

Soft Governance Instruments in the EU

coordination and legitimacy beyond the shadow and hierarchy

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Research Paper no. 4/05

Soft Governance Instruments in the EU.

**Coordination and Legitimacy beyond
the Shadow of Hierarchy?**

Susana Borrás

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**Research Papers from the Department of Social Sciences,
Roskilde University, Denmark.**

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Abstract

Following recent theoretical and conceptual developments this paper examines the extent to which the gradual introduction and unfolding of new soft instruments in the European Union is in fact changing the EUs system of governance and the nature of the European integration process. The paper focuses on issues of effective coordination based on voluntary action and on issues of democratic legitimacy in post-parlamentarian political processes. To do that, the paper presents and discusses the theoretical aspects based on rational and sociological institutionalism, and proposes a set of assumptions about the different types of instruments. These assumptions will be tested empirically in the future.

Keywords: European Governance, European integration, regulation, open method of coordination, public-private partnerships, standardization.

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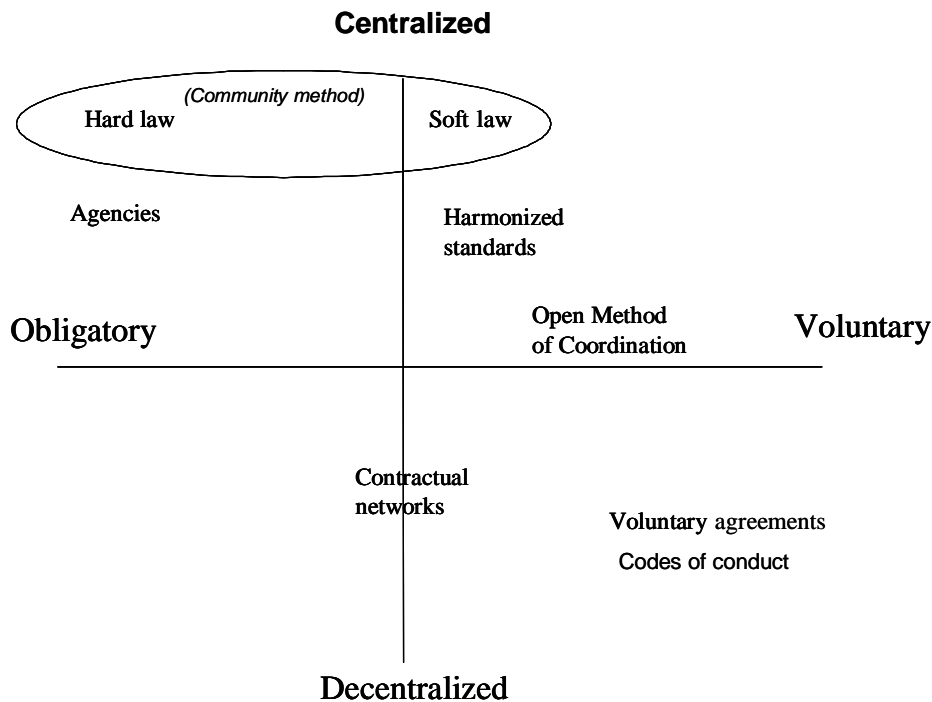
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TABLE OF CONTENTS

| | |
|--|-----------|
| INTRODUCTION..... | 7 |
| BRIDGING RATIONAL AND SOCIOLOGICAL INSTITUTIONALISMS..... | 9 |
| COORDINATION IN THE AGE OF NETWORK GOVERNANCE..... | 11 |
| THE GENERATION, IMPACT AND SOLUTION OF PROBLEMS..... | 14 |
| THE STEERING-INSTRUMENTAL CAPACITY OF THE INSTRUMENTS..... | 15 |
| THE SHADOW OF HIERARCHY – AND THE SHADOW OF ENTROPY..... | 16 |
| LEGITIMACY AND NETWORK GOVERNANCE..... | 18 |
| THE DEMOCRATIC LEGITIMACY OF THE NEW GOVERNANCE INSTRUMENTS | 19 |
| THE POLITICO-INSTITUTIONAL CAPACITY OF THE SOFT INSTRUMENTS | 20 |
| ASSUMPTIONS REGARDING COORDINATION AND LEGITIMACY | 22 |
| SOME FINAL REFLECTIONS ABOUT THE EU’S SYSTEM OF GOVERNANCE..... | 23 |
| REFERENCES..... | 25 |

Introduction

Gradually and steadily the European Union has been introducing new and soft governance instruments, the most significant of those being the open method of coordination, regulatory and advisory agencies, contractual networks, voluntary agreements, codes of conduct and harmonized technical standards. These instruments have at least three central features in common. Firstly, they entail a relative degree of voluntarism on the part of those who are subject to them. As we will examine below, this fact contrasts with the coercive and binding nature of previous instruments. Secondly, the new instruments enjoy a certain degree of administrative decentralization, with the consequence that the Commission is partly redefining its role. Last but not least, the soft instruments are largely articulated around self-organizing dynamics of partly autonomous organizations, beyond the conventional organizational traditions of market arrangements and of (hierarchical) public administration.



Taken together, the new instruments are a complement to rather than a substitute for conventional instruments, particularly the so-called “Community Method”, which is based on law (Community legislation).

This paper looks at the extent to which the gradual introduction and unfolding of new soft instruments is in fact changing the EU system of governance, and the nature of the European integration process. Thereafter, follows a discussion about the theoretical implications of these transformations, particularly focusing on the need to generate more sophisticated and broader theoretical frameworks across the different traditions of new institutionalism in EU studies.

There is at present a rapidly growing academic literature about governance and about governance instruments. In the field of public administration, researchers

have extensively reported the increasing significance of new forms of state involvement and of public administration decentralization in what has been termed “the hollowing out of the state” and networked polity (Pierre and Peters, 2000; Bovens, et al. 2001; Torfing and Sørensen, 2005; Baldwin and Cave, 1999; Brunsson and Jacobsson, 2000). Likewise, in the field of international politics, the growing role of non-state actors, private governance arrangements, and softer forms of regulation, have attracted substantial scholarly interest (Rosenau and Czempiel, 1992; Held and Koenig-Archibugi, 2003; Mörth, 2004; Jordana and Levi-Faur, 2004)).

In the area of EU studies, the governance approach has focused on the features of the EU system of governance from an institutional perspective, examining the European integration process as a process of post-national polity construction (see Hix, 1998; Jachtenfuchs, 2001 for two excellent reviews). Most recently, this school has been examining the emergence of new instruments of EU governance, in particular the “open method of coordination” (Borrás and Greve, 2004; Jacobsson, 2004), the new regulatory and advisory agencies (Chiti, 2004), and the extensive use of voluntary arrangements between EU bodies and private partners (Heritier, 2001; Gunningham et al. 1998). Harmonized technical standards have also received attention, but to a lesser degree (Egan, 2001; Bernard, 2002). Interesting but limited evidence exists about these new instruments. However this evidence so far has tended to be inconclusive and typically devoted to one instrument rather than looking at a number of them together.

The European Union’s increasing use of new governance instruments poses a series of fundamental questions regarding the nature and the conditions for achieving collective action and coordination at the EU level. These fundamental questions refer to the dimensions of policy, politics and polity of the EU as a post-national system of governance. This paper addresses some of the most crucial theoretical aspects concerning the dynamics of institutional and social change beyond the state, looking specifically at these three dimensions. The purpose is to define the overall analytical framework to be subsequently used in a large scale empirical study that can provide more solid evidence of the effects of the new instruments by comparing them.

In historical terms, the regulatory stance of the “Community method” has proven to be very successful. Almost exclusively using binding legal instruments, the Community Method has maintained high levels of compliance and coordination by significant, yet diverse, forms of domestic change in Member States. Legal scholars have repeatedly described the historical process of European integration essentially as being a process of “integration by law” and “integration by legal harmonization” (Cappelletti, et al, 1986; Armstrong, 1998). The European construction has been a process of constructing a single and hierarchically-shaped legal and judicial system which has direct and equally binding effects upon all its constituencies, has strong autonomous monitoring and sanctioning capacities, and also has a pre-defined jurisdictional and territorial boundaries. This is what other scholars have defined as a regulatory state, a model followed by the EU in the historical process of constructing a supra-national polity (Majone, 1996).

At the *policy dimension*, the questions emerging in this regard are: will the new instruments provide equally solid and stable results as the legislative instruments have done so far in the process towards “a closer union”? What is the true ability of the new instruments to forge coordinated action among partially autonomous actors? Will the new instruments be able to achieve a

significant degree of coordination by effectively changing actors' behaviour? From the *perspective of politics*, the main research question refers to how far the new governance instruments are transforming the dynamics of politics in terms of legitimacy and democracy. Are the new governance instruments having an impact over the previous organization of democratic representation, political contestation and participation in its system of governance? How far are the subjects of (self-)regulation of these new instruments truly involved in the decision process leading to the specific shape and content of the instrument? And how legitimate and democratic are these political processes of representation, contestation and participation? Last but not least, this paper will raise questions regarding the potential effects of the new governance instruments on the overall *polity dimension* of the EU system of governance. These will be strongly connected to the previous questions about the changing aspects of policy and politics in the EU, since it is assumed that there is a strong link between the three dimensions. Substantial and visible changes at the policy and political levels will certainly impinge on the contents and shape of the EU's system of governance and integration process.

The theoretical approach of this paper is in line with sociological and rational choice institutionalisms. The premises are that under certain conditions, the new instruments are able to generate the effective coordination of actors and democratic political processes. By accommodating diversity and unity in stable patterns of interaction, the new instruments might generate a series of common goods that are perceived as relevant and necessary by the greatest possible number of actors in a given political system, the EU in this case. This is made possible by a set of different but specific mixes of consequentiality-appropriateness logics and integrative-aggregative political dynamics in accordance to some pre-given conditions.

Therefore, this paper takes sociological institutionalist assumptions about voluntary coordinated action as a solid point of departure, and sets them in continuation with the assumptions formulated by Fritz Scharpf's about the preconditions that must be met in the real-world for networks and negotiated coordination to be effective, i.e. produce the same results as hierarchical coordination, and address satisfactorily the normative prerequisites of democratic legitimacy.

The paper proceeds as follows, the first five sections examine the issue of coordination, and the corresponding subsequent three sections focus on the issue of legitimacy and democracy. The questions related to the polity dimension will be articulated in the conclusions of the paper, in particular the constitutional aspects of the new governance instruments.

Bridging rational and sociological institutionalisms

One of the most interesting aspects of the new instruments is the fact that they are not based on universal and sanctioning mechanisms where the "state" (the EU in this case) is solely responsible for generating coordinated action, as traditional legislative and law instruments do. In contrast, the new instruments are based on a decentralized mechanism and on actors' voluntarism, where other actors, most notably collective and individual private actors, coordinate their action by partial self-regulation. In the fields of political science and international relations, this is also known as "non-state actors' governance" or "private governance/private regimes" by which constellations of private actors alone, or private and public actors together, produce collective goods at

national or international levels (Brunsson and Jacobsson, 2000; Teubner, 2004; Schepel, 2005). In between the two ideal extremes of hierarchical public action (as vertical coordination) on the one hand, and spontaneous private action (heterarchical coordination) on the other, there is a wide set of different forms of public authority- private actor interaction having different degrees of obligation-voluntary, centralized-decentralized forms of interaction. These forms of interaction are shaped by the new governance instruments mentioned in table 1.2. Hence, each kind of governance instrument represents in itself a very specific, yet complex, mix of vertical, and heterarchical coordination mechanisms, and is based on equally complex mix of designed incentive structures using different steering mechanisms and institutional features.

It is precisely this complex mix of mechanisms and institutional features of the new governance instruments that puts under pressure traditional rationalist premises that common action within the EU context can only be based on hierarchical or partly hierarchical means, where compliance is secured only by the partners' previous consent to inflict sanctions on non-compliers. But it also puts pressure on sociological institutionalists in two different ways. One is on the need to engage in substantive empirical research that can convincingly provide evidence that identity-based factors and other forms of intersubjective ontologies are behind these and other new policy and political processes in the construction of the European Union. The second challenge is to provide testable hypothesis about the conditions under which it is possible to have voluntary coordination in the absence of hierarchical coercion.

In a recent work, Johan Olsen points out that "students of peaceful change in political orders are unlikely to succeed if they try to understand a political world characterized by a variety of institutional settings, behavioural logics and processes of change by using models assuming a **single universal type** of institutional setting, behavioural logic and process of change. Instead, theory-builders have to take into account that actors try to calculate expected utility as well as to follow rules of appropriate behaviour derived from constitutive identities and principles they think deserve respect." (Olsen, 2004, p. 32). After decades of border skirmishes among the different traditions of institutionalism, scholars in the field of EU and policy studies are currently delving into theoretical detail to offer a wider understanding of the role of institutions and social behaviour than hitherto. In that spirit, several works have been willing to "move beyond outworn debates" defining a new institutionalist research agenda (Schneider and Aspinwall, 2001) that proposes analytical frameworks combining explanatory factors from different theoretical backgrounds (Jupille et al. 2002, Checkel and Moravcsik, 2001). There are indeed compelling arguments to move in this direction, namely the recognition that all theoretical frameworks in the social sciences have non-negligible explanatory blind spots. Hence, the rapprochement of sociological and rational institutionalist traditions means combining ideational and socializing explanatory factors with rational interest-maximizing explanatory factors.

Coordination in the age of network governance

The success of any type of governance instrument is largely related to its ability to coordinate actors and to change their behaviour according to pre-established collective goals (Peters and van Nispen, 1998; Bemelmans-Videc et al. 2003). The problem of coordination is at the core of the most vibrant theoretical debates in organizational studies and in political science, basically because it touches upon the micro-theoretical foundations of social action, and the degree to which individual behaviour is based on opportunism and rational utility-maximization, and/or on normative and cognitive frameworks of (self-) understanding.

Coordination of the economy and society has traditionally been placed along an ideal continuum between hierarchy and market. Hierarchy is a coordination mechanism based on centrally organized decision-making and management structures, and associated with several important aspects of social organization. Firstly, hierarchy reflects only one focus of authority. In democratic systems, this authority is the direct expression of majority rule, exercised by the branch of the public administration of the state. Centralized authority is a fundamental feature of the exercise of power by hierarchical organizations. In this case, it corresponds to the structure of the public administration which is the executive branch of this majority rule typically expressed in law. In hierarchical coordination, authority is strongly related to the explicit mandate of the rules which are equally binding and compulsory to all, and which are subject to sanction and penalties to non-complying actors. A second feature of hierarchy is that there are no alternatives to the binding rules and selection is not possible. Last but not least, hierarchy accommodates actors' activities in a cooperative-coercive manner, and places them in one single structure, which is functionally and bureaucratically arranged.

As mentioned before, conventional governance instruments based on coercive and compulsory frameworks of action ensure coordination by using a set of steering mechanisms of traditional hierarchical forms of organization, based essentially on a very direct and clear threat of disciplinary action in case of non-compliance. The overall notion of hierarchical coordination is that in order to ensure that actors behave within the limits established by the majority rule, a set of procedures for monitoring and for imposing sanctions are effectively laid down. This has a preventive effect by disheartening actors to behave divergently from the norms set up, as having a controlling effect by consistently punishing their defection. Hence, the success of regulatory instruments is largely related to their accurate ability to inflict this hierarchical coordination, that is, to ensure that there is a real practice of monitoring, controlling and sanctioning, that these are used without hesitation and without discrimination, and that the practices are well known by all the actors that the hierarchy is supposed to coordinate.

The market, on the other hand, is just the opposite of this. There is no single authority in market operations, only a set of different actors coordinating their interactions on the basis of exchange-based transactions that are simplified by the attribution of specific monetary value to the objects of transaction. Selection is free, and the market is precisely formed by a wide set of alternatives that compete against each other for the choice of actors. Since these alternative goods have no pre-assigned organic function, they are truly substitutable. Rather than anarchy, market coordination takes place by ad-hoc and ever changing constellations of interactions among buyers and sellers of all sorts of

goods, in a kaleidoscopic manner. Although markets can show clear patterns and dynamics, they have some important elements of unpredictability depending on external factors such as technological development. Markets have a high degree of self-regulation, however, it is worth noting that complex advanced market economies need the state to ensure good co-operation among actors, not least assigning specific rights to private property and setting different rules about market-related transactions that otherwise would be too costly or too unpredictable.

Between these two extremes (and, still, strongly interrelated forms of organization) of hierarchy and market, it is possible to find networks which are heterarchical/horizontal forms of coordination. Networks are sets of spontaneous and semi-structured interactions among actors showing structural interdependencies and generating different types of goods (pure club to pure public goods). Networks are formed by constellations of different types of actors who exchange and pool their resources, and who can show stable patterns through time.

As Fritz Scharpf reminds us, the classical theory of public goods proposes that coordination among actors is desirable “whenever the welfare level obtained through the unilateral choices of independent actors is lower than the level which could be achieved through coordinated choices” (Scharpf, 1993, p. 127). Coordination can take place in a hierarchy or it can also take place in a negotiation setting in networks or in the market. Traditionally, public good scholars have tended to assume that hierarchies are the most efficient mechanism for achieving stable results of coordination, basically because they can effectively deal with issues of the allocation of costs and benefits, and with the issue of limiting opportunistic behaviour of individual actors. In other words, hierarchical structures are those which are *prima facie* most successful in reducing the possibilities of free riding, of egoist actors and of other forms of opportunism, while also dealing with the convoluted issues of the asymmetric distribution of costs and benefits of the solutions that are most welfare-maximizing to all.

Scharpf recognizes that these statements must be explored in real world contexts. This is so because in modern political systems, hierarchical structures “are suffering from serious problems of information overload” (Scharpf, 1993, p. 141), and find themselves in complex processes of interactions among public-private actors due to the increased degree of interdependency. “When that is true, the question is not whether forms of self-coordination will be able to out compete ideal models of hierarchical coordination, but whether they have any chance of reducing the chaotic disturbances that would otherwise result from the mutual interference of inconsistent choices under conditions of “turbulent” interdependence” (Scharpf, 1993, p. 141).

To find that out, Scharpf refers to observable phenomena, namely the fact that “hierarchical organization is still ubiquitous in the real world, and it continues to serve important functions in facilitating agreement and in controlling opportunism even when it is not used to achieve hierarchical coordination” (Scharpf, 1993, p. 146). “In most Western democracies, it is true, the unilateral exercise of state authority has largely been replaced by formal or informal negotiations, in policy formation as well as in policy implementation, between governmental actors and the affected individuals and organizations. At the same time, important areas of public concern are shaped by negotiations within pluralist or corporatist “policy communities” or “policy networks”. While the former pattern seems to correspond to the vertical “dialogue model” described

above, the latter has all the appearances of horizontal self-coordination. *But it is important to realize that, in both dimensions, these are also negotiations under the shadow of hierarchical authority*” (Scharpf, 1993, p. 146 – italics mine).

In spite of the pervasiveness of hierarchical organization, Scharpf does not rule out the possible existence of truly self-organized networks outside the reach of hierarchical shadows. However, he assigns them a very high threshold of sustainability, namely these self-organizing coordination being successful only when there is a high intensity of interdependence among the actors, and their relationships are strongly based on reputation and trust. In such circumstances, the threat of exclusion is the crucial mechanism for ensuring conformative behaviour.

This approach to coordination is essentially based on the issue of aggregation of interests. Yet, another perspective exists: sociological institutionalism, by which interdependency is generating a new form of problem identification among actors, willing to recognize their real loss of autonomy and to engage in complex forms of cognitive and ideational processes leading to the definition of possible solutions and the mechanisms to implement them. The normative and identity elements are therefore an essential component of the coordination that takes place within these networks of actors and within political systems at large, finding specific mixes of unity and diversity, unity and autonomy among the actors (Olsen, 2004). In other words, the constitutive dimension of these self-organizing networks, which is based on a minimum shared identity resulting from common problems emanating from interdependence, is the essential mechanism that holds the network together successfully. Failure to define and constantly re-articulate such an identity and ideational backbone of the network will invariably lead to a failure of the network and its own disappearance. From this perspective, actors are not just utility-maximizers whose asymmetric costs and benefits must be negotiated, they are actors sharing a minimum of mutual understanding by which they essentially recognize the need to solve together the pressing collective problems around which the network has been constituted. This “constitutive” and ideational view of network coordination foresees that successful voluntary coordination will be secured as long as there is a commonly perceived “threat of disorder” as a real “risk of entropy”. We will come back to this concept later on in this paper.

Rationalist and sociological institutionalists have different views upon the overall conditions under which voluntary and self-organizing coordination can be successful. At face value, both theoretical approaches seem to be unbridgeable, but a careful look opens up the possibility for new venues. On the one hand, although having a pre-eminent preference for rational utility-maximizing attitudes, Scharpf recognizes the importance of trust and reputation in self-organizing networks. On the other hand, while preferring the approach on constitutional dimension of political orders and institutions, sociological institutionalism recognize that actors might behave under the logic of consequentiality. With their preference for “the shadow of hierarchy” and the “threat of disorder” as the overall external condition under which self-organized networks are successful, the respective aggregative and constitutive approaches of rational and sociological institutionalism can be put side by side in a series of testable hypothesis. These hypothesis will provide clues for answering the central research question of this paper, namely under what conditions are the new decentralized and voluntary-based governance instruments able to convey successful coordination?

The generation, impact and solution of problems

Renate Mayntz underlines that coordination does not only depend on the instruments alone, but also on the overall context where they are used. In this regard, she points to the concomitant structures of the political processes within which instruments are embedded. “A more comprehensive approach might want to distinguish between three aspects: problem generation (who causes a given problem by what kind of behaviour), problem impact (who suffers what kind of negative effects), and problem solution (who engages in what kind of coping behaviour). The genetic, impact and coping structures correspond to stages in a process that are linked in a causal way” (Mayntz, 2001, p. 23). Consequently “For a comprehensive case analysis it is important to consider not only the coping structure, but all three structures and their interrelation”. (Mayntz, 2001, p. 23).

In my reading, the problem generation and the problem impact which Mayntz refers to is the subsequent political processes of agenda-setting and of problem identification which have as much a material dimension (economic/organizational costs and benefits) as an inter-subjective dimension (identifying common problems, articulating political communication processes by exchanging meanings and opinions, and shaping a minimum identity dimension of ownership of the problem and necessary solution). These two processes necessarily pre-date the configuration of a soft instrument and its specific use in a given common problem.

In the EU, the type of coordination problems that the soft governance instruments typically deal with are five. The first type of problems is that associated with negative economic externalities and the risk of free-riding in a context where there is no willingness to transfer further competences to the EU level (e.g. environmental policy, taxation). Those problems put pressure on the common purpose of the European Union, in particular by the risk of a regulatory competition and a race to the bottom. The second problem is a problem of market conditions and market-creation in areas where there is no willingness for the further transfer of competences from national to EU level (e.g. employment policy, mobility of researchers, mobility of capital, social policy). The third problem is a problem of precision: when conditions change too rapidly and/or require a very detailed form of intervention in a way that the regulator cannot encompass. Here the need is to make decisions that plug the right information and develop enforceable mechanisms in tune with the rapidly changing conditions of the market or society (e.g. environmental data measurements, consumer safety). The fourth type of problem concern those arising from new societal demands or opportunities, having a nature that cannot be solved by regulation or economic resources alone (e.g. fostering innovation, information society). And last but not least, there are those problems resulting from the high functional interdependency across policy areas, where one policy area has been fully transferred to the EU level and the other is not, but requires substantial coordination among member states and corresponding private actors in order to maintain united effects (e.g. EMU).

The impact of problems refers to the asymmetry of costs and benefits. It is already common place among scholars that there is a large degree of diversity in the EU, not just in term of political systems and political/administrative cultures, but also in terms of economic and social dynamics and structures. This means that any effort to establish coordinated action at EU level faces the obstacle of a pre-existing large degree of asymmetry among actors. This asymmetry reflects equally the uneven distribution of the costs and the benefits

of coordinated action as rational institutionalists point out, as the diversity of attitudes, beliefs and world-views as sociological institutionalists underline. This leads to the assumption that the new soft governance instruments will generate successful coordination in those cases when they are able to convey means to overcome these two forms of asymmetry, namely the cost-benefit and the ideational-normative.

The third structure put forward by Mayntz, namely the coping structure, corresponds to the capacity of the instruments to set up the means to solve the problems. We saw in the introduction that each of the instruments is based on a mix of processes, mechanisms and logics, which combined in specific ways set up the conditions for conveying successful coordination. In 2001, Adrienne Héritier proposed one of the most stimulating frameworks for the analysis of the new instruments of governance, namely the careful examination of their respective instrumental and politico-institutional capacity (Héritier, 2001a). The instrumental capacity is related to “the extent to which incentives for implementation can be set, and [to] the instrument’s likely contribution to solving the problem at hand” (Héritier, 2001a, 193). Hence, instrumental capacity has mainly to do with the possibilities to ensure successful coordination.

In turn, the politico-institutional capacity is the degree to which the actors participate in decision-making processes and support politically the introduction of the instrument. The turning point of this particular notion of capacity is the issue of the political legitimacy of the soft instruments, which is largely associated with participatory rather than conventional representative models of democracy given their non-regulatory nature.

These two notions of capacity need further and more fine-grained theoretical development, particularly taking into account the present ambition to define a set of testable hypothesis to operationalize future empirical analysis.

The steering-instrumental capacity of the instruments

The instrumental capacity is mainly associated with the unfolding and use of a specific set of steering mechanisms by each governance instrument. This can be also be conceptualized as “steering capacity”, which is implicit in the procedures and concrete tools defined by the instrument as such. Traditionally, the steering mechanisms have been popularly known as the “sticks and carrots” of public policy. The new governance instruments combine a series of “sticks” or explicit demands of procedural character, which have as their main objective to enforce a control function. Table 1 shows the different steering mechanisms that the five types of new governance instruments have put in place to fulfil this control function. Likewise, the “carrots” are those specific sets of steering mechanisms put in place to fulfil a function of motivation. Thinking in terms of the network of actors where this soft governance instrument is used, the motivational dimension is very important. Hence, the steering capacity of the soft instrument to structure, maintain, and reinforce the motivation among network members is fundamental for the success of coordination.

Last but not least, the function of restating and underlying the normative principles and measures in the use of the soft instrument corresponds to “sermons”. The capacity of the soft governance to develop and articulate specific “sermons” or network-wide valid norms, largely depends on the steering mechanisms put in place for accomplishing that function within the

network. This function is of foremost importance for the self-understanding and ownership of the cognitive and ideational basis behind the constituting of the network and the functioning of the soft governance instrument as such.

The table assigns three appraisal criteria for the strength of each specific steering mechanism, based on their values, namely high (++), medium (+) and low (-). This is to provide a general assessment of the overall instrumental capacity of each of the instruments under examination. In other words, to define the extent to which these soft instruments have some teeth in terms of self-steering the dynamics and processes within the networks of actors.

Table 1: Degree of steering-instrumental capacity defined by the steering mechanisms of the new governance instruments under examination

| | OMC | Agencies | Contractual networks | Harmonized technical standards | Codes of conduct |
|--|---|-----------------------------------|---|---------------------------------------|--------------------------------------|
| Sticks (control function) | Reporting and monitoring ++ | Reporting and monitoring ++ | Reporting and monitoring ++ | Minimum technical requirements ++ | None, or very weak monitoring - |
| Carrots (motivation function) | Knowledge and detailed information by best practices + | Wide access to information + | Access to others' organizational and economic resources ++ | Reduction of certification costs + | Transparency and reciprocity - |
| Sermons (normative function) | Peer review ++ | None - | Conferences and public meetings - | None + | Conferences and public meetings - |
| General evaluation of the degree of instrumental capacity | High instrumental capacity ++ | Medium instrumental capacity + | Medium/high instrumental capacity + / ++ | Medium instrumental capacity + | Low instrumental capacity - |

A general appraisal indicates that there is a wide variety of instrumental-steering capacities among these soft governance instruments, with the open method of coordination scoring highest and codes of conduct lowest.

The shadow of hierarchy – and the shadow of entropy

There is today a widespread understanding that the “shadow of hierarchy” plays an important role in the success of voluntary coordination, mainly because this form of external threat can be an effective mechanism to ensure that actors find modes to overcome the asymmetry of their costs and benefits (Knill and Lenschow, 2004). “The instrumental capacity of the new modes is often backed

up by “hierarchy”, that is, the threat is voiced that traditional legislation will ensue if implementation should be unsatisfactory” (Héritier, 2001 p. 202).

However, the specific conditions under which actors are likely to change and adapt their behaviour is a question that deserves careful empirical research. It is not at all obvious from an empirical point of view, nor from a theoretical one, that hierarchy, and in the absence of it its sole “shadow”, will be the only possible condition under which very different instruments, with diverse degrees and forms of private actors’ involvement in flexible and partly self-regulatory arrangements, are established and implemented successfully. This is to say that there is a need to widen the number of possible circumstances and conditions under which the new instruments might be effective, as the real world might be more complex than hitherto assumed. After that, it is a matter of confronting these theoretical deductions to solid empirical evidence about how these instruments work, when and why.

The universal extension of the shadow of hierarchy to all governance instruments has three interrelated problems. First, it fails to recognize other possible conditions for actors’ interaction. As stated earlier, it is necessary to take into account a wider variety of logics of social action, namely those based on ideational, cognitive and identity elements. Secondly, it fails to recognize the interplay between the actors’ context and the variety of steering mechanisms build in the instrument as such, more precisely the incentive structures provided by the carrots and the sermons. And finally, by theorizing very highly demanding requirements of self-organized coordination, it fails to recognize the broad empirical evidence in international relations about successful network coordination beyond state interaction.

If not universally valid, when is then the “shadow of hierarchy” an optimal structurally-designed incentive? One can assume a correlation between the steering capacity of the instrument and the shadow of hierarchy, in the sense that the weaker the steering capacity of the instrument, the more the shadow of hierarchy becomes a necessary condition for successful coordination. As explored earlier, the steering capacity does not just refer to the ability of soft governance instruments to provide some “sticks”. Capacity also refers to the ability of the instrument to design and to put into practice a set of mechanisms providing “carrots” and “sermons” to the actors in the network. This is an important point to remember, namely that the steering capacity of instruments is formed by a variety of specific tools, combining elements of coercion, motivation and discourse to let and encourage social actors modify their behaviour along the goals set up in an explicitly collective manner.

In contexts of wicked and long-lasting problems typically of our modern societies, the context and conditions for achieving substantial behavioural change aligning diverse actors, however, are in reality much more complex. The process of network formation associated with the unfolding of the soft governance instruments in the implementation of the policy/collective goals cannot only be based on the vigour of coercive tools, either endogenous to the instrument (the “sticks”) or exogenous to them (the “shadow of hierarchy”). Policy and politics involve at least as many elements of persuasion, communication and identity-formation, as coercion, if not more. This is the reason why “sticks” and “the shadow of hierarchy” are not sufficient explanatory elements for understanding how soft governance instruments operate in a context of network politics. There are other elements based on identity and cognitive aspects of political life that are at least as important than the other.

In his pessimistic view, Scharpf assumes that high levels of trust and high levels of interdependence are preconditions for the success of self-organizing networks. In contrast to that, it is assumed here that aspects of trust and ideational-identity are concomitant aspects of network formation and network operation, and therefore co-exist with coercive elements inside and outside the soft governance instruments.

“Carrots” and “sermons” are those steering mechanisms of soft governance instruments that correspond to these ideational-cognitive and identity aspects endogenous to the instrument. Their ability to generate a single vision and understanding among the network actors about their common risks, common problems and common solutions is a powerful if not necessary element for understanding successful voluntary coordination. This can be defined as the “shadow of entropy” which is based on a set of images, mental pictures that more or less coherently argue in favour of coordinated action. This is typically based on an understanding of “us”. It is somehow irrelevant how strongly or loosely coupled forms of identity pre-date this common vision. What is important is that the common vision as such is able to generate a collective understanding that eventually triggers behavioural change motivating actors to follow the clarion call to put an end to that threat. In other words, the “shadow of entropy” is the condition under which actors share an understanding about a common threat and a common future which guides their action towards coordination.

Legitimacy and network governance

The ability of systems of governance to produce stable and legitimate frameworks for social and political life accommodating diversity in a single order is a fundamental aspect for the system’s sustainability. In contemporary societies, this is largely related to the democratic rule of parliamentary orders. Experience in the western world shows that democratic regimes are particularly well suited to generating legitimate and stable systems of governance because these regimes are particularly successful in accommodating different and changing societal interests. The structural principles of liberal democracies are based on the existence of clear and formalized procedures for popular representation and political contestation, where the Parliament becomes the nodal point of the overall system. For the democratic rule to be widely accepted, it needs to be anchored in a minimum notion of pre-existing political community and in a minimum ideological shared belief that democracy is the best possible regime. These two elements form what has been identified as “input legitimacy” which constitutes a basic element of any (democratic) political system (Easton, 1965). Input legitimacy is to be analytically distinguished from output legitimacy, which depends on the system’s own ability to provide goods and solutions to the needs and problems of the community. If the system fails to produce such outputs, it will soon lose the popular legitimacy it enjoys. This view of the input and output legitimacy of political systems is largely related to an understanding of public action as essentially being governmental action: the liability of output legitimacy resides ultimately in the public authority managerial capacities and service provision. It is also largely based on the understanding that political processes taking place within the political system are essentially of aggregative character. Individual actors’ accommodate their differences through complex negotiations that entail an aggregation of different preferences. These processes are channelled inside the formal institutions of the system with the Parliament at the centre and the political parties as important elements articulating those alternative views and

shaping the political negotiations. Once decisions are made, the administrative institution is in charge to implement and translate these into real action creating public goods.

The creation of the new governance instruments partly challenges some of the previous assumptions in two important ways. Firstly, it challenges the notion that output legitimacy relies essentially on the ability of public authority alone to deliver public goods. As was indicated in the introductory chapter of this book, governance instruments are purposeful devices for collective action launched and implemented by a set of private actors, or private actors in conjunction with public actors. Consequently, the responsibility of the instruments' effectiveness, and ultimately on their ability to generate popular output legitimacy, do not rest solely on public actors but on a much more diffuse number of private-private or public-private consortia. The production of public and collective goods exceeds the limits of the political system, understood as the conventional ensemble of formal political institutions functioning mechanically within the limits predefined by the constitutional order, but refers to the governance system as a much wider systemic construct including the society and economy own self-governing dynamics and their complex interface with public actors. In governance systems, private actors are not just the mere recipients of public goods, they are their co-creators and consumers, in what is a very fluid and entangled relation between the state, society and economy.

The new governance instruments also challenge the assumption that democratic legitimacy (input legitimacy) is based on aggregative political processes among political actors that share a pre-given and historically built political community identity, and are articulated by forms of party-ideological competition. The self-regulatory stance, decentralized and largely voluntary nature of those governance instruments go beyond party and ideological politics, into broader forms of politics within the limits of specific sectorial and professional areas of action. These sectorially defined areas of politics are much more specialized than the general discussions of ideological dimensions, and hence are potentially more subject to political processes of an integrative rather than aggregative nature. Integrative political processes entail a process where the actors gradually change their preferences as a direct result of their continuous interaction.

Are the new kinds of political processes generated through these new instruments able to generate and renovate the weakening popular legitimacy of the EU system of governance? Do the new governance instruments entail a minimum of shared understanding of collective interests, and therefore constitute a sort of proto- input legitimacy in the absence of a decidedly pre-given political community? Or as Heritier put it (Heritier, 2001), what politico-institutional capacities do these instruments have (in relation to input legitimacy)? What is after all the relation between input and output legitimacy in the EU context? And last but not least, how do the new political processes taking place within these instruments represent post-parliamentary democratic ideals?

The democratic legitimacy of the new governance instruments

Some scholars have expressed their discontent with the soft governance instruments because these are perceived as bypassing the representative mechanisms of parliamentary democracy. This position was particularly echoed after the Commission white paper on governance which emphasized that democratic values should be guaranteed by increased transparency, openness

and accountability of public administration. Yet, as critics point out, transparency, openness and accountability are far from being the same as democracy. Looking at it from classical and liberal democratic standpoints, democracy is largely related to the construction of a “political capital” which is based on three essential elements, namely endowing individual with specific civic and political rights, empowering weak voices and giving them access to representation, and ensuring truly political competition among contesting political views or ideologies.

Broadly speaking, these classical liberal democratic notions have been behind the critical tones against some of the most visible forms of soft governance instruments, in particular the standardization of safety issues in the early 1990s, and most recently the Open Method of Coordination, yet for different reasons. The opposition to a widely decentralized and voluntary development of technical safety standards was argued in terms of the large autonomy granted to the bodies in charge of setting up those specific standards. The process where national standardization representatives and industry-consumer representatives negotiate and decide a specific standard was perceived as problematic because essential safety-related decisions were made outside the conventional political control of national executives and the European Parliament. The recent disapproval of the OMC has only in part been based on similar arguments. The OMC, it is said, has effectively disabled processes of political competition which generally take place in the European Parliament. Besides, the content of the OMC has typically had an eminently managerial approach to politics, and the instrument has been used to impose rapidly reforming political agendas.

These critical perspectives touch upon a central nerve of current normative theories of democracy. On the one hand, classical liberal democracy is essentially based on mechanisms of representation, contestation and individual rights. On the other, the newest theories of participatory and deliberative democracy emphasize the aspects of the closeness of decisions to citizens, of open procedures involving citizens, and on the existence of a public space able to generate recursive communicative action in the form of deliberation (Sørensen and Torfing, 2005). As such these theories do not necessarily exclude each other, since the relatively new participatory processes complement the classical parliamentary representative processes. In reality, the soft governance instruments represent a litmus test of this due to the practical absence (or extreme weakness) of parliamentary involvement. The main question then is: can participatory-deliberative normative theories of democracy stand alone in this situation where the deficiency of parliamentary involvement is so obvious?

Some authors have expressed dissatisfaction with the limits of both schools by pointing to the fact that both theoretical perspectives have blind spots to the new modes of governance (Eberlein and Kerwer, 2002). This is so because these theories have been designed on the basis of understanding the EU as a regulatory state. What is needed is to understand the soft governance instruments as modes of democratic experimentalism (Sabel).

The politico-institutional capacity of the soft instruments

The politico-institutional capacity of soft instruments was defined above as the degree to which the instrument as such has the specific mechanisms that allow the actors to participate in decision-making processes and support the introduction of the instrument politically.

This is defined by a series of framework-setting mechanisms that is the specific mechanisms at hand for the definition of the framework within which coordination can be negotiated and/or deliberated. The design of these mechanisms is crucial for the effectiveness of the instrument, since those mechanisms are an integral part of the instrument's ability to generate workable frameworks of the actors' interactions. This is to say that the degree of the instruments' institutional capacity depends on the way in which the mechanisms allow the involved partners to develop a common reference point for interaction.

Three important forms of framework-setting mechanisms for democratic processes are identifiable. The first one corresponds to the framework for political contestation, the second one is the framework set up for participation in decision making and implementation, and the third one is the flexibility of the content in the process of implementation.

Table 2: Degree of politico-institutional capacity defined by the framework-setting mechanisms of the new governance instruments under examination

| | OMC | Agencies | Contractual networks | Harmonized technical standards | Codes of conduct |
|---|---|--|---|--|---|
| Framework for political contestation | European Parliament consultation and different level committees ++ | Different level committees + | Different working groups and large discussion forums + | Different level committees ++ | Different level working groups and large discussion forums + |
| Participation in decision and implementation procedures | National action plans ++ | Digital networks and gathering data ++ | Project description ++ | Standardization bodies' procedures ++ | Open diffusion (no pre-determined procedures) - |
| Flexibility of implementation content | Implementation content can be renegotiated ++ | Implementation content can be partly renegotiated + | Implementation content can be partly renegotiated + | Implementation content can be partly renegotiated + | Implementation content is not renegotiable, but subject to very wide and differentiated interpretation +/- |
| General evaluation of the degree of institutional capacity | High institutional capacity ++ | Medium/high institutional capacity + / ++ | Medium institutional capacity + | Medium/high institutional capacity + / ++ | Medium/Low institutional capacity +/- |

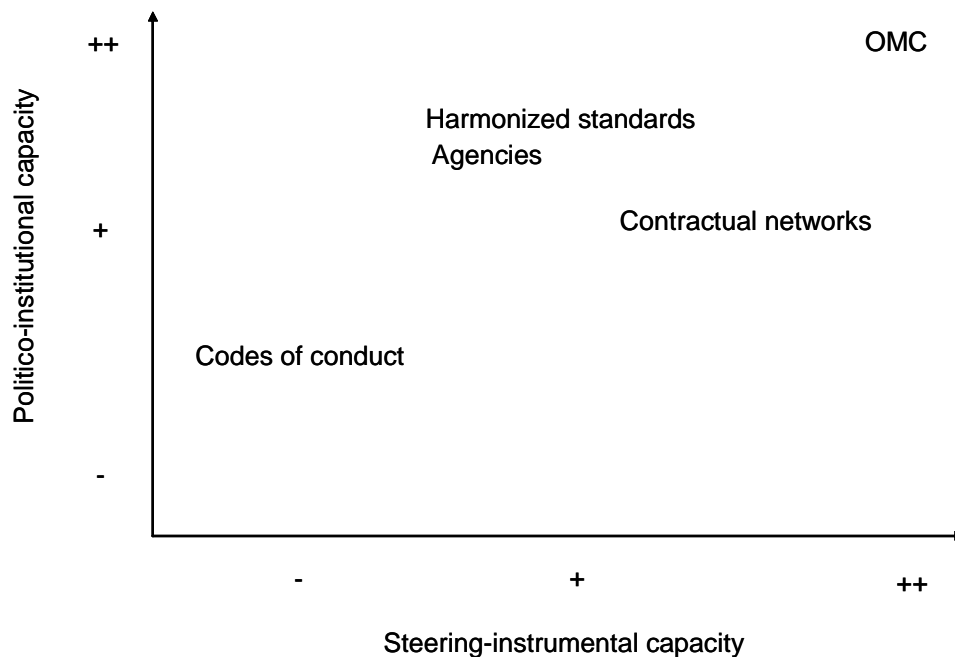
As can be seen in the table, the open method of coordination has high politico-institutional capacity. Agencies and harmonized technical standards have

medium to high capacity, whereas contractual networks and codes of conduct have respectively medium and low capacity.

Assumptions regarding coordination and legitimacy

Crossing now the expectations formulated in the tables related to the politico-institutional capacity and the steering-instrumental capacity, it is possible to locate the strengths and weaknesses of each of the five soft governance under study.

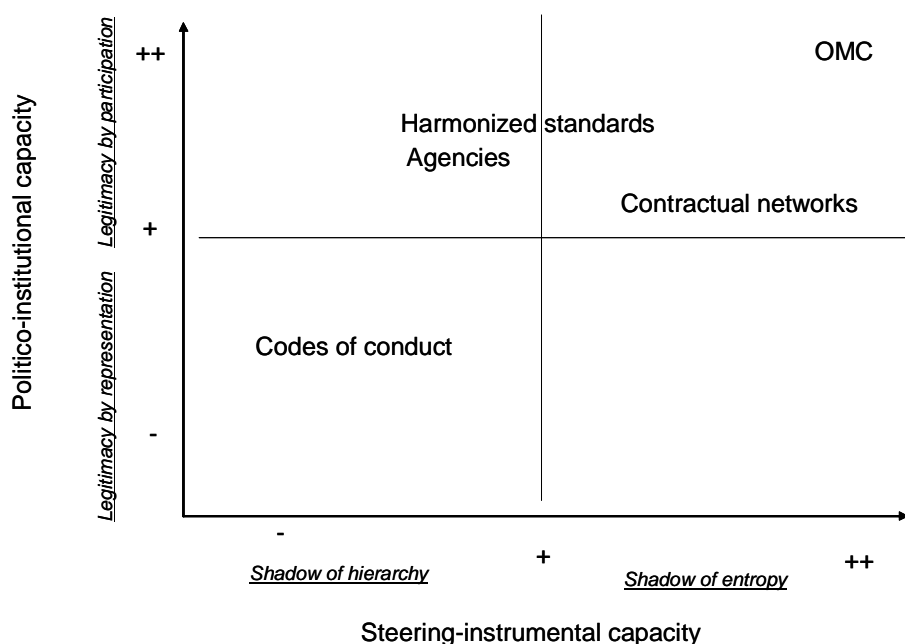
Figure 2: The strength and weaknesses of the five soft governance instruments in terms of their politico-institutional and steering-instrumental capacities.



The figure clearly indicates that there are important differences of strength in the capacities of the different soft governance instruments under study. This is hardly surprising. Yet, the most interesting observation in this respect is that the differences in capacities come from very diverse and unique combinations of logics and procedures. In other words, no soft governance instrument is similar.

Reverting now to the theoretical starting point of approaching rational and sociological institutionalist perspectives, it is worth noting that these particular mixes of capacities must also have specific and differential impacts on the conditions for successful coordination and legitimacy for each of the instruments. These conditions refer to the “shadow of hierarchy” or the “shadow of entropy” in the case of coordination, and to the “representative processes” or “participatory processes” in the case of legitimacy. It is on this basis that specific assumptions can be formulated about the conditions under which each of the soft governance instruments is able to achieve successful coordination and to achieve democratic legitimacy.

Figure 3: Assumed conditions under which the soft governance instruments must create successful coordination and democratic legitimacy.



The overall idea is that there is a direct correlation between the features of the governance instrument (high-low capacities) on the one hand, and the external conditions under which they will be successful on the other.

Some final reflections about the EU’s system of governance

As Johan Olsen reminds us, the process of constructing a new political order in Europe deals essentially with the accommodation of unity and diversity, “Unity and diversity, then, is balanced through a changing mix of institutions and processes, and the scholarly challenge is to understand the scope conditions and the interaction of the different forms, as well as the factors that drive systems of government toward one mix, rather than another”. (Olsen, 2004, p 32). The soft governance instruments are post-regulatory instruments used to achieve precisely this balance: preserve diversity and the autonomy of member states and other actors in a context of further unity of purpose. Their contribution to building up such a post-national political order and their post-regulatory nature have been the arguments behind the notion that these instruments are the cornerstones of a pragmatic new form of constitutionalism in Europe (Ekengren and Jacobsson, 2000; Sabel and Zeitlin, 2003), which contrasts with traditional European constitutionalism, and hence should had been taken into the work of the Constitutional Treaty (De Búrca, 2003; Tsakatika, Myrto (2004).

But are the soft governance instruments a starting point or an end? It is a common place in international relations theory and in particular in regime theory to assume that the constitution of new political orders beyond national borders traditionally start by “soft” procedures and then move to “harder” and binding orders. “The challenge for the component unit is also moderate when cooperation involves a limited substantive agenda and takes the form of

common conferences, declarations, voluntary exchange, non-obligatory standards and legally non-binding rules. The challenge increases when the agenda is expanded and the new unit is based on joint policy making, majority decision, legally binding rules, significant budgets and staffs, a common identity and competence to expand the system's authority and resources" (Olsen, 2004:10).

But is this ideal process, from soft to hard, the case of the EU integration process? On the one hand, the overall historical success of the Community method tends to indicate the contrary, namely that the construction of the European Union started with "hard" binding rules of de-regulation and re-regulation character, and is now moving towards softer ones. In this case, the new soft governance instruments would represent an end of the integration process as we know it today. On the other hand, however, a careful look shows how in specific policy areas close to the core issues concerning the welfare-state (e.g. social policy, employment policy, taxation and the like) the opposite might be the case. Namely that the current thrust towards the use of soft governance instruments might be a first step towards a more substantive EU regulatory and binding sets of measures. In this case, the new instruments would be a fresh starting point for the European integration process in a classical regulatory manner.

Probably none of these views is true, and yet none of them completely wrong. It is still unclear what the new soft instruments will lead to in terms of their relation with conventional regulatory instruments. Nevertheless, it is easy to foresee complex forms of interaction between them, where the "sticks" elements of the soft instruments might become more solidly anchored, or perhaps less stringently applied, and where there is a more fluid boundary between regulatory and post-regulatory instruments.

In any case, the soft governance instruments are enhancing what can be described as the rise of the transnational dimension of European integration. That is, a situation where these instruments convey further dynamism to the forms and contents of cross-border interactions in the EU at all levels. This is in contrast with the traditional vertical dimension implicit in the supra-national and inter-national dynamics of formal transfer of legal competences and the hierarchical nature of their administration and judicial enforcement.

This enhanced transnationalization makes severe challenges to the conventional theories of European integration, which have traditionally only focused on the vertical dimension of competence transfer. But it also puts pressure on the nature of the integration process, which will become (perhaps) less formalized and more difficult to grasp. The popular dismissal of the Constitutional Treaty and the de facto functional expansion of the EU to new areas of transnational network coordination seem to point towards that direction.

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arbejde

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