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## **NEWGOV** **New Modes of Governance**

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

**Exploratory workshop on**  
***Soft Law, New Policy Instruments, and Modes of Governance***  
***in the European Union***  
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**University of Exeter: Claudio M. Radaelli**

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<b>Dissemination Level</b>		
<b>PU</b>	Public	X
<b>PP</b>	Restricted to other programme participants (including the Commission Services)	
<b>RE</b>	Restricted to a group specified by the consortium (including the Commission Services)	
<b>CO</b>	Confidential, only for members of the consortium (including the Commission Services)	

## Executive Summary

The exploratory workshop (28 January 2005, University of Exeter) gathered some 20 participants engaged in theoretical and empirical research on soft law and new policy instruments in the European Union. The workshop discussed the following intellectual themes:

1. classification of formal and informal governance
2. interaction between new and old governance
3. emergence of new governance
4. quality of new policy instruments
5. effectiveness of soft law and new governance in general
6. type of social theory better suited to understand new governance

One of the main conclusions of the meeting is that the term ‘soft law’ has limited intellectual mileage, both for lawyers and political scientists. Governance should be studied along a continuum from extremely formal to very informal. The ideal-types of governance which have been identified by the literature should be situated along the continuum.

Another conclusion of the meeting is that in our future work we should look at the interaction between ‘new’ and ‘old’ governance across time and synchronically. Most participants argued that this is more conveniently done when the unit of analysis is a specific policy.

The third conclusion is that when the unit of analysis is a public policy, it can be useful to compare EU governance with other governance regimes, such as the OECD in the case of international tax policy. Some of our initial propositions about EU ‘new’ tax governance need refinement when tested against the OECD experience of tax coordination.

Finally, in terms of social theory better suited to analyse new governance, some participants thought that the classic idea of contrasting winners and losers of governance is useful, although others argued that learning and public deliberation are more important. Clearly both arguing and bargaining interact in new governance, the challenge is to understand how.

## Overview and Conclusions

By definition, an exploratory workshop has to be a somewhat adventurous and high-risk exercise. Otherwise there would be limited exploration. This was the reason why we didn't ask for polished papers, the idea being to collect a group of people sharing a research interest on the topic of 'new' modes of governance around the table and discuss some tentative papers. Some of us (Morth, Laffan, and Kraemer-Radaelli) are involved in the same integrated project on new modes of governance funded by the European Commission's Framework Six Programme. Participation was limited to 20 people to promote a focused discussion among people who are engaged in research on new modes of governance, with particular emphasis on new policy instruments and soft law. We invited senior scholars from political science and law, but we also had some graduate students working on dissertations on new governance.

Turning to the substantive intellectual themes, we thought it would be useful to debate what is common in our segments of the 'new modes of governance' project and see what type of intellectual economies of scale we can build by coordinating our research efforts. We also thought that political scientists cannot handle new modes of governance without taking the legal dimension of new policy instruments and soft law (and, more generally, socio-legal studies) into serious consideration. Indeed, what looks like new governance to political scientists may look like the re-discovery of ideas and conceptual issues which have informed legal debates many years ago. The case of soft law is paradigmatic.

The workshop discussed the following issues:

1. **Classification.** We think there is no point in discussing new and old governance or, in a different formulation, formal and informal governance, in terms of black and white opposition. Where do we draw the line between one and the other? What is new in new governance? What is informal in informal governance? One option to consider is to think of a continuum between extremely rigid and formal governance and very informal governance. Two questions arise. To begin with, we must clarify what is NOT covered by the continuum, that is, what is left out of the continuum? We must specify what is mere informality, and loosely structured social interactions outside the governance dimension. The second question is where do we put the entities which have already been somewhat recognised by the literature along the continuum? Put differently, where are the types to situate along the continuum? What is the difference between soft law, the open method of coordination, new policy instruments, and hierarchical governance? Some classifications have been proposed by Chris Knill (table 1), Guy Peters (table 2), and lawyers<sup>1</sup>, but the work has only started. We learned from the work in progress in Dublin (we discussed the classification proposed by Falkner et al. and the operationalisations under construction by the Dublin team led by Brigid Laffan), the clarifications on soft law made by Ulrika Morth (some actors in EU state aid policy – she argued - believe that soft law is 'hard' regulation and therefore behave accordingly), and the extremely useful critical remarks on the use of the term soft law made by Tony Prosser and our chair, John Usher. Tony Prosser's presentation helped us to understand the following points: (i) the relationship between soft law and hard law is complex, it is better to talk about law along a continuum; (ii) in a sense, all law is a 'soft' incomplete contract cast in a social context and a set of constitutional values; we should study law in its social and constitutional contexts; (iii) there is a proc-

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<sup>1</sup> Baldwin and Cave (1999: 58-62) have provided a typology of regulatory strategies which includes the following eight types: command and control, self-regulation, incentives, market-harnessing controls, disclosure, direct action, rights and liability laws, and public compensation.

ess of constitutionalisation of competition as a value; in this process technical reasons and hard economics play an important role; (iv) at the EU level there is a slow of process of constitutionalisation of soft values of public service, via the ECJ. At the national level, there is tension between technical reasoning and political decisions, as shown by the British experience of competition policy.

2. How formal interacts with informal. Most participants argued that it is not useful to map new governance in isolation from old governance. Soft law exists only in relation to hard law. Further, there are several cases in which new governance is nested into old governance – as shown by our research on international tax policy. The interesting research question, therefore, is all about the interaction between soft and hard. The interaction can be diachronic when soft evolves into hard – a point well-known in legal scholarship. However, the sequence can be different, with soft law being followed by self-regulation, or embryonic codes of conduct leading to failure and lack of any governance structure. More importantly still, we are interested in synchronic interaction. Here are some examples. What is the interaction between the open method of coordination and traditional directives in employment and environmental policy? What is the combined effect of codes of conduct, state aid policy, and directives in direct taxation? What is the overall impact in terms of effectiveness, coherence, and legitimacy of policy? Finally, there is the question of whether soft governance is used to counterbalance the effects of formal and hard governance, or whether one is supposed to work in the same direction as the other<sup>2</sup>. Overall, the analysis of interaction leads to research questions on sequences and combined effects – two topics discussed at length by Tony Prosser and Ulrika Morth in their presentations.
3. Emergence of new governance. The third intriguing question is about the constellation of problems, actors, instruments, resources, and decision-making styles which explains the emergence of new (or informal) governance of various types. When is soft or new governance most likely to emerge? All too often we make the assumption that new governance is a response to the rigidity of old governance. This is typical of regulation, where new instruments are used to overcome the limitations of command and control regulation. But our research on the regulation of harmful tax competition reveals that codes of conduct can be introduced as political expedients – second best choices when ‘traditional’ solutions are stymied.
4. Quality of governance. In terms of problems, new governance is often associated with problems of participation, but the participatory quality of new policy instruments can be lower than the one of traditional instruments. The case of the code of conduct in business taxation – where decisions are taken in secret by revenue authorities with no input or hearings of the social actors – is a good example of new governance with limited participatory quality. The broader issue of the quality of new governance was discussed by several participants.
5. Effectiveness. After quality, effectiveness is the other big question on what new governance can deliver. We know that new governance sometimes works and sometimes doesn't. Although there are some propositions in the literature about the scope conditions under which new governance is effective, more and fresher research is needed. Beyond scope conditions, we discussed the unintended consequences of new governance, the perverse effects of soft law, and the outliers.

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<sup>2</sup> Van Tatenhove and Mak (2005) distinguish four general strategies; informal practices as *lubricant* of policy-making in formal practices; informal practices as *experimental garden* for not yet fully developed ideas; informal practices as *whistle blower* to correct undesirable developments in formal practices and; informal practices as *adversary* against decisions made in formal practices and arrangements.

6. Power in the context of new governance. There is uncertainty on the type of social science theory one should use to approach and understand new governance. An agenda informed by instrumental rationality would look at winners and losers from new governance. This is certainly an interesting question. But advocates of communicative rationality would argue that an important property of informal and new governance is that it fosters processes of deliberation, reasoned persuasion, and deep learning. As political scientists, we are interested in who gets what from new governance. Yet some participants doubted that this question can really provide sophisticated answers. Political science is not defined by the ‘who gets what’ question. Instead, it is defined by its substantive concern with the creation and use of constrained social power (Goodin and Klingemann 1996). The use of power covers intentional action as well as unintended consequences, decisions and non-decisions, internalised norms and how they change. We need to approach power within a broad framework.

## **The way forward**

The workshop was extremely useful in disseminating information across cluster (Dublin, Stockholm and Exeter belong to different NEWGOV clusters), to brainstorm with lawyers, and to provide ideas for the refinement of our research.

One of the main conclusions of the meeting is that the term ‘soft law’ has limited intellectual mileage, both for lawyers and political scientists. Governance should be studied along a continuum from extremely formal to very informal. The ideal-types of governance which have been identified by the literature should be situated along the continuum. One important ideal-type is the open method of coordination. We learned about the research in progress at the University of Stockholm (SCORE and SIEPS, presentation by Ulrika Morth) and Dublin (Laffan and Shaw). With reference to the open method of coordination, research in progress shows limited evidence of public deliberation and participatory quality of this mode of governance. At the same time, there is a process of task expansion. The method seems able to take on new tasks and to cover new policies. We looked at the comprehensive work done by the Dublin team and suggested that ‘better regulation’ has recently been captured by the open method. We also explained to what extent the code of conduct used in business taxation should be considered a *sui generis* example of open coordination.

Another conclusion of the meeting is that in our future work we should look at the interaction between ‘new’ and ‘old’ governance across time and synchronically. Most participants argued that this is more conveniently done when the unit of analysis is a specific policy. The third conclusion is that when the unit of analysis is a public policy, it can be useful to compare EU governance with other governance regimes, such as the OECD in the case of international tax policy. Some of our initial propositions about EU ‘new’ tax governance need refinement when tested against the OECD experience of tax coordination.

Finally, in terms of social theory better suited to analyse new governance, some participants thought that the classic idea of contrasting winners and losers of governance is useful, although others mentioned examples where learning and public deliberation are more important. Clearly, arguing and bargaining interact in new modes of governance – the challenge is to understand how.

## References

- Baldwin, R and M. Cave (1999) Understanding Regulation, Oxford: Oxford University Press.
- Goodin, G., R. and H. D. Klingemann (1996). A New handbook of Political Science, Oxford: Oxford University Press.
- Knill, C. and A. Lenschow (2004) Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation, in: Jordana, J. and D. Levi-Faur (eds.), The Politics of Regulation, Cheltenham/ Northampton: Edward Elgar.
- Peters, G. (2005) The Forms of Informality: Identifying Informal Governance in the European Union, paper prepared for presentation at the International Workshop on Informal Governance, Amsterdam 13-15 January.
- Van Tatenhove, J. and J. Mak (2005) Shifting Relations in Governance in the EU: Winners and Losers of Informal Governance, Introductory paper for the International Workshop on Informal Governance in Amsterdam, 13-15 January.

**Table 1 - Modes of Regulation in the EU according to Chris Knill and Andrea Lenschow**

	<b>High level of obligation</b>	<b>Low level of obligation</b>
<b>Low level of discretion</b>	<b>RS:</b> Regulatory standards (substantive, procedural)	<b>SR:</b> Self-regulation in the shadow of the state
<b>High level of discretion</b>	<b>NI:</b> "New" instruments (economic, communicative, framework regulation)	<b>OMC:</b> Open method of coordination

**Table 2 – Guy Peters’ classification of informal governance in the European Union**

	<b>Characteristics of Informal Methods of Governance in the European Union</b>						
	Governmentality	Access	Legitimation Potential	Bargaining Potential	Coordination	Decision-making Potential	Process Change
Networking	Low/Medium	High	Medium	High	Low	Medium	Medium
Comitology	High	Medium/Low	Low	Low	Medium	Medium	Low
Multi-Level Governance	High	Low	Medium	Medium	Low	High	Low
Soft-Law	Medium	Medium	High	High	Medium	High	High
Open Method of Coordination	Medium	High	Medium	Medium	High <sup>3</sup>	High	Low

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<sup>3</sup> Vertical coordination enhanced more than horizontal coordination.

## **Programme of the workshop**

“Exploratory Workshop on Soft Law, New Policy Instruments, and Modes of Governance in the EU”, 28 January 2005, University of Exeter, Queens Building, Room 1C

10.00 *Welcome by the Chair*

**John Usher**, Department of Law, University of Exeter

*Introductory Remarks*

**Claudio Radaelli**, Department of Politics, University of Exeter

10.30 *Soft Law, Self-Regulation, and Competition Policy*

**Tony Prosser**, Department of Law, University of Bristol

11.30 *Public and Private Partnerships as Part of New Modes of Governance: The Financial market in Europe*

**Ulrika Moerth**, Department of Political Science, Stockholm University

12.30 Lunch

14.00 *The Open Method of Coordination: Classifying Governing Modes*

**Brigid Laffan** and **Colin Shaw**, Department of Politics, University College Dublin

15.00 *The Rise and Fall of Governance’s Legitimacy: The Case of International Direct Taxation*

**Claudio Radaelli** and **Ulrike Kraemer**, Department of Politics, University of Exeter

## List of Participants

1. Susana Borrás, Roskilde University
2. Emma Carmel, University of Bath
3. Fabrizio De Francesco, University of Exeter
4. Iria Giuffrida, University of London
5. Alison Harcourt, University of Exeter
6. Joanne Hunt, University of Cardiff
7. Oliver James, University of Exeter
8. Ulrike Kraemer, University of Exeter
9. Julian Lonbay, University of Birmingham
10. Christopher Longman, University of Exeter
11. Ulrika Moerth, Stockholm University
12. Nieves Perez-Solorzano, University of East Anglia
13. Tony Prosser, University of Bristol
14. Lucia Quaglia, University of Bristol
15. Claudio Radaelli, University of Exeter
16. Colin Shaw, University College Dublin
17. John Usher, University of Exeter
18. Samantha Velluti, University of Manchester
19. Ben Waine, Ernst & Young LLP London
20. Christine Wong, University of Exeter
21. Eleni Xiarchogiannopoulou, University of Exeter