



<b>Theorising the New Modes of European Union Governance</b>
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<b>Abstract</b>
Recently, 'new modes of governance' based on voluntary performance standards, rather than compulsory regulation, have gained salience in European Union governance. Can these 'new modes of governance' offer a credible solution to the challenges faced by EU policy making? We argue that a critical appraisal is difficult when it is based a) on the scarce empirical evidence, or b) the programmatic pronouncements of policy makers. We suggest instead c) assessing the potential of new governance in the light of theoretical approaches to the EU polity. While current theories of European governance shed some light on the challenges to be addressed by new governance, we argue that the theory of democratic experimentalism makes it possible to better identify the potential and the problems of new EU governance. This theoretical perspective suggests, first, that coordination 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.
<b>Kurzfassung</b>
Seit einiger Zeit gewinnen in der Europäischen Union neue Formen politischer Regelung ("Governance") an Bedeutung, die nicht mehr auf verbindlicher Regulierung sondern auf freiwilligen Leistungsstandards beruhen. Dieser Aufsatz geht der Frage nach, ob diese neuen Formen politischen Entscheidens sich im Rahmen der EU bewähren können. Gegenwärtig ist eine kritische Bewertung schwierig, wenn diese sich hauptsächlich entweder auf a) die bisher bescheidene empirische Datenbasis, oder b) die programmatischen Verkündungen der politischen Akteure stützt. Als Alternative schlagen wir vor, c) die neuen Formen des Regierens im Lichte der Theorien über europäisches Regieren zu betrachten. Die bisher gängigen Ansätze tragen zwar schon etwas zu einem verbesserten Verständnis bei, aber erst die Theorie des demokratischen Experimentalismus erlaubt es, die Probleme und Lösungspotentiale der neuen Regelungsformen umfassend zu analysieren. Dieser theoretische Ansatz zeigt, dass eine Koordination durch freiwillige Leistungsstandards, erstens, effektivere Regeln und mehr politische Partizipation ermöglicht, zweitens, die Domäne dieser Form der Regulierung nicht auf solche Policies beschränkt sein muss, die als "neue Regelungsform" etikettiert werden, und drittens, dass eines der Hauptprobleme die Koexistenz zwischen den neuen freiwilligen und die den alten formal rechtlichen Regelungsmodi ist.
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## 1 Introduction <sup>↑</sup>

Over the past decade, a new research perspective on the European Union 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/ Marks 2001, Kohler-Koch/ Eising 1999; Grande/ Jachtenfuchs 2000; for a summary see Hix 1998). In accord with this perspective, the main issue is not what drives the integration process but rather how the European Union 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 legitimacy: Does it effectively solve the problems modern political systems are supposed to solve? How democratic are its decision-making procedures? How democratic can they be? (Scharpf 1999, Schmitter 2000). And the EU's capacity to govern 'effectively and democratically' has been constantly called into question.

Against this background, so-called 'new modes of governance', which depart from the traditional 'Community Method' of regulation through legislation (directives and regulations), have gained in salience, both in the debate on reforms of EU governance, and in the real world of a few, selected policy areas. The recently released 'White Paper on European Governance', tabled by the Commission in 2001, is a prominent current focus of this debate and movement.

In this paper, we ask the following question: Can these 'new modes of governance' offer a credible solution to the challenges faced by EU governance? We will start our exploration with one specific but representative component of new governance: the 'Open Method of Coordination' (OMC) contrasts most clearly with old-style governance (regulatory, top-down, uniform), and it best captures the promise and potential of new governance (procedural, heterarchical, flexible).

Our argument runs as follows: At this early stage, empirical studies of the few pioneering examples of new governance will not permit a reliable evaluation of their possible scope and success. Nor do the programmatic pronouncements on the importance of new governance strategies, like those expressed in the White Paper on European Governance, tell us much about their usefulness. In this situation, an attractive alternative is to assess the potential of new modes of governance in the light of the theories of EU governance. In the following we want to adopt this latter strategy in an attempt to make sense of the new modes of governance. At first sight, theories of EU governance have little to contribute because they focus primarily on the regulatory state, i.e. on the EU as a governance system producing formal, binding rules. Where they do talk about informal rules, they are likely to be dismissed for being concerned with technical issues or for being ineffective. A more thorough examination of EU governance theories reveals that they also provide hints for

a more favourable evaluation. Yet, ultimately we find it necessary to go beyond this theoretical status quo. We argue that by conceptualising the EU's new forms of governance as a form of 'democratic experimentalism', i.e. as decentralised and coordinated participatory rule-making, we can better understand how they work and what their real potentials and risks are.

## 2 Governance Old and New: What is the 'New' Avenue and How to Explore It? <sup>↑</sup>

The view of EU governance and of the need to reform it has markedly 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/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 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 2000).

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However, the European Union's better-than-expected success as a decision-making machine has not removed the concern with governance performance. Without contesting relative (and variable) 'success', most observers still consider the EU political system plagued by serious performance problems. These concern effectiveness (of decision-making) and, even more often, democratic legitimacy. New challenges to EU governance compound these problems: Partly as a victim of its own success, the EU is now confronted with an ever-expanding agenda, of which Eastern enlargement constitutes only the tip of the iceberg. Most dramatic of all, 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, notably to the Commission. The mismatch between the challenge and the capacity, between the expectations and legitimacy, threaten to turn into a vicious circle in which low effectiveness and low legitimacy fuel one another.

Can new governance provide escape routes? First of all: 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 Coordination'. 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', and the Portuguese Presidency called for its general implementation.<sup>(1)</sup> 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: 33). OMC seeks to initiate an iterative process of mutual learning on the basis of diverse national experiences with reform experiments. While there are fixed guidelines and timetables for achieving goals at the EU level policies and specific targets are spelled out on the national level. National performance is constantly monitored and evaluated through peer review and benchmarking – mechanisms which act as 'soft law' catalysts for greater convergence towards European 'best practice'. This clearly contrasts with traditional, top-down and command and control type regulation backed by 'hard-law' sanctions (for presentations of OMC see Mosher 2000; Hodson/ Maher 2001; Bisopolous 2001).

The Open Method has 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/ Mosher 2001: 21). 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 sounds like a very attractive escape route from the dilemma of European governance – but is it relevant and effective?

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. Participants might only be 'willing' to learn from others and adopt 'best practice' if there is a credible 'shadow of hierarchy'. Thus, it might simply serve to support the pursuit of symbolic politics, instead of supporting real action. 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, and thus it may not enhance the legitimacy of EU

governance.

Finally, there are concerns related to the novel character of the Open Method. In the past, a similar type of informal coordination 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/ Maher 2001: 16).

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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 governance on the basis of the strategic and programmatic role they play in the repertoire of EU institutions, most notably of the Commission. The second tries to empirically measure the significance of new modes of governance – either their relative weight compared to old-style regulation or their success in terms of performance indicators.

The first strand is exemplified by the current discussion about the White Paper on European Governance. Many analysts expected this paper to give a considerable boost to new modes of governance. Early last year the incoming Prodi Commission launched a large debate on the reform of European Governance. The idea was to explore and investigate new concepts and methods for European governance, in a large consultation process involving governments experts, academics and civil society. ‘Governance Teams’ within the Commission developed the White Paper on European Governance that was finally published on 27 July 2001.

Academic observers who had hoped to find a radical reorientation of the aims and strategies of European governance in the White Paper were rather disappointed.<sup>(2)</sup> Sure, on the basis of five principles of good governance (openness, participation, accountability, effectiveness and coherence) the Commission advanced proposals for change so as to achieve, most notably, ‘better involvement’, and ‘better policies, regulation, and delivery’. And in this context, new modes of governance, ranging from co- and self-regulation to the Open Method of coordination and independent regulatory agencies, received considerable attention. However, “the White Paper concludes by proposing an enhanced (more supranational) ‘Community Method’, with an augmented executive role for the Commission itself, the cornerstone of its model for the future of the EU. The result seems somewhat unbalanced, with new modes of governance – which the exercise apparently aimed at exploring – defined so to limit their encroachment on the Community Method and relegated to a secondary role” (Wincott 2001: 2).

True, the White Paper reflects the “institutional self-interest of the Commission” (Scharpf 2001: 2; also Héritier 2001b) and the “lack of a new vision” (Metcalf 2001: 3). However, on the basis of this, one should not rush to dismiss new modes of governance as nothing but a convenient smokescreen for the Commission to pursue revitalised but old-style regulation. For one thing, “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: 3) – even if the progressive elements apparently did not muster up sufficient politico-bureaucratic support to dominate the thrust of the White Paper, which, after all, is a highly political document.

Most importantly, documents such as the White Paper cannot be viewed as an authoritative and exhaustive guide 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 a reliable guide to a complex ‘policy reality’.

The *second strand of inquiry* seeks, by contrast, to empirically assess the significance of new modes of governance in the reality of EU policy-making. From a purely quantitative viewpoint, the bulk of EU governance clearly governs traditionally, i.e. through legislation. Alternative approaches to governance are confined to a small group of measures concentrated in a very small number of policy fields. Next to environmental policy, most examples for new modes of governance can be found in the field of social policy and industrial relations (Héritier 2001a). While the case of economic coordination in the context of European Monetary Union begins to generate some evidence (Hodson/ Maher 2001), and while some elements of the Open Method have been identified in both regional and industrial policy-making (Tömmel 2000), the only fully-fledged example of the Open Method in implementation is the European Employment Strategy (Goetschy 1999). A first group of studies in this field point to the considerable potential of such alternative governance approaches to actually foster mutual learning processes (Trubek/Mosher 2001; Klemmer et al 2000, Roth/Schmid 2000). These learning processes are of paramount importance if the Open Method is to be an effective method of governance.

True, it is not only in employment policy that the Open Method "has now become a virtual template for EU policymaking in other complex, politically-sensitive areas, including not only social inclusion and pension reform, but also education, taxation, immigration, and innovation" (Zeitlin/Trubek 2001: 3). However, the big problem with the empirical assessment approach is that it is too early for conclusions on both the scope and the effectiveness of the Open Method in EU governance. Also, a snapshot of the current, newly emerging situation cannot address the question of whether approaches such as the Open Method are likely to remain transitional episodes in a largely unaltered stream of traditional governance.

Against this background, 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 rod, we suggest assessing the potential of new governance in the light of available theoretical approaches to the EU polity. In a first step, we will present the most up-to-date theory of EU governance, making a distinction between approaches that build on preference aggregation and those that centre on preference transformation. After discussing the merits and defects of the main approaches, we will then present an alternative theoretical account of governance in the EU multi-arena polity.

### 3 Theorising EU Governance <sup>↑</sup>

One of the major tasks of political science in recent years has been to understand how the European Union addresses the challenges of transnational governance. In the following, we want to mine the most promising theories in order to find out, what they have to say about the possibilities and limits of governance in the EU. The lead question will be whether the new modes of governance offer promising solutions to the challenges faced by EU governance. Attempts to theorise EU governance can be categorised into two different basic approaches according to whether they conceive of political decision-making mainly as preference aggregating or preference transforming.<sup>(3)</sup> In the following, we want to show that both offer some suggestions for why the new modes of governance could have a high problem-solving capacity. 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 decentralisation of decision-making. Theories that stress preference transformation also stress the EU's capacity to shape interests in such a way that they become more compatible. Both of these prerequisites are present in the new modes of governance and thus suggest that new modes of governance are promising.

#### 3.1 Making decisions by aggregating interests <sup>↑</sup>

Arguably, the most influential approach to theorising EU governance follows the image of a multi-level system, in which decision-making is based on aggregating interests. In the following we want to show that in accord with this perspective one of the main prerequisites for successful governance in Europe is a clever division of labour between decision-making in the various national and in the supranational arenas. Given that the new modes of governance involve different decision-making arenas, this approach suggests a benign view on the new modes of governance.

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#### Regulatory Competition

The most elaborate theory of EU governance is the version of regulatory competition theory presented by Scharpf (1999). The aim of this theory is to explain within a unified framework the surprising successes as well as the expected failures of political decision-making in the EU. 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 liberalisation forces member states into a downward spiral regarding regulatory standards, and such a 'race to the bottom' cannot be stopped by joint action among the member states, European problem-solving capacity is likely to be lower than that of any single member state (see Scharpf 1999; for a summary of the argument see Zürn 1998: 183). The 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 to come 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). For this reason, European integration is likely to erode the costly social policies of the rich European welfare states without replacements at the European level (Streeck 1995).

This analysis suggests a normative conclusion, i.e. 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). EU governance should not be burdened with issues that it is unlikely to solve. These should be tackled by the nation-state. Furthermore, both levels should conduct their problem solving so as not to undermine the activity of the other. Thus, the major concern is the degree to which decision-making should be decentralised.

### Loosely Coupled Arenas

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 integrating of the institutional structuring of decision-making.<sup>(4)</sup> The EU is understood as a multi-level governance system, in which various decision-making arenas are differentiated along both functional and territorial lines, and in which these arenas are interlinked in a non-hierarchical way (Grande 2000). This may include arenas at all levels of government, from the local to the national level in all the member states plus the supranational level. It may also include all the possible ways in which private actors might come into play to bring about a wide "dispersion of authoritative decision-making across multiple territorial levels" (Hooghe/ Marks 2001: xi). The complexity of the EU multi-level system is as much a challenge for analysis as for decision-making itself. Analysis from federal states shows that if decision-making is interdependent but no hierarchical coordination is possible, decisions need to overcome numerous veto points. Decision-making in such a political system is mostly based on the horizontal negotiation between these arenas. Therefore, there is a high probability of a decision-making deadlock. Overcoming this deadlock by negotiation has its own disadvantages: it is time consuming and may externalise costs to excluded third parties.

This problem is especially acute for the European Union, where the number and heterogeneity of decision-making arenas involved is high. Against this background, it seems reasonable to hypothesise that this type of system needs mechanisms and actors capable of engineering compromises among, or rather at the interface of, different arenas. Formal power, good public relations and even policy relevant knowledge seem less important in this respect; what is important is the capacity to form coalitions and successfully communicate at and across the boundaries of arenas, and thus the capacity to shift power from the centre to the peripheries (boundaries) of the system (Grande 2000: 20). However, the crucial question remains open: Are these functional needs actually matched by empirically observable (and theoretically plausible) patterns of interdependence management?

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The fact that the problem-solving capacity is, at least in some instances, rather high seems to suggest that decision-making deadlocks can indeed be circumvented. But how? 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 or when actors form one decision-making arena only act as principals of external agents. 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: 10-19). The first is a form of horizontal de-coupling according to the phases in a policy cycle. When agenda-setting and decision-making is de-coupled, then there is a better chance that decision-making will not be blocked by resistance to implementation.<sup>(5)</sup> Vertical loose coupling according to different instruments of governance is a second possibility. Here, negotiations between levels are restricted to definitions of broad standards that are then subsequently implemented at decentralised levels. This leads to vertically loose coupling because different coordination mechanisms are used at different levels.

These two types of loose coupling are the mechanisms proposed by this approach to explain that the EU multi-level system does not only exhibit negative interaction effects in which decision-making at different levels leads to mutual restriction, but that it also produces systematic (but not necessarily deliberate) 'positive interaction effects' (Grande), facilitating decision-making at each level. For example, de-coupling distributive decision-making from implementation in the EU regional policy (Benz/Eberlein 1999) allowed for more innovative policy proposals to emerge. Vertical loose coupling encourages more creativity in the search for best practices; it also encourages more innovation in the formulation of the general standards that should guide that process (Benz 2000: 118-119). Within such loosely coupled decision-making arenas, the role of veto players is, by definition, much more limited than in tightly coupled systems. Whereas they were previously key actors in the coordination across arenas, their role is now reduced to internal decision-making.

### 3.2 Making decisions by transforming interests

The strength of the aggregation approach is that it points out the tough challenges for European decision-making.

However, the aggregation approach is still better at identifying the problems than at explaining how they are solved. The assumption of exogenous preferences and the exclusive reliance on aggregate decision-making is the major shortcoming of the approach. It results in underestimating the possibility of transnational governance beyond ex ante preferences. Even experience in the international realm shows that whenever cooperation is institutionalised, problems can be redefined, the identities and the interests of actors can be transformed and if compliance problems are solved, commitments can become meaningful (Zürn 1998: 187-88). It is therefore necessary to take a closer look at this approach for further hints regarding the new modes of governance in the EU.

### Deliberative Supranationalism

The second approach to EU governance that shall be examined here does not share the view that decision-making is fundamentally concerned with the problem of aggregating interests external to the political process. Rather, it argues that the EU has a strong decision-making capacity because of its ability to systematically influence the preferences of member states. Deliberative supranationalism, i.e. continual discussion and the exchange of arguments about policies, transforms member states' preferences, making them more community-compatible and thus mitigating collective action problems (Joerges/Neyer 1997, Joerges/Vos 1999, Eriksen/Fossum 2000). This approach implies a different conception of the problem of EU decision-making and the way problems are solved.

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The increasing interdependence in the EU, based on deregulation, is the starting point for the transformation approach. However, the question is not whether a cooperative turnaround can be engineered whenever regulatory competition threatens to erode market-correcting social regulation by a race to the bottom. In accord with this approach, cooperation is endemic, especially regarding market-correcting social regulation. The reason for this is the high degree of interdependence between the members of the Single Market. Due to this interdependence, national conflicts and compromises over social regulation create significant transnational externalities for the other members.

For example, when British 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'. These types of significant *political externalities* forces member states into perpetual coordination efforts (Joerges/ Neyer 1997: 278-79).

Transnational political externalities suggest a different problem focus for decision-making than the one proposed by interest-based approaches. The problem is how to cope with a level of conflict in social regulation that, as a rule, is higher than within national boundaries. Within the EU, conflict regarding social regulation is exacerbated in two ways. First, the absence of a common national political culture or a common public sphere makes it difficult to reconcile the different interests in social regulation. Second, given the implications that compromises have for trade, another challenge is to distinguish real concerns about social regulations from the feigned use of such concerns to create informal barriers to trade (Vogel 1995). Was Germany concerned about BSE's threat to public health or was it concerned about its share in the beef market? We may conclude that the decision-making problem is not meant to start cooperation between member states in order to save social regulation, but that it is meant to resolve the high level of conflict between countries that are already conditional co-operators.

As a reaction to this problem, the European Union has developed a decision-making style that the most influential protagonists have called 'deliberative supranationalism' (Joerges/ Neyer 1997, Joerges 1999, Joerges/ Everson 2000). The basic idea is that frequent interaction and arguments about policy choices over time shapes the preferences of the member states and thus makes them more compatible with European decision-making. The institutional locus of these deliberations is the thick web of EU Committees in which public and private actors coordinate policy formulation and implementation, the 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.

Thus, the problem-solving capacity of the EU depends on the fact that there is a perpetual exchange of views among national bureaucrats and experts. The 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: 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').

### 3.3 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. To summarize the results, the aggregation approach emphasises the horizontal and vertical differentiation of decision-making. Only the proper choice of decision-making arenas will prevent decision-making break downs. Thus the challenge is how to differentiate decision-making into different decentralised arenas and subsequently, how to coordinate them. In contrast, the transformation approach sees the EU's problem-solving capacity and the ability to improve EU governance as being directly linked to expert deliberation in committees. Deliberation will lead to more community-compatible interests among the member states and thus contribute to mutually beneficial solutions.

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What does the survey tell us about the potential of new modes of governance? The theoretical status quo suggests a favourable view of the new modes of governance. Why? 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 two, the OMC consists of a set of autonomous national decision-making arenas that are coordinated by jointly produced best practice models. Thus, the Open Method of coordination seems to be a good candidate for an intelligent decision-making structure that combines decentralisation with reintegration, as called for by the aggregation approach (Scharpf 2001). Furthermore, it seems that the 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 expert deliberation of central committees. But deliberation within autonomous decision-making units catalysed by best practice models seems to be good functional equivalent for effective joint problem solving. In short: new modes of governance seems to hold considerable promise of good governance in Europe.

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'.

First of all, theories of EU governance by no means constitute a consistent body of consolidated knowledge. As has been pointed out, there are limits to the preference aggregation approach. However, the preference transformation approach has weaknesses of its own, too. 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: 167-68). 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/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 ratcheting up of the EU food safety standards in the BSE case was not primarily driven by Comitology deliberation. Rather, a combination of factors in the periphery of EU institutions triggered a crisis well beyond the control of deliberating experts: the scientific hypothesis that BSE could spread to humans; the ensuing consumer boycott; the German unilateral ban of British beef, rocking the fundamentals on which the Common market was built; and last but not least, the media coverage (Chambers 1999).

A second 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 focus on the dynamics of decision-making, but they do not talk about the results or outputs of formal decision-making. The implicit assumption seems to be that the output of the decision-making is regulation in its familiar EU forms. The Open Method of coordination, as a prime example of a new mode of governance in the EU, tries to advance beyond conventional regulation. It is primarily based on voluntary performance standards, rather than compulsory regulation. Law does play a role, but not as a 'policy instrument', i.e. not as means to a predefined end, but rather as a procedural framework.

This brings us to the third and most fundamentally limit: current EU theorising lacks an in-depth understanding of the procedural mechanisms of new modes of governance such as OMC. As mentioned above, the aggregation approach hypothesises that successful EU governance is characterised 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 only allows a superficial assessment of the OMC. It does not tell us how it really 'ticks'. Nevertheless, the theoretical status quo encourages us to move beyond and look for plausible mechanisms that make new governance work.

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## 4 Theorising the new modes of European Union governance <sup>↑</sup>

A promising perspective for an innovative conceptualisation of new modes of EU governance, such as the OMC, is offered by the theory of ‘democratic experimentalism’ (Cohen and Sabel 1997; Dorf and Sabel 1998). This theory, being a normative theory of democracy, has not received a great deal of attention by scholars of EU governance. Application to the EU has focused on whether the theory can provide a model of democracy beyond the boundaries of the nation-state that could serve as an ideal for the European Union (Gerstenberg 1997; Gerstenberg and Sabel 2000, Schmalz-Bruns 1999). In the following, we want to show how this theory makes it possible to make sense of the new forms of decision-making in the European Union.<sup>(6)</sup> As in the previous section, we first present a survey of the theory and then we draw the lessons for the new modes of governance.

### 4.1 Democratic experimentalism <sup>↑</sup>

Democratic experimentalism<sup>(7)</sup> theorises 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. It differs from other theories of deliberative democracy in the way it conceptualises this institutional framework.

The emphasis is neither on the micro level, with the question being whether the organisational setting fosters genuine argument among participants (Eriksen and Fossum 2000), nor on the macro level, with the question being whether and under what conditions deliberation in the public sphere can successfully besiege public decision-making (Habermas 1998 [1992], chapter eight). The theory starts with the meso-level observation that, in complex rapid evolving fields, political decision-making is based on policy networks. As such, this is hardly a new insight about modern governance. However, contrary to much of the policy network literature, which just observes a highly complex network of public and private actors, 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: 316-323). 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, community policing or education. It can also be a committee of citizens, experts and industry representatives concerned with protecting their local or regional environment (Sabel, Fung and Karkkainen 2000). Local forums of this kind persist over some time and have real decision-making power as forms of direct democracy. Thus, they differ from other forms of citizen participation, such as public hearings or environmental mediation procedures, which are often limited to informing citizens and ensuring consensus without really devolving decision-making powers.

Crucial to democratic experimentalism is the coordination of local deliberating units by a ‘governance council’ (Dorf and Sabel 1998: 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: 345-348). 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, but they also show ways to improve performance. The functioning of democratic experimentalism can probably best be illustrated in reference to local public goods, because at this level, direct deliberation can be best realised (Fung 2001). However, the governance council need not necessarily be a small town governance body that meets in a town hall; it can also be a regulatory agency at the national level (Dorf and Sabel 1998, 349-54).

Democratic experimentalism is based on a different type of rule than traditional regulation. Conventional regulation is based on *regulatory standards* that define maximum levels of pollution or minimum levels of protection. These regulatory levels are usually the result of a long and laborious consulting and negotiation process with those who are regulated, and the levels are thus rarely changed. By contrast, experimental regulation consists of *performance standards*, i.e. rules that identify the production processes best suited to achieve a regulatory goal. These can then be used as either the minimum or the maximum requirement to be met by everyone. According to the principle of benchmarking, these rules are continually updated according to the evolving practices of the firms. Such ‘rolling best-practice rules’ (Dorf and Sabel, 1998: 350) create a strong incentive for continual improvement. Regulated firms that manage to have their production processes established as best practice have a competitive advantage. For the same reason, technological innovation is triggered. Such a regulatory approach can also be used to stimulate the creation of products or processes that currently do not exist, or to address ill-defined hazards by continually redefining the problem

that is addressed by the evolving regulation.

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 guarantee the principle of experimentation and, most importantly, they can play an important role in overcoming decision-making deadlocks that block effective experimentation (Dorf and Sabel, 1998: 388-404). The reason that the familiar institutions of representative democracy are not likely to clash with the institutions of democratic experimentalism is that the support is mutual. For example, Parliament can avoid ideological battles and pork barrel politics by encouraging experimentation in areas in which no apparent solutions exist.

## 4.2 Democratic experimentalism and the OMC

The theoretical discussion of democratic experimentalism is the key to understanding the significance of the new modes of governance in the EU. The Open Method of coordination (OMC), as the prime example of governance beyond regulation, can easily be identified as a form of democratic experimentalism. The OMC is a way of networking decentralised decision-making units by a common system of benchmarking. The decision-making autonomy of the local units is not compromised by the performance standards. One of the reasons it is promoted is to enhance the legitimacy of EU decision-making, allowing more decentralised participation of the stakeholders.

If it is true that the OMC can be understood as a form of democratic experimentalism, then it has significant potential to address some of the most serious challenges to EU governance identified so far. 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 as a weak substitute for democracy, this mode of governance enables stakeholders to directly participate in decision-making processes. Second, democratic experimentalism offers a solution to the question of how a multitude of decision-making arenas can be coordinated without exerting hierarchical control that would lead to stalemate. The development of performance standards makes it possible to reintegrate decentralised decision-making without harming decision-making autonomy.

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The theory of democratic experimentalism suggests that the OMC, by virtue of coordinating deliberation through performance standards, mimics the division of labour in modern manufacturing companies (Piore and Sabel 1984). These modes of production are now widespread and have replaced large corporate hierarchies. The specific advantages of network structures are the main reason for the spread of these production techniques. The possibilities for local organisational learning are rather limited: Individual organisations rarely overcome incremental, path-dependent learning. They easily fall into ‘competency traps’, i.e. they can only improve upon what they already know, and they rarely manage to make fundamental innovations without jeopardising their existence (Levitt and March 1988). These pathologies of organisational learning can be overcome by organisational networks, because the performance standards used to coordinate them do not only uncover weak performance, they also offer guidelines for improvements. Under these conditions, the trade-off between monitored reliable operation and risky organisational change is less severe (see Sabel 1994). Thus, network structures have distinct advantages as modes of action coordination, allowing them to survive in volatile environments that require constant adaptation. Therefore, insofar as the OMC is a form of democratic experimentalism, there is clear, theoretically plausible potential for ‘effective and democratic’ governance.

Viewing OMC as a form of democratic experimentalism does not only identify its potential. It also points to the problems that come with this mode of governance. A first problem results from the debate on deliberative democracy. Time and again theories of deliberative democracy had to show that deliberation actually can make a difference in the real world of modern representative democracies (e.g. Habermas 1998[1992], chapter 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 reinventing the institutions of representative politics, but builds on existing tendencies in the various grass-roots movements of citizens and asks how existing political institutions can actually support this process. Second, it does not invest too much hope in the magic of the process of deliberation among equals. Deliberation, though vital, needs to be stabilised by exogenous support, especially by mechanisms of information pooling that link single deliberation processes to each other. Thus, deliberation does not rely as heavily on consensus as others would. One of the major practical problems is how to actually organise inclusion into the process of decentralised 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 for not being democratic. The major issue so far has been effectiveness. One initial objection has been that democratic experimentalism is indeed highly innovative. Democratic experimentalism has been attacked for being too close to incrementalism and thus too conservative when broad-sweeping changes are needed (Dorf and Sabel 1998: 403-18). Yet, the main objection to the viability of democratic experimentalism has been that it can work in the area of regulatory policies. According to democratic experimentalism, firms should be tied into networks in which performance standards provide an impulse for permanently improving in reference to a goal rather than in reference to regulatory standards, which at best only establish incentives for firms to circumvent them. 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 coordinating action. In Theodore Lowi's view it is ludicrous to think that a 'pusyfooted 'rolling-rule regime'" (2000: 75) can be as effective as hierarchical intervention by a central state. 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 experimentalism theory: How can the shadow of hierarchy be reconciled with the autonomy necessary for deliberation?

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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 harmonisation 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, either because of persistent dissent or because of formal legal restrictions resulting from the treaties. The Commission tendency to use the 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 the hope that eventually, a single best-practice rule might prevail, which could then serve as a basis for centralised harmonisation (Bisopoulos 2001).

A good example of how voluntary best practice rules might only be the prelude for binding rules is offered by EU railway policy. From the outset, the EU railway policy had an open experimental character. According to a closely involved civil servant of the Commission, its purpose was not just to take steps towards complete liberalisation. On the contrary, it acknowledged that reservations about liberalisation were legitimate, given the lack of clear solutions to the problems that such a project raises. One of the major purposes of the directive was thus to stimulate member states to try out new ways of organising railways, and to find out where competition could be viable, and in which forms (Kerwer/Teutsch 2001). After about half a decade of hardly any progress, the Commission abandoned its strategy of incremental regulatory innovation. It proposed establishing what became known as trans-European freightways – and doing so on a purely voluntary basis (Patzke 2000). These trans-European freightways are open to the incumbents as well as to some new private firms. This move was explicitly experimental in character, since its major aim was to better understand the problems that rail liberalisation would entail. After a first round of consultations, the initial institutional framework for decentralised learning was set up on a voluntary basis.

More recently, however, the Commission has again stepped up its attempts to enshrine more liberal access rights into regulation (European Commission 2001a: 32). This is a surprise, since the experience gathered by the experiments does not justify this move. So far, the freight corridors were much more successful in fostering the cooperation between the incumbent state railways than in nurturing new private service providers (Hilbrecht 2000). Thus, the example of railway policy shows how voluntary best practice standards can indeed be only yet another way (or simply a detour, seen from a regulation-prone Commission) to regulatory harmonisation.

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 (that emerges from a benchmarking process) is able to harmonise 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.

This empirical example simply demonstrates the added-value of a fresh theoretical perspective. However, it is important to remember that we are not making any claims about the actual relevance or success of new governance. Thus, we do not argue that the OMC will (or will not) effectively meet the challenges of European governance. The theoretical considerations presented here merely point to the potentials and problems of the OMC. Only experience with this mode of governance will show whether the promises can actually be fulfilled. Also, it would be foolish to claim that new governance could simply replace old governance, or that the transition from one (dominant) mode to the other might be smooth and without obstacles. To respond to these latter concerns, it would be necessary to discuss how new governance fits into the old institutional context, and to identify transition paths and obstacles.

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Thus, the question of how ‘new’ governance and ‘old governance’ will actually relate to each other (transition, competition, or complementarity) is beyond the scope of this paper. It may, for example, well turn out that new governance can only flourish in the shadow of old governance, or that ‘new governance’ may pave the way for more (but possibly better) ‘old governance’. All these questions will need to be addressed by future research.

## 5 Conclusions <sup>↑</sup>

The EU is suffering from a crisis of governance. Are new modes of governance a viable response to this crisis?

In this paper, we have tried to make sense of the rise of new modes of governance in the EU. We have proposed an alternative to the reliance upon scarce empirical evidence or ambiguous talk by policy-makers. 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 effectively and democratically governing in the EU polity, 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. Coordinating decision-making by benchmarking is a more specific form of loose coupling that can foster the positive interaction effects between different decision-making arenas. These best-practice standards confront local decision-makers with an attainable world of possibilities without forcing decisions upon them. Furthermore, besides this external challenge, there is also an internal challenge that can be overcome. It makes stalemates 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 better identify 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 things 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 they might avoid proposing them as ‘new modes’ where antagonists are suspicious of them. Moreover, our approach helps to overcome restrictive, formal definitions of new governance, such as ‘non-legislation’ or as permanent (as opposed to transitional) non-legislation. According to the more traditional approach, policy-making only qualifies as ‘new governance’ if no formal EU legal measure is adopted (e.g. Hérítier 2001a). If this criterion is employed, the universe of cases will probably be restricted to those that policy-makers themselves explicitly classify as ‘new governance’; for example, the activities presently conducted under the label of OMC. The advantage of this approach is that it offers a sobering perspective of a fashionable concept. The disadvantage is that the net might not be cast widely enough to capture the whole significance that the phenomenon already has. The reason for this is that in many instances policy-makers have not adopted a new mode of governance wholesale, but have drifted into such an approach instead (Tömmel 2000: 169-171). Whereas a formal approach is likely to capture only those instances in which a new approach is embraced *ex ante*, a theory-guided approach is more sensitive to cases in which new modes of governance have only been introduced incrementally.

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 or the rolling best practice rules 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 these will be patterns of substitution, transition, competition or complementarity.

Given that we have emphasized the output legitimacy of EU governance more than its input legitimacy, it might be appropriate to end on a more normative note. One of the major reasons for the Commission to promote these new modes of governance is that doing so allows the EU to move into decision-making areas that EU citizens really care about (e.g. unemployment policy) and thus to enhance the legitimacy of the EU. However, this might not happen. Given the heterarchical nature of new governance, within new governance arrangements it will be even more difficult than in previous settings to locate responsibility for decision-making. The advantage for the EU is that it is better insulated from blame. The disadvantage is that it is more difficult to take credit for whatever positive accomplishments might come out of these new modes of governance.

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## Endnotes

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(1) '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: 6).

(2) See in particular the current on-line forum on the White Paper on the web site of the Robert Schuman Centre, European University Institute (<http://www.iue.it/RSC/Governance/>). Also see *EUSA Review Forum* (forthcoming in *EUSA Review* (14: 4), Fall 2001, at <http://www.eustudies.org/GovernanceForum.html>).

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

(4) For a programmatic statement to this effect see March/Olsen (1989).

(5) This is of course contrary to the core of the implementation research paradigm, which assumes that decision-making is worthless unless the results are properly implemented. The dysfunctional consequences of tightly coupling policy decision-making and implementation were pointed out quite some time ago (see Baier/March/Saetren 1988), and it has more recently been reaffirmed by organisation theory (Brunsson 1989). Nonetheless, the idea of tight coupling still guides most of the research on implementation in the EU, on Europeanisation and on 'compliance' with international rules. The interest in loose coupling is therefore quite an original feature of the institutionalist approach.



(6) For the discussion of some cases in the U.S. and the developing world, see "Special Issue: Deliberative Democracy" of *Politics & Society*, Volume 29, Number 1, March 2001.

(7) 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 decentralised problem solving (Dorf and Sabel 1998: 288).

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