

MIND THE GAP: LAW AND NEW APPROACHES TO GOVERNANCE IN THE EUROPEAN UNION

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Introduction

This issue of the European Law Journal deals with the emergence of a series of new approaches to governance in the European Union. These issues were discussed at a workshop on “Law and New Approaches to Governance in Europe” which we organised. The workshop was held in Madison, Wisconsin in May 2001 and was co-sponsored by the European Union Center of the University of Wisconsin-Madison and the ELJ. Seven of the participants in that workshop developed papers that deal with one or more dimension of the new governance phenomenon. In this essay, we seek to define the concept of new governance, suggest reasons for its emergence, assess the reaction of the European Court and Commission to these developments, and identify some of the conceptual issues this phenomenon presents for legal and political theory.

(1) What mechanisms should be considered “new governance”

a) A base line for comparison--the “classic” Community Method

In order to understand new governance, we must have a baseline from which to depart. For our purposes, we will define new governance as any major departure from the classic ‘Community Method’ (CCM). The notion of the Community Method is highlighted by the Commission in its recent White Paper on Governance.¹ It is, the Commission tells us, premised upon the Commission’s exclusive right of legislative initiative, and the legislative (and budgetary) powers of the Council of Ministers and the European Parliament. Qualified majority voting is identified by the Commission as an essential element in ensuring the effectiveness of this method, and the European Court as central in guaranteeing respect for the rule of law. On this basis Article 251 EC laying down the co-decision procedure might be seen as constituting an embodiment of the CCM. Alongside the issue of the identity of institutional players, and that of voting procedures in Council, additional features might be cited as closely associated with the CCM. Notable in this respect is the tendency for the CCM to give rise to binding legislative and executive acts at the EU level, and for these to impose more or less uniform rules for all Member States.² It is ironic, in the light of this latter point, that the Commission should assert so unequivocally the capacity of the Community Method to promote diversity, as well as effectiveness, in the European

¹ COM(2001) 428 final, *European Governance – A White Paper*, p. 8.

² It is probably the case that Community law has never been predicated upon absolutely uniformity, albeit that the rhetoric of uniformity has been central to the development of ‘constitutionalizing’ principles on the part of the Court and the operation of the preliminary ruling procedure in Article 234 EC. Thus the uniformity/flexibility axis must be seen as a continuum with the CCM tending to operate closer to the uniformity end. See de G. Búrca., G. de Búrca & J. Scott (eds.), in *Constitutional Change*

Union.³ Thus, in its normative adherence to diversity, the Commission's version of the Community Method may be viewed as less than absolutely 'classic'.

b) Emerging alternatives within the Community Method

If the construction of a CCM represents a baseline for our conception and analysis of the new governance phenomenon, two distinct categories of departure from this may be identified.⁴ A first new governance departure may be presented as a variation on the CCM theme, or 'new, old governance' (NOG). While NOG presents important elements of continuity with the CCM, it is seen equally to depart from it in one or more important respects:

Thus, for example, while the CCM normally leads to binding, uniform laws, there are significant instances in which that process leads to very different results. Thus we can see numerous situations in which legislative processes have been used to produce non binding norms (soft law) or to allow Member States substantial flexibility in the way they implement general provisions. The flexibility phenomenon is particularly important in this respect, having been consolidated by virtue of the proportionality principle.⁵ Increasing recourse to framework directives is such to permit Member States substantial flexibility in the implementation of directives.

In addition to allowing substantive flexibility, new approaches to governance within the basic legislative processes may, on occasion, be accompanied by a degree of procedural prescriptiveness which is not characteristic of the CCM. Thus, Member States enjoy broad policy discretion in the implementation of directives but are, increasingly, bound to comply with certain process constraints in terms of the manner in which they exercise their implementation choices. Such process constraints relate typically to consultation requirements, reporting obligations, and transparency concerns.⁶

Another example of variation on the classic Community approach arises in the case of comitology. Here the nature of the departure is distinct in that it relates not to the character of the emerging norm, but to the institutional setting in which that norm is conceived and adopted. The innovation, as far as new governance is concerned, lies in the introduction of implementation committees into the decision-making process; this with a view to facilitating a degree of continuing Council control over the Commission in the exercise of its executive functions. As is well known, comitology operates according to a variety of guises, the specificities of each manifestation determining the precise power relations between the actors concerned; the Commission, Council, and the committees themselves.

³ Supra n.1 p. 8.

⁴ While we identify what we claim to be two distinct categories of departure, there is in fact occasional overlap between them. Social dialogue constitutes a good example in this respect. It gives rise to binding Community legislation in the form of directives, but does so on the basis of a procedural innovation which truly distinct from the CCM, i.e social dialogue.

⁵ See, in particular, paragraphs 6-7 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.

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A third exemplification of NOG concerns the range of actors involved in the preparation of Community acts. Recent years have seen a rapid expansion in the scope and intensity of civil society's role in decision-making processes. From the ad hoc to the highly institutionalised, 'civil dialogue' is now a pervasive and enduring feature of EU governance. Moreover, the White Paper places great emphasis upon encouraging the enhanced participation of civil society throughout the 'policy chain',⁷ In this respect, however, the remarks of Paul Margette are pertinent: 'Nothing', he reminds us, 'in these possible reforms, seems to break with the classic methods used by the Commission, or with the philosophy which underpins it – i.e. that participation only be initiated by the institutions, is limited to non-decision [namely consultation rather than shared responsibility for decision-making], and mainly directed towards sectoral actors'.⁸

One sphere which is exemplary as regards NOG is that concerning environmental protection. In this sphere, 'flexibility' in the setting of Community norms, has been accompanied by a marked 'proceduralization' of Community law. Not only are Member States constrained in terms of the design of implementation processes (for example by consultation or reporting requirements) in respect of increasingly open-ended environmental standards, but also a range of 'purer' procedural instruments have emerged; notably in the form of information devices. In this sphere the role of civil society in decision-making processes has been relatively highly institutionalised, as exemplified by the operation, until recently, of the Consultative Forum on Sustainable Development.⁹ In addition, there is some evidence of experimentation with collaborative decision-making with industry, for example within the framework of the controversial 'Auto-oil' project. While regulatory negotiation in respect of 'Auto-oil' led ultimately to the adoption of directives establishing command and control standards, the processes which underpinned the emergence of those standards represented a significant departure from the CCM.¹⁰

c) Alternatives to the CCM

If NOG represents a first category of departure from the CCM, a second category emerges in the form of modes of governance which operate in a way which is distinct from, and which can be seen as fully-fledged alternatives to, the CCM.¹¹

⁷ Supra n. 1, p. 10.

⁸ 'European Governance and Civic Participation: Can the European Union be Politicised?' at: <http://www.jeanmonnetprogram.org/papers/01/010601.html> pp. 3-4.

⁹ This body is no longer extant in view of the European Council's decision at Gothenburg to establish a Round Table on Sustainable Development. See Commission Decision of 26 September 2001 repealing Decision 97/150/EC on the setting-up of a European Consultative Forum on the Environment and Sustainable Development. See also, *Proposal for a Decision of the European Parliament and the Council laying down a Community Action Programme promoting non-governmental organisations primarily active in the field of environmental protection*. COM(2001) 337 final.

¹⁰ For a good discussion of regulatory negotiation within the framework of the 'Auto-oil' package, and also of recourse to environmental agreements at Community level and on the part of the Member States implementing directives, see G. Van Calster & K. Keketelaere, 'The Use of Voluntary Agreements in the European Community's Environmental Policy' in E.W. Orts & K. Deketelaere (eds.), *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer, 2001).

¹¹ This dualism between NOG and fully-fledged alternatives is somewhat artificial and in fact it might be better to see these two categories as situated on a continuum in relation to the CCM, rather than

One early example of new governance in this second sense is the concept of partnership which emerged in the context of Community structural funding.¹² This concept rests upon the establishment of committees with responsibility for the implementation of Community structural funding and operates against a backdrop of regional development plans and multi-annual thematic operational programmes (for example the Irish operational programme on tourism) adopted at Community level. These partnership committees enjoy significant authority in selecting projects to receive Community funding. They comprise not only representatives of the Commission and the Member State concerned, but also such other authorities and bodies designated by the Member State, including regional and local authorities and other competent public bodies, the economic and social partners, and any other relevant competent bodies. The relevant legislation provides that ‘in designating the most representative partnership at national, regional, local or other level, the Member State shall create a wide and effective association of all the relevant bodies’. Member State obligations in this respect are subject to the proviso that partnership takes shape according to national rules and current practices. Thus while the concept is predicated upon the institution of a system of multi-level and multi-actor governance, it remains an open-ended one, its character and identity being formed against the political and constitutional backdrop of the Member State in question.

A second example of a method that varies significantly from the Community method is the Social Dialogue. This system, established under the Maastricht Treaty, allows the officially recognised representatives of employers and employees (the social partners) to enter into voluntary agreements that are subsequently enacted as directives by the Council. The Social Dialogue differs from the CCM on the input side while leading to similar results on the output side. That is, under the Dialogue the initiative for proposing legislation rests with the social partners, not the Commission.¹³ And the Parliament has no formal role in the final outcome. However, the final result of the Social Dialogue until now, like the CCM, has been a directive.¹⁴

A third, and more radical, departure from the CCM is the Open Method of Coordination (OMC). This method is modelled on the European Employment Strategy. In addition to employment, the OMC is now being used in such areas as social exclusion and pension reform. Unlike the CCM which is designed to produce law at the Union level, the OMC aims to co-ordinate the actions of the several Member States in a given policy domain and to create conditions for mutual learning that hopefully will induce some degree of voluntary policy convergence. Under the OMC, the Member States are supposed to agree on a set of policy objectives but remain free to pursue these objectives in ways that make sense within their national contexts and at differing tempos. Thus in the European Employment Strategy (EES), the first and most developed OMC, Member States have accepted a long list of

¹² See Council Regulation 1260/99 OJ 1999 L161/1, Article 8(1), for the up-to-date definition of partnership. Structural funding refers to Community expenditure to achieve economic and social cohesion; namely greater spatial and social equality between the regions, Member States, and social groups in the EU.

¹³ While initiative formally rests with the social partners, there is evidence that the process works best when the Commission indicates an intent to acting in an area under the Community Method unless the partners can reach agreement on a measure of their own.

¹⁴ An agreement reached via social dialogue may, however, be implemented through collective

guidelines, organised into four pillars. Some guidelines are very general and some have hard numerical targets. Each Member State must file an annual National Action Plan showing how they will accomplish the goals set forth in the guidelines for the coming year. These guidelines are subject to peer review and review by the Commission and Council which issue recommendations for improvement. Under the EES, Member States are encouraged to benchmark their performance against the best performers in the Union, and to share best practices. The System is designed to achieve some convergence of results in reducing unemployment while permitting substantial diversity in methods and the timing of specific policy initiatives.

Not entirely unrelated to OMC, is the concept of 'Environmental Policy Integration' (EPI), which finds expression in Article 6 EC, and in the concrete practices of the Community institutions and the Member States, particularly since the Cardiff Summit of 1988.¹⁵ EPI is concerned to ensure the horizontal integration of environmental policy objectives into the definition and implementation of other areas of Community policy, with a view to achieving sustainable development. To this end, a range of strategies have been developed. These include organizational changes designed to overcome sectoral fragmentation, procedural guidelines for decision-making, environmental bench-marking, the development of environmental indicators, and reporting and monitoring requirements.

(2) What are the characteristics of “new governance”?

New governance is the label that we will use to refer both to departures within the “classic” Community Method (NOG) and alternatives to that Method. These mechanisms share a number of characteristics that mark them off from more traditional modes of policy making and legislation. While there is no single characteristic that divides the “new” from other modes of governance, these mechanisms include some or all of the following dimensions:

a. Participation and power-sharing

Many of the new governance approaches involve novel ways to expand participation by elements of civil society in policy making. And some entail a greater degree of power sharing than traditional legislation or regulation. Thus, in some cases, policy making may be seen not as something to be done by autonomous regulators but rather as a process of mutual problem-solving among stakeholders from government and the private sector, and from different levels of government.

b. Multi-level integration

New governance tends to accept the necessity for coordination of action and actors at many levels of government, as well as between government and private actors. This means that new governance mechanisms may include machinery that brings actors from various levels of government (localities, sub-national regions, national, European) together in ways that facilitate dialogue and coordination.

¹⁵ Environmental Policy Integration has a longer history than this, particularly in the area of

c. Diversity and decentralization

New governance, unlike much EU legislation and regulation, accepts the possibility of coordinated diversity and the advantages of leaving final policy making to the lowest possible level when this is feasible. To that end, several new governance mechanisms are designed more to support and coordinate Member State policies than to create uniformity across the Union.

d. Deliberation

Many of the new governance mechanisms are designed to foster extended deliberation among stakeholders over the nature of problems, the best way to solve them, and the challenge of carrying out solutions within the widely differing contexts of the fifteen Member States. Deliberation serves both to improve problem-solving capabilities and possibly provide some degree of democratic legitimation.

e. Flexibility and revisability

Many of the approaches emerging in the area of “new governance”, including some that are carried out through the Community Method, rely less on formal rules and “hard law” than on open-ended standards, flexible and revisable guidelines, and other forms of “soft law”. In this way, these mechanisms can adapt to diversity, tolerate alternative approaches to problem-solving, and make it easier to revise strategies and standards in light of evolving knowledge.

f. Experimentation and knowledge creation

Some new governance mechanisms facilitate experimentation and the creation of new knowledge. New knowledge may come from deliberative process, from combining local experimentation with multilateral surveillance, and from formal and informal ways of exchanging results, benchmarking performance, and sharing best practices.

3) Why do we see increasing use of New Governance in the EU?

As the papers in this volume show, “new governance” covers a number of very disparate mechanisms each of which has its own particular history. Most, if not all, have emerged as pragmatic forms of accommodation between emerging needs of the Union and available mechanisms for policy making. While detailed histories of all these mechanisms are not available, six factors seem to explain the new governance trend.

a. Increasing complexity and uncertainty of the issues on the agenda

New governance can be seen as a way of coping with complex problems under conditions of uncertainty and thus the trend to new governance may well reflect the

increasing salience of such complex problems on the Union's agenda.¹⁶ We can see this within the Union's traditional areas of competence as well as in some of the newer areas it is engaging with. Thus, for example, the unexpected complexities involved in "re-regulation" under the Single Market led to the emergence of the comitology system, and as the Union moves into new areas such as employment and social exclusion it starts to tackle problems that have stymied many Member States for years and for which no easy or uniform solution exists.¹⁷

b. Irreducible diversity

Not only are many of the problems the Union is now dealing with highly complex; they also may simply not allow for uniform solutions. This is certainly true of many of the issues confronted by the European Employment Strategy OMC. The underlying systems of industrial relations and social protection of the fifteen Member States vary tremendously, and there is rarely one solution that will work effectively in all these diverse settings.¹⁸ In recognition of this reality, EES has chosen to set general goals, but leave specific policy measures and legal change to several Member States.

c. New approaches to public administration and law

The trend to new governance has undoubtedly been influenced by developments in the fields of public administration and law. One can see elements of some of the practices we are calling new governance in domestic administrative law and public administrative practice in Europe and the United States. In these fields, there has been a growing recognition of the limits of traditional top-down regulatory approaches, and repeated calls for things like power sharing, participation, management by objectives, and experimentation.¹⁹

d. Competence "creep"

Some of the new approaches may have been adopted to deal with areas where legal authority for EU level action is limited or non-existent. This may well be true of some of the areas to be covered by future OMCs. While the EES has a treaty base, there is no explicit treaty base for such areas as social exclusion and pensions. In such cases, new governance may or may not be the best available approach to policy making, but it may be the only way the Union can play a role in a particular domain.

e. Legitimacy

New Governance often reflects an effort to secure legitimacy for EU policy making. The social dialogue seems to solve some of the democratic deficit problems in the

¹⁶ See, N. Lebessis & J. Paterson. 'Evolution in Governance: What Lessons for the Commission? A First Assessment.' (European Commission Forward Studies Unit 1997). See N. Lebessis & J. Paterson. 'A Learning Organisation for a Learning Society: Proposals for "Designing Tomorrow's Commission.'" (European Commission Forward Studies Unit 1999).

¹⁷ Begg et. al 'Social Exclusion and Social Protection in the European Union: Policy Issues and Proposals for the Future Role of the EU.' (South Bank University, European Institute, 2001).

¹⁸ D. Trubek & J. Mosher 'New Governance, EU Employment Policy, and the European Social Model.' at: <http://www.jeanmonnetprogram.org/papers/01/010601.html>

¹⁹ R.A.W. Rhodes *Understanding Governance: Policy Networks, Governance, Reflexivity and*

area it covers by essentially delegating law making authority to representatives of the parties to be affected by these laws. Partnership and civil dialogue similarly seek to strengthen the legitimacy of EU actions. And the Open Method of Coordination's emphasis on broad participation, coupled with the fact that OMCs leave final authoritative legal and policy decisions to the constitutional processes of the Member States, shows how legitimacy concerns may have affected the design of this mechanism

f. Subsidiarity

The generic pressure on the Union, suggested above, to ensure that decisions remain at national level when they can, or are delegated to the social partners when that makes sense, acts to amplify the trend to accept diversity, allow flexibility, and encourage decentralized experimentation. While this pressure may well have impelled the Union towards new approaches had there been no independent subsidiarity doctrine, the strength of this doctrine and the political forces behind it certainly added impetus to the trend.

4) Why does New Governance create a challenge for Community law?

The challenge which new governance presents for Community law arises from the gap which separates a traditional conception of law (associated with the CCM) and new governance. This gap takes a variety of forms. Thus, for example, whereas a traditional conception of law looks for a unitary source of ultimate authority, new governance is predicated upon a dispersal and fragmentation of authority, and rests upon fluid systems of power sharing. Whereas a traditional conception of law posits hierarchies, and places courts at the centre of systems of accountability, new governance posits heterarchy, and often looks outside of the courts in seeking to secure real accountability. A traditional conception of law appears to rest upon a clear distinction between rule making on the one hand, and rule application and implementation on the other. New governance, on the contrary, accepts that this distinction must break down as indeterminate and flexible rules are adapted to meet new challenges and resolve unexpected problems. Related to this, while a traditional conception of law might see itself as predicated upon existing knowledge, new governance places emphasis upon the need to facilitate the continuous generation of new knowledge(s). There is then a gap between the premises and values of a traditional conception of law, and the premises and values of new governance.

The challenge presented by the gap separating a classical conception of law from new governance is not confined to the European Union. It arises also within the confines of national legal orders, against the backdrop of the rise of the administrative or regulatory state. Thus, Peter Goodrich points more generally to the distance which has grown up between law, as conceived in traditional legal theory, and governance (administrative practices), and to the consequent detachment of jurisprudence from reality; and the rendering of jurisprudence as a 'form of elite ignorance', or 'non-knowledge of the social'.²⁰

²⁰ 'Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality' (2000) 9 Social and

Nonetheless, while the emergence of such a gap is clearly not unique to the EU, it may be that it presents special difficulties for the EU. After all, EU law has tended to stand in awe of what we have called here a traditional conception of law, grasping after those attributes identified above, and doing so with remarkable and unprecedented success in view of the transnational nature of the project. Direct effect, supremacy, pre-emption, uniform interpretation, and more, all attest to the EU's 'success' in emulating a classical conception of law, rather than seeking its transformation. In a sense this should not surprise us. Not only are those attributes of a traditional conception of law consistent with the ever closer integration motif, but they speak too of power and uncompromising authority, in real as well as symbolic terms, and never is power and authority more desired than when it is contested, as in the case of the EU. The point here is perhaps that EU law has emerged as instrumental to a degree which goes beyond the specific objectives pursued by particular norms. It has been instrumental in promoting the transformation of Europe from international, to supranational, or even constitutional, order. Thus the premises underpinning EU law have a symbolic value, and their 'tainting' with the values of new governance might be seen to threaten not merely the integrity of 'law' as such, but the broader dynamics of integration.

(5) How have the EU courts responded to New Governance so far?

The EU courts have had several opportunities to come to grips with new governance. The response has been quite eclectic. Though it has been rare for the courts to actively thwart new governance, they have, in some cases, simply ignored the new changes. In others they have distorted the real nature of the new approach in order to fit it into to preconceived legal categories. In at least one case, however, the ECJ has recognized the need to develop realistic jurisprudence concerning these departures from classic approaches. Here are a few instances of the varied reactions from the courts:

a.) In which they thwarted it:

There is perhaps only one clear example where the European Court has thwarted an experiment in new governance. The early *Meroni* case²¹ was concerned with the issue of delegation of powers by a Community institution (the ECSC High Authority) to independent agencies. The European Court declared such a transfer to be incompatible with the Treaty where the delegation involves a transfer of discretionary power which was such to imply a wide margin of discretion on the part of the agency, and hence the possibility of an actual capacity to execute economic policy. Thus, the Court ruled that delegation may take place only where this involves clearly defined powers which may be subject to strict review on the basis of objective criteria laid down by the delegating authority.

²¹ Case 9/56 *Meroni v. High Authority* [1957-8] ECR 133. This has not prevented the establishment of agencies at European level, but merely served to require that 'even when they do have a degree of decision-making potential...the final decision is nevertheless still formally taken by one of the major institutions, the Commission or the Council'. See G. de Búrca 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999), p. 77. In this sense the Court is seeking solace in formality and turning a blind eye to the social

One other respect in which the European Court may have acted to thwart new governance, albeit at the level of the Member States, arises in respect of the implementation of directives. The Court continues to insist that where directives are such to confer rights or obligations on individuals, they must be implemented by way of binding legislation. This precludes recourse at national level to softer policy instruments for implementation such as, for example, voluntary environmental agreements. Significant in this respect is the Court's propensity to construe legislation as capable of giving rise to individual rights even where it merely lays down general targets to be achieved.²²

b.) In which they ignored it:

Since the *Meroni* case, the European Court does not appear to have actively thwarted experiments in new governance. It has, however, tended on occasion to ignore it. Thus, for example, comitology has evolved not at the hands of the European courts, but according to the vagaries of political conflict and compromise. Thus, it was by way of an exchange of letters between the then Presidents of the European Parliament and Commission (Plumb and Delors respectively) that the Parliament came to be informed of all proposals submitted to such committees. While the 1987 comitology decision operated to bring law up-to-date with current practice, it served to sanction rather than constitute reality.²³ The European Court's determination to dodge the legal issues arising from the side-lining of the European Parliament in comitology, was achieved by way of procedural devices which allowed law to close its eyes to the issues. Crucial in this respect was the Court's narrow construction of the Parliament's right to standing under Article 230 EC (then Article 173 EC)²⁴, and by a restrictive definition of Parliament's third party intervention rights.²⁵

The 'blindness' of the European Court vis-à-vis new governance is apparent too in relation to partnership, one of the longest standing new governance forms identified above. This notion, it will be recalled, operates on the basis of a committee system and is premised upon shared, multi-level, multi-actor governance. Thus, project funding decisions are adopted by the partnership on the basis of shared responsibility. While Member States, and the Commission, participate in the partnership, they do so alongside a range of other actors, and (at least until recently²⁶) against a backdrop of

²² See, for example, Case C-361/88 *Commission v. Germany* [1991] ECR I-2567.

²³ See, generally, K.A. Armstrong, *Regulation, Deregulation, Re-regulation* (Kogan Page, 2000), pp. 52-84.. A new *modus vivendi* between the Council, Commission and European Parliament was reached in 1994, and it was not for another five years that law once again adapted to reality. See Council Decision 1999/468/EC.

²⁴ Case 302/87 *European Parliament v. Council* [1988] ECR 5615. Later the ECJ changed its mind on this issue accepting Parliament's privileged standing in so far as it was seeking to protect its own prerogatives, a position currently codified in Article 230 EC. Entry into force of the Nice Treaty would place the European Parliament on an equal footing with the other Community institutions in this respect, rendering it a wholly privileged applicant.

²⁵ See Case C-156/93 *Commission v. Council* [1995] ECR I-2019.

²⁶ The latest Council Regulation governing structural funding (*supra n.*) addresses the issue of ultimate authority within the partnership for the first time, making it clear that the Member State bears ultimate responsibility for decisions adopted within this framework. Article 8(3) provides that the implementation of assistance shall be the responsibility of the Member States, at the appropriate territorial level, according to the arrangements specific to each Member State. It is thus apparent that the European courts judgments have spilt-over to the legislative sphere. One wonders whether the

uncertainty as regards power relations within the partnership. In *An Taisce* the CFI (and the European Court on appeal) was faced with the question of the legality of Community funding of a project for the construction of a visitors centre at Mullaghmore in County Clare in the Republic of Ireland.²⁷ The application for judicial review was declared inadmissible on the basis that there was in existence no Community level ‘act’ which was susceptible to review within the meaning of Article 230 EC. This conclusion was predicated upon a finding that it is for the Member State concerned, and not the Commission, to select projects to receive funding within the scope of multi-annual operational programmes, such as the Irish operational programme for tourism. The concept of partnership was not mentioned, let alone analysed, in the course of arriving at this conclusion. Hence formal lines of authority were drawn without even the barest of reference to the social reality of partnership, or engagement with its implications for law.

c.) In which they distorted it:

In a relatively recent case, which mirrors some of the issues in *An Taisce* above, we find an example of law distorting reality in order to accommodate new governance, in the guise of comitology. In *Rothmans*,²⁸ the CFI was called upon to assess the legality of an alleged Commission Decision to refuse access to the minutes of a Customs Code Committee meeting. The Commission denied that it was the author of those minutes. The CFI, as in previous cases, laid emphasis upon the existence of a general principle of transparency, whereby the public should have the greatest possible access to the documents held by the Commission and the Council. Exceptions to the principle should be strictly construed. It proceeded on the basis that the rule on authorship is an exception to this general principle and should consequently be strictly construed,²⁹ and went on to assess the status of committees, their role being to assist the Commission in the performance of its tasks. The Commission provides secretarial support to the committees, and as such draws up the minutes which the committee then adopts. Such committees do not have their own administration, archive or premises, or even an address, and as such cannot be regarded as constituting ‘another Community institution or body’, or to fall within the third party categories established by the authorship rule. Equally, a refusal of access to such minutes would, according to the CFI, ‘amount to placing a considerable restriction on the right of access to documents...[which] is not compatible with the very objective of the right of access to documents’. As such the CFI ruled, for these purposes, that comitology committees come under the Commission itself, and it is the Commission which is responsible for ruling on applications for access to comitology documents.³⁰ Consequently it is not entitled to refuse access on the basis of the

authority, thus facilitating judicial review at national level, might not have been bought at a price; namely the diminution of the effectiveness of informal systems of accountability arising by virtue of the prior reality of shared responsibility, whereby each of the actors participating was responsible albeit in a manner and to a degree that was ill-defined. In a context of shared responsibility multiple perspectives are brought to bear arguably generating a system of checks and balances which might, in practice, be an effective means of ensure responsible decision-making.

²⁷ Case T-461/93 *An Taisce and Others v. Commission* [1994] ECR II-733; Case C-325/95P *An Taisce and Others v. Commission* [1996] ECR I-3727.

²⁸ Case T-188/97 *Rothmans v. Commission* [1999] ECR II-2463.

²⁹ The rule on authorship within the Commission Code of Conduct on Public Access to Commission Documents provides that ‘Where a document held by an institution was written by a natural or legal

authorship rule.³¹ Thus, the legal fiction of Commission authorship is offered up in order to ensure the inculcation of new governance with established constitutional values; in this case transparency.

d.) In which they engaged seriously with new governance:

If the European courts' engagement with new governance has, on occasion, been characterized by myopia and distortion, there are also signs of those courts responding more openly and authentically to new governance.

One simple example is to be found in the case law concerning locus standi under Article 230 EC. Here we see the European courts relaxing their strict test for standing in respect of those non-privileged applicants who have participated in the processes leading to the adoption of the contested decision.³² In this way the social fact of participation is allowed to impinge upon the content of the legal category of 'individual concern', and thus expanding the actual degree of participation on the ground comes to play an important role in facilitating an unusually high degree of access to the courts.

In more substantive terms, the recent decision of the European Court in *Standley and Metson*³³ may be cited as evidence of a shift in law's underlying premises, in the face of the values of new governance. Here the Court, in construing the Nitrates Directive, accepted that this may be applied by the Member States in different ways, and that this would not be incompatible with the nature of the Directive, since it does not seek to harmonise national laws, but rather to get them to create the instruments needed in order to ensure protection against pollution. This, the Court emphasized, is implicit in the decision of the Community legislature to grant Member States a wide discretion in identifying the waters covered by the Directive. Thus, because the Court recognised that the goal of the directive was to ensure some form of regulation rather than harmonisation, it could eschew the need for uniformity of outcome.

While other such examples of law's shifting premises in the face of the values of new governance could be cited, there is one judgment of the CFI which stands out in terms of law's engagement with, and responsiveness to, new governance. *UEAPME* concerned a challenge to the legality of a directive adopted pursuant to social dialogue, one of the new governance forms identified above.³⁴ In the course of

³¹ This is not the first time the issue of authorship has arisen before the European courts. The same approach was implicit in the early comitology cases. See, for example, Case 25/70 Köster [1970] ECR 1161 and Case 23/75 *Rey Soda* [1975] ECR 1279. See also Case C-259/95 *European Parliament v. Council* [1997] ECR I-5303, concerning the status of acts adopted by both the Council and the European Parliament pursuant to the co-decision procedure. On this occasion the Court confirmed that such acts should be regarded as having been enacted by the Council.

³² Case T-122/96 *FEDEROLIO v. Commission* [1997] ECR II-1559.

³³ Case C-293/97 [1999] ECR I-2603, para. 39.

³⁴ Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335. See Articles 138-139 EC, and Barnard in this volume. Kenneth Armstrong, *supra* n. 19 at pp. 48-49, observes that after the conclusion of the *UEAPME* case, UNICE and UEAPME announced that they had reached agreement on a process for co-operation on social dialogue. This provides for the consultation of the latter by the former prior to the former expressing its opinions within the social dialogue framework. The other side of this coin was that UEAPME withdrew its legal action challenging the directive giving effect to the agreement on part-time work. As Armstrong observes, 'Law does not create the reform but rather serves as a

assessing the admissibility of the action the CFI settled upon the existence of an obligation binding upon the Commission and the Council, to assess the ‘collective representativity’ of the parties to the agreement, and in particular their capacity to represent all categories of undertakings and workers at Community level. Only in so far as the participation of any party could be construed as indispensable in ensuring such representativity could this party be viewed as individually concerned by the contested measure, and consequently enjoy standing to challenge the directive. While the CFI’s reasoning is convoluted in that its findings on social dialogue take shape within the framework of an assessment of admissibility, such is the nature of its approach that its observations would appear to enjoy a broader significance, and to be suggestive in terms of law’s engagement with new governance.

The CFI insists that it is incumbent upon the Community institutions concerned to ensure the collective representativity of the parties to the social dialogue. Any failure to do so would be such to vitiate the measure. This obligation to ensure representativity is conceived in both procedural and substantive terms. As regards the former, it entails an obligation to take steps to verify representativity; compliance on this occasion being evidenced by the terms of the preamble to the contested directive, and by information and evidence presented by the Commission and Council to the CFI, including extracts from documents relating to the relevant Council meetings, and a Commission study.³⁵ In substantive terms, the CFI sets out, in a manner which is demanding and by no means deferential, to assess the collective representativity of the three cross-industry organizations which were signatories to the framework agreement upon which the directive was based. In this respect the CFI concludes that the institutions quite properly took the view that ‘the collective representativity of the signatories to the framework agreement was sufficient in relation to that agreement’s content’.³⁶ It did so having particular regard to the representation of small and medium sized undertakings which was the constituency represented by the applicant organization, UEAPME.

The obligation incumbent upon the Commission and the Council to ensure sufficient representativity appears to derive from two sources. First, Article 3(1) of the Agreement on Social Policy provides that the Commission shall have the task of promoting the consultation of management and labour at Community level and shall take the relevant measures to facilitate the dialogue by ensuring balanced support for the parties. This is construed as conferring a right on the Commission to re-enter the procedure, and it follows (according to the CFI) that on regaining this right the Commission must ‘in particular’ examine the representativity of the signatories to the agreement in question.³⁷ The reasoning is not entirely clear in this respect.

More important is the emphasis placed by the CFI upon a second source for this obligation. This implies that:

...in the absence of the participation of the European Parliament in the legislative process – the participation of the people must be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a

³⁵ Ibid, paras. 91-92.

³⁶ Ibid, para. 110.

³⁷ – – –

qualified majority, on a proposal by the Commission, with a legislative foundation at Community level. In order to make sure that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.³⁸

The judgment of the CFI in *UEAPME* is significant from a number of perspectives. The mere fact and intensity of the court's engagement with this expression of new governance is striking. While ultimately the CFI denies the admissibility of the action, it does so by a route which necessitates careful scrutiny of the social dialogue phenomenon. It is at least conceivable that more straightforward means of achieving closure in this case were available to the court; be it in terms of the legal identity of the contested act (a directive rather than a decision) or the absence of factors distinguishing *UEAPME*'s position from that of the other social partners excluded from the negotiating table. But instead we find the court confronting new governance head on, and in so doing offering us much which is interesting and important.

Striking too is the manner in which the principle of democracy is apparently conceived by the CFI as a 'meta-positive' principle,³⁹ and thus to apply regardless of the existence or non-existence of a specific text so providing.⁴⁰ Significant too is the willingness of the CFI to think creatively about the content of this principle, when confronted with the novel circumstances of new governance. Thus, while the court was unequivocal in its assertion that democracy be associated with the participation of the people, it accepted that participation could be ensured in a variety of ways. Thus the participation of the European Parliament was not conceived by the court as indispensable. The very fact of this openness to other possibilities is indicative of a responsiveness on the part of the CFI, and a willingness to adjust established categories in the light of novel circumstances. That said, the level of the court's analysis of the core concepts – democracy and representation – is shallow. Democracy implies the participation of the people. Full stop. And representation concerns the capacity of the organizations in question to speak for a sufficiently broad constituency; 'speak for' being conceived in terms of membership and mandate.

³⁸ *Ibid*, para. 89.

³⁹ This term 'meta-positive' is drawn from a debate between Christian Joerges and Kieran Bradley about the *Angeolpharm* (Case C-212/91 [1994] ECR –171) case. See C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999), pp. 79-84. Joerges has suggested, and Bradley does not accept, that this case may be read as propounding a meta-positive principle designed to 'promote the adequacy of regulatory policies' (314) in the form of a general obligation on the Commission to consult scientific committees, or to ensure that measures adopted are at least adopted on the basis of latest international research. Bradley argues, on the contrary, that this obligation derives from Article 8(2) of the cosmetics directive and hence has a clear basis in positive law, albeit that the CFI resolved an ambiguity in that positive law in favour of mandatory consultation. In so doing it demonstrates an impressive willingness to look behind the façade of the committees concerned in order to accurately assess their ability to ensure that Community rules are founded on scientific and technical assessments which are themselves based on the results of the latest international research. Thus, only a scientific committee, and not the Cosmetics Adaptation Committee, political in nature, and comprising Member State representatives, was capable of achieving this objective.

⁴⁰ Questions remain over the scope of application of this principle. In *UEAPME* the CFI places considerable emphasis upon the fact of the exclusion of the European Parliament from the procedures

6) What does the Commission White Paper on Governance Contribute to the Debate?

While it comes as no surprise that the judiciary has not fully confronted the growing “new governance” phenomenon, it was to be expected that the recently issued Commission White Paper on Governance (“White Paper”) would do so. And, to be sure, the White Paper does mention many of the alternatives within the Community method as well as such alternatives to the method as the partnership, OMC, and EPI. However, the discussion of most new forms of governance is sketchy and in some cases the White Paper expresses some suspicion of these new developments.

The White Paper starts off by recognising a need for change within the Community Method and for greater use of alternatives to it. Thus the paper states:

“The Union must renew the Community method by following a less-top-down approach and complementing the EU’s policy tools more effectively with non-legislative instruments.”⁴¹

Despite this broad endorsement of “non-legislative” approaches, the White Paper is far from uniform in its treatment of new governance. Thus it supports such innovations as framework directives, partnerships, greater participation by civil society in policy formation through “civil dialogue”, and wider use of the Social Dialogue. But the White Paper raises serious questions about two aspects of new governance: comitology and the OMC.

The White Paper does not discuss comitology in any detail. Rather, it proposes a new approach to regulation that would largely supersede comitology. In this approach, more EU law would be made through regulations enforced by independent regulatory agencies or through framework directives that would be implemented exclusively by the Commission. In order to legitimate its bid for enhanced executive authority, the Commission advocates that the conditions and limits of its role be defined in legislation, and that a ‘simple legal mechanism’ be established to enable the Council and the European Parliament to monitor and control its actions in the light of principles and political guidelines laid down in legislation.⁴² The nature of this legal mechanism is not defined. The White Paper notes in respect of comitology that:

“If these orientations are followed the need to maintain the existing committees, notably regulatory and management committees, would be put into question. Therefore a review of existing committees would have to be undertaken and their continued existence assessed.”⁴³

In a revealing passage that shows the gap between the thinking of the authors of the White Paper and the premises of much new governance, the Commission sets out conditions for the creation of regulatory agencies at the EU level and notes:

⁴¹ Supra n. 1, p. 4.

⁴² Ibid, 1, p. 31.

⁴³ ———, ———.

“Agencies cannot be granted decision-making power in areas in which they would have to arbitrate between conflicting public interests, exercise political discretion, or carry out complex economic assessments.”⁴⁴

This startling statement flies in the face of fifty years of experience with independent regulatory bodies in the United States and Europe which has shown that it is simply impossible to structure agencies in this way. Indeed, many of the reforms of administrative process over the last half-century have been designed to ensure that when, as they must, agencies arbitrate conflicting interests, exercise discretion, and carry out complex economic assessments, they do it in a way that is transparent and allows broad participation. In some cases, new governance reflects a continuation of this trend away from the chimera of neutral and purely technical administrative government.

In the discussion of the emergence of OMCs, once again the White Paper strikes a negative tone and reveals a preference for more traditional models. Despite the warm embrace of this method by the European Council, and the growing use of the Open Method of Co-ordination in practice, the White Paper seems more concerned with limiting the scope of the OMC than with fostering this innovation. The White Paper does list OMC as one of seven ways to improve the quality and effectiveness of regulation. But when it goes on to specify “circumstances for the use of the open method of co-ordination”, the White Paper focuses almost exclusively on when it should not be used and on the constraints to be placed on it when it is. Thus the paper starts the discussion of when to use OMC by stating that this method:

“must not dilute the achievement of common objectives or the political responsibility of the Institutions...and ...should not be used when legislative action under the Community method is possible...”⁴⁵

We think there is a thread that connects the White Paper’s reactions to the various forms of new governance and explains why some new approaches are favoured and others are not. It appears that the Commission favours those approaches that promote maximum possible uniformity across Europe. While the White Paper accepts the need for flexibility, it shows a marked preference for approaches that maintain at least some degree of Union-wide uniformity. At the same time, the White Paper shows a strong preference for processes that preserve a major role for the Commission in initiating and implementing policy.

Thus we can see that all the more favoured approaches either promote uniformity or give the Commission a central role in policy making, and some do both. The White Paper proposes recourse to a wide range of policy instruments, including EU regulations and framework directives and suggests that the Commission or regulatory bodies under its jurisdiction should enjoy responsibility for executing policy and legislation through the adoption of implementing measures. It accepts the need for diversity in some areas where regional variations are important, but proposes a partnership arrangement through which it retains an important voice. It accepts the Social Dialogue which leads to uniform rules and in which it has significant albeit

⁴⁴ Ibid, p.24

⁴⁵ ...

informal power. It favors greater openness and participation, but only in Community Method processes where it has the initiative and other arenas where Commission voice remains strong.

At the same time, the White Paper raises questions about the OMC. This system actively encourages a diversity of solutions and laws, and has a more limited role for the Commission than the CCM. Thus, OMC processes may produce some agreement on broad objectives, but they leave each Member State to set its own policies and move at its own pace. And although the Commission plays a role in steering the system, the bottom-up and multi-level aspect of OMC, plus the important role of the Council in the system, dilute the role of the Commission. Similarly, while comitology may produce uniformity of outcome, in this setting the Commission's authority remains subject to significant constraints.

This analysis suggests that the Commission does not fully accept the trends we have outlined in section (3), and wants to roll back some of the alternatives in order to preserve its own power and maintain the drive towards European-wide uniformity if at all possible. But many commentators, including some of the papers in this volume, favor a different approach altogether. They suggest that the OMC and similar methods that are more multi-level and flexible, and which rely less on a strong bureaucracy in Brussels and more on networking national regulators and nationally based civil society, may be a better solution for Europe.⁴⁶

Conclusion

There is an irony in what was described above. While, on the one hand, the emergence of new governance may be explained in part by the contested legitimacy of the CCM, on the other it may be thought to deepen the legitimacy challenge confronting the European Union. While formal empowerment of the European Parliament in the CCM has not served to quell the legitimacy crisis, new governance shrugs off even the cloak of 'gross legitimacy',⁴⁷ tending, for example, to eschew the direct participation of elected parliaments in decision making processes. In this it departs, visibly and dramatically, from traditional modes of legitimation of political power. It renders urgent the task of (re)conceiving legitimacy in a way that both deals with the reality of transnationalism and accepts that traditional principles of legitimacy drawn from state-based models do not work at the European level and may be obsolete at national level as well.

If new governance presents a legitimacy challenge, this is a challenge which the European Union has barely begun to confront. We saw above that the European courts have tended to ignore, or distort, new governance, in order that new governance practices can be accommodated by the premises of a traditional,

⁴⁶ See F. Scharpf. 'European Governance: Common Concerns vs. the Challenge of Diversity.' (Jean Monnet Working Paper, 2001); G. Esping-Andersen, D. Gallie, A. Hemerijck, and J. Myles. 'A New Welfare Architecture for Europe?: Report submitted to the Belgian Presidency of the European Union.' (2001); A. Hemerijck & J. Visser. 'Learning and Mimicking: How European Welfare States Reform.' (June 2001).

⁴⁷ Selznick, P., *The Moral Commonwealth: Social Theory and the Search for Community* (University of

positivist, conception of law. Thus the courts down-play the role of new governance interlocutors, such as committees and agencies, focussing rather upon the continuing formal authority of the Union's political institutions, notably the Commission and the Council. And they ignore or distort the reality of shared – collaborative - governance, and the absence of clear lines of authority which characterises this, preferring instead to posit, in the name of formal accountability, the existence of a unitary actor with ultimate authority. They thus seek to conceal that which is novel and challenging in new governance. They squeeze new governance into law's existing categories, in order that the woeful inadequacy of law's traditional tool-kit – for example judicial review of decisions adopted in conditions of complexity and uncertainty – may remain unspoken.

A somewhat similar pattern can be detected in the Commission White Paper. We have seen that there is a relationship between the rise of new governance and efforts to deal with legitimacy concerns. And we know that the White Paper was produced in part to point towards solutions to those problems. While the White Paper acknowledges most of the mechanisms that are surveyed in this Symposium, it tends to favour those which conform to the traditional patterns of the Community Method, albeit with more allowance for diversity of outcome and greater emphasis on consultation and participation. Yet it raises doubts concerning a mechanism like the OMC which attacks legitimacy issues in a very different way, introducing wholly new forms of transnational governance and legitimation. Thus the White Paper seems unable to accept the possibility that to understand and evaluate new governance we may need to develop a wholly new vision.

The courts and the authors of the White Paper seem to be caught in the same trap. They are being confronted with governance developments which have, in the main, emerged through experimentation and pragmatic accommodation and which, to one degree or another, seek to provide new approaches both to efficiency and legitimacy. But in their confrontation with these developments, judges and the authors of the White Paper tend to deploy models of law, politics, or public administration which contain built-in, *a priori* answers to what is legitimate and what is not. Because these traditional models are unable to accommodate governance systems built on different principles and premises, both the courts and the White Paper's authors have had trouble dealing with new governance. And thus some of the cases and parts of the White Paper seem to display symptoms of cognitive dissonance.

The purpose of this Symposium is to help us move beyond the resulting impasse. There is a gap between the models and standards being employed to assess new governance, and the reality of these mechanisms and the principles which they reflect. The challenge that faces us in seeking to 'mind the gap' is three-fold. First, we need to study new governance more carefully in order to understand how these mechanisms operate, and to help us unearth the principles which they embody. Second, we must interrogate received models of law, politics, and public administration and revise them in light of what is positive in these emerging practices and principles. Hopefully, from these efforts will come a vision of a more open and flexible architecture for democracy and constitutional order in the transnational polity emerging in the European Union. And with that in mind, we can revisit the new governance processes in question in order to ensure that they do, in fact, fit within that emerging vision.

This Symposium begins that task in a modest way. The papers that follow deal with a wide range of new governance mechanisms, providing descriptive accounts and normative assessments. They help us understand better the dilemmas faced by the courts, and they draw to our attention to some of the problems with the White Paper. The authors come from different disciplines and deploy different theoretical frameworks. While they all agree that new governance is an important phenomenon, they do not reflect a common position in relation to it, in its many manifestations. However, each in his or her own way offers a contribution to the larger project of interrogation and re-thinking that must be undertaken.

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