

The 4th Project Year of NEWGOV

The fourth and final project year of the NEWGOV project began in September 2007. During this period, NEWGOV has been concentrating on three major tasks. The first is the consolidation and completion of the scientific research carried out at the level of the individual clusters and projects. The second task is the integration of research results across clusters at the Consortium level. The third is the dissemination of results.

With regard to the first two tasks, NEWGOV had already begun during its third year to compare in greater detail the developments in various policy fields, that is the foci of many individual projects, and has analysed the relative utility of different policy instruments across areas, at the clusters and the consortium level. Additional comparative perspectives, such as across policy areas, have come into play as well. Research results have been compared and discussed at numerous cluster workshops and at the three Consortium Conferences. These discussions have led to a greater coherence in the individual projects' research. Such cross-cutting activities have continued during this final year and will also be documented in a number of thematic edited volumes / special journal issues. A final monograph, jointly produced by all cluster leaders and the chairperson of the Steering Committee, will provide cross-cutting answers to the main framework questions relating to the Emergence, Execution, Evaluation and Evolution (our 'four Es') of

New Modes of Governance.

With regard to dissemination of results, the third major task of the final year, the Consortium will continue to rely on its already established instruments: Practitioners Fora, the External Newsletter and the Policy Brief series, dedicated dissemination events, as well as the project website and the EUROGOV Working Papers series. Updated information and documents can be found on the project website www.eu-newgov.org.

The [annual report](#) covering the third project year (ended in August 2007) provides an account of the progress made and the tentative and/or conclusive results of each of the projects in relation to the hypotheses formulated in the NEWGOV [Scientific Objectives Document](#) (the annual report and the scientific framework document can be downloaded from the NEWGOV website, section [Publications](#)). Six projects concluded their research during the second and third project years, and a number of academic publications have been achieved or are forthcoming in the next months. Around 150 project deliverables were produced in year three, including: project workshops, practitioner forums, and meetings; websites; technical deliverables such as glossaries, indicators, and interviews digests; and scientific publications including reports on empirical research, working papers, journal articles, book chapters, special issues of peer-reviewed journals, edited volumes, and final project research reports.

NEWGOV's External Newsletter

The aim of the NEWGOV Project is to examine the transformation of governance in Europe (and beyond) by mapping, evaluating and analysing the emergence, execution, and evolution of what we refer to as 'New Modes of Governance' (NMG).

The pan-European Project is funded by the European Union under the Sixth Framework Programme from 2004 up to 2008. NEWGOV includes 24 projects and 2 transversal task forces and has around 120 participating researchers from some 35 institutions in Western and Eastern Europe.

The Newsletter can be downloaded at the project website www.eu-newgov.org (fully hyperlinked) and is sent to a special email distribution list. To subscribe to this Newsletter, please send an email to: NEWGOV@eui.eu.

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NEWGOV Cluster 1: Emergence, Evolution and Evaluation of New Modes of Governance

1. Introduction

The analysis and discussion of modes of governance in the European Union is one of the most exciting and fascinating issues relevant to both the academic and political worlds. Within Cluster One, participants have gathered impressive amounts of data and information on single policy areas and their specific features of governance. Furthermore, a number of horizontal issues have been addressed such as conditions for modes of communication, the issue of delegation via agencies and the role of soft law.

Cluster One takes the debate on new modes of governance as an incentive and a tool to describe major developments in the EU system of decision-making: What changes have taken place in EU governance, and which factors may be identified that account for such change? Thus, the main approach of the Cluster has been to focus on the dynamics of EU governance in a number of key areas over the last years and the explanatory variables for these processes. Our intention was not to define or trace any single new mode of EU governance, but rather to use innovation and change as our guiding principle, examining the warp and weft of EU governance from an overall systemic as well as a policy-specific viewpoint, and then identifying the patterns of that change in the EU system.

The aim was to move beyond one-dimensional conceptualisations of modes of governance, in an effort to capture the phenomenon in a more comprehensive manner:

Although consensus on how to define modes of governance differs in detail, it still appears useful

to adopt a common starting point in the identification of hierarchy, negotiation, cooperation/coordination and competition (with specific ramifications) as the basic models of governance with specific meaning in the EU. These modes refer to several dimensions by describing patterns of institutionalisation, of interest mediation and of instruments used.

Modes of governance rarely appear in an ideal-type singular version, but reveal mixed features, adjusted to the specific character of the EU system. This also implies that new modes of governance appear less in the identification of the emergence and evolution of a particular isolated version, but as an innovative combination of different modes and/or dimensions within modes.

The dynamics of governance may be approached from a general systemic perspective, as well as from a more restricted focus on the specific policy areas in which

they are rooted, both being complementary. Therefore, in addition to the analysis of EU governance in the legal and living architecture of the EU, a number of (sub-) projects start from a policy perspective, without assuming that there is simple congruence between policy area and mode of governance. On the contrary, our assumption has been that within a particular policy field, different modes of governance may be observed to co-exist.

Modes of governance have to be analysed over time. Innovation becomes evident when different periods are compared with regard to the dominant mode of governance in play.

Research in Cluster One has covered a number of policy areas from all three pillars of the EU which are relevant to the emergence, execution, evolution and evaluation of modes of governance. These include social and environmental policy, research



NEWGOV Practitioner Forum

The Practitioner Forum was organised by Cluster 1 in spring 2007, focusing on the "Assessment of New Modes of Governance" ([programme](#)).

Right: Cluster 1 leader, Wolfgang Wessels

policy, cohesion policy, social dialogue, pension reform, justice and home affairs as well as the Common Foreign and Security Policy.

The analytical starting point lies in the legal and living architecture of the EU and its impact on the emergence and evolution of modes of governance. Primary law provisions (the legal architecture) offer constraints and opportunities for the adoption of different ways in which institutional actors, private and public, interact in order to arrive at decisions (the living architecture) on the adoption of instruments. From the Single European Act (1986) to the adoption of the Lisbon Treaty (2007), the EU has been subject to two decades of reform entailing substantial adjustments to its institutional and procedural set-up. The evolution of the EU system has ever since revealed signs of differentiation and expansion, in terms of decision-making capacities.

2. The Emergence of Modes of Governance: Political, Institutional and Economic Factors

The emergence of modes of governance has been influenced and shaped by the interplay of basic institutional, political and economic factors at the EU and the national levels. Basically, most (sub-)projects identify a combination of factors which explain the emergence of modes of governance. The assertions made in the project in terms of interest-, discourse- or problem-driven dynamics reveal that these three elements are mostly inter-linked. Problem pressure in key policy areas whether on the national or on the EU level has been prominent for the identification of a need for change in EU governance, e.g. in environmental policy or in asylum and visa policy. A certain ideational and conceptual 'spill-over' process has also been

observed, which acts by emulation and example, leading to a dynamic expansion of coordination models for different policy areas, e.g. employment, social, research, or migration policy, due to its presumed 'success' in other areas. But in particular the instauration of coordination processes has probably been less inspired by considerations of final policy effectiveness but by the shorter term rationale of its rather easy institutionalisation. Coordination processes are regarded as acceptable for member states even in more sensitive fields, and thus enabling to the establishment of EU related interaction cycles. While the institutional dynamics and policy outcomes were not fully foreseeable, that left sufficient space for different expectations and interpretations by relevant actors. It has proved rather difficult to impose formal procedures that imply a high degree of supranational policy-making in core areas of modern welfare states, not only due to national heritage, but apparently also because national political systems aspire to preserve sufficient opportunities for participating in international competitive arenas, instead of adopting common European models.

The changes witnessed in Amsterdam to the institutional paths of the Maastricht Second and Third Pillars demonstrated that the CFSP remained strong with regard to reforms of the intergovernmental features of policy areas, but that the EC sphere of action had greater influence over major elements of cooperation in justice and home affairs—albeit with substantial modifications from the classical Community method. The transfer of areas of intergovernmental bargaining into more hierarchical modes of governance thus appears to evolve in steps and stages, trying to bypass supranational influence as far as possible. Modes of governance in this case may be regarded as a

way to hinder traditional ways of communitarisation with strong supranational features from taking over, and to allow more leeway to the member states in following their preferences in crucial areas of national sovereignty. Social, environmental and research policy have followed similar paths of transfer from the mode of intergovernmental or mixed negotiations into more hierarchical versions of joint decision-making since the Single European Act. In contrast, due to national sensitivities, policy traditions and legal heritage each took different evolutionary paths. The closer one gets to the core of national welfare systems, the more difficult it appears to adopt variants of the Community method. Thus, it is in particular the nature of the problem addressed by shaping EU responses, and the degree and quality of national policy heritage which heavily influences the estab-

The Project Website www.eu-newgov.org

Turn to our website which offers topical information concerning the project, in particular publications, reports, articles and working papers of the Research Consortium for download, links to other information sources relating to the project's research fields, as well as regularly updated information on events organised in the framework of NEWGOV.

ishment of new opportunity structures in EU governance

While structural conditions for the emergence of modes of governance do not explain their coming into place in specific cases, the projects of Cluster one have identified the existence of windows of opportunity, political entrepreneurship (both from national as well as EU sources) and party po-

litical preferences as crucial factors for enacting certain governing modes. In employment policy or pension reform, key players at the national and EU level worked together to bring about specific institutional and procedural set-ups for EU governance. But decisions on institutional and procedural change rarely lead to a clear cut result in modes of governance, as the actors bring different sets of interests and worldviews into the arena.

3. The Evolution of New Modes of Governance: Mixture and Hybridisation

Regarding the evolution of modes of governance, the assumptions made at the start of the project have been reviewed critically without confirming a trend towards convergence around the Community method; instead the thesis of a more complex and varied picture characterised by hybridisation and cross-policy expansion has been more substantially confirmed. Across different areas, the evolution of modes of governance has revealed tendencies towards innovative combinations.

In the second pillar, the establishment of the European Security and Defence Policy in 1998, which led to the (cautious) introduction of incentives for competition, cooperation and delegation concerning defence procurement and military capability improvement, in the shadow of intergovernmental negotiations, has delivered major dynamics in governance. These are not rooted primarily in the legal architecture of the Union, but rather more in institutional agreements among the member states which deliberately choose options outside the formal framework of the Treaties. In the third pillar, a major turning-point was the Amsterdam Treaty, which provided for the communitarisation of visa, asylum, immigration and other policies concerning the

free movement of persons. This in itself has had rather diverse impacts on the modes of governance resulting from this transfer, revealing a dividing line between sovereignty-loaded areas where mainly non-binding measures have been taken and those areas amenable to more binding instruments. The fact is that binding legal acts produced throughout a joint decision-making mode has been a major shift in EU governance from the times of the Maastricht Third Pillar. This is more pronounced in the latter, but has not led in either case to the adoption of a neat model of hierarchical governance. Instead we observe mixed forms and combinations with a strong intergovernmental impact (path dependency matters).

In the EC, the establishment of majority voting in a number of key policy areas has generated a new drive in modes of governance, becoming more open to hierarchical elements, but here again without prescribing a common path. Intergovernmental or mixed negotiation systems have been replaced by joint decision-making systems in areas such as social, environmental and research policy, thus opening up the possibility for a new institutional dynamics without strictly determining the actual use of a specific mode in political reality. In a number of key policy areas crucial to the welfare state, the step from intergovernmental negotiation towards more mixed models has however, been accompanied by rather cautious use of Treaty provisions and a tendency towards non-binding instruments.

The partial and incomplete hierarchisation of modes of governance in the EU, coupled by a high degree of mixtures and combinations particularly between a) different variants of joint decision-making as well as b) different inter-relations between procedural modes and legal instruments, has been accompanied by a parallel

move towards a decisively non-hierarchical mode of coordination processes, which has spread all over different policy areas since the late 1990s, reducing member states' loss of decision-making autonomy, the level of commitments and the degree of binding obligations. Their preliminary success has been due not least to the determination of avoiding hierarchy without resorting to classical intergovernmentalism, but their impact in terms of effectiveness and legitimacy are rather poor.

4. Assessing the Results

The evaluation of EU modes of governance has produced specific results for single policy areas and procedures.

Treaty changes provide opportunities, incentives and constraints for decision-making in the EU and thus are to be considered as important milestones for the analysis of EU modes of governance. While in general the EU legal architecture has strengthened foundations for the use of the supranational joint decision-making model, it also opened up the space for combinations, so that the legal provisions enabling the supranational joint decision making mode is by far not the dominant one. Institutional elements of hierarchy and non-hierarchy are frequently combined in the legal provisions, particularly so in the Lisbon Treaty. There is not a clear relation between the newly introduced areas of competence and specific procedures, not even under the "coordination of economic and employment policies" or under the "supporting, coordinating and complementing actions".

The analysis of the living architecture of the EU has shown that the Treaty provisions are intensively used by the actors. At the same time, member states do not fully exploit the potential for hierarchy in the living architecture, tending instead to favour modes of governance based upon con-

sensus. It remains to be seen how much recent enlargement will substantially change that rationale, as consensus will be much harder to achieve. Shifts in modes of EU governance are therefore subject to dynamic which is more incremental than 'revolutionary', leading to new institutional and procedural solutions that trigger processes of differentiation. We find elements of mixing and combination, with trends toward more supranational, hierarchical modes in the context of complexity and evolutionary enhancement.

Particularly soft modes such as OMC have revealed only limited success in terms of effectiveness, efficiency and legitimacy. There is general scepticism towards the Open Method of Coordination as an effective, efficient and legitimate way of decision-making in the EU, which contradicts the high expectations held at their instauration. The intergovernmental areas of CFSP and the third pillar do not meet the highest demands for effectiveness and efficiency, but apparently reveal tendencies favouring increased policy outcomes and alternative ways of decision-making.

In general, there seems to a tendency of cautious upgrading to-

wards more hierarchical modes of governance in the EU. This is less by virtue of the dominance of a supranational joint-decision-making model relying upon coercive instruments (which beyond doubt has become more important under the Lisbon Treaty and the ordinary legislative procedure), but rather more by the combination of hierarchical elements with mixed joint decision modes with varying degrees and

components of bindingness. New modes emerge and succeed in cases where the transition from older modes takes place in a piece-meal fashion, building upon the pre-existing institutional and procedural *acquis* without strong ruptures.

Udo Diedrichs, co-leader of Cluster 1, resorting to contributions from Cluster 1 partners

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NEWGOV Policy Briefs

The NEWGOV Policy Brief Series has been set up to aid the dissemination of research results to a broader academic and especially practitioner community beyond the Consortium. Briefing papers are short executive type summaries of Working Papers or articles written by NEWGOV partners, or they can be related to specific and topical events. The [Policy Briefs](#) can be downloaded from the NEWGOV Website (section [publications](#)).

Claudio M. Radaelli and Ulrike S. Kraemer, *Governance Arenas in EU Direct Corporate Taxation*, [Policy Brief no. 04](#), Winter 2007/2008.

Waltraud Schelkle, *How effective are new approaches to economic governance? The re-launched Lisbon Strategy and the revised Pact*, [Policy Brief no. 05](#), Winter 2007/2008.

Udo Diedrichs, *The Evolution of CFSP: Trends and Assessments*, [Policy Brief no. 06](#), Winter 2007/2008.

Holger Bähr and Oliver Treib, *Sectorialised Policy-Making in the EU: Modes of Governance in Social*

and Environmental Policy, [Policy Brief no. 07](#), Winter 2007/2008.

Leonor Moral Soriano, *Integration of Energy Markets through Public Services Obligations*, [Policy Brief no. 08](#), Winter 2007/2008.

Adrienne Héritier, *Voluntary Environmental Agreements*, [Policy Brief no. 09](#), Winter 2007/2008.

Susanne K. Schmidt, *Governance through Mutual Recognition*, [Policy Brief no. 10](#), Winter 2007/8.

Jens Steffek and Stijn Smismans, *Civil Society Participation in European Governance*, [Policy Brief no. 11](#), Winter 2007/2008.

Focus on: Task Force on Legal Issues

New Modes of Governance and the Relevance for EU Law

1. Project Objectives and Scope

The move to new forms of governance presents serious issues for EU law and for theories of the role of law in European integration. Traditional conceptions present EU 'law' as a body of rules binding on Member States and in some cases on individuals and corporate bodies, which are more or less uniform in application, which can be vindicated and justified before the ECJ, and which are enforceable. The existence and acceptance of such a body of law, and the presence of the ECJ to interpret and enforce it, has been seen as an important factor in the integration process. Since the law originated through processes that involved the Commis-

petences, guarantee that decisions are made by authorized actors, ensure accountability, assign responsibility, provide clear sanctions for infractions, guarantee access to impartial bodies to settle disputes, and protect individual rights. However, the move to new governance creates a very different situation. New governance involves greater tolerance of diversity, less use of binding norms, and greater participation of actors other than those that are responsible for the Community Method and whose role is stipulated in the treaties. New governance mechanisms may by-pass the Parliament and the ECJ, assign a more limited role to the Commission, involve actors from the private sector and sub-national entities, and rely heavily on technocratic networks.

For these reasons new governance presents a challenge to EU law. EU lawyers must understand the rationale for, and operation of, a whole new set of mechanisms, instruments, and processes that may affect or even supersede the mechanisms they are used to. They must learn how to assess these new developments in light of the basic principles that govern EU law. They must look for ways to ensure that the law supports new governance when that is necessary and desirable. They must determine how best to integrate these new developments into overall processes to ensure that the EU can benefit from the functional capacities of 'old' and new governance. And they must learn how to make the transition from old to new or from old to hybrid configurations of new governance and traditional legal methods.

While a good deal of scholarly attention has been paid to the emergence and spread of new

governance, far less has been devoted to the implications for law and legal values of these developments. The general aim of the project is to analyse the implications for law and legal-constitutional values of the development of new modes of governance in the EU. It also seeks to explain the relevance of law and legal institutions for the operation of these new modes.

2. Project Findings

2.1 Emergence of New Modes of Governance

The various sectoral studies of this project suggest that: NMG emerge as a result of very basic changes in economy, polity and society, as well as being influenced by more technical innovations in public administration. According to such theories, as society becomes more complex, socio-economic and regulatory problems also become harder to solve, and there is therefore a need for more experimentation and fluidity. In relation to the EU context in particular, the emergence of NMG can be seen in part as an answer to the specific and complex challenge presented by the twin aims of the EU of reconciling market integration with the needs of social re-ordering.

Looking across a range of policy sectors, the emergence of NMG suggests a response to breakdowns in regulatory capacity (in areas such as food safety, maritime safety/pollution) or the threat of such breakdown (e.g. in financial market supervision), or a means for unblocking rule-making in domains that had become stalemated by struggles between proponents of (traditional) centralization and (traditional) decentralization (e.g. competition policy, state aid). The project sug-



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sion, Parliament and Council, it was accepted as legitimate. In addition, the interpretation of the ECJ, which was accepted as final and binding, ensured the existence of common standards throughout the Union.

'EU law' as it has evolved operates within this broad schema and includes processes and principles that are designed to allocate com-

gests that NMG have emerged in many sectors, but three broad sectors in particular are highlighted: the regulation of privatized network infrastructure (electricity, gas, telecommunications), in the field of public health and safety, and the domain of social solidarity.

2.2 Execution of NMG

The NMG emerged mostly in sectors affected or threatened by stalemate or breakdown in regulatory capacity, but they have also spilled over to other policy sectors where there was a need to unblock rule-making from the struggles between proponents of centralization and those of decentralization. In other words, it is arguable that once actors perceive commonalities in the problems arising in the original domains of NMG emergence, they believe that the problem-solving architecture that addresses these common factors in one setting can be adapted to address them in others.

Another feature characterising the operation of NMG is what the project terms hybridity, i.e. the co-existence of NMG with the 'old' or classical legal architecture. This co-existence can take various forms: NMG and legal regulation can work in a way which is complementary to one another, or in a form of rivalry to one another or, finally, by transforming each other as parts of a new integrated system where the functioning of each element is necessary for the successful operation of the other. Although further empirical and other research is needed, there is evidence that some of the decisive factors that result in the direction of one or another outcome include: inclusion of key stakeholders, maintenance of legal remedies as a default position, low cost effectiveness of each of the systems, and the resistance of actors to change.

One example of a sector where

law can potentially provide a framework for a novel form of participatory rule-making to provide concrete solutions to problems is the policy area of health care services, where the classic community method is considered to have failed. An example of the opposite scenario of hybridity, i.e. where new governance measures and law seem to operate together in order to achieve enforceability is provided by the EU fiscal coordination sector.

2.3 Evaluation of NMG

The examination of various policy sectors suggests that the classic community method has not been successful in several areas. While this might lean towards a conclusion that NMG are more efficient, it is in fact the co-existence of NMG with traditional legal regulation that seems to offer greater potential, either due to the pressure that it can impose on legal regulation, or due to the enabling environment that the latter creates for NMG, or due to the 'default penalty' position that legal regulation often assumes, i.e. as a background threat that gives stronger definition to and enhances the potential of NMG.

The suggested relation between NMG and traditional accounts of law involves the emergence of new structures and institutions. First, accountability structures will also have to respond to this apparent hybridity, and assume different forms in order to adapt to different situations. Second, NMG call for a re-conceptualisation of the role of courts beyond formalistic notions of law. The judicial role is not just about enforcement; courts already do and should be also recognised as prompting and creating occasions for normatively motivated inquiry and remediation by relevant non-judicial actors in response to signals of problematic conditions or practices. This does not necessarily mean requiring informal processes that mirror the

features of formal adjudication, but rather encouraging a more principled and context-specific approach to 'due process'. Third, at a more general level, we might even need to alter our view of the EU overall. While an empirical checklist of NMG is useful for their understanding as responses to the EU's distinctive character as a polity, it nevertheless may be thought to overlook a growing and common underlying 'architecture' of public governance in the EU which is transforming the distinct elements of EU governance.

2.4 Evolution of NMG

Despite the argument made in the project about the potential value of a hybrid system of NMG and classic law, many observers are not convinced of the novelty of NMG as a set of developments capable of transforming law. The project proposes the use of the concept 'reflexive universalizability' as one which captures the common traits of both law and NMG, which helps to explain changing modes of governance, while at the same time taking into account traditional legal concerns.

Gráinne de Búrca, Fordham University, New York, NEWGOV Task Force Leader

Further Reading

Further information on the Legal Task Force and online publications can be found on the NEWGOV website, section research/Legal Task Forces. Two edited volumes were published:

De Búrca, Grainne (ed.), (2007), [Law and New Governance](#), Special Issue of Columbia Journal of European Law (13:2).

De Burca, Grainne and Joanne Scott (eds.) (2006), [Law and New Governance in the EU and the US](#). Oxford: Hart Publishing.

Recent Publications

- Begg, Iain (2007), "[Contested Meanings of Transparency in Central Banking](#)," *Comparative European Politics* 5, 36-52.
- Coen, D (2007), "[Empirical and theoretical studies in EU lobbying](#)" *Journal of European Public Policy*, 14:3, pp. 333-345.
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EUROGOV Working Papers



The peer-reviewed working paper series EUROGOV is the joint series of the CONNEX and NEWGOV networks in the interdisciplinary field of 'European governance' research. Scholarly contributions from all relevant disciplines involved in the two networks are welcome. Papers are published and distributed online. The EUROGOV-Website is: <http://www.connex-network.org/eurogov>. EUROGOV is a member of the European Research Papers Archive (ERPA). Since its start in early 2005, 17 working papers have been published. Three NEWGOV contributions were published in the year 2007:

[EUROGOV No. N-07-03](#): *Integration through de-legislation? An irritated heckler*, written by Christian Joerges. This paper is about the difficult relationship between law and governance in the European Union.

[EUROGOV No. N-07-02](#): *The Making of European Private Law: Regulation and Governance design*, written by Fabrizio Cafaggi and Horatia Muir Watt. The paper contributes to a better understanding of the debate on the challenges to Europeanisation of private law.

[EUROGOV No. N-07-01](#): *New Modes of Governance in the EU: Common Objectives versus National Preferences*, written by Manuele Citi and Martin Rhodes. The working paper critically reviews the literature on New Modes of Governance and the OMC. It also focuses on the absence of a comprehensive, multi-level framework for analysis for specifying the conditions under which OMC practices are likely to produce member states convergence on common objectives.