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## Summary

New complexities in European governance mean that individual assessments of the emerging and evolving modes of governance of the EU have become more complex – and more contested. They depend greatly on the theoretical perspective of the analyst. This paper outlines different theoretical models in order to set the scene for the main focus: namely, the theoretical explanation of new modes of governance and the different phases in their lifecycle. After suggesting a distinct approach to the further analysis of new modes of governance, the author relates their emergence and evolution to the overall EU integration process and argues, that NMG do not modify the EU system in the sense of breaking the general trend towards further integration, but have to be understood as an integral element of the EU integration process.

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## I. Introduction

The EU system has evolved over the past years as the Single European Act and the treaties of Maastricht, Amsterdam and Nice gradually endowed the institutional framework of the EU with new incentives and constraints. Yet, the interplay between the institutions, as well as the interaction between member states and the EU level of decision-making, are key factors for the smooth and effective working of the European Union as a whole and its evolution over time. The development of the EU, particularly by and through treaty revisions, has progressively changed the “rules of integration” (Schneider and Aspinwall 2001) and the institutional environment in which decision-making is located. The classical notion of a Community method or Community orthodoxy for the adoption of legislation has been replaced by more complex and differentiated forms of interaction. Most significant amongst these new forms of interaction is the increasingly important role of the European Parliament (EP), leading to the emergence of a “triangular” or even *de facto* “tricameral” system of EU decision-making (Tsebelis 2002; König and Bräuninger 2001), the strengthening of majority voting in the Council, the expansion of the powers of the Court of Justice, and the growing importance of the European Council; all of these processes reveal a high significance for the analysis of modes of governance.

These new complexities in European governance mean that individual assessments of the emerging and evolving modes of governance of the EU have become more complex – and more contested. They also depend greatly on the theoretical perspective of the analyst. This paper therefore outlines different theoretical models in order to set the scene for the main focus: namely, the theoretical explanation of new modes of governance and the different phases in their lifecycle.

From an intergovernmental perspective, the Council and the European Council serve as the primary sources of decision-making in the European Union (Goetschy 2003; Moravcsik 1998). The Commission provides politically low profile, technical input and information (Kassim and Menon 2002) and is not regarded as a supranational entrepreneur shaping EU politics, while the EP is seen as an assembly with limited, but not key powers (Moravcsik 1999a; 1999b). From such a viewpoint, the fact that the Community method has come under pressure with new modes of governance, is rather unsurprising. Member states increasingly perceive the effects and implications of the integration process as a step too far, trying to cut back its overgrown and excessive institutional and procedural setup. In particular coordination processes provide the opportunity of disguising the slow and gradual degradation of Community institutions, depriving the Commission from its traditional powers and keeping the EP outside the door. Intergovernmentalists would also postulate that Member States delegate powers to agencies to overcome the inherent problems of collective action and to improve bargaining efficiency (Moravcsik 1993; Kassim and Menon 2002). Thus, delegation to agencies might appear plausible, while assuming that a key driver has been the intention of bypassing supranational implementation of EU law.

For intergovernmental theorists, Hoffman’s (1966) distinction between ‘high’ and ‘low’ politics remains a useful categorisation, in particular for areas such as foreign and security policy where more hierarchical modes of governance have been introduced with much more caution and hesitation. Although the intergovernmental model is an ideal-type, it is helpful in classifying current developments such as the increasingly important role of the European Council in shaping the EU agenda and in defining concrete policy initiatives for introducing new modes of governance inside or outside the Treaties.

Intergovernmentalists have had a long-standing classical debate with “neofunctionalists”, which provides clear but controversial definitions of the fundamental direction of the EU sys-

tem. If the intergovernmentalist perspective perceives the European Council, the Council and the Member States as the main controllers of EU decision-making, by contrast the neofunctionalist perspective identifies supranational institutions primarily as autonomous actors (not agents) and identifies a growing degree of impact on the member states in shaping EU policy (Haas 1968; Schmitter 1969, Tranholm-Mikkelsen 1991). As a result of “spill-over” processes and bureaucratic drift - fuelled by an in-built propensity for administrative expansion, supranational EU institutions are becoming increasingly independent of Member States and the Council (Schmitter 2004; Bach 1995). Supranational entrepreneurship and transnational problem constellations may be regarded as catalysts driving European integration and the emergence of new modes of governance forward (Sandholtz and Zysman 1989).

In addition to the classical branches of EU studies, the theoretical landscape has been substantially enriched since the late 1980s with the emergence of neo-institutionalism. Defying the intergovernmentalist-neofunctionalist divide, neo-institutionalists seek a more differentiated way of analysing and explaining the evolution of the EU system. Neither “continued member state dominance” nor a federal superstate is posited as plausible options (Pollack 1997, p. 99). Neo-institutionalist approaches reject an ‘abstract’ definition of interinstitutional relations, focussing instead on the specific institutional context in which decisions are taken, which may vary over time and across policy fields. In addition, rational choice approaches include principal-agent and delegation theories, which deal with the interaction between supranational institutions and Member States (Pollack 2003; 1997; Thatcher and Stone Sweet 2002). Principal-agent theories focus primarily on the mechanisms through which principals - more or less successfully - try to reduce ‘agency losses’ by preventing agents from acting against their perceived interests (Schmidt 2000; Pollack 1997). Rational choice approaches also include game theoretical models, based upon a power index (Stokman and Thomson 2004; Widgrén 1994) or spatial analysis (Tsebelis 2002; Garrett and Tsebelis 1999; 1996), which analyse agenda-setting and veto power within or among institutional actors in specific decision-making situations (Mattila 2004; König and Bräuninger 2000; Holler and Widgrén 1999). This highlights a crucial aspect of hierarchical modes in the EU in the shape of majority voting in the Council: its asymmetrical, mixed and balanced nature, responding to contesting claims and trying to balance different criteria (particularly between small and big member states). Furthermore, rational choice institutionalism focuses on the interaction between the Council, the Commission and the EP, which they view as embedded in a complex set of decision-making rules which determine each institution’s scope of action. “Since institutions determine the sequence of moves, the choices of actors, and the information they control, different institutional structures affect the strategies of actors and hence the outcomes of their interactions” (Tsebelis and Garrett 2001, p. 384). In particular, voting rules in the Council and different legal procedures – from consultation to co-decision - are viewed as key variables.

On this view, new modes of governance reflect variable degrees of hierarchy in different policy fields, depending on the institutional setting, the specific policy preferences of Member States, varied access to information and the existence of trans- or sub-national constituencies. The model takes into account the substantial changes that have taken place for the European Union: from the Single European Act (introducing the cooperation procedure), via the Maastricht Treaty (introducing the co-decision procedure), to the Treaty of Amsterdam (modifying the co-decision procedure by eliminating the third reading in the European Parliament).

The broad scope for policy differences between different areas confers on the institutions a good deal of discretion for implementation. The power of supranational institutions is deemed much greater than intergovernmentalist principal-agent approaches would assume without, however, a clear trend towards increasing independence that neo-functionalists would predict.

Supranational autonomy is regarded as a function of the mechanisms established by the Member States “to control their international agents”, while “the costs and credibility of these control mechanisms vary considerably from agent to agent and from one issue-area to another for a given agent” (Pollack 1997). Variations of supranational autonomy across issue areas and over time is therefore as much an assumption of this model as the hypothesis that decision-making is closely controlled by different mechanisms such as oversight committees or sanctions (Pollack 1997).

Multi-level governance approaches apply a broad repertoire of options for analysing inter-institutional relations. As a common denominator, the approaches underscore the explanatory power of deliberative and discursive processes within the EU (Joerges and Neyer 1997). In particular, these theorists maintain that the creation and development of non-hierarchical policy networks has contributed to the emergence of a “culture of dialogue” (Jachtenfuchs and Kohler-Koch 2003, p. 25) within and between institutions, which rational choice approaches - focusing on strategic interaction alone - do not adequately address. Tension between efforts to preserve Member States’ autonomy and those promoting Community solutions is accepted as inherent in the political system of the EU (Jachtenfuchs and Kohler-Koch 2003) and this accounts for the mix of different modes of governance within the EU.

The Commission, Council and EP are part of an ever more complex political system which lacks the hierarchical structures familiar in national arenas. As active players in the dynamic evolution of the EU system, these institutions find themselves in a constant process of adaptation and adjustment. The dynamics of the integration process assume an inherent trend towards increasing integration (Olsen 2000), as multiple stages of decision-making emerge and shifts in competences occur, starting with loose forms of intergovernmental cooperation and proceeding towards supranational decision-making (Wessels 2001b, pp. 197ff.). In this complex and differentiated context, the member states and the EU institutions are regarded as key players. They form part of the legal and living architecture of the EU combining supranational and intergovernmental procedures and principles. It anticipates the emergence of a new kind of political system, following patterns that have evolved since the fifties. Coalition-building, informal politics, multi-level bargaining and deliberative and communicative action constitute key features of this model. In contrast to rational choice assumptions, inter-institutional strategic bargaining is not considered the only or *the* privileged mode of interaction in the EU. Nor are preferences necessarily regarded as fixed over time; they are open to persuasive adjustment. Considerable importance is attributed to “deliberative politics” (Dehousse 2002; Joerges and Neyer 1997), in which consensus and cooperative behaviour prevail, leading to non-confrontational patterns of interaction.

## **II. New Modes and the Evolution of the European Union: Two Alternative Perspectives**

The task of explaining the evolution/transformation of the EU political system is a challenging one. Looking back at past efforts one could assume that it is a road well travelled – much of the debate in earlier decades has centred around “grand theory” and the question which of the offers (most centrally the big three: neofunctionalism, intergovernmentalism and federalism) does best (Rosamond 2000; Chrysochoou 2001; Wiener and Dietz 2004). Recently, however, grand theorising has moved somewhat to the background of scientific attention. As the EU-system has become more sophisticated, so have the scientific tools forged to analyse this system and the focus of research has narrowed to meso- and micro-level processes. Explaining the evolution of the EU System requires a differentiated research design, which identifies a set of key variables; no simple access promises to give the desired outcome, but the

path of discovery needs to start from strategic points /fligstein and Stone Sweet 2001; Peterson and Bomberg 1999; Hix 1997; 1998).

We observe a regular and consistent pattern of transforming/evolving/integrating the EU-System in both vertical (from the MS level to the Brussels scene) as horizontal (from inter-governmental to supra-national forms) towards a state- like agenda (Wessels 1997; 2001b). Modes of governance may serve as an indicator for such developments.

The discussion about new modes of governance in the European Union belongs to the most dynamic and prominent fields of attention within the academic as well as political audiences over the last years. The introduction of the Open Method of Coordination (OMC), originally praised as a fresh and bold step towards integrating hitherto uncovered policy areas into the spectrum of EC activities, has been very much at the core of the debate (de la Porte and Pochet 2002; Hodson and Maher 2001); but also unorthodox developments in fields such as the area of freedom, security and justice, with its highly mixed and differentiated combination of first and third pillar components, the expansion of soft law for defining formal and informal policy instruments, the rising importance of private actors in shaping and implementing EU policies, or the growth in agencies as a reflection of an increasing delegation of tasks and competencies, all have been taken as signs for the fact that the classical Community method is accompanied by innovative and so far not experienced methods of decision-making. New modes of governance have become a catchword for changes in the fabric of EU decision-making, whose scope and importance however, have so far not become fully clear (Hix 1998).

We take this debate as an incentive to identify patterns of the EU system of decision-making, focusing on changes and trends in EU governance and on the factors which may account for such change. Here the questions of how new modes of governance emerge and evolve, how they are executed and how these forms can be evaluated are of particular importance. At this, the investigation follows a multidimensional approach which does not limit the analysis to *one* single or specific mode of governance, but takes “new modes of governance” as a keyword for the dynamics of change within the institutional architecture of the European Union over the last more than 50 years (Fligstein and Stone Sweet 2001; Bulmer 1994). Thus, modes of governance are understood as closely interrelated to the systemic evolution of the institutional architecture of the EU and the specific features of its institutional and procedural functioning.

We assume that new modes of governance are interrelated with the legal and living architecture of the EU, by adding a new dynamics and dimensions to the integration process (Wessels 2003b). This also means that we cannot separate the discussion about modes of governance from the overall evolution of the EU system as has become apparent particularly in the Treaty changes over the last decades, with the Lisbon Treaty as - probably – the final stage in this process for the years to come. Those Treaty reforms, adopted formally by the European Council, reflect basic demands for adjusting the institutional and procedural landscape of the EU, in response to major internal and external challenges. It does not come as a surprise that the emergence of new modes has taken place at a crucial phase of the integration process, linked to the process of policy expansion and the 'conquest' of new areas of competence and responsibility for the European Union, and reflecting specific tensions which arise from the member states' interests to tackle common problems of the modern welfare states while preserving a high degree of autonomy and capacity for national governments (Wessels 2003c; 2001b). The key question thus lies in the interpretation of such developments as either a case of productive innovation or rather of a degeneration and fragmentation of the EU. On this account, a time-dynamic perspective on new modes of governance appears particularly mean-

ingful if linked to the two following contrary interpretations, which will serve here as guiding theses for the further analysis.

- New modes are considered as attempts to find innovative methods for decision-making which may not fit the classical forms of the Community method, but still try to enhance the set of common approaches in order to tackle problems arising from interdependence. While reflecting a high degree of variety and differentiation, their function following forms are regarded as temporary and transitional, open to further upgrading and enhancements at later stages. Though not being fully consistent with the traditional forms of decision-making, they are nevertheless compatible with the broader trends of the EU system. With other word, new modes can be observed by a shift in the pattern of institutional interaction which take the form of supranational centralisation as the most hierarchical type of decision-making, running via forms of negotiations (supranational joint decision-making, mixed joint decision-making and trans-/intergovernmental negotiations), through the method of coordination until reaching competitive patterns.
- A second assumption, opposed to the first interpretation of modes of governance, sees new modes of governance as a reflection of the loss of an overall trend in the institutional development of the EU, leading to a high degree of differentiation and even fragmentation between and among policy areas. In general, they are regarded as a weakening of the Community method, whose attraction for the member states has lost considerably in value and weight over the last years, reflecting not necessarily a reversal of the basic integrationist dynamics, but a need for peculiar institutional and procedural solutions within distinct areas of political and legal action, thus breaking up the familiar set-up of the Union and leading to a new range of fuzzy and often confusing provisions.

Guided by these competing interpretations, we will investigate the emergence, execution, evolution and evaluation of new modes of governance from an overall systemic perspective of the EU, but closely connected with specific patterns observed in a number of policy areas in all three pillars. These will provide empirical evidence for the main trends and directions which allow us to assess the role and impact of new modes of governance for the integration process.

## **II.1 Approaching Modes of Governance**

Generally speaking, governance refers to patterns of interaction and coordination of social actors for the purpose of adopting and implementing collectively binding decisions. More specifically, it hints at the preparation, adoption, implementation and control of decisions, revealing both a structural and processual dimension. Thus it is embedded into institutional structures defining the rules of the game, as well as specific interaction principles guiding the actors' capacities, behaviour and orientations (Tömmel 2007).

Consequently, for policy-making in the EU, three dimensions are especially relevant for the analysis of governance:

- the sphere of authority between the public and private areas
- institutional modes of decision-making relying on the specific forms and patterns of decision-making between hierarchy and competition; and
- different types of policy instruments between hard and soft law.

This three-dimensional approach on modes of governance allows for differentiation with regard to the question whether new modes may be finally observed. This may be the case when increasingly the private sphere is involved in decision-making, breaking up traditional notions

of an authoritative allocation of values by public institutions, or when the nature of instruments shifts from traditionally binding acts towards the growing use of non-binding, informal and soft acts in areas where this has been rarely observed before (Hix 1998; Bulmer 1994; Wallace 2000). Finally, new modes may be observed by a shift in the pattern of institutional interaction, taking hitherto unfamiliar forms between hierarchy and competition.

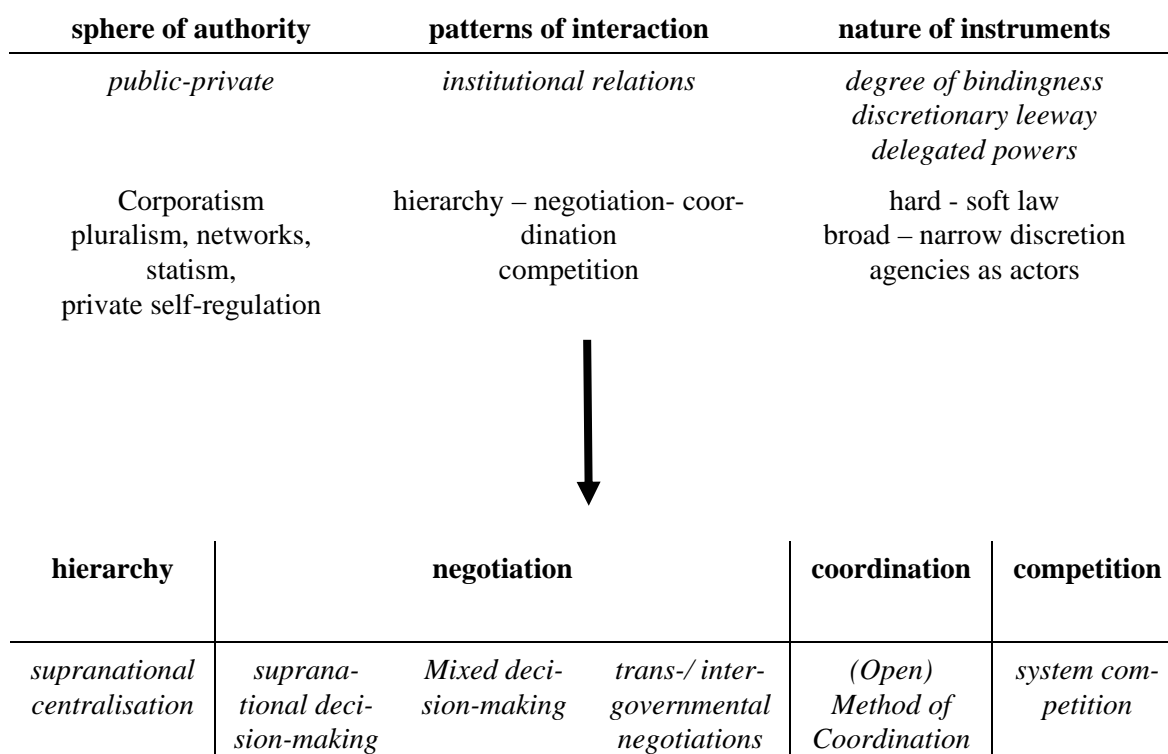
Changes in modes of governance may be observed in one or several of these dimensions, not necessarily in all of them. The features of modes of governance may thus be mixed with regard to the three dimensions, combining rather traditional patterns of public-private relations with remarkable shifts in institutional interactions (e.g. in CFSP), and again such changes may occur accompanied by a new fabric in the nature of instruments (e.g. in justice and home affairs). In general, this initial assumption may warn us again against using the idea of new modes in a too homogeneous and narrow sense, hinting at only one dimension of innovation. It requires a contextual perspective that takes into account the composition and configuration of different features of a policy area over time (Schneider and Aspinwall 2001; Fligstein and Stone Sweet 2001).

Modes of governance are regarded as “new” if and when

- innovative modes of decision-making, initially outside the existing treaty provisions are introduced, such as the OMC
- “old” institutional and procedural provisions on decision-making” are transformed or further developed, particularly by up- or downgrading existing modes into more hierarchical patterns
- the mixture between different old and/or innovative ways of decision-making is changed by enhancing certain modes in favour of others,
- the nature of the policy instruments (binding / non-binding decisions) is modified into using particularly soft law
- the involvement of public and private actors and institutions is extended and strengthened

Thus, in a particular policy area, new modes are identified as innovative in the sense that they have so far been un-experienced and un-tested. But it may also mean that already familiar ways of decision-making in certain policy areas are introduced in other areas, that old modes are incrementally adjusted, or that the mixture of modes has changed over time.

**Graph 1: Three Dimensions of Modes of Governance in Detail**



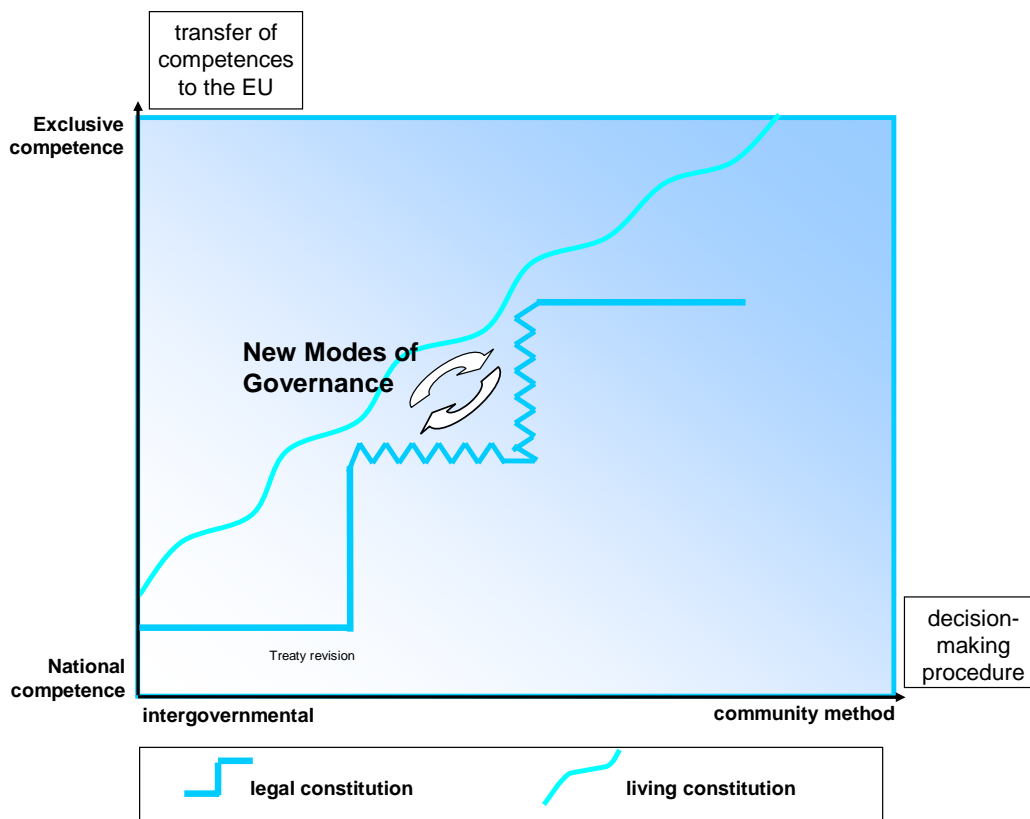
### III. New Modes of Governance - Stages in the Development of the EU Integration Process

Summing up the findings and trying to embed them into a coherent approach with regard to the overall development of the EU system, the empirical investigation of the relationship between new modes of governance and the overall development of the integration process leads to a number of conclusions both at a macro-level focusing upon the impact of major Treaty reforms in the EU on the legal and the living architecture, and on a micro-level focused upon the different policy areas in play (Wessels 2003b; 1997; Hix 1997; 1998; Peterson and Bomberg 1999; Bulmer 1994). Taking up the guiding theses of this chapter, we argue that new modes of governance may well fit an overall institutional and procedural dynamics of the EU system, whose basic trends over the last 50 years have not been substantially reversed nor become subject to a fragmentation and break-up (Jachtenfuchs and Kohler-Koch 2003).

Shifts in modes of EU governance are subject to a dynamics which is more incremental than 'revolutionary', leading to new institutional and procedural solutions triggering off a process of differentiation. Instead of a consistent clear-cut architecture we find elements of mixture and combination, with trends into the direction of more supranational, hierarchical modes in the context of complexity and evolutionary enhancement (Tömmel 2007). Within this dynamics, NMG have emerged and evolved as a result of policy demands particularly in areas that have been transferred from intergovernmental cooperation in spheres of highly pronounced sovereignty concerns to more Community-oriented fields of policy-making without adopting the traditional Community method. This transfer, going along with an increasing hierarchisation of the decision-making procedures, did not necessarily break up the mainly intergovernmental nature of an area, but opened up dynamics where either close relations to EC policies exist (defence industry), or where policy gaps had to be met (Diedrichs 2007). However, a

substitution of older modes by more innovative ones has rarely been the case. Instead, the co-existence of different modes and trends towards hybridisation are much more frequent. So far, new modes represent thus the changing composition in modes of governance in particular policy areas. As stated, it is less the mix or combination than the co-existence or parallelism of different modes of governance which is to be observed across policy areas.

Following the model of a Treaty-based ladder for the legal architecture and a smoother process of the living architecture leading upwards towards shared or exclusive competences and towards the community method as a focus point, new modes of governance emerge and evolve within a general upward trend on the systemic level of the EU (Wessels 2003b; 1997). Here, they are regarded as transitional and temporary phenomena, which aim at including new policy areas or at strengthening existing cooperation without – initially – employing the traditional community method. Following this interpretation, modes of governance reflect stages of approximation towards the Community method, although in different speed and differentiated stages, leading to a certain degree of fuzziness and lack of transparency when it comes to describe the transition between an already reached plateau of the integration ladder and the next. These stages are not neatly distinguished, but include a range of highly mixed, differentiated and hybrid arrangements which are open to upgrading and deepening at a later stage, but do not neatly fit our demands for a clear-cut set of intra- and inter-institutional as well as procedural relations. The thumb rule could even be formulated as follows: The higher the ladder goes in the transfer of competencies, particularly reaching those of a sensitive nature – be it in economic, social, political or security terms – the more complicated does the transition become – and the more likely will member states look for innovative interim solutions not primarily for blocking further developments, but for retaining control and gaining experience. This is the window of opportunity for new modes of governance, whose concrete shape depends upon the policy area in question and the features of the policy issues in play. Spill-over effects may be in place, but they do not generate an unequivocal institutional and procedural solution. The Community method represents a long-term goal, and serves as an orientation point, against which changes and reforms might be measured.

**Graph 2: The Treaty-based Ladder and New Modes of Governance**

Source: Wessels, W. (2005), *The Constitutional Treaty: Three Readings from a Fusion Perspective*, JCMS Annual Review

With other words, new modes of governance do not modify the EU system in the sense of breaking the general trend towards further integration, but have to be understood as an integral element of the EU integration process. They have been introduced by establishing innovative coordination mechanisms, whose impact and effectiveness have been generally weak in policy terms, but rather successful in preserving member states' autonomy and discretion of action. The temporary deviation from the Community method may therefore be regarded as a weakening of the EU institutional and procedural framework, at the expense particularly of the Commission and the EP, and to the benefit of the member states. On the other hand, it may also be seen as a creative and innovative answer of the member states for achieving institutional solutions where consensus was frail, policy objectives not broadly shared, and political will to transfer further competencies uneven. Therefore, the power allocation should be seen also in the dimension of competencies, which have been opened for the EU, at the price of temporarily accepting new modes as transitional means for handling these competencies.

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