

New Governance in the European Union: A Theoretical Perspective*

BURKARD EBERLEIN
York University, Toronto

DIETER KERWER
Technische Universität, München

Abstract

New modes of governance based on voluntary performance standards, rather than compulsory regulation, have gained salience in the European Union (EU). Can these new modes of governance offer a credible solution to the current challenges faced by EU policy-making? In this article, we assess the potential of new governance in the light of the theory of democratic experimentalism. This theoretical perspective suggests, first, that co-ordination by voluntary performance standards can lead to more effective rules and more opportunities for political participation; second, that the scope of this mode of governance in the EU is not confined to cases which are explicitly flagged as new governance; and third, that one of the main problems is how a voluntary mode of governance can coexist with compulsory regulation.

Introduction

Over the past decade, a new research perspective on the European Union (EU) has become increasingly prominent. Research has shifted from analysing the process of integration to analysing the European Union as a system of governance (e.g. Marks, 1993; Hooghe and Marks, 2001; Kohler-Koch and Eising,

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1999; Jachtenfuchs, 2001; for a summary see Hix, 1998). The main issue is now how the EU works as a decision-making system. As such, the EU is increasingly confronted, like any other political system, with the double requirement of effectiveness and democratic legitimacy (Scharpf, 1999; Schmitter, 2000).

The EU's capacity to govern 'effectively and democratically' has constantly been called into question. Yet, the view of EU governance and of the need to reform it has changed over time. For a long time, the major problem of EU governance was seen to lie in its limited decision-making capacity. Member States' wide-ranging veto powers (Scharpf, 1988), collective action problems for private interest groups (Streeck and Schmitter, 1991) and the regulatory competition triggered by the single market programme (Woolcock, 1996) severely constrained the leeway available for political decision-making. Recently this view has changed. Empirical research has demonstrated how, time and time again, the EU has overcome the different interests of its Member States and has moved into new policy fields (Héritier *et al.*, 1996; Eichener, 1997, Héritier, 1999). This literature concludes that the EU's decision-making capacity is in fact greater than previously suspected (Grande and Jachtenfuchs, 2000).

However, most observers still consider the EU political system to be plagued by serious performance problems. These concern effectiveness (of decision-making) and, even more often, democratic legitimacy. New challenges to EU governance (in particular eastern enlargement) compound these problems. The discrepancy between what the EU is expected to manage and the level of legitimacy enjoyed by EU institutions seems to be increasing. This translates into a growing reluctance to grant regulatory powers to the EU. The mismatch between the challenge and the capacity, between the expectations and legitimacy, threatens to turn into a vicious circle in which low effectiveness and low legitimacy fuel one another.

Against this background, so-called new modes of governance, which depart from the traditional 'Community method' of regulation through legislation, have gained in salience, both in the debate on reform, and in the real world of various policy areas. Can these new modes of governance offer a credible solution to the challenges faced by EU governance?

We argue that programmatic pronouncements on the importance of new governance strategies, like those expressed in the White Paper on European Governance (Commission, 2001), are a rather poor guide to their actual usefulness or relevance. A growing body of empirical evidence on new modes of governance, and the open method of co-ordination (OMC) in particular, does provide a much better starting point and basis for an assessment. However, at this early stage, empirical evidence is neither conclusive nor does it permit a

full evaluation of the possible scope and success of new governance. In this situation, an attractive alternative is a theoretical assessment of the potential of new modes of governance. In this article, we want to show that conceptualizing the EU's new governance as a form of 'democratic experimentalism', i.e. as decentralized and co-ordinated participatory rule-making, contributes to an improved understanding of its real scope and significance.

I. The 'New' Avenue and How to Explore it

What is new about new governance? Defined *in negativo*, new modes of governance depart from the Community method of legislating through the use of regulations and directives. They build on the participation of private actors in policy formulation, relying on broad consultation and substantive input. Policy-making follows a procedural logic in which there is joint target-setting and peer assessment of national performances under broad and unsanctioned European guidance (cf. Héritier, 2001a). The best example of new governance is the 'open method of co-ordination'. This concept originated in the European Employment Strategy as laid down in the Amsterdam Treaty (1997). The Lisbon European Council (March, 2000) coined the expression and defined the contours of the 'open method'. 'The Open Method of Coordination' as outlined by the Portuguese Presidency, is composed of four elements: (1) fixed guidelines set for the Union, with short-, medium-, and long-term goals; (2) quantitative and qualitative indicators and benchmarks; (3) European guidelines translated into national and regional policies and targets; and (4) periodic monitoring, evaluation and peer review, organized as a mutual learning process' (Mosher 2000, p. 6).

The essence of the OMC is 'not to establish a single common framework, but rather to share experience and to encourage the spread of best practice' (Wallace 2000, p. 33). OMC seeks to initiate an iterative process of mutual learning on the basis of diverse national experiences with reform experiments. It avoids strict regulatory requirements and allows experiments that are adapted to local circumstances, while fostering policy improvement, and possibly policy convergence, through institutionalized mutual learning processes. This clearly contrasts with traditional, top-down and command and control-type regulation backed by 'hard-law' sanctions (for presentations of OMC see Hodson and Maher, 2001; Scott and Trubek, 2002). The open method has therefore been touted as the 'third way' in EU governance, to be used when 'harmonization is unworkable but mutual recognition and the resulting regulatory competition may be too risky' (Trubek and Mosher, 2001, p. 21). But is it really an attractive escape route from the dilemma of European governance?

A priori, many doubts and concerns can be levelled against the open method (e.g. Mosher, 2000). As a largely voluntary exercise, it lacks the bite of real sanctions, especially when it comes to implementing broadly defined targets. Also, participation is likely to be selective, so that exclusive interests will shape the content of 'best practice'. Decision-making might not be less elitist and opaque than in traditional governance. Finally, there are concerns related to the novel character of the open method. In the past, a similar type of informal co-ordination has often been used, notably by the Commission, to prepare the ground for formal legislation. Therefore, the open method could turn out to be a subtle 'transitional mechanism', geared towards transferring formal competences to the EU level (Hodson and Maher, 2001, p. 16).

In the debate on the actual significance of new modes of governance for the EU, two lines of inquiry have thus far been dominant. The first seeks to assess the salience of new modes of governance on the basis of the strategic and programmatic role they play in the repertoire of EU institutions, most notably of the Commission. The first strand is exemplified by the current discussion on the White Paper on European Governance, published in July 2001. The idea was to explore new concepts and methods for European governance, in a large consultation process involving governments, experts, academics and civil society. Yet, academic observers¹ found that the Commission seemed to be more concerned with defending its role in the policy-making process by redesigning the Community Method than with defining the role of the new modes of governance (Wincott, 2001, p. 2). No doubt, the White Paper reflects the 'institutional self-interest of the Commission' (Scharpf, 2001, p. 2; also H eritier, 2001b) and is characterized by a 'lack of a new vision' (Metcalf, 2001, p. 3). However, one should not rush to dismiss new modes of governance as nothing but a convenient smokescreen for the Commission as it attempts to pursue revitalized but old-style regulation. Most importantly, documents such as the White Paper cannot be viewed as authoritative guides to the 'real' policy approach of key actors such as the Commission. They are notoriously political, ambiguous, and thus difficult to decipher. And they are not reliable guides to a complex 'policy reality'. 'The published papers of the Commission working groups that contributed to the White Paper show forward thinking and a recognition that innovation is essential to meet new challenges' (Metcalf, 2001, p. 3) – even if the progressive elements apparently did not muster up sufficient politico-bureaucratic support to dominate the thrust of the White Paper.

¹ See, in particular, the online symposium on the White Paper on the website of the Robert Schuman Centre, European University Institute: 'Mountain or Molehill: A Critical Appraisal of the Commission White Paper on Governance' available at <<http://www.iue.it/RSCAS/Research/OnlineSymposia/Governance.shtml>>. Also see EUSA Review Forum in EUSA Review (2001), Vol. 14, No. 4, at <<http://www.eustudies.org/GovernanceForum.html>>.

The second strand of inquiry seeks, by contrast, to assess empirically the significance of new modes of governance in the reality of EU policy-making. Despite the short history of alternative governance modes in the EU, empirical inquiries have already generated important insights.

First, as an important antidote to the frenzy surrounding the new modes of governance, it is important to acknowledge that governance in the EU to a large extent is still based on the traditional Community method, which relies on legislation (Héritier, 2001a). That said, it is also undeniable that new modes of governance are on the rise. Soft law has surfaced in EU policies for the regions (Tömmel, 2000), the environment (Lenschow 2002), taxation (Radaelli, 2001), immigration (Zeitlin and Caviedes, 2002), research (Kaiser and Prange, 2002) and transport (Kerwer and Teutsch, 2001a). Similar patterns of 'informal governance' have been identified in utility regulation (Eberlein, 2003). New modes of governance are most important in the area of economic policy co-ordination among members of the European Monetary Union (Hodson and Maher, 2001) and in social policy (Goetschy, 2003). In these areas, new governance has been introduced in its most distinct form, i.e. as the OMC. In economic policy, the OMC was becoming increasingly relevant in the second half of the 1990s; and in 1997 it was transferred to the area of social policy.

Second, new governance modes are by no means restricted to uncontroversial cases in which there is a high level of consensus. On the contrary, they are almost always introduced after legislative deadlocks. New modes of governance, and particularly the OMC, are important whenever central legislative policies are not feasible because the solutions to policy problems are uncertain and politically sensitive. For example, the EU seeks to foster the discovery of effective ways to combat unemployment while still respecting the autonomy of Member States in this sensitive policy area (Trubek and Mosher, 2003, pp. 36–42). In research policy, one of the main problems is the rich diversity of national systems of innovation, which makes a centralized policy dysfunctional (Kaiser and Prange, 2002). From this, it follows that the real question about new governance is not whether it can only thrive in fair weather, but rather how well it can thrive in bad weather.

Third, one of the most consistent observations about the new modes of governance is that they exert influence by fostering policy learning. The EU voluntary tax code, designed to prevent a race to the bottom in taxation, is an incentive for Member States to reconsider their policies if they cause negative externalities for others (Radaelli, 2001). Learning is enhanced even further by the specific learning mechanisms of the OMC. In social policy, there is evidence that, through disciplined comparisons guided by best practice rules which are periodically evaluated by applying benchmarks and using a peer review process, national administrations better understand how they could

combat unemployment (Trubek and Mosher, 2003, pp. 46–9). In economic policy, the voluntary guidelines have been somewhat less effective (Hodson and Maher, 2001). However, although the Council recommendations were not taken on board, they did have some effect: they resulted in a discussion beyond national borders on Irish economic policy and thus a discussion of potential negative externalities of national policy measures (Hodson and Maher 2001, pp. 732–7).

Fourth, more often than not, new modes of governance have not translated into a more participatory policy style. Although the OMC should be a combination of bottom-up participation and top-down guidance, in reality it is often dominated by the centre. The Commission plays a major role in setting the standards that Member States have to live up to and closely determines the process of evaluation. In social policy, there has been no lasting success in integrating the social partners (Goetschy, 2003, pp. 81–2). This leads to a certain bias in the policy measures adopted. Given that the European Parliament does not participate extensively in the OMC (Trans European Policy Studies Association, 2002), there is a deficit of democratic control.

Finally, it is important to recognize that, notwithstanding these common features, new governance is characterized by considerable diversity across different EU policy sectors that are governed by different policy regimes.

While empirical research has already contributed much to illuminating the scope and character of new governance, empirical evaluation, at this stage, encounters certain limits. The EU experience with the new mode of governance is short, and does not lend itself to clear-cut and definite conclusions. This is all the more of a problem since the effect of the OMC will usually be rather indirect, its output not being a European policy but a frame for national policies. Determining the impact of the EU on national policies is a challenging task for the traditional Community method based on binding regulations (Kerwer and Teutsch, 2001b), and it is even more difficult for the OMC, which by definition influences national policies indirectly (de la Porte and Pochet, 2002a). Causal relationships between the European and national levels may be rather obscure. Sometimes Member States claim that past policies have already in effect implemented European guidelines (Trubek and Mosher, 2003, p. 43), or national policies are designed mainly for the purpose of signalling compliance with EU standards and have little real effect (Jacobsson and Schmid, 2002). The large number of evaluation reports produced by the Commission are not a neutral source of information, they are eminently political documents, which carefully avoid contradicting the Member State's self-evaluation too much (de la Porte and Pochet, 2002a). In taxation, where political sensitivities are probably even higher than in social policy, the explicit report on the state of implementation of the guidelines was not endorsed by the

Council as an official EU document (Radaelli, 2001). Finally, the OMC's performance indicators, while facilitating comparisons across Member States, might not reveal much about how policies translate into outcomes. For example, declining employment figures cannot only be attributed to the OMC; they could be caused by many other factors, e.g. by macroeconomic changes (Goetschy, 2003, pp. 68–9). Thus, although by no means futile, any empirical evaluation of the new modes of governance is problematic at present.

Given the limits of the first two, we take a third avenue of inquiry to examine the relevance and potential of the open method as new mode of governance. Rather than using a programmatic or empirical measuring stick, we suggest assessing the potential of new governance in the light of available theoretical approaches to the EU polity. After discussing the merits and defects of the dominant approaches, we will then present an alternative theoretical account of governance in the EU multi-arena polity.

II. Theorizing EU Governance

Attempts to theorize EU governance can be categorized into two different approaches according to whether they conceive of political decision-making mainly as preference aggregating or preference transforming.² Theories of preference aggregation focus on the limits of the problem-solving capacity of EU governance, and thus see the major prerequisite for EU governance in a decentralization of decision-making. Theories that stress preference transformation focus on the EU's capacity to shape interests in such a way that they become more compatible. We want to show that both offer some suggestions for why the new modes of governance could have a high problem-solving capacity.

Making Decisions by Aggregating Interests

The most elaborate and influential theory of EU governance based on the logic of aggregating interests is the regulatory competition theory presented by Scharpf (1999). The main hypothesis is that EU governance is plagued by systematic limits, black holes of 'non-decision'. The crucial variable that determines the scope of non-decision is the dynamics of regulatory competition. Whenever the regulatory competition unleashed by market liberalization forces Member States into a downward spiral regarding regulatory standards, European problem-solving capacity is likely to be lower than that of any single Member State (see Scharpf, 1999; see also Zürn, 1998, p. 183). The

² Multiple-actor decision-making can occur either by transforming inconsistent preferences into more consistent ones, or by aggregating preferences with techniques such as log-rolling and bargaining (March, 1994, pp. 139–40).

type of regulatory competition dynamics depends on whether market-correcting policies are based on product or production standards. Both impose costs on the production process, but only product standards increase the value of the product: production standards do not. This is why poor countries are willing to accept the former but not the latter; for doing so would undermine their competitive advantage *vis-à-vis* rich states. Given that, at the European level, decision-making is usually based on quasi unanimity, there is no way of coming to an agreement that would force poor countries to accept higher standards. Decisions of this kind get caught in Europe's infamous 'joint decision trap' (Scharpf, 1988). This analysis suggests the normative conclusion that one of the most important tasks is to reach a proper division of labour in the national and the supranational decision-making arenas (Scharpf, 1994). The major concern is, hence, the degree to which decision-making should be decentralized.

A second theory that builds on the view of decision-making as aggregation sees the key to the EU's problem-solving capacity in specific forms of differentiation, and of the integration of the institutional structuring of decision-making (e.g. March and Olsen, 1989). The EU is understood as a multi-level governance system, in which a large number of decision-making arenas are differentiated along both functional and territorial lines, and in which these arenas are interlinked in a non-hierarchical way, resulting in a 'dispersion of authoritative decision-making across multiple territorial levels' (Hooghe and Marks, 2001, p. xi; Grande, 2000). Analysis from federal states shows that if decision-making is interdependent and based on horizontal negotiation between these arenas, without the option of hierarchical co-ordination, there is a high probability of decision-making deadlock. The fact that decision-making capacity is, at least in some instances, rather high suggests that decision-making deadlock can indeed be circumvented. One promising explanation is based on the distinction between loose and tight coupling (Benz, 2000). The familiar pathologies of multi-level governance are produced by tight coupling, i.e. when actors hold veto powers in other decision-making arenas. If this is not the case and interdependencies can be effectively reduced, then successful decision-making is more likely.

Loose coupling is conceivable in two forms (Benz 2000, pp. 10–19). The first is a form of horizontal decoupling according to the phases in a policy cycle. A second possibility is vertical loose coupling according to different instruments of governance. Here, negotiations between levels are restricted to definitions of broad standards (at a higher level) that are then subsequently implemented at decentralized levels. Loose coupling helps to avoid negative and may even produce 'positive interaction effects' instead. For example, decoupling distributive decision-making from implementation in the EU regional

policy (Benz and Eberlein 1999) allowed for more innovative policy proposals to emerge.

Making Decisions by Transforming Interests

The second major approach to EU governance argues that the EU has a strong decision-making capacity because of its ability to influence the preferences of Member States. Deliberative supranationalism, i.e. continual discussion and the exchange of arguments, transforms Member States' preferences, making them more community compatible and thus mitigating problems of collective action (Joerges and Neyer, 1997; Joerges and Vos, 1999; Joerges, 1999; Joerges and Everson, 2000; Eriksen and Fossum, 2000). The institutional locus of these deliberations is the thick web of EU committees in which public and private actors co-ordinate policy formulation and implementation, so-called 'comitology'. To the extent that comitology deliberation forces individual actors to acknowledge the potential externalities of their political preferences for others and to modify them accordingly, the logic of intergovernmental bargaining is replaced by the logic of supranational decision-making. This notion of deliberative supranationalism explicitly excludes the possibility of the EU being a regulatory state that could rely exclusively on technocratic legitimacy (Majone, 1996). Social regulation cannot be technocratic because it always involves value judgements, and conflict between regulation and redistribution is inevitable (Joerges, 1999, pp. 5–6). Therefore, there is no trade-off between 'effective' and 'democratic' governance. A European decision can only be effective insofar as it is democratic (at least in the sense of 'expert deliberation').

In contrast to the aggregation approach of regulatory competition, cooperation is seen as a direct result of EU deregulation since deregulation amplifies interdependencies within the EU. Due to these interdependencies, national conflicts and compromises over social regulation create significant transnational externalities for the other members. For example, when UK authorities decided that BSE in cows did not pose a health problem for consumers of beef until scientific evidence proved the contrary, other EU Member States could not legally justify a ban on British beef imports on the grounds of the precautionary principle of 'no regrets'. Hence, these types of significant political externalities force Member States into perpetual co-ordination efforts that give rise to deliberative processes (Joerges and Neyer, 1997, pp. 278–9).

The Need to Move Beyond the Status Quo

Our survey of the two basic approaches to EU governance shows the conditions under which we can expect successful decision-making at the EU level.

The aggregation approach emphasizes the horizontal and vertical differentiation of decision-making. Only the proper choice of decision-making arenas and/or adequate patterns of arena linkages will prevent decision-making breakdown. In contrast, the transformation approach sees the EU's problem-solving capacity as being directly linked to expert deliberation in committees. Deliberation will lead to more community-compatible interests among the Member States.

The theoretical *status quo* suggests a favourable view of the new modes of governance. If the OMC can be taken as a representative example, then both problems pointed out by theories of EU governance are addressed by the new modes of governance. As has been shown in Section I, the OMC consists of a set of autonomous national decision-making arenas that are co-ordinated by jointly produced best practice models. Thus, OMC seems to be a good candidate for an intelligent decision-making structure that combines decentralization with reintegration, as called for by the aggregation approach (Scharpf, 2001). Furthermore, OMC should also appeal to those who see the main potential of EU governance as lying in preference transformation. Admittedly, the OMC does not rely on the expert deliberation of central committees. But deliberation within autonomous decision-making units catalysed by best practice models seems to be a good functional equivalent of effective joint problem-solving.

However, the theoretical *status quo* is seriously limited in assessing the potential of new governance. The most important limitation is that it fails to identify a plausible mechanism to explain how new governance could actually 'tick'.

The promising transformation approach exhibits some specific weaknesses in this respect. For one, it is not clear whether deliberation can effectively facilitate multiple actor decision-making. Deliberation might also decrease the likelihood of consensus by exposing the different world views of the deliberating parties (Johnson, 1998, pp. 167–8). Second, it is not at all clear to what extent deliberative supranationalism meets the standards of democracy. Lacking constitutional control, it is plagued by a legitimacy deficit (Hofmann and Töller, 1998; Lindseth, 1999). Also, the fact that it is insulated from the public sphere and limited to expert deliberation makes it appear more like an expertocracy than a version of deliberative supranationalism (Schmalz-Bruns, 1999). Third, even if comitology deliberation works as claimed, its significance for good governance might be exaggerated. The EU food safety standards in the BSE case, for example, were not primarily improved because of comitology deliberation but by external events (Chambers, 1999).

A further, general limit of the theoretical *status quo* is that it targets the EU exclusively as a regulatory state, whereas the new modes of governance are

based on voluntary rules. All the approaches reviewed so far assume that the output of decision-making is regulation in its familiar EU forms. New governance, in contrast, is based primarily on voluntary performance standards. Law does play a role, but more as a procedural framework than as a 'policy instrument'.

This brings us to the third and most fundamental limit: the lack of an in-depth understanding of the procedural mechanisms of new governance. The aggregation approach hypothesizes that successful EU governance is characterized either by properly allocating powers to different arenas or, more interestingly, by positive interaction effects that arise between loosely coupled decision-making arenas. But this is more like locating a black box than describing the mechanism at work inside it. Therefore, the present state of the art on EU governance theory does not allow a satisfactory assessment of new governance.

III. Theorizing the New Modes of European Union Governance

A promising perspective for an innovative conceptualization of new governance is offered by the theory of 'democratic experimentalism' (Cohen and Sabel, 1997; Dorf and Sabel, 1998). Its application to the EU has so far focused on whether the theory can provide a model of democracy beyond the boundaries of the nation-state (Gerstenberg, 1997; Gerstenberg and Sabel, 2000; Schmalz-Bruns, 1999). We would like to show how this theory makes it possible to make sense of the new forms of decision-making in the European Union.³

Democratic Experimentalism

Democratic experimentalism⁴ theorizes on the basis of a specific logic of decision-making. Like other theories of deliberative democracy, it is built on the conviction that deliberation is at the core of democratic and effective decision-making. It also shares the widespread conviction that the institutional framework heavily influences deliberation. In this respect, it shares key features with deliberative supranationalism as set out above. It differs, however, from the latter approach in the way it conceptualizes this institutional framework.

³ For the discussion of some cases in the US and the developing world, see the Special Issue 'Deliberative Democracy' of *Politics & Society* (2001), Vol. 29, No. 1.

⁴ The authors of the theory use 'directly-deliberative polyarchy' when they refer to the polity (Cohen and Sabel, 1997) and use 'democratic experimentalism' as a generic term for a political system that follows the logic of decentralized problem-solving (Dorf and Sabel, 1998, p. 288).

The emphasis is neither on the micro level, with the question being whether the organizational setting fosters genuine arguments among participants (Eriksen and Fossum, 2000), nor on the macro level, with the question being if deliberation in the public sphere can successfully besiege decision-making (Habermas, 1998 [1992], ch. 8). The theory starts with the meso-level observation that political decision-making is increasingly based on policy networks. As such, this is hardly a new insight. However, contrary to much of the policy network literature, the theory identifies a precise logic of governance that can be clearly distinguished from markets and hierarchies.

The basic unit of democratic experimentalism is a local forum in which collectively binding decisions are reached by deliberation among the affected parties (Dorf and Sabel, 1998, pp. 316–23). Such a forum can be a committee in which citizens and providers jointly strive for vital local public services of a satisfactory quality, such as public transport. It can also be a committee of citizens, experts and industry representatives concerned with protecting their local or regional environment (Sabel, *et al.*, 2000). Local forums persist over some time and have real decision-making power as forms of direct democracy.

Crucial to democratic experimentalism is the co-ordination of local deliberating units by a ‘governance council’ (Dorf and Sabel, 1998, p. 316). This centre fosters mutual learning among the local deliberating units by collecting and distributing information on experiences gathered within the network (Dorf and Sabel, 1998, 345–8). The most important task of the governance council is to convert information on multiple parallel experiments into performance standards based on the best practice found. These performance standards help local units to locate a large number of similar experiences and draw lessons from them. They stimulate discussion on the reasons for shortcomings and possibilities for improving performance. Such performance standards are constructive in that they do not only entail an implicit criticism of sub-standard performance, they also show ways of improving performance. The functioning of democratic experimentalism can probably best be illustrated by reference to local public goods because, at this level, direct deliberation can best be realized (Fung, 2001). However, the governance council need not necessarily be a small town governance body; it can also be a regulatory agency at the national level (Dorf and Sabel, 1998, pp. 349–54).

Democratic experimentalism is based on a different type of rule from traditional regulation. Conventional regulation is based on regulatory standards that define maximum levels of pollution or minimum levels of protection. By contrast, experimental regulation consists of performance standards, i.e. rules that identify the production processes best suited to achieving a regulatory goal. According to the principle of benchmarking, these rules are continually

updated according to the evolving practices of firms. Such 'rolling best-practice rules' (Dorf and Sabel, 1998, p. 350) create a strong incentive for continual improvement. Regulated units (firms) that manage to have their production processes established as best practice have a competitive advantage.

The world of democratic experimentalism is not an alternative to the world of representative democracy. On the contrary, democratic experimentalism needs the active support of the institutions of representative democracy in order to be viable. The central bureaucracy (e.g. administrative agencies) can provide vital assistance by acting as an instance of second-order learning, in which local governance councils can profit from the experience of other local governance councils in setting performance standards. Parliament can stimulate democratic experimentalism by identifying broad goals and explicitly delegating experimentation to the lower level. And, finally, judicial review by administrative courts guarantees the principle of experimentation and, most importantly, it can play an important role in overcoming decision-making deadlocks that block effective experimentation (Dorf and Sabel, 1998, pp. 388–404).

The Open Method of Co-ordination: Democratic and Experimentalist?

Democratic experimentalism offers a key avenue for understanding the significance of new EU governance. OMC can easily be identified as a form of democratic experimentalism, since it is a way of networking decentralized decision-making units by a common system of benchmarking. The decision-making autonomy of the local units is not compromised by performance standards. One of the reasons it is promoted is to enhance the legitimacy of EU decision-making, allowing more decentralized participation by stakeholders.

If OMC can be understood as a form of democratic experimentalism, then it has significant potential to address some of the serious challenges to EU governance. First, given that this mode of governance relies on local deliberation, it offers an answer to the challenge of democracy in Europe. Instead of relying exclusively on expert deliberation within European regulatory agencies or committees, it enables stakeholders to participate directly in decision-making processes. Second, democratic experimentalism offers a solution to the question of how a multitude of decision-making arenas can be co-ordinated without exerting hierarchical control. The development of performance standards makes it possible to reintegrate decentralized decision-making without harming decision-making autonomy. Third, the theory of democratic experimentalism suggests that OMC can overcome the incremental, path-dependent learning so typical of organizations (Levitt and March, 1988), because the performance standards used to co-ordinate them not only uncover weak performance, they also offer guidelines for improvement. This fosters

adaptational learning and ensures that policies can be effective even in volatile environments (Sabel, 1994).

Viewing OMC as a form of democratic experimentalism not only identifies its potential, it also points to its problems. A first problem results from the debate on deliberative democracy. Time and time again theories of deliberative democracy have had to show that deliberation can actually make a difference in the real world of modern representative democracies (e.g. Habermas 1998[1992], ch. 8). Democratic experimentalism is a variant of deliberative democracy that carefully avoids the argumentative burdens associated with too much idealism. First, it does not call for the reinvention of the institutions of representative politics, but builds on existing tendencies in citizens' various grass-roots movements, and asks how existing political institutions can actually support this process. Second, it does not invest too much faith in the magic of the process of deliberation among equals. Deliberation, though vital, needs to be stabilized by exogenous support, especially by mechanisms of information-pooling that link single deliberation processes to each other. Thus, deliberation does not rely on consensus exclusively. One of the major practical problems is how actually to organize inclusion in the process of decentralized decision-making. How can those who are affected and therefore should participate – the stakeholders – be identified (Schmitter, 2001)?

However, on the whole, democratic experimentalism has not been fundamentally challenged as not being democratic. The major issue so far has been effectiveness. Democratic experimentalism has been attacked as being too close to incrementalism and thus too conservative when broad-sweeping changes are needed (Dorf and Sabel, 1998, pp. 403–18). Yet, the main objection has been that it will not work well in the area of regulatory policies. According to democratic experimentalism, firms or units should be tied into networks in which performance standards provide an impulse for permanent improvement. The most idealistic assumption underlying the concept of democratic experimentalism is not that it works but that (given some favourable circumstances) it can stand on its own feet and replace markets and hierarchies as forms for co-ordinating action. In Theodore Lowi's view, it is ludicrous to think that a 'pusyfooted "rolling-rule regime"' (2000, p. 75) can be as effective as hierarchical intervention by a central state. This objection is particularly relevant in cases of divergent interests resulting from distributive conflicts, which cannot easily be transformed into a 'win-win' solution. Even sympathetic critics point out that democratic experimentalism will hardly be autarchic, but will depend on the backing of a hierarchical pillar that does not just support deliberation, but that stands on its own (Sunstein, 2000). If this objection is valid, it poses a theoretical problem for democratic experimen-

talism theory: how can the shadow of hierarchy be reconciled with the autonomy necessary for deliberation?

The problematic relationship between regulatory standards and performance standards within democratic experimentalism has already surfaced within the EU. The OMC might not become a mode of governance in its own right but a prelude to regulatory harmonization instead. This will happen if the European Commission sees the OMC primarily as a vehicle for incrementally intruding into realms where its competencies are restricted. The Commission tendency to use OMC merely as a way of building consensus for central rule-making has already become visible (Scharpf, 2001). Even in one of the paradigmatic cases, the area of active labour market policies, there seems to be a hope that eventually a single best-practice rule might prevail, which could then serve as the basis for centralized harmonization (Bisopoulos, 2003).

However, this pessimistic view underrates the procedural qualities of decision-making inherent in new modes such as OMC. Even if, at the end of the day, convergence on a single best practice is able to harmonize EU legislation, the quality of these rules might be higher than if they had been directly developed by way of the traditional Community method. Thus, we should be careful not to dismiss new governance as irrelevant insofar as it is 'transitional'. After all, one of the central ideas of the new governance is that procedures and the quality of decision-making are intimately linked.

Conclusions

The EU suffers from a crisis of governance. Are new modes of governance a viable response to this crisis? In this article, we have tried to make sense of the rise of new modes of governance in the EU. We have proposed an alternative to reliance on the programmatic discourse by policy-makers and to the current limited reach of empirical analysis. Our claim is that if these new modes of governance are viewed through the theoretical lenses of democratic experimentalism, we can much better assess their potential for effective and democratic governance in the EU, as well as their limits and problems. First, we showed how, viewed in this theoretical light, new modes of governance could address some major challenges of EU decision-making. Co-ordinating decision-making by benchmarking is a more specific form of loose coupling that can foster the positive interaction effects among different decision-making arenas. These best-practice standards confront local decision-makers with an attainable world of possibilities without forcing decisions upon them. Furthermore, they make stalemate within the decision-making arena less likely by confronting local deliberation with new and relevant outside information.

Second, we showed how this approach managed to identify better not only why and how (the mechanism) but also under which conditions (the scope) new modes of governance may come into play. Being able to identify these independently of the self-description of policy-makers is very important because policy-makers may have strategic reasons for promoting policies under the label of 'new modes', or for avoiding doing so where antagonists are suspicious of them. Moreover, our approach helps to overcome restrictive, formal definitions of new governance, in which policy-making qualifies as new governance only if no legal measure is adopted (e.g. H eritier, 2001a). If this criterion is employed, the net might not be cast widely enough to capture the real scope and significance of the phenomenon. The reason for this is that, in many instances, policy-makers have not adopted a new mode of governance wholesale, but have only adopted it partially, or have drifted into such an approach instead (T ommel, 2000, pp. 169–71).

Finally, this theory points to the real problems associated with new governance. The major question concerns how new modes of governance can be reconciled with the need for binding rules. It is an open question whether it is possible to reconcile an open learning process with attempts to convert the underlying performance standards into regulatory standards. Only future research will be able to shed more light on the actual patterns of interaction between 'old governance' (regulatory standards) and 'new governance' (best practice) to explore whether, and in which cases, these will be patterns of substitution, transition, competition or complementarity. Also, we cannot and do not argue that OMC will or will not effectively meet the challenges of European governance. The theoretical considerations presented here merely point to the potential and problems of OMC, but they cannot be a substitute for future empirical inquiry. Future research will have to pay particular attention to variations across different policy sectors and at the different stages of the policy cycle. Just as there is no one single 'old governance', we should not expect to find a one single 'new governance'.

Correspondence:

Burkard Eberlein
Canadian Centre for German and European Studies
York University
230 York Lanes, 4700 Keele Street
Toronto (Ontario), Canada M3J 1P3
Tel: 00 4 16 736 5695
email: eberlein@yorku.ca

Dieter Kerwer
 Technische Universität München
 Lehrstuhl für Politische Wissenschaft
 Lothstrasse 17
 D-80335 München, Germany
 Tel: +49 89 289 24230
 email: dieter.kerwer@wi.tum.de

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