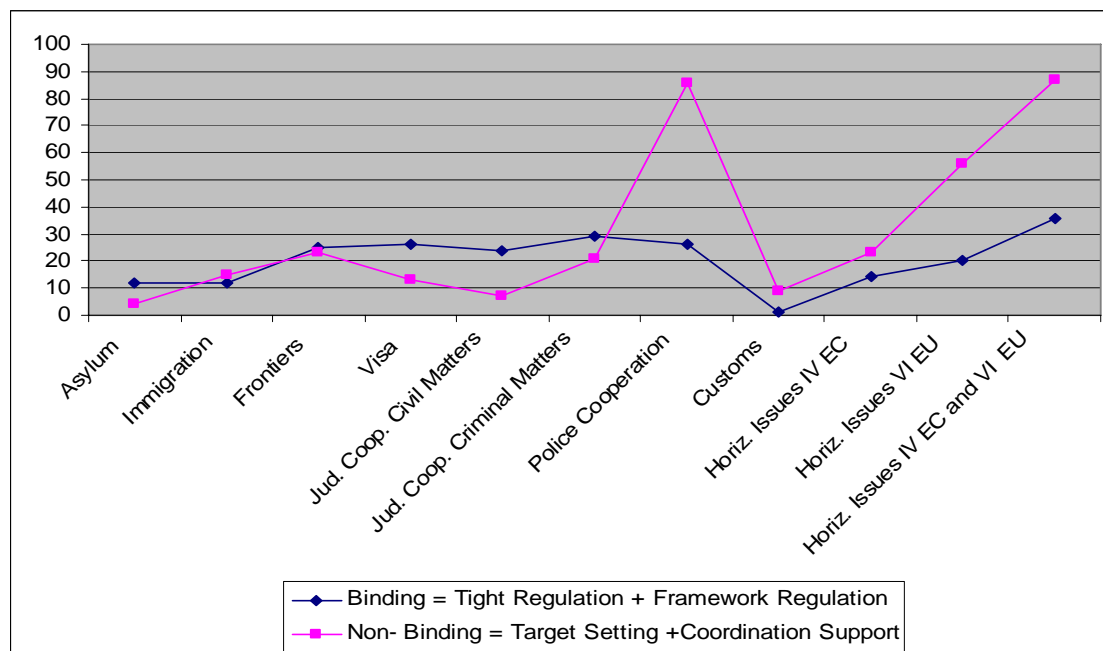
Udo Diedrichs (chair of the Practitioner Forum) and Adrienne Héritier (Scientific Director of the NEWGOV consortium) welcomed the participants and gave a brief introduction into the work of the consortium.

1st Session: Justice and Home Affairs – Trends towards Mixed Modes of Governance?

The topic was introduced by *Jörg Monar*, who started by giving a brief summary of specific factors of EU governance in the Justice and Home Affairs domain. These comprise the diversity of sub-fields of JHA; the touching upon core functions of the nation state (leading to a preference for the use of “lighter” modes of Governance); a particular focus on cooperation and coordination issues, and the artificial divide between the ‘first’ and ‘third pillar’ fields. Furthermore, despite the strong operational dimension of JHA, the existing agencies in this area have not been granted operational power so far.

Mr. Monar continued by highlighting results from his quantitative analysis of JHA governance. He concluded that in the JHA domain, all kinds of instruments (hard/soft) are used, and regularly mixtures of modes can be found. The emergence of mixed modes was explained by combinations of ‘old’ and ‘new’ modes; a hybridisation of GMs (e.g. the Council framework decision as originally Community instrument which was copied to the 3rd pillar with only minor changes); and pragmatic solutions to unexpected problems.

Figure 1: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Numbers of binding and non-binding texts per policy field



To conclude, he addressed the three aspects effectiveness, efficiency, and legitimacy. With a view to the former two, he identified the following problems: Firstly, high levels of diversity, for instance in between the structures of national police forces, cause frictions and reduce trust. Cooperation Centers at the national level are not sufficient to change the ‘cooperation

culture' within the Member States. Secondly, the weakness of the decision-making process in JHA is speed. Due to a missing command/control hierarchy, a consensus must be reached before any decision can be taken. Thirdly, there are implementation problems: the heavy reliance on (non-binding) programming documents leads to huge delays in the implementation of decisions. Binding acts such as 'Tight Regulations' or Framework Regulations' often appear as implementation instruments of target setting. Another result of this reliance on programming documents is the high probability of 'window-dressing' by the Member States.

Concerning legitimacy, Mr. Monar stated that JHA was a showcase for subsidiarity, rendering decisions taken in this area legitimate and leading to an added value at low costs. However, the downside is that JHA is highly intransparent, not least due to the domain's sensitivity.

The following discussion was kick-started by *Hans Nilsson*, Council of the EU. Mr. Nilsson began by stating that the Council usually followed a quite modest approach by setting minimum rules only (e.g. in drugs trafficking). His following remarks addressed the mutual evaluation of member states, which serves as substitute for an infringement procedure in the JHA domain. A qualification to this was, however, that this evaluation is usually not focused on a single instrument but on a whole system, thus limiting its practical consequences.

The ECJ has become more important in JHA during the last years, despite the fact that only 15 member states accept its Preliminary Rulings. Wolfgang Wessels argued that the less the Council decides, the more important the ECJ becomes. Jörg Monar agreed, but claimed that there is no explicit pro-EU-level agenda in the form of a 'system changing function' of the court visible. In contrast, Hans Nilsson gave the example of the judgement on an environmental protection Framework Directive where the Court 'went too far' and the Commission immediately moved in to occupy the space left by the verdict. An open question remained a comment by Egle Svilpaite on the Constitutional Court of Lithuania, who has rejected the prevalent notion that EU law breaks National Constitutional Law.

The issue of transparency was intensively discussed among the participants. Referring to Mr. Monars comments on legitimacy, Mr. Nilsson affirmed that the Council is trying to become more transparent by publicly debating legislative acts. A more comprehensive publication of legal acts in the JHA domain might be another, perhaps more promising way to enhance legitimacy. In contrast, he rejected the proposal to vest agencies with operational powers because it would be very difficult to subject these agencies to democratic control. However, there is a tendency to enhance the coordination capacities of agencies instead of their operational powers. Subsequently, Andreas Orator broached the issue of agencies in the space between first and third pillar.

Mr. Nilsson described the difficulties with respect to accepting law decisions made within other national entities, referring to what Mr. Monar had termed as different 'cultures' in the Member States. He gave the example of a national court's judgement sentencing a defendant to prison combined with the loss of the driving licence. In a different Member State, there might be two different legal bodies responsible for each element of the verdict, thus posing a huge problem for cross-border judicial cooperation.

The question why the OMCs on immigration and asylum were dropped in 2002, was answered by pointing out that the Member States reacted negatively to their introduction.

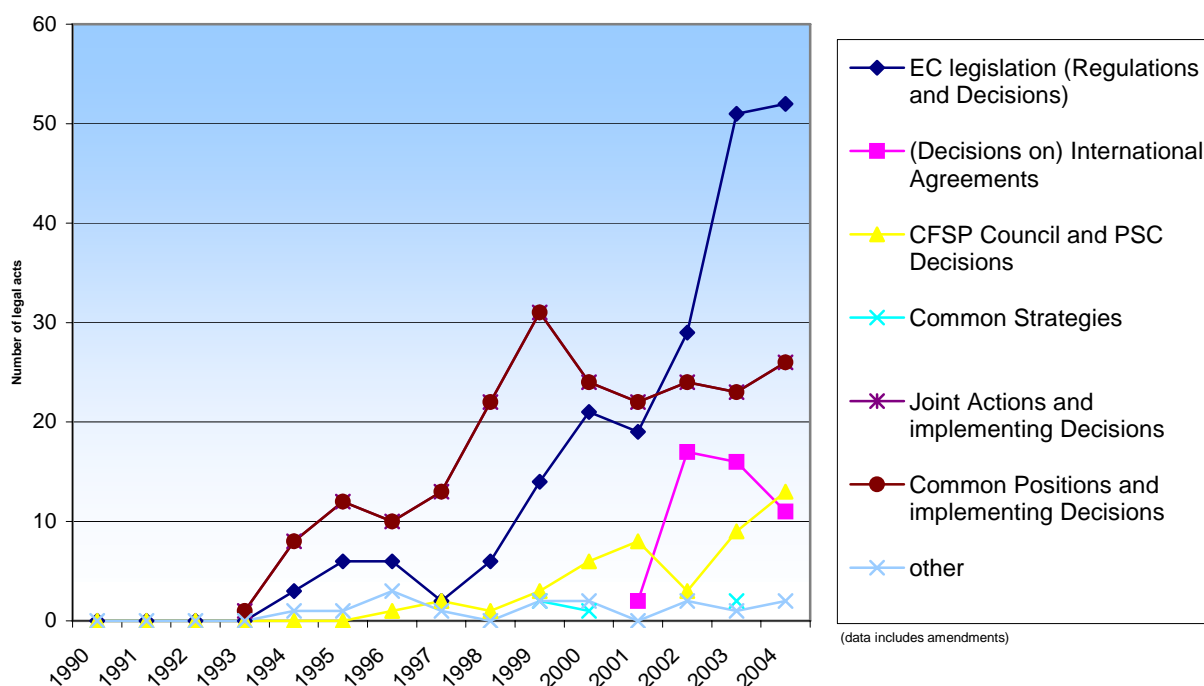
Another topic discussed in the meeting was the diversity of sub-fields of JHA. Alluding to the concept of path dependency, David Natali commented that this complexity inherent to this domain might explain the lack of coordination within JHA. Based on this affirmation, he hinted that there might be greater similarities between the areas of social protection and JHA than one might think at first as both are cross-cutting policy fields.

Adrienne Héritier stated that, as experience in other policy fields has shown, processes such as learning from best practices could be used in the JHA domain as well. In response, Mr. Nilsson argued that, unlike in other policy fields, JHA decisions might have gravest consequences (imprisonment etc.) for the individual, thus requesting extreme care in this domain.

Issues of enlargement were subject of intensive discussion. The meeting highlighted the importance of any existing acquis for new Member States. Additionally, Mr. Nilsson argued that enlargement inevitably has not helped trust-building among national entities, the problem being that widening came before deepening. Another issue discussed were processes such as the Treaty of Prüm, which are favored by a growing number of Member States, rendering constructions similar to ‘Core Europe’ more likely. Jörg Monar saw these developments critically, as today these frameworks outside the treaty carry far more the risk of becoming a standard procedure than, for instance, during the 80’s. Hans Nilsson concurred, but expected a growing number of participants in these processes. On the remark by Udo Diedrichs, that initiatives of countries with similar legal cultures coming together seem to flourish, Hans Nilsson responded that differentiation might be the only way to proceed in certain areas, but only at high costs (due to frictions, a weakening of EU external relations, etc.)

2nd Session: From the Common Foreign and Security Policy to the European Security and Defence Policy: New Dynamics beyond Intergovernmentalism?

Udo Diedrichs presented the latest research findings with regard to CFSP. Quantitative analysis has revealed a number of trends, which were briefly described and interpreted in the following. A marked increase in the adoption of *Joint Actions* was caused by ESDP operations – a majority of which is of civilian and not military nature. Nominations of Special Envoys also constitute a large part of instruments in this category. In terms of regional distribution, former Yugoslavia is a priority region with 73 out of 204 acts between 1993 and 2004. Other important areas of EU activity are the Middle East and Africa (each 19/204 Joint Actions). A second trend can be observed in the increased number of EC regulations, reflecting the rising importance of trade restrictions as instrument of CFSP. These EC regulations often implement a common decisions made under the CFSP. Until the year 2000, Yugoslavia was the most frequently adressed region in this category, but was replaced by terrorism henceforth.

Figure 2: Legal Acts in CFSP, 1990 - 2004

All in all, the area of CFSP has been subject to a growing variety in and diversity of instruments used during recent years. Although the pillars have not been mixed up, there are strong links between EC legislation and CFSP, meaning that EC legislation does belong to CFSP. The interplay between EC and CFSP can be amended by two further modes: ‘Shaming without naming’ a rather cautious version of coordination in the process of civilian and military capacity improvement in ESDP (ECAP and DLM), as well as the attempts for an emerging market regulation in the sphere of defense equipment, through the ‘Code of Conduct for Defense Procurement’, supervised by the European Defense Agency.

Budget use was the next topic addressed, and Udo Diedrichs argued that the Member States try to pool money through operations such as ATHENA.

Cesira D’Aniello, Council of the EU, and *Dietmar Nickel*, European Parliament, opened discussion with all participants. With regard to the use of legal acts, *Cesira D’Aniello* affirmed that there is an external demand for the EU to be more active, and also an internal will to do so. The raise in the number of legal acts reflects the growing international importance of the Union. This, however, also means that the distinction between External Relations and CFSP requires clarification (e.g. with regard to Commission decisions under the rapid decision mechanism). She added that common strategies were no longer used due to their lack of success.

The second topic intensively discussed concerned financing. CFSP budget was described as extremely limited. The thesis of Member States pooling money was affirmed only in part, as there was no trend discernible. Cross-financing between CFSP and EC was said to be strictly opposed by a number of Member States (although most Member States are in favour), leading to the affirmation that financing and chain of command are worlds where EC and CFSP can clash.

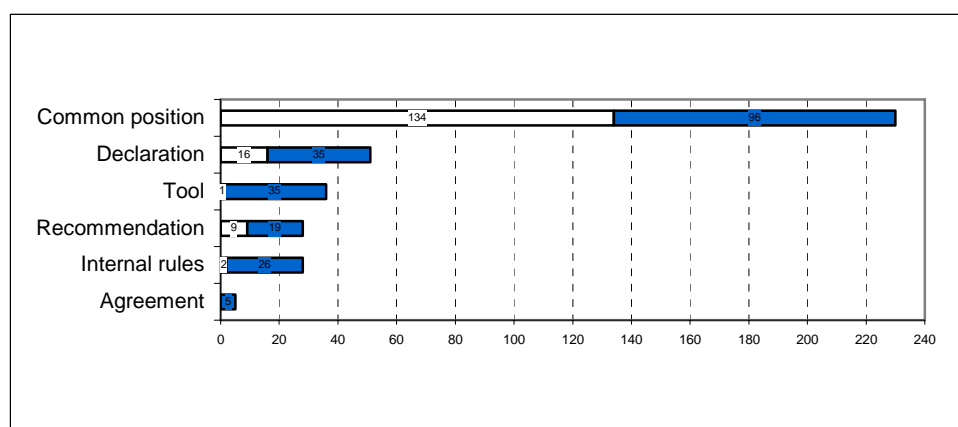
A third aspect taken up in the discussion concerned capabilities. The process to increase capabilities is pushed by outside events (9/11 etc.). Taking up this point, Dietmar Nickel described the rather reactive way CFSP works because the numerous actors have to come together after such an outside event, while the EP, for instance, could react much faster than Council and Commission. During further discussion, the notion of a Habermasian “European Public” was rejected in part for CFSP as it only appears after big events and recedes again. During discussion, the participants also addressed the EU Special Representative in the Former Yugoslav Republic of Macedonia. The “double-hat” structure of this post was characterized as a new model that might become common if it proves successful.

3rd Session: Social Dialogue and Pensions Reform: The Limits of Coordination?

David Natali, who started by giving a brief summary of the project’s research in the social dialogue domain, introduced the topic. He described the way in which a quantitative and qualitative analysis of documents adopted by Social Partners and EU institutions in this sector was conducted and presented the conclusions drawn from this analysis. For the Sectoral Social Dialogue (SSD), and the Interprofessional Dialogue (IPSD), the following observations were made: While the majority of SSD documents are common positions, Agreements with binding effects are only 2% of the texts adopted. There is a tendency towards both consultation (common positions) and internal consumption (mutual undertakings). Both IPSD and SSD converge towards non-binding texts, leading to the recommendation to assess the real implementation of the main agreements and recommendations.

David Natali then turned towards Pensions Reform, addressing the question why the OMC on Pensions is so weak. He described his ‘window of opportunity’ approach, where institutional factors, socio-economic factors and political factors combined with the influence of political entrepreneurs lead to the emergence of a governing mode (OMC on Pensions). Cautious generalization implies that in a normative dimension, ambiguity prevails, as it is difficult to assess causal links. Transparency, visibility, and participation as aspects of the procedural dimension of the OMC on Pensions are low and require improvement. Equally, the existing potential for learning should be used.

Figure 3: SSD: Number of documents per type (1978-2005)



1978-1997 : white : 162 docs 1998-2005 : grey : 216 docs

The following discussion was kick-started by *Ruth Paserman* and *Steven D'Haeseleer*. In the field of Social Dialogue, Steven D'Haeseleer argued that the separation between binding and non-binding acts was artificial and not useful insofar as it supports tendencies to regard non-

binding agreements as inferior. In contrast, the choice of instruments is and should be dictated by the matter.

Another point discussed was that Social Partners in the New Member States may lack the capacities those in the EU-15 dispose of. However, it should be kept in mind that when deciding on capacity-building, a ‘one-fits-all’ strategy might prove detrimental.

Concerning the OMC on Pensions, Ruth Paserman specified that the OMC is not supposed to be ‘strong’ – otherwise pre-existing instruments could have been used instead. As the OMC on Pensions has no treaty base, loose coordination is already quite far-reaching. Steven D’Haeseleer added that OMC is not only a formal platform. Rather there is much informal activity of UNICE and the other social partners, fostering essential processes such as Learning. The importance of learning through peer review was somewhat contested by the remark that it might prove futile to copy single elements from a successful system in order to achieve an improvement.

Wolfgang Wessels posed the question whether there is a ‘Sachzwang’ for coordination in the pensions domain. Kálmán Dézseri brought in his perspective as economist by focusing on economic spillover effects of integration: policy makers loose traditional instruments of national economic policy making and labour market support, leading to a growing importance of pension systems for national labour markets. He added that national Parliaments ignore this EU level perspective.

The visibility of Pensions Reform in national debates was described as high during the discussion. However, the label ‘OMC’ is usually omitted. Adrienne Héritier added that the Pensions debate existed long before the OMC came into being.

Further discussion focused on the questions if Social Partners are facing a crisis of legitimacy, and if it will become more common to rely on courts in order to ensure that very soft commitments are taken seriously. There was consensus among the participants that there are a number of factors setting the pace for reforms in the pensions sector, such as coalitions among member states, color of governments, budget situation etc.

Conclusions

Adrienne Héritier, Udo Diedrichs and Wolfgang Wessels integrated the meeting and its intensive discussions into the overall context of NEWGOV and formulated some conclusions. An interesting aspect of the meeting was that all projects presented are working in a very empirical manner. This should be further stressed to exploit the comparative perspective NEWGOV offers. Focusing on the Emergence and Evolution of Governing Modes, typical patterns and specificities of sectors will form a framework to comparatively assess different modes in terms of their legitimacy, effectiveness and efficiency. Adding together the results of the single policy fields, NEWGOV will provide deeper insight in the evolution of the whole EU system.

II. Programme

Friday, 3 November 2006

9.30	Arrival
10.00 – 10.30	<p>Welcome and introduction</p> <p><i>Udo Diedrichs and Wolfgang Wessels</i>, University of Cologne, NEWGOV Cluster 1 Leaders</p> <p><i>Adrienne Héritier</i>, NEWGOV Scientific Director</p>
10.30 – 13.00	<p>1st Session: Justice and Home Affairs – Trends towards Mixed Modes of Governance?</p> <p>Introduction by: <i>Jörg Monar</i> and <i>Anya Dahmani</i> Robert Schuman University Strasbourg</p> <p>Comments by: <i>Hans Nilsson</i>, Council of the EU</p> <p>Open discussion</p>
13.00 – 14.00	Lunch Break at the Fondation Universitaire
14.00 – 15.30	<p>2nd Session: From the Common Foreign and Security Policy to the European Security and Defence Policy: New Dynamics beyond Intergovernmentalism?</p> <p>Introduction by: <i>Udo Diedrichs</i>, University of Cologne</p> <p>Comments by: <i>Cesira D’Aniello</i>, Council of the European Union <i>Dietmar Nickel</i>, European Parliament</p> <p>Open discussion</p>
15.30 – 16.00	Coffee break
16.00 – 17.30	<p>3rd Session: Social Dialogue and Pensions Reform: The Limits of Coordination?</p> <p>Introduction by: <i>David Natali</i> and <i>Philippe Pochet</i>, Observatoire social européen, Brussels</p> <p>Comments by: <i>Steven D’Haeseleer</i>, UNICE <i>Ruth Paserman</i>, European Commission</p> <p>Open discussion</p>
17.30 – 18.00	<p>Conclusions</p> <p><i>Wolfgang Wessels</i>, University of Cologne, NEWGOV Cluster 1 Leader</p>

III. List of Participants

1. Mr. Holger Bähr, Institut für Höhere Studien Wien
2. Ms. Anya Dahmani, Université Robert Schuman
3. Ms. Cesira D'Aniello, Council of the European Union
4. Dr. Kalman Dezseri, Institute for World Economics of the Hungarian Academy of Sciences
5. Mr. Steven D'Haeseleer, UNICE
6. Dr. Udo Diedrichs, Universität zu Köln
7. Prof. Dr. Adrienne Héritier, European University Institute
8. Mr. Tobias Kunstein, Universität zu Köln
9. Prof. Jörg Monar, Université de Strasbourg
10. Dr. David Natali, Observatoire social européen
11. Mr. Dietmar Nickel, European Parliament
12. Mr. Hans Nilsson, Council of the European Union
13. Mr. Andreas Orator, Wirtschaftsuniversität Wien
14. Ms. Ruth Paserman, European Commission
15. Mr. Colin Shaw, University College Dublin
16. Dr. Egle Svilpaite, Universität Basel
17. Dr. Krisztina Vida, Institute for World Economics of the Hungarian Academy of Sciences
18. Prof. Wolfgang Wessels, Universität zu Köln