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NEWGOV

New Modes of Governance

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

The Scientific Objectives of the NEWGOV Project

A Revised Framework

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Contents

I. NEW MODES OF GOVERNANCE: THE PUZZLE3

(I) QUESTIONS – AND A NOTE ON THEORY 8

II. STATE OF THE ART AND INNOVATION IN NEWGOV11

(I) DEFINING ‘NEW MODES OF GOVERNANCE’ 11

Proviso #1: questioning definitions 12

Proviso #2: scope conditions and the impact of new modes 13

(II) ANALYTICAL QUESTIONS 15

E₁ – EMERGENCE..... 16

E₂ - EXECUTION 18

E₃ - EVALUATION..... 19

E₄ - EVOLUTION 22

III. REFERENCES24

Table of Figures and Graphs

FIGURE 1: FORMS OF GOVERNANCE: ACTORS, STEERING MODES AND UNDERLYING SOCIAL PROCESSES..... 12

FIGURE 2: LEGAL INSTRUMENTS AND FORMS OF IMPLEMENTATION..... 13

FIGURE 3: POLICY INSTRUMENTS AND POLICY CONVERGENCE CAPACITY 14

FIGURE 4: SCOPE CONDITIONS FOR NMG EFFECTIVENESS 15

I. New Modes of Governance: The Puzzle

The aim of the NEWGOV IP is to examine the transformation of governance in Europe (and beyond) by mapping, evaluating and analysing the emergence, execution, and evolution of ‘New Modes of Governance’ (NMG). By new modes of governance we mean the range of innovation and transformation that has been and continues to occur in the instruments, methods, modes and systems of governance in contemporary polities and economies, and especially within the European Union (EU) and its member states.

‘New modes of governance’ cover a wide range of different policy processes such as the open method of co-ordination, voluntary accords, standard setting, regulatory networks, regulatory agencies, regulation ‘through information’, bench-marking, peer review, mimicking, policy competition, and informal agreements. But we also include new modes of governance and forms of policy experimentation in different economic sectors, where either new mixes of public and private goods are sought, and/or where new and innovative forms of policy process linking public and private actors have been put in place to deal with new policy problems. Policy areas in which the new and innovative modes of governance have been, and are being applied include, for example, macro-economic management, economic reform and innovation, research and development, employment, social inclusion, public service provision, and sustainable development; migration, criminal prosecution, utility and service regulation, taxation, training and education and others. Thus, we are not simply interested in exploring the mix of old, renovated and new governance mechanisms in the EU’s multi-level structure, we are also interested in the manifestation of new and innovative modes of governance in systems of socio-economic organisation.

Our analytical attention does not solely focus on the creation of new or novel instruments of governance. NMGs should not be studied in isolation from existing political, legal and socio-economic structures.

1. innovation is rarely path-breaking and usually occurs in the context of institutional inertia and complexity, demanding that the ‘old’ is examined along with the ‘new’;
2. a core concern of the project should be to understand the reasons for, and consequences of shifts to NMG, again demanding that the dynamics of relations between ‘old’ and ‘new’ should be analysed;
3. the innovation and the transformation of ‘old modes’ in the face of new challenges in Europe’s multi-level polity are also important
4. moreover, the most fascinating puzzles may be found at the boundaries of governing modes, both old and new, where they overlap, merge into one another and develop hybrid forms.

In thinking about these developments it is worth restating and developing the concerns that are at the centre of attention of our large pan-European, multi-disciplinary team:

1. First, while heterodox and innovative modes of governance have attracted academic interest for many decades, and although there has been a recent flurry of studies and publications on certain ‘new modes’ in the EU such as the open method of coordination, their emergence (DelaPorte and Pochetxxxx; Héritier 2001; 2002) execution, evaluation and evolution in the context of the EU has not been systematically and comparatively investigated. The scale and scope of our project puts us in an unrivalled position to achieve this.
2. Indeed, second, the study this topic seems particularly apposite given contemporary developments in the EU. In the recent evaluation of the institutional structure of the EU in

the European Convention, the subsequent Intergovernmental Conference and debates over treaty revisions, new modes of governance were assessed as possible alternatives to traditional Community methods or as useful complements in the quest for more effective and more legitimate forms of European policy making. This emerging and variety of, and competition between, policy modes is typical of better-established federal, or ‘quasi’ federal, systems. But, as recent developments have confirmed, the outcomes – in terms of the effectiveness, legitimacy and durability of new modes - should not be assumed in advance. This makes a critical study of ‘new modes’ especially important.

3. For, third, there has been a tendency in the early literature on the subject to analyse new modes uncritically (and normatively) as if they represented a natural and inevitably successful solution – both more flexible and more democratic - to the problems facing more traditional, hierarchical forms of government (Eberlein and Kerwer (2004) Our instinct should be to be critical and sceptical as to the viability, quality and effectiveness of ‘new modes’ and alert to the problems of governability they may generate.
4. Fourth, it is also important to have a critical perspective on what new modes of governance may tell us about the capacity of political systems (and especially that of the EU) to respond to the turbulence created by recent economic and political change. Rapid changes in the social, economic, technological and natural environment have been challenging governments in Europe (and beyond) due to poor economic growth, and the rise of unemployment the acute strains upon welfare states. At the same time, EU enlargement poses daunting problems of incorporating former socialist economies and societies into existing governing structures and processes. A core question of our project is whether the prospects for dealing effectively with these problems in a multi-level polity can be improved by innovating in modes of governance and, if so, what kinds of innovations are appropriate. Again, there should be no prior assumption that ‘new modes’ as a political project for formulating or implementing policies will succeed or have the ideal effects that are frequently attributed to them. (this is especially true for our socio-economic studies, as in the changes occurring in national systems of corporate governance, or in the economic governance systems of the ‘new capitalisms’ of the east);
5. Fifth, there is the crucially important issue of how the study of ‘new modes’ connects with the traditional concerns of political scientists with the issues of “who gets what, when and how” (Lasswell 1950). The issue of power should be at the forefront of our quest to understand how and why new modes emerge and to evaluate their consequences for governability, accountability, responsiveness and legitimacy (Van Kersbergen and Van Waarden 2004). There are clearly ‘leaders’ and ‘followers’ in shifts from older to more novel forms of governance, raising the question of who sets the trajectory of change and where and with what consequences.
6. And finally, to reiterate, rephrase and re-emphasise point 3, we should not begin by assuming that ‘new modes’ are more conducive to participation, inclusion and responsiveness than apparently more traditional hierarchical modes of governance; they may well turn out be more technocratic and more exclusive and lacking the legitimacy that can only be acquired by coupling with representative institutions. Coen and Thatcher (deliverable 6/D01), for example, observe with regard to regulatory networks that “in terms of good regulatory-policy making such networks have advantages of flexibility, expertise, credibility and political independence, but conversely they are constrained by limited accountability and transparency in the appeals process”. Rhodes (2005) demonstrates how in EU policy-making processes, the ‘open method of co-ordination’ (OMC) tends to be more exclusive and less open to democratic input than the traditional ‘Community Method’.

In investigating all of these issues it is important to understand that ‘new modes’ are nested amongst ‘older’ policy instruments and structures and that we necessarily need to avoid a de-contextualised analysis of such developments. Such analysis risks the danger of assuming that what is novel is also ‘new’ (in the sense of a complete departure from institutional and policy-making tradition), and of failing to detect the real institutional dynamics behind the emergence and development of NMG. In reality, in the case of the case of the EU (but also, one should note, in other ‘multi-level’ systems such as the United States – see Salomon 2002), traditional instruments have evolved over time, producing ‘hybrid’ forms of governance, in which traditional hierarchy (top-down legislation, law and decree) frequently co-exists with (or ‘casts a shadow’ over) newer, more deliberative, partnership-based, instruments. Indeed, as many of the first deliverables from the NEWGOV IP have concluded (e.g. Héritier - deliverable 5/D01b), it is unlikely that ‘new modes’ such as the OMC can have much real effect in terms of concrete policy outcomes *unless there is* such a linkage, or that networks will have much meaning beyond open-ended deliberation unless, once again, there is an external threat of recourse to more traditional legislated or law-based solutions.

Thus, from a comparative study of networks and the extension of new rules in pharmaceuticals and the environment to the accession countries, Koutalakis (deliverable 14 D/1) shows that network properties (and power) affected the extent to which networks can function, leading him to conclude that “it is imperative to assess whether the application of new modes of governance requires specific scope conditions such as a minimum of political and administrative forces (‘shadow of hierarchy’) or even working systems of interest intermediation (civil society, corporatist business-government relations), in the candidate countries”. We return to the issue of scope conditions below. Radaelli (deliverable 22/D2) reaches similar conclusions regarding the links between the ‘old’ and the ‘new’ from an exploratory workshop on soft law and new policy instruments. He suggests that one should draw a continuum between rigid and formal governance and very informal governance, that soft law and hard law may also be on a similar or parallel continuum and that it is not useful to map new governance in isolation from old governance. For soft law only exists in relation to hard law, and, as already argued above, in some instances new governance is nested in old governance, and the interesting questions relate to their interaction and why one might turn into the other.

It is also important to note that although innovation in the case of the European Union (the principal focus of our study) may be occurring in the novel context of an emerging ‘quasi-polity’, or ‘proto-state’ (Peters 2000), the governance problems and coordination dilemmas that it responds too are also found in other systems of multi-level governance (Hooghe and Marks 2003). Indeed, in many respects the EU is not so novel at all in the extent to which its traditional forms of governance still condition its responses and adaptation to those dilemmas. The EU has sometimes been characterized as *sui generis* in form. Hix (1998: 54), for example, has described it as a system of ‘multi-level, non-hierarchical, deliberative and apolitical governance, via a complex web of public/private networks and quasi-autonomous executive agencies’. But as Sbragia (2000: 220) argues, in reality “the EU exhibits a good deal of both ‘old and ‘new’ governance”. Despite the absence of the requisites of a traditional state, the Union is able to govern, and to steer in a traditional sense via a constitutional order and court system that incorporates a specific set of policy choices and policy direction, backed by access to a wide range of information (Sbragia 2000: 220ff). One should also add that, as is obvious to any observer of the EU, this system is far from being ‘apolitical’ and is also characterised by its own sets of power relations, some of which parallel, reflect or refract those found in member states, while others will take specific ‘European’ forms. It is important for us to note that this steering capacity may be strengthened (and potentially rendered flexible, and perhaps, who knows, even endowed with new legitimacy) by mechanisms of ‘new gov-

ernance’ such as networks. But there is no evidence that they are substituting more traditional, more hierarchical methods.

Much of the recent discussion about ‘new modes of governance’ has been inspired by the Lisbon process and the OMC processes that have flowed from it. Yet even in the new Lisbon-based strategies the close imbrication of the ‘old’ with the ‘new’ is evident from a close analysis of the operation of the OMC and its antecedents. In the 1990s, the European Employment Strategy, which is often seen as the role model and precursor of the OMC, exhibited many elements of the Community method (Treaty base, Commission proposing and reviewing, EP involvement, Council adopting by QMV, as well as a major role for the member states in setting parameters for its operation in standard intergovernmental fashion) even if it did not produce binding legislation. Meanwhile, analysis of the past twenty years or so of pre-Lisbon employment policy reveals a series of experimentations with soft law to set the stage for harder law innovations, as well as innovative processes of negotiated regulation, producing framework legislation at the EU level that was subject to new rounds of negotiation (between social partners) prior to national implementation (Rhodes 2005).

The fact that ‘new modes’ may not be as new as we think, and the reality that ‘new’ and ‘old’ modes are closely related, and sometimes linked in hybrid forms, raises important issues as to the reasons and motivations behind such innovations. There has been much speculation as to why new modes of governance emerge, or why shifts between forms of governance occur, and much of that speculation assumes a link between social and political complexity and a new ‘demand’ for NMG in response. Thus, complexity seemingly stimulates a reconsideration and modification of existing instruments of policy-making, and a development of new forms of governance to deal with new problem loads in an effective yet flexible way. These problems may possibly derive from international problem interdependence with negative external effects, producing a need for cross-boundary policy co-ordination, co-operation and multi-level governance. This supposedly gives rise to policy innovation across borders even in policy areas where national sovereignty is still strongly defended. Other problems of this kind are expected to emerge in local and regional contexts and should be attended to at a decentralized level. In the Lisbon agenda, and the Commission White Paper on Governance (2001), new modes are seen as an especially pertinent response to promoting European competitiveness under conditions of diversity, while also improving social cohesion and respecting the principle of subsidiarity. National and sub-national actors are thereby supposed to ‘learn’ from ‘best-practice’ experiences in neighbouring countries – in itself is a policy recommendation replete with assumptions about the nature of policy transfer and potential for both the identification and transmission of ‘best practice’, as well about the possibilities for policy ‘learning’ across complex and quite different socio-economic systems.

Much research in recent years has focused on *national* models of socio-economic organisation and governance, sometimes construed as (national) varieties of capitalism (Hall and Soskice 2001). But other recent research suggests that these national models are breaking down - if indeed they ever existed in the stereotypical way often assumed. The integration of the European economy is hastening this process. Increasingly it is now found that elements and even fragments of the main governance forms identified in the literature are coming together in new and frequently changing ways - not necessarily successfully, but usually innovatively (Crouch, Finegold and Sako 1999; Crouch et al 2001; Kitschelt et al 1999 and Pierson 2000). Crouch (deliverable (deliverable 23/D1) refers to this phenomenon as ‘recombinant’ governance as fragments of established institutions reappear in new guises, and traditional institutions play a major part in quite new ways in developing new forms of economic activity. Studies of developments in eastern and central Europe are of particular importance for this

research. Actors here have been forced to innovate in governance at all levels following the removal of many institutions familiar to them during the 1990s. The reform of socio-economic governance in eastern and central Europe has thus led to what some (e.g. Cernat 2002) have described as ‘cocktail capitalism’. The region therefore provides a rich laboratory for case studies.

The conventional story in the EU goes like this. Political decision-makers increasingly turn to new modes of governance in order to respond to these problems rapidly and in a flexible form. This has led to the initiation (within the so-called Lisbon Strategy, following the Lisbon European Council in 2000) of a series of innovations to encourage flexible policy making processes, conducive to experimentation, learning, the stimulation of exchange and the emulation of best practices. These new modes of governance seek to avoid the prevailing ‘traditional’ modes of governance based on lengthy legislative processes in that they only marginally – if at all – are based on legislation and/or rely on the self-regulation of private actors, the co-regulation of private and public actors as well as the delegation of tasks to new public actors (regulatory agencies) in policy formulation. At the implementation level they use non-hierarchical and less formal modes of steering and policy-making based on the creation of incentive structures and non-legal sanctioning methods, such as ‘naming and shaming’, as well as learning, arguing and persuasion. Thus, in the case of ‘open method of co-ordination’ or OMC – a means, launched as part of the Lisbon Strategy, of developing modern governance while respecting the principle of subsidiarity – the aim is to link the use of guidelines, the search for best practices, monitoring, evaluation and peer review across Europe’s multi-level policy with other methods of governance, “ranging from integration and harmonisation, to co-operation” (see Rodrigues 2002: 23).

In practice, in its efforts to move away from traditional ‘state’ instruments in this fashion, the EU has had to rely heavily on ‘allies’ (political authorities and interlocutors at different levels) and to build coalitions through time and space, creating sometimes ad hoc and temporary, but also more permanent, institutionalised relationships, both vertically and horizontally, across the Euro-polity and economy. In this way, institutional innovation across *policy* spaces, and the progressive transformation of norms into rules and procedures for interaction, underpins a large part of the development of the EU *political* space (Stone Sweet, Sandholtz and Fligstein 2001). But once again, this may be novel but it is not necessarily new. It is important to note that this has always been an important part of the way in which the Commission as an agent has bolstered its powers and autonomy from its member state principals. Thus, new modes of governance dependent on these kinds of coalitions and networks are extremely unlikely to be immune from the kinds of institutional power struggles that have always characterised such developments – or from attempts to protect them from those struggles by accentuating their technocratic nature. One should not get carried away with the supposed novelty of this approach and ignore the lessons of its antecedents.

One of the critical questions to be addressed across the NEWGOV consortium is whether this mix of old, renovated and new governance mechanisms will be sufficient to deal with the management of an integrated European economy and the implications of enlargement. The combination of EMU and its need for new modes of co-ordination of different economic policy arenas with the accession of new member states generates new problems of governing interdependence, managing heterogeneity, coping with potential negative external effects, and – at least from a functional viewpoint - increases still further the need for cross-boundary policy co-ordination, co-operation and multi-level governance. Note that to date such management has faltered not so much over issues related to the expansion of the territory to be governed, but over managing and coordinating relations vertically and horizontally - in the first case

amongst the largest core (and founder) member states, notable Germany, France and Italy, and in the second in carving out areas of functional interdependence. This alerts us to the fact that a core objective of our enquiry must be to understand the problems of ‘polity-construction’ in extending multi-governance structures. Thus, these difficulties reveal the tensions between what Hooghe and Marks call type 1 and type 2 responses to multi-level coordination dilemmas. According to Hooghe and Marks (2003) there are two types of response to ‘coordination dilemmas’ in multi-level governance systems depending on whether type 1 governance or type 2 governance is at stake: while the first involves general purpose jurisdictions, as in relations between central governments and tiers of non-intersecting subnational governments, the second involves task-specific jurisdictions. While the first response in this formulation will seek to tackle coordination problems by limiting the number of autonomous actors that have to be coordinated, the second will limit the degree of interaction among actors by “splicing competencies into functionally distinct units”. In effect, intergovernmentalism and (quasi-) sovereignty have in effect triumphed over both strategies in disputes surrounding macro-economic management and revisions to the Stability and Growth Pact, and the new mode of governance that was established in the latter was revealed to be badly wanting.

(i) Questions – and a Note on Theory

From the above, as in the original version of this document, we derive four broad sets of questions (our “Four E’s” – *Emergence, Execution, Evaluation and Evolution*), which constitute the ‘puzzle’ or ‘puzzles’ at the core of this Integrated Project:

- EMERGENCE. Why did the new modes of governance emerge in the first place? Are they primarily a response to ‘complexity’ and related primarily to the search for effectiveness and efficiency, and to what extent are they driven by perceived need to enhance legitimacy? Can they be traced to intentional strategic planning or have they emerged gradually through experimental learning? Or, at the EU level, do they rather manifest a search for ‘second-best’ means of policy influence by transnational elites and coalitions faced with the reality that much regulation is still national (and still jealously guarded at that level) and other supranational channels for exerting that influence are blocked? Do they signal the emergence of new kinds of power – technocratic, elitist, and exclusive – seeking new forms of control and new specific interest-oriented policy processes, or the maintenance of old forms of power on a new basis?
- EXECUTION. How are the new modes executed? How do they function in practice? To what extent are new modes of governance characterised by ‘experimental deliberation’ and to what extent do they manifest processes of learning? And can such processes become institutionally embedded and endure? Or are new modes of governance necessarily linked to ‘old modes’, especially the use of hierarchy - i.e. legislation and executive intervention - in order to render them more effective? Do new modes of governance undermine existing power relations between actors or do they reflect them in a new form? Do they give access to new actors or are they subject to capture and manipulation by traditional actors?
- EVALUATION. Are these new modes of governance better able to tackle the challenges of competitiveness and linked social problems in a diverse and interdependent world? Are they - as has been claimed – indeed more efficient, effective, robust and flexible? Do they improve governability or do they detract from it? What is the impact of shifts to new forms of governance on existing state structures and legal accountability and what are their implications for existing forms of democratic legitimation? Are they destabilising of these structures or do they strengthen them? Do they lead to legal differentiation and

flexibility (de Witte, Hanf and Vos 2001)? To what extent are ‘deliberative’ networks coupled to representative institutions or are they rather closed and exclusive to technocratic memberships?

- EVOLUTION. Finally we raise the question of the long-term development of the new modes. How do they develop over time? Do they escape form or are they subject to the traditional distributive politics of ‘who gets what, when and how?’ Are they gradually subject to processes of institutionalisation and embedding in existing political/administrative frameworks, and assisted or impeded by the ongoing but uncertain process of EU constitutionalization, or are they especially subject as ‘light’ forms of governance to capture by ‘traditional’ forces and institutional erosion?

Finally, an important note on theory. In the above discussion, and most evidently in the discussion of the four ‘E’s’, we have not explicitly separated out the different theoretical approaches and assumptions that underpin the core questions we refer to. This is an important task since in much of the literature on new modes of governance one finds a toxic mix of unspecified normative, functionalist and utilitarian assumptions, though a relative absence, as already indicated above, of analysis from a power-distributional perspective. In other words, the “who gets what, when and how” questions have taken second or even third place to statements about what is “desirable”, in terms of an abstract notions of “the best form of governance” or in terms of “cost-benefit” analysis of “effectiveness and efficiency”, or even in terms of what is “inevitable” given “growing social and political complexity”. Such implicit assumptions must be made explicit in the projects of this consortium and provide the basis for cautious hypothesis exploration.

A more complete statement concerning theoretical approaches to studying innovations in governance has still to be set out, but in future iterations of this document it will build on reflections already set out in some of our early deliverables. Especially useful for this purpose is the framework document for project 18a produced by Avdagic, Rhodes and Visser which sets out such approaches systematically as the basis for their study of the emergence and institutionalisation of social pacts (deliverable 18/D4). Their deliberation on how we should understand processes of institutionalisation and de-institutionalisation theoretically distinguishes the following approaches. Are innovations in governance and their subsequent evolution best analysed in *functionalist* terms (i.e., is their emergence and development driven primarily by perceived system effectiveness and efficiency), *utilitarian* terms (in which rational actors believe that the benefits of new modes of governance outweigh those of older modes as well the costs of their subsequent abandonment or transformation), *normative* terms (in which institutional development is due to actors’ “self-understanding about what is the right thing to do” (Mahoney 2000: 523) and institutions persist when they embody norms and beliefs that are shared, widely accepted, appropriate and just), or in power-distributional terms (in which institutions are not responses to the needs of the system, but rather the outcomes of political games between differently endowed actors who strive to secure institutions most favourable to their interests)? These different perspectives can provide alternative hypotheses and propositions for our research across the consortium, and by reflecting on whether and to what extent our assumptions are derived from these approaches, we can avoid being trapped analytically by any one of them.

In order to answer the research questions of our consortium, which are elaborated below, in this integrated project we apply an interdisciplinary, comparative perspective across policy areas, countries and levels (European, international, subnational) as well as across units of analysis within countries. Systematic comparison, in research terms, constitutes a precondition for explaining different outcomes; in practical terms it constitutes a precondition for mu-

tual learning between countries, sub-national units and political levels and promises to contribute to a more successful problem solution. To this end, we are channelling the integrated efforts of a number of research institutions, spanning different disciplines and sub-disciplines, into a joint endeavour, combining the insights of political scientists, lawyers, sociologists and economists, and within those disciplines a number of distinct sub-disciplinary approaches.

As we have already discovered, this is not without its difficulties, for preoccupations and assumptions differ quite radically across the social sciences. Often what is the residual for one approach or project is the central explanandum for another. We are also extremely diverse, with one cleavage separating studies of policy making and governance in the EU's multi-level polity from studies of socio-economic governance in national or local contexts, and another separating a political science majority from representatives from our other disciplines of law, sociology and economics. As Van Kersbergen and Van Waarden (2004: 143) have pointed out, the notion of 'governance' can provide a "bridge between disciplines", allowing for "cross-disciplinary inspiration regarding shifts in governance and problems of governability, accountability and legitimacy". Indeed, in a major theoretical contribution to NEWGOV, Colin Crouch (in deliverable 23/D1) shows that 'governance' is a property of many different arenas, running from market through hierarchy, association, community, network and the state; and that, while in the polity, economy and society it will take different forms, attributes of governance will range along a series of dimensions that may be common to all of them.

But finding common ground for the study of governance across these perspectives and arenas poses formidable challenges. Indeed, one of the lessons to be drawn from the first twelve months of the NEWGOV integrated project (IP) is that as an innovative mode of EU-funded research organisation, the IP is itself a 'new mode of governance'. It raises numerous questions about financial and organisational management (in which a rather strong form of hierarchy is unfortunately necessary) but also intellectual 'management'. Regarding the latter, there is obviously great scope for the bottom-up diffusion of ideas, but also an evident need for some effort in providing top-down guidelines and impetus that can assist in propelling our individual projects forward. In particular, considerable effort needs to be applied to thinking about the extent to which the disciplinary and sub-disciplinary divisions in NEWGOV can indeed be bridged, for as this revised framework document shows, for the time being political science perspectives and preoccupations remain dominant. The cluster workshops at the consortium conference held at the end of May 2005 assisted greatly in promoting the bottom-up diffusion of ideas and conceptual reflection, as well as the enhancing cross-disciplinary input and reflection. We anticipate that our follow-up meetings in 2006 and 2007 will further contribute to this ongoing process. As a result, future iterations of this document will be much more successful and comprehensive in recognising the insights from the various parts of the project. They will also benefit obviously from the advances made from this point forward, as year one of NEWGOV has largely been devoted to putting research designs in place and implementing the very early stages of our projects.

The following therefore simply represents a first step in revising our original scientific document, an incomplete attempt to create a 'meta-framework' for our joint endeavours in the four clusters, projects and task forces. It tries to bring some of the insights already provided at those levels into a more general discussion about the orientation of the integrated project as a whole.

II. State of the Art and Innovation in NEWGOV

(i) Defining ‘New Modes of Governance’

In the light of the above, it is important to agree on some elements of ‘new modes of governance’ and to establish some guidelines for the use of the term across the consortium. As already suggested above, the notion of governance is used in a variety of ways and there is no clear consensus on what ‘new modes’ are or where the boundary lies between ‘old modes’ and ‘new modes’. A very broad notion (Commission White Paper on Governance 2001) defines governance as every form of ordered rule and collective action to achieve policy results, by solely public, democratically legitimized actors (government) and/or private actors. A more restricted notion defines governance as those governing mechanisms which do not or only minimally take recourse to public authority and the sanctions of government (Héritier 2001; 2002; Stoker 1998:17), that link responsibility of the public and the private sector, and that rest on the interaction of a multiplicity of relatively autonomous actors who influence each other (Joerges et al. 2001, Kooiman and Van Vliet 1993; Rhodes 1997; Kohler-Koch 1996). In the light of the established categorization of steering mechanisms to achieve policy outcomes, e.g. hierarchy, markets, negotiated self-regulation (tripartism), delegated self-regulation and networks (Mayntz 1997), new modes of governance are clearly mainly based on the last three. Additionally, a more subtle mode of steering has increasingly been conceptualized and theorized, i.e. guidance through persuasion and arguing and ‘experimental deliberation’ (Kohler-Koch 1998; Jachtenfuchs 1995; Risse 2000; Sabel and Cohen 2001; Neyer 2002, Joerges 2002; Scott 2002 and 2001; Bächtiger and Steiner 2005).

In the first version of this scientific document, we presented a definition of new modes of governance in terms of a two-dimensional conceptualization (see figure 1) The first dimension concerned the types of actors involved. Forms of governance were distinguished according to whether only state or public actors (governments, supranational or international organizations) are involved, whether public and private actors jointly govern in co-regulation, or whether private actors are exclusively involved in self-regulation. The category of private actors encompassed a wide range of actors including:

- national and transnational firms
- sectoral, national, or transnational interest groups
- the non-profit sector including (international) non-governmental organizations (NGOs)

The second dimension concerned the modes themselves and their intrinsic characteristics. In this framework, ‘old’ forms of governance encompass hierarchical modes of steering and regulation through legislation backed up by various legal sanctioning mechanisms, but also ‘top down’ and/or command-and-control instruments. In the case of ‘new’ modes of steering, the processes underlying rule-making and implementation refer first to bargaining processes among actors with fixed preferences over possible outcomes involving the manipulation of incentive structures as well as the use of various (non-legal) sanctions (non-hierarchical 1 in figure 1). Second they refer to learning and persuasion, i.e. the non-manipulative use of arguments and reason-giving to change actor’s choices and preferences independently of their calculations about the strategies of other players (Keohane 2001, 10) as well as arguing geared towards altering actors’ interests and preferences and achieving a reasoned consensus. Figure 1 therefore distinguished different modes, more according to the underlying steering mechanisms than according to more classical categories that would classify according to policy domains or formal decision rules (see also Boerzel and Risse 2005).

Figure 1: Forms of Governance: Actors, steering modes and underlying social processes

Actors involved Steering Modes	Public Actors Only	Public & Private Actors	Private Actors Only
<i>Hierarchical</i> Top-down/legal sanctions	Traditional nation-state Supranational Institutions		
<i>Non-hierarchical #1</i> Bargaining/Positive Incentives	Intergovernmental Bargaining	Delegation of public functions to private actors; Neo-corporatism	Private-interest government
<i>Non-hierarchical #2</i> Non-manipulative; persuasion; learning and arguing; diffusion	Institutional problem-solving across levels; European agencies	Public-private networks; Bench-marking	Private-private partnerships (NGOs)

There are also other ways/criteria of defining modes of governance, depending on their legal basis and status, the type of decision-making and the sanctions applicable, i.e. the scope for supranational institutions to influence outcomes, the degree of bindingness/compliance (on governing modes see Scharpf 1999, Wallace 2005, Joerges *et al.* 2002). Indeed, one important purpose of this Integrated Project is to develop better criteria and indicators to distinguish governing modes from each other, to map and evaluate them. We briefly note here below two issues (set out as provisos, or qualifications to the discussion top this point) that have come out of our project work so far – the first relating to modified way of defining new modes of governance, the second relation to the important question of scope conditions and the impact of new modes in the EU’s multi-level framework.

Proviso #1: questioning definitions

It was always expected that as the NEWGOV project proceeded, these different approaches to the categorisation of new modes of governance would be explored and the different analytical pathways for assessing them, and different empirical data tests relevant to validating them, would also be explored and contrasted. One issue already raised in our project’s work is whether this definition – which excludes implementation and legislation – should be extended to include them. As already discussed above, we are especially concerned to emphasize in our research the ways in which NMGs interact with more traditional forms of governance. Boerzel, Guttenbrunner and Seper (deliverable 12/D1) propose a slightly revised definition to that set out above to the effect that:

“new modes of governance refer to the making and implementation of collectively binding decisions (based or not based on legislation) that (1) are not hierarchically-imposed, i.e. each actor involved has a formal or de facto veto in policy-making and voluntarily agrees with the decision made, and (2) systematically involve private actors, for profit

(e.g.) firms and not for profit (e.g. non-governmental organisations) in policy formulation and/or implementation”.

This definition blurs the line between old modes and new modes in that *government* – via the involvement of governmental actors and the use of legislation – is also part of the equation. Boerzel et. al. argue that ‘governance without government’ (or non-hierarchical coordination) should refer not to the *non-involvement* of governmental actors but “to a mode of political steering that does not authoritatively impose but is based on voluntary cooperation”. They identify two such modes that *voluntarily* engage actors: (1) “the setting of positive or negative incentives, e.g. through side-payments, issue-linkage or sanctions, which changes the cost-benefit calculations of actors in favour of the desired behaviour, without affecting their preferences over outcomes”, and (2) “non-manipulative persuasion and social learning through which actors are convinced to change their preferences over outcomes in a way that concurs to the desired behaviour”.

Specifically excluded from this formulation are those arrangements among private actors that are either based on “self-coordination and do not aim at the provision of common goods and services (i.e., markets)” or “produce public goods and services as unintended consequences (e.g. ratings agencies) or provide public ‘bads’ (mafia, drug cartels, transnational terrorism)”. In this connection Crouch (deliverable 23/D1) notes the importance for governance across many arenas of some kind of ‘structuring principle’ – i.e., of regularity, predictability and constraint, encouraging actors to act in certain ways not others - for where such mechanisms do not exist, there is no predictability of commitments and ‘governance’ cannot be said to exist.

Proviso #2: scope conditions and the impact of new modes

It has also become clear from a number of early deliverables that the issue of scope conditions and impact require some elaboration and discussion, and should become a more developed part of any future iteration of this document. In one attempt to specify the link between types of policy instrument and forms of implementation within cluster one, Treib, Bähr, and Falkner (2004) (cluster 1), set out the relationship between legal instruments and forms of implementation as follows (Figure 2):

Figure 2: Legal Instruments and Forms of Implementation

		Legal Instrument	
		Binding	Non-binding
Implementation	Rigid	I. Coercion	III. Targeting
	Flexible	II. Framework Regulation	IV. Voluntarism

Source: Treib et al. (2004)

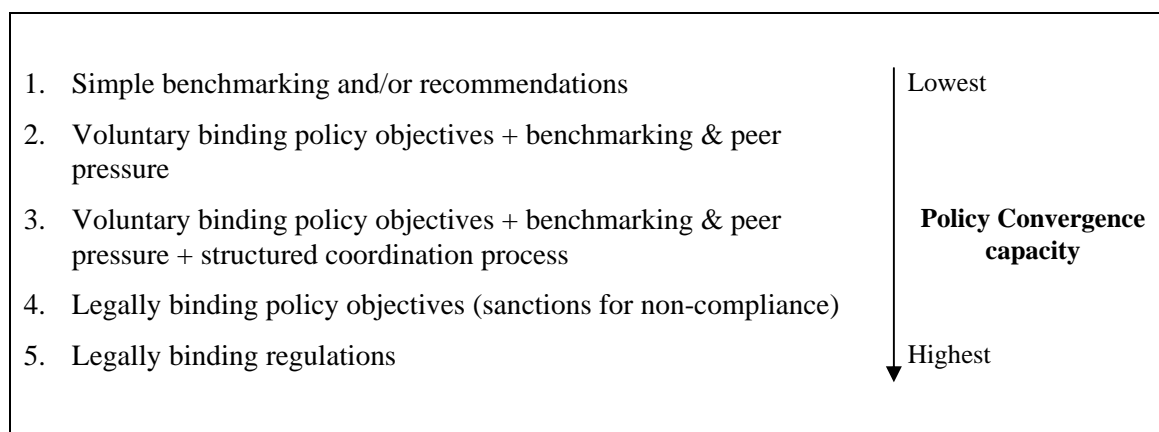
This kind of framework can help us investigate further the ways in which new modes (which will figure in ideal-typical form in boxes II, III and IV, but in reality merge and overlap) may function. The framework suggests a number of hypotheses for elucidating the ways in which implementation is facilitated or constrained. Bulmer and Padgett (2005) go slightly further in hypothesising the links between particular modes of governance in the EU (hierarchy, negotiation and facilitation), institutional variables (treaties/legislation, QMV + problem solving/unanimity + bargaining, and guidelines/ benchmarks/ and networks) and a series of likely

outcomes, ranging from emulation, through synthesis and influence to ‘abortive’ (i.e. policy failure). New modes of governance fall in the Bulmer/Padgett formulation under facilitation via guidelines, benchmarking and networks with potential only for ‘influence’ and subject to the likelihood of failure.

What is missing from both of these approaches, however, is an analysis of the scope conditions under which these various modes will succeed or fail, with success defined for the purposes of the present discussion as the achievement or not of policy influence, policy transfer or policy convergence. There have been many innovations in recent years in thinking about the ways in which international institutions can influence policies (and the domestic constituencies and coalitions that support or oppose them) via different combinations of hard influence (conditionality) and soft power. Both materialist and constructivist methodologies have been deployed for the purpose (Kelly 2004; Epstein 2005; Vachudova 2005). As a prelude to a more complete discussion of this issue in the future, we present one such approach here which is based on a ‘rational’ understanding (though one in which social influence can also be accommodated) of the conditions under which governments will respond positively to various kinds of external influence – remembering, of course, that the bulk of regulation in the EU is still determined within national decision-making systems.

Rhodes and Citi (1996) propose establishing a single common variable along which to ‘locate’ all possible governance practices with different degrees of potential impact. ‘Policy convergence capacity’ (though ‘policy influence’ may be a preferable term) indicates the capacity of European modes of governance to induce policy changes in member states towards common political objectives. This variable is composed of five different steps, going from governance practices with low capacity for influence to governance practices with high capacity for influence (Figure 1). New modes of governance are captured in categories 1 to 3.

Figure 3: Policy Instruments and Policy Convergence Capacity



We specify the scope conditions under which new modes of governance (1 to 3) will be effective in the following terms.

Figure 4: Scope Conditions for NMG Effectiveness

Conditions for rationality of policy transfer	<ul style="list-style-type: none"> - Policy Failure - External Conditionality - High Degree of Uncertainty - Functional Interdependence
Conditions for non-rationality of policy transfer	<ul style="list-style-type: none"> - Costs of policy transfer are higher than expected benefits

By ‘rationality’ we mean those circumstances under which it can be expected that rational actors will comply with instruments of cross-border policy development that are not accompanied by legal or other forms of sanction. ‘Policy failure’ refers to a situation in which policy makers realize that a policy is not working, either because it fails to produce the expected outcome, or because certain domestic factors prevent its effective implementation. ‘External conditionality’ can range from ‘hierarchy’ (or its ‘shadow’ - as used in the discussion above), through economic inducements to political argumentation and the cultivation of domestic pro-reform coalitions (on argumentation, see Risse 2001; on compliance via domestic coalitions, see Dai’s 2005 analysis of the European acid rain regime). ‘High degree of uncertainty’ refers to the situation in which a given environment or a given political/economical context places pressure on policy makers to take action or undertake policy change, but there is a high degree of uncertainty as to the course of action to be taken. ‘Functional interdependence’ refers to the situation in which two or more countries adopt policies whose effects can be reciprocally harmful to one another. This approach would suggest that the possibility that new modes of governance concerned with policy transfer (the various OMCs clearly fall under this rubric) would be most successful in achieving their objectives when all four scope conditions are present. In the absence of one or more of them, the scope for policy influence/transfer will correspondingly be reduced. When the costs of policy transfer (financial or political) are higher than the expected benefits, then the scope for policy transfer will be diminished.

This is just one way of thinking about scope conditions. Others can be proposed. It clearly does not allow precisely for the kind of diffuse influence associated with ‘experimental deliberation’ and ‘learning’ to be explored or accounted for, although deliberation (and ‘learning’) might conceivably accompany any or all of the instruments set out in Figure 3. Nor does it deal specifically with the mimesis and policy convergence that may occur via competition among policy solutions or normative pressures of professional norms (e.g. Breton and Ursprung 2002). Nevertheless, the scope conditions we have set out will also be useful for understanding the conditions under which such policy competition or mimesis occurs. We will return to some of these issues in the discussion below and will develop them further in future iterations of this document.

(ii) Analytical Questions

After this provisional conceptualization and classification, the relevant theoretical arguments and selected hypotheses derived there from will be presented following our four leading perspectives : Emergence (E₁), Execution (E₂), Evaluation (E₃) and Evolution (E₄). As pointed

out above, our fifth ‘E’ (Externalities) operates in transversal fashion. This general analytical structure underpins the more specific investigations carried out by our wide range of projects, but will evolve over time to accommodate their findings.

E₁ – EMERGENCE

The emergence of the new modes of governance may be accounted for on different theoretical grounds. One theoretical strand in political science is grounded in the critique of the theory of hierarchical steering by state actors. This type of steering – the argument runs – leads to policy failure because in a highly complex, differentiated society, with problems extending across borders, central detailed steering is doomed to failure (Mayntz 1997). Central actors are not able to muster the necessary knowledge to shape instruments of intervention in such a way as to reach the desired goals. Rather, state actors depend on the expertise of private actors and the knowledge of actors at the local level to deal satisfactorily with complex problems.

Coming from a somewhat different angle, principal-agent theory (used by both economists and political scientists) which accounts for the establishing of regulatory agencies, presents a similar argument when it argues that the principal delegates policy-making functions to an agent either because the principal does not have the necessary expertise or resources concerning the problem to be regulated, or because the principal prefers to make the agent bear the transaction costs of carrying out the relevant function.

Other kinds of changes are also relevant. Thus ‘state failures’ generate a need to devise alternative tools. Often new policy modes have emerged in response to large shocks or systemic changes, as was clear in Europe after the second world war, or in central and eastern Europe after the collapse of the Soviet imperium, or more broadly in response to the impacts of globalisation. Changes in values may produce alternative approaches, as Muller (1992) argues cogently with his emphasis on the *référentiel* of policy making approaches.

The hypothesis derived from these theoretical arguments would be:

“Central intervention failed to reach its set policy objectives, and led to the development of the new modes of governance, e.g. delegation.”

A second strand of political science literature argues from a viewpoint that takes strategic institutional interests into account. The theory of political transaction costs (Epstein and O’Halloran 2002) points to the high transaction costs incurred by legislative decision-making in terms of the time needed for providing the necessary information and the amount of time needed for negotiation. Particularly in highly contested issue areas - be it because redistributive issues are at stake or because the decision-making power of individual political units is questioned (subsidiarity questions), (Estella de Noriega, 2002) and therefore strong political opposition likely - new modes may promise to save political transaction costs. The decision-making process may end up in an impasse and/or a decision may not be taken at all. In this situation, it is argued, avoiding legislation and choosing new modes to reach the policy goals in question help avoid high political transaction costs and possibly the failure to reach a decision. Hence the proposition may be formulated that:

“In highly contested issue areas, new modes are chosen in order to save political transaction costs.”

Similarly economic analysis can help here to reveal the relevance of institution-derived transaction costs for economic behaviour.

The emergence of NMG may also be accounted for in terms of diffusion theory and ecological learning, as well, drawing on sociological as well as political insights. As organizations

interact, they tend to emulate successful organizations (diMaggio and Powell 1991; and for one of the first applications to European integration, see Stone Sweet, Sandholtz and Fligstein 2001). Mimesis may be transported through the competition among policy solutions or the normative pressure of professional norms and lead to convergence in applied policy practices (Breton and Ursprung 2002). A precondition is that one policy practice stands out clearly as successful practice (Radaelli 1998) – one example would be that of independent central banks and their proliferation from the 1970s onwards. One way of imitating and transplanting, also typical of quasi- or full federal systems, is by ‘experiments’ which allow opposition to be curbed by the claim that more traditional modes or rules remain in place. The proposition to be derived from the theory of organizational mimesis is:

“If a new mode of governance stands out as a successful practice of one organization, other organizations tend to emulate this practice.”

These approaches may need to be complemented by insights from legal reasoning and analysis. Within the extensive body of analysis and empirical investigation carried out by legal scholars we can derive two differing lines of reasoning. One shows us evidence of the extent but also the limits to the reach of European Union law and the concomitant *acquis de l’Union*. Within the corpus of European case law we can observe a remarkable flexibility in the adaptation of European jurisprudence to differing circumstances over time and across sectors, including the ways in which it reaches into the national legal systems of member states as well as the administrative cultures contained therein (Slaughter, Stone Sweet and Weiler 1998; Ladeur 2002). Yet we need to understand better the limits of this process and the ways in which the behaviour of those to whom laws are addressed can sometimes escape the apparently hard constraints of a centralised legal regime. Also relevant is the ‘distortion’ of the original purpose of EU ‘directives’ intended to allow scope for national flexibility by their frequent transformation into more rigid templates (Prechal 1995), and the considerable diversity, and failures or incompleteness, in the translation of Court (ECJ) case law into national settings (Conant 2002). A second line of reasoning suggests that effective policy outcomes require that the legal rules are set at a level at which there is a relevant jurisdiction to ensure compliance and deter deviation. To the extent that some new modes of governance place the operational responsibility within national jurisdictions, issues arise as to whether and how co-operation among those responsible for national jurisdictions can facilitate the emergence of parallel modes of governance in different EU countries.

Economic analysis also has a great deal to bring to this subject. Basic concepts of efficiency, competitiveness, and comparative advantage address issues of how a particular economic space, with its mix of private and public institutions, performs in global competition. Some of the political science approaches indicated above have their origins in economic analysis, notably those that address principal-agent relationships, asymmetries of information, and the need to address market failures as they emerge by adding new formal constraints or changing the incentive structures for compliance with preferred policy objectives (see, for example, the work of Alberto Alesina and his colleagues, e.g. 1997 and 1999). An objective of the NEWGOV IP is to find new ways of bringing legal and political science analysis together with the perspectives of economists. The traditional boundaries between these disciplines have for too long created an obstacle to mutual understandings and scientific progress. As we proceed with our IP we are finding ways of achieving this objective in our workshops and consortium conferences.

E₂ - EXECUTION

Once new modes have emerged, how do they operate? How is the application of the new instruments institutionalized? Whose knowledge and expertise determine the particular features of an instrument? Who prevails in the shaping of the policy instruments applied under the new mode? How do they interact with ‘old’ modes of governance? Do the new modes function in the shadow of ‘old’ modes of governing? Some of these questions may be dealt with theoretically on the basis of principal-agent theory which describes how the agent, once charged with a particular task, tries to eschew the supervision of the principal. Given the asymmetry of information between principal and agent, there may be a problem of “shirking”, i.e. that the agent does not fulfil their tasks. In this situation the principal can take recourse to various control mechanisms, such as “fire-bell ringing”, monitoring etc. in order to reduce “agency loss”. In other words, agents operate under the shadow of hierarchy. If the agent engages in shirking, executive intervention by the principal will ensue.

Given the preliminary evidence that new modes seem to be most effective when linked to some form of “hierarchical” instrument, be it legislation, executive intervention or legal rulings, we claim that :

“If a new mode is linked to hierarchy, agency loss is less likely.”

Going beyond dyadic principal-agent theory (Hood 1998), the notion of regulatory space (Prosser 1997) points to the fact that the agent is subject to the attention of various stakeholders in a regulatory area, such as the media, the ministry, public interest groups etc. which together make it more likely that the agent may be under control and protected against “agency capture” by powerful interest groups. It is interesting to note here that political scientists have absorbed a great many insights from economic analysis in this area of research. One further task of our work in NEWGOV will be an attempt to export back to economics the eventual findings of the Consortium based on tools of political analysis. These general considerations on the functioning of the new modes, once instituted, lead to the hypothesis:

“If a new mode and its organization is embedded in a regulatory space with several principals, it is less likely that its operation can become self-serving and biased in favour of particular interests.”

Possible answers to the question of which actors prevail in a regulatory space in the shaping of the new modes are offered by resource dependency theory. It argues that in a governance network actors mutually depend on each others’ resources in order to produce a policy output. From this it follows that

“The harder it is to substitute an actor’s resources, the more power the actor in question has to shape the application of the new mode of governance.”

Additionally we argue from the point of view of learning and diffusion theory that “under conditions of high problem uncertainty and complexity with unclear losses and gains for the involved actors,

“the actors in the application of the new mode may engage in a process of deliberation and joint learning and come to convergent views on how to solve the problem”.

Critical to an understanding of how these variations in the modes of governance work is the apparent bifurcation between hard law instruments and soft law or soft ‘not quite’ law (Trubeck and Scott 2002). Legal analysis will be drawn on to assess both the successes and

failures of hard law ‘to bite’ as policy measures are applied across the EU, and to derive from the analysis a categorisation of legal impacts to be read alongside the political and process-tracing analyses. Similarly, lawyers are directly involved in many of the projects dealing with the softer modes of governance in order to develop further the systematic analysis of how soft ‘laws’ are (or are not) carried through the multiple jurisdictions in which they are now expected to operate and via the multiplicity of instruments (codes of conduct etc). Of particular relevance in the European context is the empowerment of relevant and interested actors to use their access to a transnational legal system to invoke compliance with European laws and/or themselves to act transnationally in the jurisdiction of another EU country than their own (Harlow 1999).

It will be particularly important to incorporate economic analysis here. A central and growing preoccupation for economists examining the changing policy regimes of the EU is how to navigate between rules and discretion in setting the parameters of economic governance. For example, there is rich body of economics literature addressing the new Euro regime and its governing arrangements. But there is as yet rather little by way of *ex post facto* analysis of the impact of softer modes of governance of the kind set out by Rodrigues *et al.* (2002). The tools are not yet fully developed for exploring OMC as a mechanism for systems competition (though see Zeitlin and Pochet with Magnusson 2005 for an initial foray into the field with regard to employment and social inclusion policies), and whether or not it works so as to promote economic dynamism, or rather loosens the constraints so much as to relax the pressures for economic efficiency and foster a lack of ‘economic loyalty’ within the European economy - or indeed whether it promotes more opportunities for regulatory and agency capture.

E₃ - EVALUATION

Evaluation #1: Impact on Policy Results

One main emphasis here lies on the policy impacts of the new modes of governance. Do they tackle a given policy problem better than ‘old’ modes of governance? Are they more efficient? How are problem types and available instruments linked? How successful will new modes be in the dealing with ‘tough’ problems of policy (such as prisoners’ dilemma problems and redistributive problems)?

Here the explananda are the policy results. There is a wide range of political science policy analysis literature which focuses on the impact of particular policy measures on member states’ policies (Héritier *et al.* 1994; 1997; 2001; Knill 2000, Cowles, Caporaso, Risse 2000; Boerzel 2002 and 2003). They argue that the adjustment to European policy exigencies depends a great deal on the nature of pre-existing policies, the willingness and the capacity to adjust (depending, for example, on the number of veto players involved in the national political system) as well as the similarities or dissimilarities between European and national belief systems. Central hypotheses, derived from this strand of literature, are that:

“The higher the policy misfit between the existing policies and the expected policy performance of the new mode, the less likely policy effectiveness”;

“Given a need to adjust, the number of veto players engaged in the domestic implementation process determines the policy outcome of a new mode of governance”;

“The higher the number of veto players with diverse preferences (or the less integrated political leadership in a political system), the lower the expected policy effectiveness”; and

“In the case of a balanced domestic power structure pro and against a reform, the European policy demands may strengthen the pro-reform faction”.

Further hypotheses relating to the probable success or failure of a new mode of governance depart from the dominant problem at stake. The argument is that in the case of redistributive problems, prisoners’ dilemma (PD) problems and deep institutional entrenchment of the policy problem will militate against the policy effectiveness of new modes of governance. Since new modes operate with soft instruments (which are not legally binding and invoke no sanctions) the political resistance to be expected will be difficult to overcome – whether from ‘losers’ (in the case of redistributive problems), from free-riders (in the case of a PD problem) and ‘institutional losers’ in the case of deeply-entrenched problems where vested institutional interests are at stake. Hence policy effectiveness will be unlikely. By contrast success is much more likely when problems are of a distributive nature where ‘all win’, when they are discrete problems with no external effects and where highly complex problems (in which gains and losses are unclear) are dealt with (Héritier 2003).

This leads us to the hypothesis:

“If redistributive, prisoners’ dilemma and institutionally deeply entrenched problems are at stake, new modes of governance are less likely to be effective”

The outcomes of the political science analyses of these hypotheses will then need to be read against the existing and emerging economics literature that addresses similar or the same phenomena in an endeavour to see where relevant explanations may be able to combine evidence and interpretation from both disciplines.

Theories of policy learning and diffusion offer a different answer as to the process of producing policy outcomes. It is argued that member states will emulate other successful national practices of policy making and hypothesizes that:

“under conditions of uncertainty and given non-redistributive problems, a successful mode of new governance will be imitated by other member states”.

Here we should note that political and sociological analyses place great emphasis on behavioural and attitudinal changes that occur. From a legal point of view, the imitation process is something of a risk in that many such imitations may remain more formal than substantive, or produce unintended effects because the systemic requirements for or impacts of such ‘intrusions’ or ‘irritants’ (Teubner 1993) may have been neglected. Moreover, because of their very nature, such shifts in policy are harder to detect, measure and therefore analyse. Establishing when ‘learning’ rather than ‘mimesis’ or ‘emulation’ is occurring (or whether in reality it amounts to the same thing) encounters enormous methodological as well as empirical difficulties (Meseguer 2005).

Economists (and, it should be said, many political scientists as well) tend to be deeply sceptical about the value of such insights for explaining policy outcomes and are likely to discount the relevance of policy learning and attitudinal variation over time as relevant to changing the economic outcomes. Nevertheless, there are already some pointers in the economics literature on fiscal federalism that point the way forward for interdisciplinary research. A major test for

this IP will be to try to confront these various perspectives in order to generate interpretation of the outcomes that can draw on evidence and analyses from different disciplinary perspectives.

Evaluation #2: Impact on Structures

With respect to the structural outcomes of the new modes the following questions are posed. How are the relationships between the different European and domestic institutions, or between different European and domestic actors affected under NMG? Do some institutions gain or lose in power due to the application of new modes? How are the relationships between different levels of governance affected? Is subsidiarity enhanced through the application of the new modes? Have actors at the local level gained or lost in power due to adoption of NMG? This perspective is closely linked to a multi-level governance approach (Marks and Hooghe 2002; Börzel and Risse 2002), pointing to the new interaction dynamics opened up by new alliances and access possibilities created through a multi-tier government and the presence of multiple actors at the same horizontal level of action.

Given the important role of private actors in new modes of governance, the question arises of how they can be held accountable for the consequences of their activities? How can the lack of democratic legitimation, linked to the use of new modes of governance involving non-elected private actors, be compensated for? Which different forms of democratic legitimation play a role in the present application of new modes of governance, such as parliamentary control, transparency requirements, elements of negotiated democracy, and judicial procedures.

Theories of democratic legitimation in Europe (Schmitter 2001; Lord 1999; Jachtenfuchs 1995; 2001; Héritier 2001, 2002) emphasize the different dimensions of democratic legitimation in Europe as opposed to member states and help identify the particular democratic legitimacy challenges created by the new modes of governance. Deliberative democracy theory emphasizes the importance of incorporating local public and actors in policy networks in order to solve problems adequately and in a democratically legitimate way (Dorf and Sabel 1998). On the basis of this literature two preliminary hypotheses may be proposed:

“New modes of governance lead to a shift from classical modes of democratic legitimation through vertical representation to other modes of democratic legitimation such as negotiating democracy, deliberative democracy and others.”

“New modes of governance lead to a shift from political to functional modes of expected policy effectiveness”

A further issue arises here from the discussion of the choices between majoritarian and non-majoritarian approaches, with their very different implications for legitimacy and accountability. Majone (1996) argues strongly for the benefits of (yet limits to) non-majoritarian approaches to certain areas of especially regulatory policy. Yet Mény and Surel (2000) argue that populism in Europe is partly due precisely to the imbalances between the ‘popular’ component and the ‘constitutionalist’ component (including regulatory institutions) in national (and supranational) polities. This debate has huge importance for the ways in which legitimacy is understood. Traditional analysis asserts that there is continuity between the political and the administrative to the extent that they are hierarchically related. The relative autonomy of some new instruments and modes of governance is a serious challenge to this view and also to popular perceptions about what is legitimate.

In addressing these questions a range of issues arise for legal analysis. Lawyers involved in the NEWGOV IP, backed by the Legal Task Force of the Consortium, will address several

transversal questions. These include: what are the implications of the new modes of governance for the rule of law (and traditional understanding of ‘the state’) in EU member states? Do the new modes replace traditional legal practices, or are they additional? To what extent do they conflict with existing legal practices? How are any such conflicts resolved. Furthermore, what is the impact of multi-level governance on the resolution of such conflicts? (Pernice 1999) What are the implications for the European Constitution and constitutionalism as a whole? And how do they feed back into the overarching system of European Union law, whether to reinforce it or to erode it? (see Joerges and Dehousse 2003 for an elaboration of these questions, and some tentative answers).

E₄ - EVOLUTION

Once new modes of governance have been introduced, how do they evolve over a longer period of time? Do they increasingly converge in terms of structures, processes and instruments, or do we find an increasing differentiation of new modes?

Hypothesis – “A polity with multiple arenas gives rise to more differentiation of new modes of governance” (linked to diffusion theory: if modes are successful others will seek to emulate them).

Under conditions of a quasi-federalist institutional structure we have new forms of innovative activities that have spillovers horizontally and vertically, which might produce differentiation or convergence, in terms of instruments and institutional set ups. How do exogenous factors and endogenous factors impact on the further evolution of new modes of governance? How do new modes translate into what kind of change - first order, second order or third order change (Hall 1997)? For once a new mode of governance is instituted, within the theory of path-dependency, one would still argue that there is dynamism in the character of change activation of latent aspects, etc. (Thelen, Steinmo and Longstreth 1992)

Many questions arise here for careful exploration and analysis. Are changes consolidated and fused – or do they remain fragmented and diffuse? Is there an incremental substitution of one mode of governance by another, or rather a form of reciprocal contamination? Is what we observe a process of reform by explicit substitution, or is there rather a process of sedimentation and multiple layers of policy regimes? Can we observe marked evidence of sectoral or territorial differentiation?

General Hypothesis - “Once a new mode of governance is instituted, it will be subject to transformation” - “In terms of path dependency there may several typical patterns and factors of change” e.g. voluntary accords (mobilisation of marginalised groups; e.g. social pacts where excluded actors seek participation).

On the other hand, there may be features specific to a policy sector, e.g. the nature of the technology involved, that may have an important influence on shaping new modes in terms of convergence or differentiation.

Hypothesis - “The stronger the cross-border character of the object of regulation of a new mode, the less differentiation we expect to find in the evolution of the new mode”.

Again, a multi-disciplinary perspective is essential. Economics once again has an important contribution to make to the work of lawyers and political scientists, beginning with the insights of the literature on fiscal federalism. Recent innovations in this literature (for a seminal contribution, see Oates 1999), reveal that the interaction between multiple jurisdictions within

federal systems (such as the United States, and the evolving EU) may well lead not to ‘race to the bottom’ as the result of jurisdictional competition or arbitrage by those agents (firms, individuals) able to play one location (and its rules and regulations) off against another. Rather it may lead instead to an enhanced form of experimentalism and learning, both in terms of the content of policy and the levels at which they are undertaken and institutionalised, and the achievement, as a result, of more effective and equitable distributional trade-offs than hitherto. This produces the hypothesis that

“New modes of governance will result as a process of experimentalism and longitudinal learning across the multiple levels of a federal or quasi-federal system, offering new solutions to traditional distributional trade offs.”

These questions, phrased above in a deliberately open-ended way, are currently being addressed at the level of our projects, with the tools and analytical insights of all of the disciplines represented in the Consortium. Careful attention is being given to not only the political and sociological lines of enquiry, but to an assessment of the implications for both European and national legal systems and cultures and the intertwining with wider global rules and codes. The consequences for economic outcomes will be evaluated and hence the pertinence for the state of the European economy and its complex patterns of economic governance.

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