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NEWGOV

New Modes of Governance

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

Review of cluster 30 months results

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CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

During the plenary conference of the NEWGOV consortium at the EUI Florence, 31 May – 1 June 2007, the 30 months results of cluster one and their implications for the overall cluster perspective on Modes of Governance were discussed. In view of the planned joint publication, the participants presented their ideas for the respective chapters and gave an outlook for the remaining research steps. There was general agreement that the cluster’s theoretical and empirical work on a vast array of forms of governance is of high relevance and has produced interesting results over the past 30 months.

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I. Results of Cluster One

At the plenary meeting in Florence, Cluster One seized the opportunity to take stocks of the activities undertaken in the past and the prospects for the future. Mainly, all partners have accomplished a considerable theoretical and empirical workload that will become part of a joint publication to appear in 2008.

During the meeting, all partners presented key findings of their projects and gave an outlook for the remaining research steps. In a summary, the results of the presentations and the subsequent discussions are summarised as follows:

I.1 Theoretical Background for publication chapters (Wolfgang Wessels)

Based upon a questionnaire that was distributed prior to the workshop (see annex), Wolfgang Wessels outlined the categories and main avenues of investigation that are supposed to structure each chapter of the volume.

The use of dichotomies like “old – new” and “hard – soft” needs to be reconsidered. Most partner agree that “old – new” is context-dependent and therefore not a meaningful distinction. Therefore, the guiding question will be defined in a broader and more fruitful way by applying a dynamic perspective: What changes have taken place in EU governance, and which factors may be identified that account for such change? Thus, the volume will try to analyse the dynamics of of EU governance in a number of key areas over the last years and define the explanatory variables for these processes.

The “Es” approach (stressing *Emergence*, *Evolution* and *Evaluation*) was generally considered a useful way of structuring the chapters. However, there were some reservations, e.g. that *Emergence* of new equals *Evolution* of old, and that legal norms do not alter that frequently.

Another dimension useful in order to foster coherence within the chapters might be *Expectations*, including both positivist and normative aspects of future outcomes.

One goal of each chapter should be to add up and aggregate the research results in order to reveal some general lines of development. For example, do soft modes develop into hard forms (Monetary Policy, CFSP,...), or vice versa?

As an overall goal of the volume, a “Dynamic macro view” of the EU as system *sui generis* was proposed: Is there a link between the macro-perspective of the evolution of the EU system, which has undergone changes and transformations since the treaty reforms of Maastricht, Amsterdam and Nice, and the development of Modes of Governance? Do we witness “fusion” or “fragmentation”?

I.2 Concepts of Governance: A Three-Dimensional Approach

Gerda Falkner, Oliver Treib and Holger Bähr presented a revised typology of governance, which falls back on three dimensions to construct nine ideal types of governing modes. The other partners are invited to use this typology in their respective area of research if possible. It will be integrated into the questionnaire. NewGov Deliverable D01/50 gives a more detailed account of these theoretical considerations.

It was claimed by others that the typology by the Vienna team introduced a view that was in contrast to the previously dominant way of classifying Governing Modes according to the actors involved.

Regarding the use of “market” as governance mode, one has to distinguish between having no intention to govern on the one hand, and the use of competition to realize a policy outcome on the other.

I.3 What can be learned from the debate on steering modes in governance? The Institutional Design of Deliberative Settings

Thomas Risse and Mareike Kleine focused not on a specific policy but on the EU constitutional process, contrasting the Convention method with the IGC method in order to show how steering through arguing and deliberation differs from steering through bargaining. Consequently, in this view, only public actors are involved. Uncertainty and transparency are depicted as elements central to the effectiveness of deliberative steering modes in negotiations. After the failure of the first treaty, the governments try to contain the second attempt between closed doors, thus negatively affecting public visibility and transparency of the process as compared to the convention method.

On the new / old dichotomy: The “newness” of a mode is not helpful as an analytical distinction. The term “new modes”, refers to two distinctive features:

- involvement of non-state (private) actors in steering;
- non-hierarchical mode of steering (i.e., bargaining as well as positive/negative incentives and/or arguing/learning/persuasion)

I.4 Social Dialogue and Pension Reform

David Natali and Philippe Pochet presented their findings on the evaluation of OMC in the fields of social dialogue and pension reform. As a conclusion in this area, normative differences rooted at the national level impede coordination at EU level. The distance between preferences results in difficulties for compromising / arguing.

In this regard, interests serve as decisive factor to ascertain why certain GMs are used / not used. Another part of the session dealt with the role of political leadership in defining and using a window of opportunity for the introduction of EU level governing instruments.

On the new / old dichotomy: Instead of differentiating between old and new, it seems more important to many participants to assess the policy convergence capacity of each mode of governance.

I.5 Research Policy and New Modes of Governance

Regarding the evaluation of OMC in the area of research policy, the cluster partners intensively discussed the causality problem. While Colin Shaw stated that it is hardly possible to trace back positive developments in this sector to OMC, as for some countries foreign direct investment and technology transfer are much more important than government research funding, the evaluation is further complicated by the very ambitious – possibly overambitious – target figure for EU research funding. Despite much activity regarding the OMC in this field, it is often cited as “failure”.

Furthermore, the question was raised whether the establishment of OMC could be seen as a means of blame shifting at the national level.

I.6 Cohesion Policy in the enlarged EU: New Modes for New Members?

The area of Cohesion policy is marked by high dynamics, including divergent starting points for each country.

With a view to the evaluation of Governing modes in cohesion policy, a number of conclusions can be drawn so far:

- Old modes of governance in place before 1987: tension between Member States wanting to act but refusing to cede sovereignty
- New modes of governance, when more efficiency, legitimacy, transparency are needed
- New modes of governance do not substitute but rather complement old modes
- Mixed modes: old and new in horizontal and vertical dimensions

As a new element, two tracks can be discerned: The division of functions between member state policy-making and Commission co-funding has become Commission-dominated. On the national level, local NGOs act as allies of the Commission.

I.7 Social Policy and Environmental Policy: Comparing Modes of Governance

In the field of social and environmental policy, the project team identified three key dimensions

Institutional (polity) dimension: Modes of Interaction

Social Policy

- Move from intergovernmental negotiation to joint decision-making in Maastricht (one issue area already in SEA)
- Today: important areas still subject to unanimity (intergovernmental negotiation) or excluded from Community intervention (unilateral adjustment)

Environmental Policy

- Move from intergovernmental negotiation to joint decision-making in SEA, completed in Maastricht
- Today: joint decision-making predominant mode of interaction (almost no exceptions)

Politics Dimension: Forms of Interest Intermediation

Social policy

- Creation of corporatist bargaining procedure in Maastricht, but de facto, procedure used only a few times (5 agreements since 1992)
- Network governance thus still dominant mode of interest intermediation in the “living constitution”

Environmental policy

- No constitutional rules
- “Living constitution”: mixture of network governance and pluralism

Policy Dimension: Modes of Governance as Policy Instruments

Social policy

- Dominant modes: framework regulation, few examples of coercion
- Also examples of targeting (employment) and voluntarism (social exclusion, pensions) in OMCs

Environmental policy

- Dominant modes: coercion and, increasingly, framework regulation
- Also examples of targeting (Eco labels) and voluntarism (voluntary agreements)

In general, government interests are more favourable to expansion of EU environmental policy; therefore, one finds more joint decision-making in the institutional dimension and more coercion in the policy dimension.

As a conclusion, actor interests are necessary for any explanation. However, there are two main differences between both policy areas

- Product standards more important in environmental policy (“battle of the sexes” → lower degree of controversy)
- Domestic policy legacies in environmental policy less deeply entrenched than in social policy

Yet, during the discussion, it was noted that externalities were not only present in Environmental Policy, but also in Social Policy (system competition). This underlines that interests are the decisive factor; there seem to be no categorical differences between areas.

On the new / old dichotomy: It is not regarded as useful as the innovative capacity of a Governing Mode is context dependent and therefore varies for each policy area.

Furthermore, the problem of classification of legal acts to the two areas was discussed.

I.8 Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain

Jörg Monar gave an account of the specificities of governance in the JHA area, which include the extensive use of non-binding instruments, especially functional and programme target-setting texts, mutual evaluation and monitoring mechanisms.

Governing modes in JHA can be described in a continuum rather than with a clear-cut threshold. As factors for Emergence, external shocks (terrorist attacks of 9/11) have played a key role. Concerning the Evaluation of Governing Modes, the main criterion is effectiveness.

On the new / old dichotomy: Some “old” EC modes have been introduced to JHA only recently. There are, however, some innovative elements: For example, the mutual evaluation of member states’ compliance with Schengen has spread to other areas in JHA.

On the Legal / Living constitution: The Legal constitution can be seen as sine qua non (potential) of (innovative) Modes of Governance, but there are also examples vice versa (Eurojust).

I.9 The Self- and Co-Regulation in the European Union Legal Framework: Towards Shared Governance?

Anne Peters and Egle Svilpaite have been dealing with characteristics of soft law as a Mode of Governance from a legal perspective. Soft law is defined as law that is not binding, but also not devoid of legal effects. However, it seems difficult to parallelize the term “soft law” to all non-binding instruments used in other fields. Soft law instruments are old in some areas, new in others. Therefore, the old/new divide is not useful as an empirical device.

A “mushrooming” of soft law can be witnessed during recent years. Self-regulation and co-regulation have become more and more frequent. However, the EU controls emergence of self-regulation, and accordingly the Commission prefers to assign self- and co-regulation instruments an important role only at the legislator’s pre-law-intervention stage. Both are used within the Community framework merely in a complementary way and are subject to the authority of legislation.

The requirements imposed on the integration of self-regulation into the Community’s legal framework and their subordination to Union’s hierarchical structure threaten to deprive self-regulation practices of their exclusive and much sought-after features such as flexibility, cost-efficiency or better adaptation.

I.10 Meroni Revisited: Empowering European Agencies between Efficiency and Legitimacy

The research on European agencies undertaken by Stefan Griller and Andreas Orator has been related to democratic theory and aims at operationalizing the requirements of democratic legitimacy the transfer of different kinds of powers to European agencies.

On the new / old dichotomy: This differentiation is only meaningful in context and, in the case of agencies, used only to describe when an agency was established compared to others.

Endogenous factors (Meroni doctrine; other ECJ jurisprudence as well as reaction to it by EC/EU institutions) and exogenous factors (regulatory demands, regulators/others asking for efficient and flexible solutions) define the “regulatory powers” vs. “decision-making powers” divide. The Commission has so far been hesitant in establishing agencies for fear of losing decision-making powers.

Another preliminary conclusion is that the very strict limits to the delegation of powers to agencies as established by the ECJ’s jurisprudence might be loosened to a certain extent without giving up their legal fundamentals. E.g., in contradiction to the original Meroni judgement, agencies like the EASA dispose of de-facto discretion.

II. Annex: Questionnaire

On the research focus

- a. Do you use the divide between “old” and “new”; is this dichotomy useful?
- b. Do you develop clear indicators and thresholds or more a continuum between “new” and “old” with fuzzy borders?
- c. Do you relate/link your research field with/ to specific “grand theories”, a preferred method of research and/or other priorities of your research; i.e. with which pre-existing body of literature, apparatus and approach do you enter your field of research?

On your findings (here we suggest to go back to the „E“ approach as developed before and during the existence of the NewGov project)

On the Emergence of the mode(s) of governance in your research field

- a. Which factors were relevant: e.g. form follows function?
- b. Do you see a special causal (?) link between the formalized written texts (“legal constitution”) and the emergent real practices (“living constitution”)? Is there a “spiral” of mutual influence between the two?
- c. Do you observe a “spill-over” process or a “path dependency” in relation to other EU fields, e.g. to “old” modes of governance?

On the Execution

- a. Which patterns of use and implementation do you observe?
- b. Are these clearly different from “old modes”?
- c. Would you identify major difference between the “legal” and the “living constitution”?
- d. Is the Europeanization literature helpful?

On Evaluation

- a. Which criteria do you use to assess the mode of governance; e.g. efficiency of decision making, effectiveness/impact of the formal and informal output / work, rule of law, sources of legitimacy?
- b. Which of these yardsticks were hoped for / assumed; which were accomplished?
- c. Is there a marked difference to “old modes”?
- d. Would you characterize the activities in your area as “success”?

On the Evolution and Expectations

- a. Did your mode of governance change over time in the legal and living constitution? In which direction: towards an “old” or a “new” mode; that is, which form supersedes which? Do you identify clear stages and periods? Do you identify the achievement of a plateau / equilibrium or would you expect some kind of “up-” or “downgrading”?
- b. Do you identify endogenous or exogenous factors/dynamics which have and will influence the legal and living constitution?

- c. Is a reform debate going on in your area and do you formulate recommendations?

On general findings

- a. Would you see in and from your field of research clear patterns leading to more generalized sets of explanations? For this purpose: is the 4 “E” approach useful? Also in this perspective: which other areas in the volume do you see as interesting / most similar or dissimilar case to your field. Do you recommend “exports” from you chapter – would you like to use ”imports” form others; more generally? Do you miss an area or perspective?
- b. Would you consider the typology of Governing Modes developed by the Vienna team as useful and applicable in your research area? With a view to your specific area, is the matrix exhaustive?
- c. In a dynamic macro view: Do you see divergences and convergences among the modes of governance inside the EU system but also outside; is the EU a case *sui generis* or does it fit into broader general pattern. Would you see any overall integration trend within your field perhaps even as a major step of a “fusion ladder”?
- d. Will the work on your chapter be of importance for your works; do you draw specific lessons for you own research agenda and/or theoretical and methodological approaches?

III. Annex: Programme for the Cluster One 30 Months Review Meeting

Thursday, 31 May 2007

- 10:00 – 10.30 Welcome address and Introduction (Wolfgang Wessels)
- Presentation and Discussion of the common theoretical background
Based on main points of paper:
 Modes of Governance in the Legal and Living Constitution of the EU
 (Wolfgang Wessels)
Round table
 Based on the questionnaire, we will explore the possibilities of aligning the different contributions of the volume to a common research perspective. Where this is not feasible, we will try to make the controversy between the contributors' different viewpoints explicit.
- 10.30 – 11.30 1st session: Theoretical framework of Part I as a point of reference for chapters.
Based on main points of papers:
 New Modes of Governance viewed from a policy perspective (Gerda Falkner, Oliver Treib, Holger Bähr)
 New Modes in EU Constitutional Governance (Thomas Risse / Mareike Kleine)
 Round table
- 11.30 – 11.45 Coffee Break
- 11.45 – 12.30 2nd session: Policy Perspective of Part II
Based on main points of papers:
 Social Dialogue and Pensions Reform (Philippe Pochet / David Natali)
 Research Policy and New Modes of Governance (Colin Shaw)
 Round table
- 12.30 – 13.30 Policy Perspective of Part II (cont.)
Based on main points of papers:
 New Modes in Justice and Home Affairs (Jörg Monar / Anya Dahmani)
 Cohesion Policy in the enlarged EU: New Modes for New Members?
 (Krisztina Vida / Kálmán Dezséri)
 Social Policy and Environmental Policy: Comparing Modes of Governance
 (Gerda Falkner / Oliver Treib / Holger Bähr)
 Round table
- 13:30 – 15:00 Lunch

- 15:00 – 16.00 3rd session: Cross-cutting Perspective of Part III
Based on main points of papers:
Agencies in the EU: Governance by Delegation (*Stefan Griller / Andreas Orator*)
Soft Law, Hard Law and Governance (*Anne Peters*)
Round table
- 16.00 – 16.30 Conclusions: Similarities and Differences – Aligning the Chapters for a Draft Structure of the Volume
Publication of NEWGOV results: From the research design towards a book structure. Results so far and synthesis on theoretical and horizontal research questions
Preliminary book structure, proposed by the coordinator and to be discussed
Round table
- 16.30 End of Cluster workshop, cont. general programme