



Project no. CIT1-CT-2004-506392

NEWGOV

New Modes of Governance

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

Cluster Three Workshop
reference number: C3/D05 and part of CLA/D21

Due date of deliverable: June 2008
Actual submission date: 5 June 2008

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:
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Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	X
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 final meeting of Cluster 3 revisited the research programme of NEWGOV focusing on 14 guiding questions defined by the Steering Committee to aggregate the major findings generated by the Consortium. Particular focus was placed on the emergence and evaluation. Each project submitted a short paper summarizing its major findings. The meeting took place during the 4th and final NEWGOV Consortium Conference, 5 and 6 June 2008, at the European University Institute in Florence.

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I. Introduction

The final meeting of Cluster 3 revisited the research programme of NEWGOV focusing on 14 guiding questions defined by the Steering Committee to aggregate the major findings generated by the Consortium. Particular focus was placed on the emergence and evaluation. Each project submitted a short paper summarizing its major findings and addressing the following issues:

1. Which (new) modes of governance (NMG) did you study in your project? Did you observe any major variations of NMGs across policy areas, across time periods, across countries, across territorial levels (supranational, national, subnational)?
2. Which key factors account for the emergence of new modes of governance in EU?
3. Which instruments/mechanisms do the (new) modes of governance you study employ to achieve their declared goals?
4. In how far did the NMG under investigation involve a mix of private and/or public actors?
5. In how far and under which conditions have you found NMG to be (in)effective / (in)efficient and legitimate/illegitimate in achieving their declared goals?

In the following, the most important insights of the papers and the discussion will be summarized.

II. Seek and ye shall find? Evidence on New Modes of Governance

Our projects focus on the role of new modes of governance (NMG) for the implementation of EU policies and EU primary Law in different types of states, “weak states” in particular, including Southern European member states, CEE candidate countries and associated states in the former Soviet Union and Northern Africa.

These weak states appear to be most likely cases for the emergence of new modes of governance. On the one hand, the EU cannot hierarchically impose the *acquis communautaire* on accession and neighbourhood countries. Not being members, their relationship with the EU largely remains in the realm of classic diplomacy and international negotiations. The EU’s supranational institutions do not even cast a shadow of hierarchy, yet, since the supremacy of EU law and its direct effect which empower domestic courts to enforce EU Law without the consent of national governments only take effect after accession. On the other hand, the Southern, Central and Eastern European (CEE) accession countries as well as most of the states in the Eastern and Southern neighbourhood of the EU have been limited in their capacity to hierarchically coordinate the adoption of and adaptation to the *acquis*. Harmonization and approximation with the *acquis communautaire* creates an enormous policy load, which meets with limited resources (expertise, money, personnel) that are already strained by managing the transition from authoritarian and socialist rule, respectively.

The governance literature leads us to assume that new modes of governance could compensate for the weak hierarchical steering capacity on both sides. It would be only rational for public actors to seek the cooperation with private actors to share or shift the burden by pooling resources and delegating certain tasks in the adoption of and adaptation to EU policies. Private actors, in turn, could exchange their resources for influence on policies which would significantly affect them. Finally, the European Commission strongly encourages accession and neighbourhood countries to involve non-state actors in the adoption of and adaptation to the *acquis* to ensure both greater effectiveness and legitimacy of the harmonization and approximation process.

In order not to limit our analytical focus too much, we adopted a rather broad definition of NMG and defined them as structures and processes of adopting and implementing collectively binding decisions (based or not based on legislation) that:

- are not hierarchically imposed, i.e. each actor involved has a formal or de facto veto in policy-making and voluntarily complies with the decisions made, and
- systematically involve private actors, for profit (e.g. firms) and/or not for profit (e.g. non-governmental organizations) in policy formulation and/or implementation.

Understanding new modes of governance as the involvement of private actors in public policy-making through non-hierarchical coordination covers a wide range of potential arrangements. In order to avoid conceptual overstretch, however, certain forms remain outside this definition. We exclude the lobbying and mere advocacy activities of non-state actors aimed at governments as well as supranational and international organizations.

Contrary to our initial expectations, we have found only limited evidence for the emergence of New Modes of Governance. This is even true if we adopt a less demanding definition that focuses on non-hierarchical modes of coordination and does not necessarily require the (equal) involvement of private actors and includes policy implementation as well as binding policy outcomes.

The six projects in Cluster 3, which focus on the domestic level and explore NMG in nine different countries in Southern, Central and Eastern Europe, have found only limited evidence for the emergence of new modes of governance. There is a clear dominance of traditional modes of governance, or “hierarchy in disguise” (project 15), in which state actors resort to command and control regulation to adopt and adapt to EU policies. Consultation, outsourcing, and to a lesser extent voluntary agreements are the only NMG we find that involve private actors. Moreover, NMG are usually embedded in old modes. Thus, the shadow of hierarchy often looms in the background. Likewise, NMG in the EU’s external relations with third countries frequently occur in conjunction with intergovernmental and hegemonic cooperation.

Did you observe any major variations of NMGs proliferation across policy areas, across time periods, across countries, across territorial levels (supranational, national, subnational)?

While the findings of scarce and only weak forms of NMG generally hold for all our weak states, the Southern European countries show some interesting change over time. Spain and Portugal in particular have seen some first inceptions of NMG after accession due to a strengthening of both state and non-state actors’ capacities. EU financial and technical assistance as well as the empowerment of societal actors through EU compliance pressure, particularly regarding the participatory requirements of EU directives, have helped to improve the conditions for the emergence of NMG.

Moreover, we also find variation across policies and policy sectors. Some EU policies, e.g. in regional and environmental policy, specifically prescribe the involvement of non-state actors in the policy process. While state actors are often reluctant to comply with the participatory requirements EU policies provide non-state actors with a new opportunity structure to influence policy-making. Thus, state actors seek the cooperation with civil society organizations in order to avoid litigation and/or to increase the legitimacy of unpopular political decisions. The capacity of non-state actors to exploit the EU opportunity structure varies, of course, not only across but also within policy sectors. This is not only true for civil society organizations. Companies in high-performing sectors, which are usually strongly export-oriented, attract foreign direct investments and employ modern technologies in production, have few problems and sufficient capacities in complying with EU obligations. They have the necessary informa-

tion and expertise state actors are often lacking to effectively implement EU policies. By contrast, branches such as industrial farming, which are also subject to pollution control, are experiencing major problems due to the environmental investments they are forced to do. They usually have little incentive to cooperate with state actors in order to improve implementation.

Finally, the two projects (13, 17) that focus on governance at the EU level rather than in the domestic context, have been more successful in tracing NMG. Studying EU Treaty law and on EU relations with third countries, they have adopted a somewhat broader definition of NMG, which also encompasses purely public forms of NMG. In the EU's relation with associated neighbourhood countries, transgovernmental networks and networks of regulators have emerged, which are partly organized around European agencies as NMG (project 17, see also project 14). The principle of mutual recognition in services and soft law play a prominent role to make EU policies work in situations, in which the member states have not been able to agree upon further integration.

III. Factors fostering and impairing the emergence of NMG

Accession countries do not only have to cope with the challenge of adopting and adapting to the comprehensive *acquis communautaire*. Their governments also have to manage the still ongoing transition to democracy and market economy. The weak capacities of transition countries may render NMG an important way to cope with the challenge of accession by pooling resources and sharing costs with non-state actors. Moreover, the European Commission has promoted NMG as a means to make the implementation of the *acquis communautaire* more effective. Nevertheless, we have found only scattered and weak forms of NMG. Our projects have identified several factors that have fostered and impaired the emergence of NMG. These factors impact upon the willingness and the capacity of state and non-state actors to engage in cooperation with each other. They are located both at the European and the domestic level.

At the domestic level, state capacity has provided an important incentive for both, state and non-state actors to engage in cooperation. Accession and transition require immense resources, a demand that is hardly met by the weak governance capacities of the candidate countries. State actors often lack sufficient financial (money), administrative (staff) and cognitive (expertise) resources, and the capacity to mobilize existing resources (e.g. due to administrative fragmentation), respectively, to effectively adopt and enforce public policies. Moreover, given the political instability and frequently changing governments, they may not appear as reliable negotiation partners. Finally, after decades of authoritarian statism, institutions that provide an arena for exchange between state and non-state actors are only emerging. In the absence of a credible shadow of hierarchy (see project 12, 14, and Cluster 2), non-state actors have hardly any incentives to cooperate with state actors exchanging their resources for political influence. At the same time, state actors often shy away from cooperating with non-state actors, too, because they are afraid of being captured (project 12), or are indeed captured by powerful private interests (see project 17).

The capacity of non-state actors tends to be even weaker. Particularly civil society organizations do not have sufficient organizational capacities to offer themselves as reliable partners to state actors. Or they lack resources to exchange to begin with (project 12, 14, 17). Business actors also appear to be rather weak, with regard to both their financial resources and organizational capacities. Yet, there is significant variation between sectors, which also affects the willingness of business to collaborate with state administration. Highly productive industries, which are usually strongly export-oriented and attract foreign direct investments, tend to pos-

ses relevant capacities, which are lacking, particularly with small and medium size enterprises. They also take an interest in fostering the regulatory capacity of states in order to reduce legal uncertainty (project 12, 14).

The low governance capacities of both state and non-state actors (“low equilibrium trap”, project 15;) as a major impediment for the emergence of NMG are in line with an argument of the governance literature that new modes of governance require both, a strong state and a strong society (Renate Mayntz refers to a modernization deficit of Central Eastern European countries; cf. project 12). The findings on the importance of governance capacities, and the shadow of hierarchy in particular, for the emergence of NMG are also corroborated by the projects which focus on NMG in the context of EU Treaty Law. Trust among Member states in each other’s monitoring and enforcement capacities has proven to be a major pre-condition for the functioning of mutual recognition (project 13). In the EU’s external relations with third countries, NMG are more likely to emerge where both sides display a similar level of governance capacity (project 17).

The impairing effect of weak governance capacity is reinforced by a state tradition which is hostile to the involvement of non-state actors in public policy-making. Not only are NMG incompatible with the legacy of authoritarianism and socialism. NMG do not necessarily correspond to the newly established institutions of representative democracies. Thus, non-elected interest groups and civil society organizations are not always accepted as legitimate representatives of societal interests. Moreover, their involvement in the policy process outside majoritarian institutions is often considered as a continuation of traditional clientelistic networks (project 12, 17). Likewise, the civil society tradition in the transition countries does not always resonate with NMG either. Civil society largely emerged in opposition to the authoritarian state. Many civil society organizations still see themselves as “watchdogs” rather than partners of the state in public policy-making (see project 24 in Cluster 4).

Finally, domestic political and economic changes have had a major influence on the emergence of NMG over time by affecting the capacity and willingness of state and non-state actors to cooperate. Decentralization in Spain, Poland and Hungary, for instance, provided non-state actors with additional access points to the policy process. On a more general level, the consolidation of democracy in the accession countries helped strengthen participatory institutions, which facilitated the interaction between state and non-state actors and helped foster trust and a culture of cooperation.

Domestic factors have largely impaired the emergence of NMG in accession countries. Europeanization, by contrast, has played a prominent role for the timid emergence of NMG in all our countries.

First, EU pressure induced state actors to resort to NMG. On the one hand, the EU may legally require the involvement of private actors (e.g. the principle of partnership or participatory policy instruments in environmental Directives). Thus, it may be rational for state actors to apply NMG in order to avoid punishment and to receive rewards by the Commission, respectively (accession conditionality). On the other hand, there is a normative logic that may drive the emergence of NMG – it is the “EU way of doing business” (project 12, 17). The Commission has actively promoted the idea of NMG as a means to help countries cope with the challenge of accession.

Second, the EU does not only provide incentives and governance paradigms that may favour NMG. It also helps strengthening governance capacities of accession countries. The transfer of money and expertise through Community programs and twinning processes provides state as well as non-state actors with additional resources they can exchange. These processes also

foster policy learning and trust building (project 12, 15, 16, 17). Moreover, the monitoring and sanctioning system of the EU (accession conditionality and infringement proceedings) have empowered non-state actors by opening new opportunities for them to pursue their interests, e.g. by taking their governments to court. State actors may resort to NMG in order to accommodate the interests of non-state actors and avoid complaints to the Commission or legal proceedings (project 12, 13, 14).

While Europeanization has fostered the emergence of NMG, it can also have the opposite effect. First, the EU has not always been consistent in its approach to governing accession. In structural policy, the prioritizing of the absorption capacity has fostered centralization and, hence, counteracted the emphasis of the principle of partnership for the involvement of subnational and private actors (project 15, 16).

Second, Europeanization has helped strengthening the capacity of both state and non-state actors. However, the building of governance capacities has been unequal, favouring state over non-state actors. Not only has the down-loading of a vast number of EU policies in a rather short period of time not allowed for the involvement of private actors. Accession conditionality and the focus of the Commission on the absorption capacity of the candidate countries have strengthened the autonomy and the resources of central government actors in hierarchically imposing policy outcomes. This is even the case for regional and agriculture policy, in which the Commission explicitly requires and encourages the involvement of subnational and private actors (see projects 15, 17). While state actors have become more open to the involvement of non-state actors, they have managed to stay in control of the policy process. The asymmetrical relationship to a large extent explains why we only find weak forms of NMG, which largely operate under the shadow of hierarchy (project 12, 15, 16).

IV. Handle with Care: NMG, effectiveness and legitimacy

Since we have only found scarce and weak forms of NMG, it is difficult to explore the extent to which they can contribute to the effectiveness and legitimacy of public policy. Moreover, the projects have focussed on the (non-)emergence of NMG. They will address the question of effectiveness and legitimacy in the months to come.

The empirical evidence allows for some preliminary insights, though. Effectiveness in cluster 3 relates mostly to the timely, complete and correct implementation of EU policies. Legitimacy is defined as the voluntary acceptance of a policy by the rule targets because the policy and its making conform to pre-established norms (see the key note speech of Philippe Schmitter at the Consortium Conference in May, 2007). The projects present mixed results. NMG may increase the effectiveness of implementation by providing additional resources (money, expertise), reducing costs and helping to resolve conflicts among actors involved (project 12), particularly if policies do not involve prisoner's dilemma and redistributive problems (project 16). However, they can also have the opposite effect e.g. by decreasing the capacity of accession countries to absorb EU funds (project 17). Moreover, the effectiveness of NMG may depend on some scope conditions, such as the capacity of the state to provide additional incentive to non-state actors to participate in regulatory networks of national agencies (project 14). The impact of NMG on the legitimacy of public policies is equally ambivalent. While NMG may increase the acceptance of a policy by involving affected parties and mediating conflicts of interest, they can also generate opposition and resentment because NMG are seen as clientelistic, intransparent, exclusive, and, thus, undemocratic (projects 12, 17). Thus, instead of helping to deal with 'tough' policy problems, NMG can also create additional policy problems.

In the context of EU Treaty law, NMG, such as mutual recognition or state aid soft law, have been found to considerably impact on Member states' policies. While these NMG may have increased output-legitimacy in terms of overall levels of trade and competition in the EU, both their input- and output-legitimacy are questionable from a national or subnational perspective. Moreover, NMG have given rise to additional problems of input legitimacy at the EU level. In the case of mutual recognition, issues of legitimacy arise as a result of the horizontal transfer of power. By contrast, state aid decisions – often involving important redistributive issues – are taken by the Commission largely free from control by the Parliament or the Council, and the progressive development of state aid soft law privileges certain potential state aid beneficiaries over others (project 13).

Finally, in some rare instances, we also find NMG to have increased both effectiveness and legitimacy. For instance, the participation by social partners improved the effectiveness of spending EU assistance money in CEE countries (which in the new member states is seen as the main sign of a policy's effectiveness) and, concurrently, increased public support of European integration and of certain activities of the public authorities (project 17). Likewise, the delegation of pre-accession preparations to a participatory regulatory network has significantly reduced the demand of CEE accession countries for derogations in the pharmaceutical area and has contributed to a smooth transition to the new regulatory regime. This is in sharp contrast to the environmental *acquis*, where no such NMG emerged (project 14). In regional policy, NMG helped improve the absorption capacity of accession countries by mobilizing information and resources otherwise not available or too costly to gather, see and discover possibilities where the central state does not see any and improve the local acceptance or legitimacy of governmental policies by producing goods that can be seen to represent public goods (project 15). We should also keep in mind, however, that the criteria for effectiveness can vary significantly over time and policies. Within EU structural policy, for instance, there is an ongoing struggle on what should count as effectiveness that should be increased by the Structural Funds (see project 15). Therefore, we need to be clear about the definition of effectiveness we apply in the evaluation of NMG.

In sum, we need to explore the scope conditions under which NMG foster and impair the effectiveness and legitimacy of policies at the domestic level. State capacity, again, appears to be a key factor. Thus, the degree of institutionalisation of arenas of interest intermediation between the state and private actors, on the one hand, and the ability of the state to provide incentives in order to alter private actors' preferences and interests in favour of harmonization with EU rules, on the other, appear to be crucial domestic scope conditions that facilitate the effective and efficient adoption of and adaptation to the *acquis communautaire* (project 14).

V. Strengthening rather than transforming the state: The structural impact of NMG

Tracing the structural impact of NMG on power relations is difficult since it is hard to isolate their effect. Not only are NMG limited in number, their emergence coincides with other changes induced by accession to and approximation with the EU. Moreover, for Southern, Central and Eastern European countries, accession to the EU has overlapped with their still ongoing political and socio-economic transition. The same is true for the neighbourhood countries of the Former Soviet Union.

Theoretically, we would expect that due to their inclusiveness NMG lead to the strengthening of civil society and the participation of a greater number and variety of state and non-state actors more generally speaking. Yet, so far our research has shown this is not really the case, as

for NMG to occur state- society relations need to be based on a solid basis from the outset. The resort to NMG has not changed the societal structures in neither in member states, nor accession or third countries. Rather, our empirical evidence seems to imply that the impact of NMG on (domestic) power relations is at best differential. NMG may empower non-state actors and local authorities vis-à-vis their central governments if they have the capacities to exploit the opportunities offered to them for participating in the policy process. Thus, Spanish and Hungarian environmental groups, often supported by transnational organizations, have been more successful in getting involved than their Greek and Rumanian counterparts, partly because environmental mobilization in Greece and Romania is much more localized (project 12). In a similar vein, Polish regional actors have been more involved in regional governance regimes than their counterparts in Hungary where the degree of territorial decentralization is still weak (project 15). But the overall finding so far seems to be that NMG have reinforced rather than changed existing domestic structures, particularly with regard to the dominance of executive actors at the national but also at the EU level (project 16). Thus, the introduction of social dialogue institutions in Poland, Estonia and Lithuania has done little to transform the socialist legacy of the administrative state towards a more “Western-type” network model. On the contrary, NMG may reinforce some of the pathologies of these states by undermining “classical” modes of democratic legitimation allowing state actors to circumvent majoritarian institutions (project 17). In a similar vein, the ‘layering’ forms of NMG in the field of regional development policy in the CEE accession countries are part of a predominantly hierarchical and centralized governance regime, which induces slow change on the margins but mostly contributes to the reinforcement of hierarchical mode of governance (project 15). The structural impact of NMG has not only been limited due to weak governance capacities and the low resonance with the administrative and civic culture in the accession countries. The EU has also started to turn away from attempts to directly interfere with the domestic institutions of its member states, emphasizing competition and subsidiarity (project 16).

In sum, NMG have done little to transform the state. On the contrary, NMG may reinforce some of the pathologies of these states by undermining “classical” modes of democratic legitimation allowing state actors to circumvent majoritarian institutions (project 17). At the same time, mutual recognition shows that NMG can have advantages. Compared to the Community method, Member states are much more flexible when regulating, so that mutual recognition facilitates democratic self-determination. Moreover, there is the argument in the literature, made by Joerges, that mutual recognition reduces the legitimacy deficit of national decision-making, which produces externalities for other Member states, by forcing countries to take these interests into account (project 13).

VI. Workshop Programme

10:00 – 11:30	The Key Questions around the 4 Es in NEWGOV Cluster 3: Emergence: Which (new) modes of governance (NMG) did you study in your project? Did you observe any major variations of NMGs across policy areas, across time periods, across countries, across territorial levels (supranational, national, subnational)?
11:30 – 12:00	Coffee Break
12:00 – 13:30	The Key Questions around the 4 Es in NEWGOV Cluster 3: Emergence cont.: Which key factors account for the emergence of new modes of governance in EU?
13:30 – 15:00	Lunch Break
15:00 – 16:30	The Key Questions around the 4 Es in NEWGOV Cluster 3: Evaluation: Which instruments/mechanisms do the (new) modes of governance you study employ to achieve their declared goals? In how far did the NMG under investigation involve a mix of private and/or public actors?
16:30 – 17:00	Coffee Break
17:00 – 18:30	The Key Questions around the 4 Es in NEWGOV Cluster 3: Evaluation cont.: In how far and under which conditions have you found NMG to be (in)effective / (in)efficient and legitimate/illegitimate in achieving their declared goals?

VII. List of Participants

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