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Experimentalist Governance in the European Union

Towards a New Architecture

Charles F. Sabel
Jonathan Zeitlin

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Edited by
Charles F. Sabel and Jonathan Zeitlin

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List of abbreviations

AA	Association Agreement
AC IMPEL	Accession Countries Network for the Implementation and Enforcement of Environmental Law
AFSJ	Area of Freedom, Security, and Justice
BAT	Best Available Techniques
CARDS	Community Assistance for Reconstruction Development and Stabilization
CBC	Cross Border Cooperation
CCA	Committee of Competent Authorities
CEBS	Committee of European Banking Supervisors
CEEC	Central and Eastern Europe Countries
CEER	Council of European Energy Regulators
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CEN	European Committee for Standardization
CESR	Committee of European Securities Regulators
CFSP	Common Foreign and Security Policy
CFTC	Commodity Future Trading Commission
CIS	Community of Independent States/Common Implementation Strategy
COEX net	Co-existence net
CRL	Community Reference Laboratory
DDP	Directly Deliberative Polyarchy
DG	Directorate General
EAPs	Environmental Action Programmes
EC	European Competition
ECJ	European Court of Justice
ECN	European Competition Network
ECCP	European Climate Change Programme
EDF	European Disability Forum
EDPS	European Data Protection Supervisor
EES	European Employment Strategy

EESC	European Economic and Social Committee
EFSA	European Food Safety Authority
EGA	Experimentalist Governance Architecture
EMCDAA	European Monitoring Centre for Drugs and Drug Addiction
EMEA	European Agency for the Evaluation of Medicinal Products
ENAR	European Network Against Racism
ENGL	European Network of GMO Laboratories
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
EP	European Parliament
EPR	Environmental Policy Review
ERGEG	European Regulators Group for Electricity and Gas
ESC	European Securities Committee
ESDN	European Sustainable Development Network
ESDP	European Security and Defence Policy
ETSO	European Association of Transmission System Operators
EU	European Union
EU ETS	European Emission Trading System
EUMC	European Union Monitoring Centre
EU-SDS	EU Sustainable Development Strategy
FDA	Food and Drug Administration
FESCO	Forum of European Securities Commissions
FRA	Fundamental Rights Agency
FSAP	Financial Services Action Plan
FSCG	Financial Services Consumer Group
FVO	Food and Veterinary Office
GFL	General Food Law
GM	Genetically Modified
GMOs	Genetically Modified Organisms
GMOREGEX	GMO Register and Exchange of Information
ILGA	International Lesbian and Gay Association
IMPEL	Implementation and Enforcement of Environmental Law
IOSCO	International Organization of Securities Commissions
IPP	Integrated Product Policy initiative
IPPC	Integrated Pollution Prevention and Control
IIMG	Inter-Institutional Monitoring Group
IPA	Instrument of Pre-Accession

ISO	International Standard Organization
ISPA	Instrument for Structural Policies for Pre-Accession
JRC	Joint Research Centre
JHA	Justice and Home Affairs
MEPs	Members of European Parliament
MLP	Model Leniency Programme
NAPs	National Allocation Plans
NCA	National Competition Authorities
NPAA	National Programme for the Adoption of the Acquis
NSDSs	National Sustainable Development Strategies
OCTA	Organised Crime Threat Assessment
OECD	Organisation For European Co-operation and Development
OMC	Open Method of Coordination
OSCE	Organization for Security and Cooperation in Europe
PCA	Partnership and Cooperation Agreement
PERF	Pan-European Regulatory Forum
PHARE	Pologne-Hongrie, Aide à la Reconstruction Economique
PMEM	Post-Market Environmental Monitoring
PNR	Passenger Name Record
RASFF	Rapid Alert System for Food and Feed
RAXEN	Racism and Xenophobia
REACH	Registration, Evaluation, and Authorization of Chemicals
RFID	Radio Frequency Identification
SAPARD	Special Assistance Programme for Agriculture and Rural Development
SCFCAH	Standing Committee on the Food Chain and Animal Health
SCOOP	Scientific Co-operation on Questions Related to Food between Member States
SD	Sustainable Development
SEAC	Spongiform Encephalopathy Advisory Committee
SEC	Securities and Exchange Commission
SIS II	Schengen Information System
TACIS	Technical Assistance to the Commonwealth of Independent States
TAIEX	Technical Assistance Information Exchange Office
WFD	Water Framework Directive
WGs	Working Groups
WISE	Water Information System Europe

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1

Learning From Difference: The New Architecture of Experimentalist Governance in the EU*

Charles F. Sabel and Jonathan Zeitlin

1 Introduction

Wrestling with massive rapid expansion, buffeted by economic globalization and demographic change, provoked by a bumbling effort to normalize its constitutional status, the EU is today in crisis, and will likely remain so for several years to come. The outcome of that crisis is unforeseeable, but any outcome short of a radical uprooting of administrative, judicial, and professional dispositions that have been decades in the making is likely to leave intact the novel pattern of the rule making characteristic of governance in the EU. Paradoxically, the distance from the world of parties, parliaments, and referenda that contributes to suspicion about the legitimacy of the EU also protects some of its core institutions from political turbulence. Total disaster aside, what was true of EU governance yesterday is likely to be true the day after tomorrow. This essay is directed towards analysis of the distinctive and surprisingly effective innovations that have emerged in EU governance, in the frank hope if not expectation that a clear appreciation of these can usefully inform the next round of efforts to render the institutions of European decision making comprehensible and democratically accountable.

Looking beneath and beyond the turbulence of the moment, and putting aside the possibility of catastrophic outcomes, here is what we and other observers see: the EU is creating a single market while constructing a framework within which the Member States can protect public health and safety in ways that grow out of their own traditions and allow them to pursue their own best

* A previous version of this essay appeared as Sabel and Zeitlin (2008). This version contains fewer empirical examples but elaborates the underlying theory.

judgements for innovative advance. In a more analytic vein, it is agreed among the many who now take the EU to be a functioning novel polity without a state that its regulatory successes are possible because decision making is at least in part deliberative: actors' initial preferences are transformed through discussion by the force of the better argument. Deliberation in turn is said to depend on the socialization of the deliberators (civil servants, scientific experts, and representatives of interest groups) into epistemic communities, via their participation in 'comitological' committees of experts and Member State representatives that advise the Commission on new regulation and review its eventual regulatory proposals (Joerges and Neyer 1997*a*; Joerges and Vos 1999*a*; Neyer 2004). The process of socialization and the consensus that it generates is further said to be largely informal, in the sense that it was neither directly anticipated by, nor much less can it be deduced from, the directives and other legal instruments establishing various regulatory decision-making processes (Christiansen and Piattoni 2003; Eberlein and Grande 2005). In the eyes of some it may also be 'informal' in the additional and suspect sense of establishing extra-legal workarounds to surmount institutional blockages in the EU's constitutional design (Héritier 1999).

In the same vein, this system of decision making is called 'multilevel' because it connects national administrations with each other and the EU without establishing a hierarchy between them: the decisions of 'lower'-level entities can influence the choice of ends and means at 'superior' levels. Among other things multilevel concertation reduces the risk that actors at various levels will make disjointed use of their veto powers and block Union decisions. In solving this coordination problem, multilevel concertation is said to blur the distinction between centralized and decentralized decision making by networking various types of decision makers (Dehousse 1997; Kohler-Koch and Eising 1999; Kohler-Koch 2003; Chiti 2004; Geradin and Petit 2004; Egeberg 2006; Hofman and Türk 2006).

Finally, this networked deliberative decision making is widely seen as a departure from the norms of representative democracy by which laws are legitimate only if they exhibit a pedigree extending from a sovereign people assembled in the electorate through a legislative act and ending, eventually, in administrative elaboration. Deliberation, especially informal deliberation, among technical elites rather than decision making by majority vote of elected representatives naturally looks suspicious from this point of view. Whether such deliberative decision making can establish its legitimacy by the emergent standards of some alternative deliberative democracy remains a question even for those who strongly suspect that the answer will be yes.

In this essay, we will argue that this list of distinctive features of European governance, useful as it is, overlooks the underlying architecture of decision making in the EU: the fundamental design for public rule making, and the way this design transforms the distinct elements of EU governance by connecting

them into a novel whole. Although this decision-making architecture can neither be mapped from the topmost directives and Treaty provisions nor read out from any textbook account of the formal competences of EU institutions, it regularly and decisively shapes EU governance. In this design, first, framework goals (such as 'good water status', safe food, non-discrimination, and a unified energy grid) and measures for gauging their achievement are established by joint action of the Member States and EU institutions. Lower-level units (such as national ministries or regulatory authorities and the actors with whom they collaborate) are, second, given the freedom to advance these ends as they see fit. Subsidiarity in this architecture implies that the lower-level units have sufficient autonomy in implementing framework rules to propose changes to them.[1] But in return for this autonomy, they must, third, report regularly on performance, especially as measured by the agreed indicators, and participate in a peer review in which their own results are compared with those pursuing other means to the same general ends. Fourth and finally, the framework goals, metrics, and procedures themselves are periodically revised by the actors who initially established them, augmented by such new participants whose views come to be seen as indispensable to full and fair deliberation.

The four key elements just listed should be understood as a set of necessary functions which can be performed through a variety of possible institutional arrangements. Put another way, there is in such an experimentalist architecture no one-to-one mapping of governance functions to specific institutional mechanisms or policy instruments, and vice versa. A single function, such as monitoring and review of implementation experience, can be performed through a variety of institutional devices, operating singly and/or in combination with one another. Conversely, a single institutional mechanism, such as a formal peer review exercise, can perform a number of distinct governance functions, such as assessing the comparative effectiveness of different national and subnational implementation approaches, opening up opportunities for civil society actors to hold governments accountable at national and EU levels, identifying areas where new forms of national or transnational capacity building are required, and/or contributing to the redefinition of common policy objectives.[2]

With this qualification, and under such rubrics as fora, networked agencies, councils of regulators, open methods of coordination (OMCs), or simply processes, we find the pattern of decision making just described in the regulation of telecommunications, energy, drug authorization, data privacy, environmental protection, occupational health and safety, food safety, maritime safety, rail safety, financial services, justice and home affairs, employment promotion, social inclusion and pension reform, among many other areas. Similar arrangements have been recently inaugurated in other key areas such as health care, anti-discrimination policy, fundamental rights, genetically modified organism (GMO) regulation, competition policy, and state aid.[3]

It is these processes of framework making and revision that give precise definition to the deliberation, informalism, and multilevel decision making characteristic of the EU. Consider first deliberation. In conventional views of deliberative decision making, the goal is enduring consensus or reflective equilibrium. In the EU, by contrast, deliberative decision making is driven by the discussion and elaboration of persistent difference. Practices and institutions are expected to become more mutually responsive, but not to converge to a single and definitive best practice. So consensus is correspondingly regarded as provisional, a necessary condition for taking decisions that have to be confronted now, but certainly not the final word of discussion or a reflective equilibrium.

Take next informalism. The mutability of institutions and the lack in some cases of formal sanctions create the general impression of informal governance. But we will see that whatever the informal attributes of the governance system as a whole, those institutions whose explicit purpose is to expose and clarify difference so as to destabilize and disentrench settled approaches and solutions are typically highly formalized. Indeed, it is only a slight exaggeration to say that it is the search for ever better ways of meeting this objective which produces the continuous institutional revision that in turn gives the impression of informalism. At a minimum, the assertion of unbridled informalism is hard to square with the formalization of procedural requirements in key EU directives, let alone with the emergence of a body of EU administrative law directed to ensuring respect for certain formalities concerning access to, conduct of, and dissemination of deliberation without which the new architecture could not function effectively.

Finally, this architectural perspective complements and corrects the notion that multilevel governance is primarily concerned with overcoming political blockages through vertical concertation. Concertation is certainly a politically useful effect of multilevel governance. But such governance also reflects the division of labour inherent in a recursive conception of rule making. Even though Union officials and Member States collaborate in formulating frameworks and evaluating them, it is the distinctive role of the EU level to promulgate authoritative frameworks and oversee their enforcement, while it is the distinctive role of the Member States and subnational bodies to adapt these frameworks to their own circumstances and to report on their experience. The most successful of these arrangements combine the advantages of decentralized local experimentation with those of centralized coordination, and so blur the distinction between forms of governance often held to have incompatible virtues.

This profusion of common deliberative techniques not only prompts revision of partial descriptions of EU governance, but also challenges application to the EU of more settled, theoretically rooted views about the form and possibility of good governance current in liberal political economy, political science, and jurisprudence. One such idea, derived from standard liberal views of the polity and the economy, is that market making (negative integration)

should be governed by unambiguous, nearly self-enforcing rules too clear to be gamed; market correction (positive integration) by independent regulatory authorities acting under carefully delegated mandates; and social solidarity by political compromise (increasingly within judicially determined frameworks of fundamental rights).[4] We will see, on the contrary, that regulation in all three realms increasingly takes the novel form of contestable rules to be understood as rebuttable guides to action even when they are also taken as enforceable sovereign commands.

By the same token, these developments challenge the related assumption that deliberative processes produce at most a monitory, 'soft' complement to 'hard' state-made law: non-binding guidelines, 'naming and shaming' by listing poor performers at the bottom of league tables, and the like.[5] In this view, deliberation can be at best a handmaiden to the tough political bargaining that produces real law. But we will see that in many cases, the new architecture routinely results either in revisions of EU directives, regulations, and administrative decisions, or in the elaboration of revisable standards mandated by law and the enunciation of new principles which may eventually be given binding force. In others, the changes may influence only the behaviour of national administrations with no immediate impact on the legal framework of the EU itself. Revisionary results aside, moreover, there are many domains where refusal to participate in, or comply with, the decisions of deliberative processes can have draconian consequences. Often these take the form of what we will call a destabilization regime: a reversion to traditional (and today unworkable) forms of law or rule making, or some other condition equally beyond the actors' control and therefore extremely alarming to them. It is certainly not a fundamental characteristic of framework rule making and revision to operate by suasion alone.

A third revision of conventional interpretations concerns the rule of law. In standard liberal accounts, the rule of law depends on a clear distinction between the state, which may act only insofar as it is explicitly authorized to do so, and individuals, who may do whatever is not explicitly prohibited. In this view, the freedom of individuals is tied to limits on state power, and the limits are only effective when catalogued in detailed specifications of what is permissible to the authorities. Against this backdrop, the mutability of EU governance institutions looks not just like politically expedient informalism, but like a threat to the liberty of the moderns. But we will see that recursive framework making and revision is prompting the emergence of new forms of dynamic accountability and peer review, which discipline the state and protect the rights of citizens without freezing the institutions of decision making. Arguably, these dynamic mechanisms provide effective ways of addressing long-standing accountability and rule-of-law deficits within the nation-state itself.

We call this new form of governance directly deliberative polyarchy (DDP). It is deliberative because it uses argument to disentrench settled practices and

open for reconsideration the definitions of group, institutional, and even national interest associated with them. It is directly deliberative because it uses the concrete experience of actors' differing reactions to current problems to generate novel possibilities for consideration rather than buffering decision-makers in Madisonian fashion from experience of the world the better to elicit their principled, disinterested response to abstractly posed problems. It is polyarchic because it is a system in which the local units learn from, discipline, and set goals for each other. For this reason, it is especially well suited to heterogeneous settings such as the EU, where the local units face similar problems, and can learn much from their separate efforts to solve them, even though particular solutions will rarely be generalizable in any straightforward way. In this sense, deliberative polyarchy is a machine for learning from diversity, thereby transforming an obstacle to closer integration into an asset for achieving it. Because of the way it systematically provokes doubt about its assumptions and practices, while unrelentingly treating its solutions as provisional and corrigible, DDP can be thought of as a form of experimentalist governance in the pragmatist sense, and we will use the two terms interchangeably.[6]

The final conventional view that these developments challenge is that deliberation involving experts is tantamount to a supranational or transgovernmental conspiracy against democracy. But the dynamic accountability of EU governance has a potentially democratizing destabilization effect on domestic politics, and through them, in return, on the EU itself.[7] The requirement that each national administration justify its choice of rules publicly, in the light of comparable choices by the others, allows traditional political actors, new ones emerging from civil society, and coalitions among these to contest official proposals against the backdrop of much richer information about the range of arguably feasible choices, and better understanding of the argument about their merits, than traditionally available in domestic debate. Whether or not the potential participants avail themselves of the possibilities thus created, and whether, if they do, the result is more fully democratic decision making (on any of the many dimensions on which this could be counted) are of course of matters of domestic institutional and political context. But to the extent this potential is realized, the linkage of domestic and supranational rule making in the EU does indeed create a democratizing destabilization effect. More generally, the widespread institution of peer review, experts criticizing and responding to criticism by experts in public, undercuts the very notion of incontrovertible technocratic authority, and *a fortiori* the version of technocracy associated with the Commission's monopoly on legislative initiative as informed and corrected by expert comitological scrutiny. Of course, as we shall have reason to insist repeatedly, in undermining technocracy through democratizing destabilization, the new architecture does not automatically produce democratic outcomes. It means rather that the

new forms of decision making promote forms of accountability that are consistent with some aspects of democracy, though not necessarily furthering representative democracy in any traditional way.

Subsequent chapters in this volume document and explore the operation of DDP in its various institutional forms across a broad range of EU governance regimes. These chapters were composed in response to an earlier version of this introduction (Sabel and Zeitlin 2008), explicitly to assess the goodness of fit between the architecture of deliberative rule making proposed here and actual institutional developments in the following domains: data privacy, financial market regulation, energy, competition policy, food safety, GMOs, environmental sustainability, anti-discrimination policy, justice and home affairs, external relations, and fundamental rights.

This way of proceeding put the cart before the horse, for once, we hope, to good effect. Normally in joint undertakings of this kind the group agrees at the outset on a framework of interpretation, and secures funding for investigation of the framing ideas in a series of coordinated research papers. Inertia then naturally favours affirmation in the end of some variant of the ideas agreed at the beginning. We began instead with a preliminary formulation of the theoretical ideas contained here, illustrated in some detail with a range of domain-specific cases. We then solicited reactions from experts, chosen (as far as our own deepseated proclivities would allow) on the basis of their expertise rather than their theoretical affinities. At the first meeting, participants were asked to assess the validity of the general architectural claims about EU governance in light of their own previous work. Once the heuristic utility of the framing ideas was established in this forum, the participants undertook a second round of investigation and writing, focusing especially on a key aspect of recursive rule making: the revision of frameworks in the light of their implementation. Since no funding was provided for the writing and revision of papers, and there was no prior agreement to produce a joint result, inertia favoured an inconclusive on-the-one-hand–on-the-other-hand outcome or none at all. Instead, the surprise of convergent and mutually reinforcing discoveries produced the results presented here. But despite our conviction that the goodness of fit is in general high enough to constitute a first validation of the recursive, experimentalist architecture of the EU as a useful heuristic, each reader will naturally want to come to her own conclusions by comparing the notions presented here with the thoughtful and detailed evaluations of developments in various domains that follow.

Two related differences between our views and those in the thematic chapters occur frequently enough, however, to be, worth underscoring here. The first regards the totalizing nature of our view. Some authors are concerned that although experimentalism is proving to be of surprising centrality in the area to which they attend, it coexists with other more traditional forms of hierarchical governance and may long continue to do so (see, e.g., Monar's chapter

on Justice and Home Affairs). A second concern—a species of the first—is that experimentalism not only coexists with these traditional forms of governance but requires them as a complement (see especially Eberlein's chapter on Energy). Both of these concerns are reflected in current interpretations of EU governance as a hybrid of old and new forms. We will return to the question of hybridity below both to acknowledge the continuing coexistence of old and new forms, and to challenge the coherence of the narrower notion of a necessary complementarity between them.

The body of this introduction examines the origins or scope conditions of the new governance arrangements, and the theory and practice underpinning their distinctive architecture: dynamic rather than principal–agent accountability; the kinds of mechanisms which prevent breakdowns in deliberation; questions of hybridity or the relation between old and new forms of governance raised by the operation of these deliberation-promoting devices. The next section extends this discussion to examine the ways that these new forms of deliberation can open up new possibilities for democratization of decision making without themselves being democratic in any immediately familiar sense. By way of conclusion we present some reasons for viewing the EU not as a *sui generis* outlier, but instead as a forerunner of new forms of governance especially suited to the temper of our times at both national and global levels.

Throughout we draw illustrations from the thematic chapters, but for economy of exposition these references will be more in the way of pointers to the subsequent analyses than a reprise of their substance. In this introduction, we will thus have to do without the ballast of empirical detail that keeps theoretical explanation on an even keel, and we therefore ask you to take the invitation to compare our general account with the more specific ones seriously, but also ask you in the meantime to moderate if not suspend disbelief in the face of stark and provocative claims.

Finally, wide-ranging though it attempts to be, the essay is far from comprehensive in its treatment of the governance innovations underway within the EU. One important omission concerns transformations in national welfare states, particularly within the Nordic universal access, service-based welfare regimes that are arguably becoming a model for the EU as a whole.[8] Another is the reorientation of the European Court of Justice, both in relation to the Member States and to international law. A decade ago, European Court of Justice (ECJ) decisions were rightly regarded as essential conditions for regulatory reform. The baricenter of ECJ adjudication has now arguably shifted to the articulation of fundamental rights in relation to the four economic freedoms, and to the relation of the EU legal order to legal orders 'below' and 'beyond' it.[9] For that reason, in this essay we take the jurisprudence of the single market as essentially fixed and affording an adequate basis for the changes discussed here, though of course we are well aware that in some important areas such as regulation of service provision, the employment

conditions of posted workers and the rights of unions to take collective action, the situation is in fact in flux.[10]

2 The theory and practice of framework revision

2.1 Origins and scope conditions

Experimentalist governance in the EU arose, in Adam Ferguson's phrase, as the product of human action but not human design. Until the first experimentalist governance systems were working, no one knew that they could be built. It is only in recent years that their features have become well enough understood to serve as the template for governance reform in new areas.[11] Despite this increased understanding, actors in many of the domains covered in this book are even now 'stumbling' into experimentalist solutions without having consciously striven to attain them, as de Búrca's chapter (Chapter 9, this volume) shows in the case of anti-discrimination policy.

The possibility or scope conditions for the emergence of experimentalist governance appear to be twofold. The first is strategic uncertainty. Under strategic uncertainty actors by definition have to learn what their goals should be, and while learning determine how to achieve them. This learning necessarily involves cooperation, since any actor able to fix a strategy independently would do so, and not be in a state of strategic uncertainty. The second and closely related condition is a multipolar or polyarchic distribution of power, in which no single actor has the capacity to impose her own preferred solution without taking into account the views of the others. If any actor could impose the full costs of her mistakes on the others, ignorance would be costless, and there would be no need to learn, or indeed to fret about strategy at all.[12] (Of course, and as usual, the actors' understandings of these conditions are in part subjective, the result as much of their own particular ways of analysing possibilities as of the possibilities themselves.) As we will see in more detail in a moment, fulfilment of these conditions can transform distributive bargaining into deliberative problem solving through the institutional mechanisms of experimentalist governance.

Given its pronounced polyarchic character and particularly the substantial political and legal obstacles to the centralization of rule-making authority in many domains, the EU seems an especially propitious environment for the discovery and diffusion of experimentalist governance. Indeed, several recent accounts of the networked agencies, fora, councils of regulators, and other new governance processes under discussion here focus exclusively on this path-dependent constellation of baffles or guides in explaining what seems like an aberrant outcome: given the need for supranational regulatory coordination in many domains but the manifest impossibility of establishing

European equivalents to the 'federal' agencies which on the basis of US solutions are thought to be the first-best solutions to such problems, the EU had to settle for mid-level networked institutions—better able to coordinate than informal networks of national regulators, but not as effective as stand-alone authorities with comprehensive powers.[13]

But the accounts of the emergence of experimentalist governance presented here suggest that this exclusive focus on the political and legal constellation to the neglect of the more general context of strategic uncertainty is misleading. For one thing, there are areas like competition law, where the EU through the Commission had de facto centralized decision-making power, but arguably chose to decentralize key parts of it to (appropriately networked) national authorities in order to deal with the increasingly complex task of crafting remedies for abuses of market power and monitoring their application (Svetiev, Chapter 5, this volume). For another, there are a number of areas such as data privacy, where established decentralized solutions introduced recursive rule making in response to the volatility of their environment. Thus, as Newman's chapter shows, the Article 29 Working Party began life as a federated network of national regulators charged with overseeing the implementation of European data privacy legislation and advising the Commission on evolving policy issues in this field (Newman, Chapter 2, this volume). Over time, however, the Working Party has turned increasingly to experimentalist tools such as open consultations, transparency, and peer review in order to identify emerging privacy concerns, assess the effectiveness of existing legislation, and propose new regulatory solutions. A major consequence of these recursive review processes was the creation in 2001 of a European Data Privacy Supervisor, responsible for guaranteeing data protection in the Union's own institutions and overseeing police and judicial cooperation under the 'Third Pillar', areas left uncovered by the original 1995 Directive.

Determining the balance between the influence of institutional and political constraints on the one hand and the imperative to routinize learning on the other is of course difficult in any particular case. Our point here is simply that both influences seem to have played a role in all the domains under discussion and more generally that the EU has found its way more quickly and consistently to experimentalist solutions than other polities precisely because it had to address problems of increasing strategic uncertainty under firm polyarchic constraints.

2.2 From principal–agent governance to peer review and dynamic accountability

Accountability in representative democracy follows the principal–agent model. The democratic sovereign sitting in the legislature sets goals and delegates responsibility for their execution to the administrative branch. The

legislature periodically reviews the administration's fidelity to statutory instruction and the electorate periodically judges the legislature's fidelity to its political mandate. Constitutional courts in both Europe and the United States vigorously assert the primacy of the politically accountable principal over its administrative agent and require therefore that the delegation of authority from the former to the latter be limited and controlled by the definition of legislative goals.[14]

The difficulty, of course, and the open secret of administrative law in both the EU and the United States, is that it is very often—regularly?—the case that *no actor* among those seeking to coordinate their efforts has a precise enough idea of the goal either to give precise instructions to the others or reliably recognize when their actions do or don't serve the specified end. So long as at least one actor can indeed survey the space of possible solutions with the precision required by this condition, principal–agent relations are possible, though it turns out to be trickier than one might think to identify who is the principal and who the agent (on the case of the EU, see e.g. Coen and Thatcher 2008; Héritier and Lehmkuhl 2008). But if actors have to learn what problem they are solving, and what solution they are seeking, through the very process of problem solving, then principal–agent relations are impossible, not least because the very distinction between principal and agent is confounded. The recursive redefinition of means and ends at the heart of the experimentalist architecture of EU governance acknowledges and responds to precisely this situation. More yet: so much rule making in national and global fora occurs under such circumstances—beyond the ken of the 'command and control' relations characteristic of the modern state—that administrative lawyers speak on occasion of the production of 'anomalous' administrative law (Kingsbury et al. 2005; Cohen and Sabel 2006). The question—raised most urgently by the extension of this architecture to rights, but insistently in regulatory domains as well—is whether it is possible to establish some form of accountability in such a fluid situation: whether 'anomalous' administrative law can be accountable. For present purposes, we can conveniently show that there is by tracking some recent work on the EU that 'discovers' a model of administration providing accountability even in the absence of a clear specification of initial goals.

Nicolaides et al. (2003) capture this discovery process well in their work on policy implementation in the EU. Their initial aim was to apply the tested and true principal–agent framework to the ramshackle structure of the EU, taking two empirical oddities into account. The first is that the principal, the EU, has multiple agents: the national administrative authorities. Agents being what they are, each interprets the principal's instructions—a directive, say—in a self-serving way; and the principal is of course determined to minimize this agency 'drift'. The second oddity is that the principal is presumed to have only a vague or provisional idea of its own goals. Thus sometimes self-interested

drifting by national administrative agencies will reveal possibilities that the principal has overlooked, and prefers more than any of the options entertained ex ante. In other words, the principal can sometimes learn from the agents. Since accountability cannot under these circumstances be established by comparing rule to performance—the performance is going to change the rule—how can it be achieved? The device is simple:

> Accountability is strengthened not when the actions of the agent are constrained but when the agent is required to explain and justify his actions to those who have the necessary knowledge to understand and evaluate those actions. We conclude, therefore, that effective delegation must confer decision-making discretion to the agent, while effective accountability mechanisms must remove arbitrariness from the agent's actions by requiring him to (a) show how he has taken into account the impact of his decisions on others, (b) explain sufficiently his decisions and (c) be liable to judicial challenge and, preferably, to some kind of periodic peer review. The latter is very important because only peers have the same knowledge to evaluate the agent's explanations. (Nicolaides et al. 2003: 46)

Accountable behaviour in this setting no longer is a matter of compliance with a rule set down by the principal, as if the principal knew what needed to be done, but rather provision of a good explanation for choosing, in the light of fresh knowledge, one way of advancing a common, albeit somewhat indeterminate project. At the limit, principal–agent accountability gives way to peer review through fora, networked agencies, councils of regulators, and open methods of coordination: the full repertoire of processes by which EU decision makers learn from and correct each other even as they set goals and performance standards for the Union. Peer review becomes in turn dynamic accountability—accountability that anticipates the transformation of rules in use—and dynamic accountability becomes the key to 'anomalous' administrative law: the exceptional kind of administrative law that must become the rule when administration is not built on a 'core of command-and-control', and cannot be because it does not operate in the state's shadow. Accountability generically understood means presenting the account of one's choices that is owed to others in comparable situations. Here then is a form of accountability that does not require a central, delegating authority. Elsewhere we have argued that the deliberative polyarchy sketched above embodies this ideal of dynamic accountability (Cohen and Sabel 1997, 2003; Gerstenberg and Sabel 2002). The chapters that follow provide particularly cogent examples of how review of implementation can lead to rule revision, such as the Water Framework Directive and its Common Implementation Strategy (von Homeyer, Chapter 6, this volume); the Rapid Alert System for Food and Feed (Vos, Chapter 7, this volume); Post-Market Environmental Monitoring of GMOs (Dąbrowska, Chapter 8, this volume); mutual evaluation procedures in Justice and Home

Affairs (Monar, Chapter 10, this volume); and networked collaboration between European institutions, Member States, and non-governmental organizations (NGOs) in reviewing and revising anti-discrimination legislation (de Búrca, Chapter 9, this volume).

In isolation, peer review can be ineffective, indeed unworkable: ineffective because its deliberations might seem to yield only recommendations that can be ignored without penalty by those to whom they are addressed; unworkable because in the absence of any sanction or discipline the actors could well choose to limit themselves to pro forma participation or worse yet manipulate the information they provide so as to show themselves, deceptively, to best advantage. For these reasons, it is has often been argued that the new governance mechanisms of the EU can result merely in the admonitions of 'soft law' that achieve the very modest effects of which they may be capable only because some actors can sometimes be moved by moral suasion or the baser fear of public embarrassment.[15] In the next section, to respond to this concern we set peer review in relation to other institutions of governance that enable its operation and ensure the effectiveness of its outcomes.

2.3 Experimentalist governance: neither 'soft law' nor rule making in the 'shadow of hierarchy'

Peer-review accountability induces participation in its processes and respect for its outcomes through an ensemble of devices that we will call destabilization regimes. By these we mean mechanisms for unblocking impasses in framework rule making and revision by rendering the current situation untenable while suggesting—or causing the parties to suggest—plausible and superior alternatives. These regimes can be thought of as imposing sanctions in the very general sense that they pressure parties to act in ways they might not have entertained, but they are not sanctions in the narrower technical sense of imposing determinate costs on actors, which the latter can weigh precisely against the advantages of breaching obligations they might reasonably be expected to honor.

These destabilization regimes can take many forms. One may be termed a public justification requirement, well illustrated by the conflict and mediation clauses in EU food safety and GMO regulation, discussed in the chapters by Vos and Dąbrowska (Chapters 7 and 8, this volume). In cases of disagreement over scientific risk assessment between the European Food Safety Authority (EFSA) and national authorities, both sides are obliged to submit a joint document explaining their differences. But doing so would put both parties at risk because either could lose the debate in full public view, while political instrumentalization of the issue could endanger future collaboration and scientific exchange. This gives both parties strong incentives to continue deliberation until an agreement that both can defend is public is reached.

A second mechanism, in some ways a variant of the first, is the right to challenge and the duty to explain, found in the new EU competition policy regime analysed in Svetiev's chapter. There, the Commission has the right to take over cases from national competition authorities, but must formally justify its decision to other members of the network. This right of challenge, however, extends horizontally as well as vertically, since any member of the network can demand a review of another national competition authority's handling of a case.

Yet a third destabilization mechanism, the penalty default, works indirectly. Rather than requiring the parties to deliberate, the central authority creates brutal disincentives for refusal to do so. It does this by imposing rules sufficiently unpalatable to all parties that each is motivated to contribute to an information-sharing regime that allows fair and effective regulation of their interdependence. In a world where standard rule making produces such unpredictable consequences as to be unworkable, the easiest way to generate penalty defaults is to (threaten to) engage in traditional rule making.[16]

The Florence Electricity Forum, examined in Eberlein's chapter (Chapter 4, this voume), provides a notable example of the use of the penalty default in the EU.[17] To unblock potential impasses in the deliberative process, the Commission has periodically threatened to invoke its formal powers under EU antitrust, merger control, and state aid rules, whose application could make intransigent or obstructionist parties worse off than a compromise reached in the Forum. As in many other areas of EU policy making, moreover, the Commission's powers of legislative initiative and delegated regulation have also served as a means of inducing Member State and private actors to cooperate in framework rule making within the Florence Forum. This mechanism has proved especially effective in the case of thorny issues such as cross-border tarification where the parties fear the unpredictable consequences of an imposed alternative. The experience of the Florence Forum is a striking, but hardly unique example of how the EU's institutions work together to create a broader destabilization regime.

In sum the new destabilization regime—whether or not accompanied by penalty default in the strict sense—shifts the regulatory focus from rules to frameworks for creating rules. This shift is of a piece with, and helps establish the background conditions for, the shift from accountability as rule following to accountability as the justifiable exercise of discretion subject to peer review.

But in steering clear of the Scylla of a trivializing soft-law interpretation of the new architecture, it might seem that we will run aground on the Charybdis of an interpretation contrary to this first, except insofar as it diminishes the novelty and significance of what we take to be the key innovation in EU governance: the view of the new architecture as operating in the 'shadow' of traditional public hierarchy. This 'shadow of hierarchy' view extends to EU governance a trope originally developed to explain collective bargaining and neo-corporatist concertation between the state, labour, and capital. The core

idea is that the state or public hierarchy more generally is limited—perhaps because of the volatility of the situation in which it acts—in its ability to secure the outcomes it prefers. Given this limitation, the state seeks to enlist non-state actors who do command the necessary capacities by proposing an exchange: in return for a promise to bargain with one another fairly and in a public-regarding way, the relevant parties are endowed with semi-constitutional authority to speak on behalf of their members and assured that the state will back their agreements, provided that the parties themselves continue to respect them. In case the parties fail to agree, or fail to respect their agreements, the state reserves the right to impose a settlement. Parties to such agreements are thus reasonably said to be 'bargaining in the shadow of the state' and acting in some sense as its authorized agents or deputies in reaching solutions not directly available to the authorities themselves (Scharpf 1997: 197–205). Seen this way, the new architecture that we describe might be thought to be simply a capacity-increasing extension of the EU's formal hierarchical decision-making apparatus rather than a networked, deliberative alternative to it. At the limit, this argument simply applies to governance an idea familiar from organizational sociology, in which the capacities of a rigid formal organization are rendered flexible by connecting it to an informal network over which the official hierarchy maintains control (Christiansen and Piattoni 2003; Eberlein and Grande 2005).

But while destabilization regimes as inducements to explore novel possibilities and to respect the outcome of informed deliberation draw on official authority, they do so in a way that is crucially different from the use of state power that occurs in the shadow of hierarchy. In the latter, the authorities acting independently could arrive at an (almost) acceptable disposition of the problems before them, though this unilateral determination could be substantially improved by the participation of the better informed non-state actors. As Héritier, a leading proponent of the 'shadow of hierarchy' view of the EU's new governance architecture, puts it: 'should there be mismanagement or policy failure, public authorities may take on the regulatory functions' (Héritier 2002: 194). Indeed these non-state actors are motivated to participate in decision making precisely because they can calculate what they will gain by bargaining in the shadow of hierarchy over the alternative outcome that would be imposed by the authorities themselves.[18]

By contrast, in a destabilization regime with peer review, the best 'solution' available to authorities acting themselves is so manifestly unworkable to the parties as to count as a draconian penalty and an incalculably costly disruption of their capacities to control their own fate. Indeed, it is precisely the patent unworkability of official solutions—the failures, if you like, of rules made by anything like traditional means—which makes the mere threat of imposing them so effective a device for inducing the parties to deliberate in good faith. To return to the example of the Florence Electricity Forum, the penalty

defaults at work here cannot be considered viable hierarchical substitutes for recursive rule making through networked, experimentalist governance, as Eberlein (who is himself attracted to the idea of the 'shadow of hierarchy') clearly shows. Thus competition law, 'based as it is on single-case procedures . . . is more of a negative control instrument, a check on and incentive for the type of fine-tuned regulatory development performed by experimentalist processes'. In the same vein, 'legislation can obviously not address all current and future regulatory contingencies and needs, especially in such a technically complex policy area, and across 27 heterogeneous jurisdictions'.[19]

Hence bargaining under these conditions is not bargaining in the shadow of hierarchy, but rather deliberating when hierarchy has itself become a shadow: powerful not for what it can deliver, but only for what it can obscure and disrupt. In short, the new architecture of EU governance is not 'soft law', but neither is it traditional 'hard law' of a form that grows out of and is reducible to principal–agent rule making.

2.4 Hybridity: coexistence and complementarity

The discussion of the shadow of hierarchy returns us to the question of hybridity: the coexistence of and relation between new and old forms of governance noted above. We have already acknowledged as incontrovertible the innocuous claim that novel institutions, not least novel governance institutions, always coexist with older ones, out of which they invariably emerge. We also rejected as incompatible with the cases presented here (and no doubt with a wide body of other evidence) the much more exiguous claim that historical legacies fully determine current outcomes through mechanisms of path dependency. Indeed, if this latter view were true, the issue of hybridity would not arise at all because the new would in some sense be but an extension of the old.

If we accept then, for purposes of argument and as all contributors to this volume do, that this experimentalist architecture is on the one side novel yet arose from traditional hierarchical forms and continues in some way to interact with them, then we must inquire into the nature of that interaction. Three possibilities seem especially relevant (cf. de Búrca and Scott [2006]; Trubek and Trubek [2007]).

The first is complementarity: old and new are mutually dependent, with each retaining its essential characteristics while producing heretofore unknown effects because of its relation to the other. The shadow of hierarchy view just discussed of course exemplifies this possibility. The second is restorative: old and new coexist for now, but in the long run the new is subsumed under or reverts to the old. The third is transformative: the old is assimilated to the new. In the short term and locally, some version of the continuing complementarity thesis seems likely to be correct. But in the longer term and globally, the transformative assimilation of old to new is, we think, more plausible.

Continuing complementarity seems the likely outcome in the short term and locally simply because, as the chapters that follow and other case studies demonstrate, a common and convenient way of constructing experimentalist institutions is indeed by repurposing (or as the historical institutionalist literature terms it 'converting') parts of existing structures to support new forms of decision making. Underscoring the importance of this process of innovation through bricolage—creating the new from the old in a way shaped but [not] fully determined by starting points and building materials is the central contribution of theories of path dependency and historical institutionalism (Thelen 2003; Streeck and Thelen 2005).

But in the long run and globally it is unlikely that these local complementarities between hierarchical and experimentalist forms of governance will endure in their current form. Hierarchy, as we have noted, is legitimated by principal–agent forms of accountability, while experimentalist or networked decision making is legitimated, to the extent that it is, by forms of dynamic accountability that reject the principal–agent distinction. The more explicit the complementarity between old and new becomes, the more likely there will be explicit conflicts between competing and incompatible principles of legitimacy, and hence a need to choose between them or to find some third form of justification which explicitly reconciles both.

This is of course just the source of the widespread concern that new governance is subverting representative democracy. This widely felt need to reconcile old and new calls into question the notion of continuing complementarity and invites its proponents to explain how such complementarity can persist except as an interstitial and transitional phenomenon.[20] In earlier work, we tried to suggest how parliaments, courts, and constitutions could be remade in theory and are already to some extent being remade in practice to accommodate experimentalist forms of accountability (Dorf and Sabel 1998; Sabel 2004; Sabel and Simon 2004; Zeitlin 2005). In the next section, we discuss a mechanism, democratizing destabilization, which can help clear the way to such transformation, while heightening the accountability of governance innovations within the current regime of representative democracy.

3 Democratizing destabilization

Even if rule-making systems of the type we have been describing are accountable and produce formal rules to which sanctions can be attached, they are not therefore democratic. Democracy requires not only that citizens be equally subject to the law, but also that they be jointly and equally its authors. In this regard, peer review and directly deliberative polyarchy more generally are doubly suspicious: first because the rules they make are not validated by the familiar processes of representative democracy through legislative enactment

and control; second, and worse still, in deviating from the norms of representative democracy and principal–agent accountability, they appear to deliver decision making into the hands of a technocratic elite, whose potentially self-interested manipulations are cloaked in the robes of dispassionate deliberation. A comprehensive democratic justification of this new governance architecture would be an independent project in political theory and well beyond the scope of this essay. For now, we want to show that the second, technocratic concern is not only unfounded because of the way peer review deliberations expose technical expertise to searching public scrutiny, but also that this scrutiny may have broader and potentially democratizing effects on the new system of governance taken as a whole. Put another way, our claim is not the new architecture of peer review is itself intrinsically democratic, but rather that it destabilizes entrenched forms of authority—starting with, but not limited to, technocratic authority—in ways that may clear the way for an eventual reconstruction of democracy. Here are some of the ways by which this destabilization occurs.

3.1 Transparency and participation as procedural requirements

A necessary foundation for all forms of democratizing destabilization is transparency: the citizen's right to know not just what the authorities are deciding but also the evidence and arguments motivating their decisions. Without such a free flow of information, it is impossible to contest official proposals by drawing on the expanded range of feasible alternatives generated through the EU's experimentalist governance architecture. In other words, although transparency is not itself destabilizing, it is the precondition for everything that is.

The EU was not initially transparent, but it is becoming so. The treaties do not explicitly guarantee the principle of transparency, but commitments to openness, accessibility of information, and publicity of decision making in EU networked governance have progressively deepened over the past decade. Such transparency requirements both build on an earlier set of procedural safeguards in European administrative proceedings established by ECJ decisions and have served in turn as the basis for further commitments to ensure the active participation of a broad range of stakeholders in EU governance.

There is no general administrative procedural law in the EU. But the case law of the European Courts has created a coherent set of horizontal principles and procedural safeguards applicable across distinct policy areas. These principles and safeguards regulate administrative behaviour not only by European institutions themselves, but also by national authorities participating in the 'mixed' or 'composite' multilevel proceedings characteristic of EU networked governance. As Sabino Cassese, the dean of European

administrative law scholars observes, these safeguards include: the right to 'good administration' (now explicitly incorporated into the Charter of Fundamental Rights); 'the duty to impartially, accurately and comprehensively represent the facts'; 'remedies against bureaucratic inertia'; 'the duty to notify interested parties that an administrative proceeding has begun'; 'the duty to exercise diligence'; and 'the duty to conclude the proceeding within a reasonable time'. Most fundamental of all is 'interested parties' right to information and to be heard at various stages in the decision-making process', which Francesca Bignami terms a 'first-generation participation right' (Bignami 2004: 63–67; Cassese 2004: 25). These administrative rights and duties are not innovative except insofar as they extend to the EU best-practice protections against arbitrary and unfair treatment available to citizens in the Member States. But such procedural safeguards nonetheless constitute an indispensable foundation for more ambitious claims to transparency in administrative decision making.

In the EU, pressure for transparency originated from the Nordic countries, particularly Sweden, where access to official information antedated representative democracy as a form of popular accountability. When Sweden and Finland joined the EU in 1995, they pushed for procedural reforms favouring transparency in the Council and Commission, adding their weight to that of Denmark and the Netherlands, which had long urged such measures. These Member States then won broader protection for the principle of transparency through successful litigation before the European Courts. Treaty reform followed in Amsterdam in 1997. Since then the Courts have extended procedural safeguards further to ensure the deliberative quality of comitological decisions, for example, by scrutinizing the methods by which expert opinion is solicited and evaluated. Although the ECJ has not accorded transparency to 'the legal status of a general principle of Community law' or recognized a 'general right of freedom of information', it has interpreted grounds for exceptions to them narrowly. The 'right of access to documents' is guaranteed by the Charter of Fundamental Rights, and improved regulations for public access to EU documents were adopted in 2001, which apply to not only to the European institutions themselves, but also to any agencies established by them.[21]

Although transparency as a legal right in the EU refers mainly to individual access to documents, this principle increasingly shapes the provision of information by European and Member State administrative bodies engaged in networked governance. For transparency to serve as an effective tool for public accountability, and potentially for democratizing destabilization, information about administrative decision making must not only be open, in the narrow sense of not closed, but freely and widely accessible. Knowledgeable observers of the EU see developments moving in just this direction. Thus as Bignami (2004: 71) remarks:

> The new commitment to transparency has affected the Commission most precisely in the administrative arena. Traditionally, only important, new policy initiatives of the Commission were publicized in advance through White and Green Papers. Now, certain committees of national representatives and certain divisions within the Commission have begun making transparent the more mundane activity of interpreting, implementing, and updating existing legislative frameworks. . . . The Commission, on its own initiative or while functioning as the secretariat for committees of national regulators, has recently begun placing the committees' work agendas and draft proposals on its website, marking a dramatic shift from the past.

Geradin and Petit likewise identify a progressive elaboration of transparency requirements in the operation of EU networked governance. The first generation directives for the regulation of privatized infrastructure industries established only modest transparency requirements, such as the obligation for national authorities in telecommunications to make their decisions public and give reasons for them in resolving interconnection disputes. But in more recent framework directives establishing networked agencies, they discern a 'noticeable evolution' towards more robust insistence on transparency at both the EU and national levels, as in the case of the recent railway safety directive, which requires national authorities to carry out their tasks 'in an open, non-discriminatory and transparent way', as well as to 'allow all parties to be heard and give reasons for decisions' (Geradin and Petit 2004: 28–9). In a similar vein, the European Medicines Agency now publishes the names of participating scientific experts and nominating authorities on its website (http://www.emea.europa.eu/htms/aboutus/experts.htm, last visited 21 February 2009), while the European Food Safety Authority, whose core mission explicitly includes transparency, goes further still in posting minutes of all its Board Meetings online and opening some of them to the public (Vos, Chapter 7 and Dąbrowska, Chapter 8, both this volume). In the highly contested field of GMO regulation, as Dąbrowska observes, online document registers and public access rules enable EU citizens to obtain detailed information on the authorization process, which can be used to enhance the accountability of both public institutions and private companies involved in the commercialization of transgenic products.

As with transparency, there is an increasing tendency in EU networked governance to establish procedural requirements for ensuring active participation by a broad range of stakeholders in regulatory decision making, including civil society associations and NGOs as well as industry bodies, social partners, and other interested parties (Bignami 2004: 72–82; Geradin and Petit 2004: 29–31). Both the European Railway Agency and national rail safety authorities are obliged to 'consult social partners and organizations representing rail freight customers and passengers at European level (Geradin and Petit 2004: 29–30). Committees of European financial regulators are expected to

'consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner' (Decision 2001/527/EC, cited in Bignami [2004: 71]; Posner, Chapter 3 this volume). Other examples include: the involvement of consumer groups as well as industry in the Florence Electricity Forum; the representation of patient organizations (but not the pharmaceutical industry) on the board of the European Medicines Agency, following the 2004 legislative review of its operations; and the incorporation of 'professionals from the sectors concerned' as non-voting members on the board of the European Maritime Safety Agency.[22]

The Water Framework Directive (WFD) and its common implementation strategy (CIS), analysed in von Homeyer's chapter (Chapter 6, this volume), provide a striking illustration of the broader trend to extend procedural requirements in EU networked governance from transparency to participation. The CIS is formally committed to 'the principles of openness and transparency encouraging creative participation of interested parties'. NGOs and other stakeholders are invited to nominate experts to the working groups, to comment on guidance documents, and to attend meetings of its Strategic Coordination Group and the working groups themselves 'when they can contribute to the work with a specific expertise.' In addition, the WFD requires Member States to 'encourage the active involvement of all interested parties' in its implementation, particularly in the 'production, review, and updating of . . . river basin management plans', which von Homeyer terms the 'overarching instrument' for delivering the core objective of 'good water status'.[23]

3.2 The EU and the other: accession as mutual transformation

Another and unlikely case of democratizing destabilization concerns the accession of new Central and East European states to membership in the EU. The case is, at first glance, unlikely to contribute to the democratizing destabilization of either the EU or the accession states because of the enormous, manifest disparities in power and wealth between the established members and the accession candidates. Given the raw and plausible promise of prosperity that membership in the EU confers, and the unilateral formal authority of the EU to set the terms of accession, it seems that any changes wrought by enlargement would be limited to accommodations to EU practices in candidate countries seeking to comply with admission requirements. The obvious and sufficient explanation for their willingness to change is simply the rewards for successfully doing so. Indeed, one strand of literature regarding the accession process treats it as an exemplary case of the transformative effects of 'high-powered' conditionality, in which the extraordinarily attractive prospect of EU membership motivates widespread governance reforms that apparently cannot be achieved through the lower-powered inducements of conditions attached to World Bank or IMF loans.[24] But this interpretation overlooks,

first, the way the accession process, because of its very complexity, operates by means of framework rule making and revision familiar from internal domains of EU regulation. Second and consequently, this interpretation overlooks the democratizing destabilization effects on the EU itself produced by the recursive rule making carried out in collaboration between the EU and accession candidates.

Eastern enlargement presented the EU with an unprecedented set of challenges. The number of candidate countries far exceeded those of previous enlargements, and the resulting concerns about the EU's absorptive capacities were exacerbated by serious doubts about the commitment and capability of ex-Communist states to implement the *acquis communautaire*.[25] Thus, from an early stage, the Council and the Commission realized that eastern enlargement would overwhelm the classic Community Method of individualized accession negotiations followed by centralized, *ex post* monitoring and enforcement of compliance with EU rules. The 'Copenhagen criteria' adopted in 1993 therefore required prospective Member States to have established stable, democratic institutions (guaranteeing human rights, the rule of law, and protection of minorities); a functioning market economy capable of withstanding competitive pressures within the Union; and the ability to adopt the *acquis*. Over the next few years, the EU became increasingly concerned that candidate countries demonstrate the 'administrative capacity to apply the *acquis*', which was progressively defined as an essential condition for accession alongside the original Copenhagen criteria. Yet the Commission encountered considerable difficulty in operationalising this latter criterion, since 'there are no EU treaty provisions regarding the design of the Member States' public administrations and no general body of European law in the public administration field', while national administrative structures and regulations vary widely across the Union.[26]

The real breakthrough in the accession process, as Tulmets' chapter (Chapter 12, this volume) explains, came with the European Council's adoption in December 1997 of the 'Agenda 2000', a new enlargement strategy proposed by the Commission, which closely resembled the new architecture of networked, experimentalist governance then emerging across other areas of EU policy making. This new strategy established an iterative procedure for promoting, monitoring, and evaluating the candidate countries' advance towards the common European objectives embodied in the augmented Copenhagen criteria. These common objectives were adapted to divergent local contexts through bilateral Accession Partnership agreements and National Plans for the Adoption of the Acquis drawn up and regularly updated by the candidate countries themselves. The National Plans in turn required elaboration of Institution-Building Plans for establishing the administrative capacities needed to implement the *acquis*. Together these nested agreements and plans defined benchmarks that the candidate countries were expected to

reach, and served as the basis for national programmes of EU technical assistance, aimed at helping them build the capacity to meet these goals through exchange of best practices with Member State administrations. The Commission evaluated progress against the jointly agreed goals, using a detailed set of common indicators and monitoring data generated by the national planning process, through a series of Regular Reports on each of the candidate countries, whose recommendations played a key part in the final accession decision.

Crucial to the effectiveness of the new enlargement strategy was the transformation of EU technical assistance through the practice of institutional 'twinning': the secondment to candidate country administrations of Member State practitioners experienced in the national implementation of EU rules in key policy areas. Whereas before 1997, EU technical assistance had focused primarily on facilitating economic liberalization in response to ad hoc governmental requests, it was now reoriented towards building institutional capacity to implement the *acquis* in the candidate countries. Although the new procedures tied twinning projects more firmly to the EU's accession requirements, they also gave candidate countries considerable leeway in the selection of cooperation partners and administrative or institutional models to adapt to their own national context. Project teams were chosen by candidate country administrations on the basis of presentations by Member States, which included detailed information about national approaches to the legal transposition of directives and the informal solutions developed for their implementation. Often, too, twinning project teams involved practitioners from multiple Member States, encouraging comparative discussion of the merits of alternative approaches to the implementation of the *acquis* in particular fields. Not only did the twinning programme serve as a vehicle for selective transfer of expertise to new Member States in line with the latter's priorities and policy choices, but it also promoted reciprocal learning through mutual exchange in the old Member States themselves. Thus, the competitive selection process for twinning projects pushed national administrations to evaluate critically their own internal capacities and learn how to present their expertise to partners from very different backgrounds. In some cases, moreover, practitioners from old Member States discovered that solutions developed in candidate countries could be also useful for tackling similar problems back home. So successful did the twinning process prove in paving the way for enlargement that this approach has since been embraced as a useful mechanism for enhancing administrative coordination between Member States within the EU, while also becoming the template for the Union's external technical assistance programmes as part of its new 'European Neighbourhood' and development aid policies.[27]

In certain technically complex policy fields, such as pharmaceutical authorization and environmental protection, the EU also sought to 'smooth' implementation of the *acquis* in the accession countries by integrating them into

horizontal regulatory networks of European and national authorities. Thus in pharmaceuticals the Commission created a Pan-European Regulatory Forum (PERF) involving experts from both old and new Member States coordinated by the European Agency for the Evaluation of Medicinal Products (EMEA), while in environmental protection an Accession Countries Network for the Implementation and Enforcement of Environmental Law (AC IMPEL) was established alongside the existing IMPEL network in the old Member States and merged with the latter in 2003. In both sectors these networks served not only as mediators between the Commission and regulatory authorities in the candidate countries, but also as fora for cooperation, dialogue, and mutual learning, as well as for the identification of specific administrative capacity building needs to be addressed through twinning projects. As in the case of twinning, moreover, participation in these horizontal regulatory networks enabled candidate countries to learn not only about those parts of EU sectoral legislation 'which are uniformly implemented in all Member States, but also those parts which allow for some flexibility and which are implemented in different ways in the Member States' (Koutalakis 2004: 33).[28]

Alongside the formal *acquis*, the enlargement process pushed the accession countries to adopt the new procedural requirements of transparency emerging within the EU's new governance architecture. Thus to a much greater extent than other recently established democracies in Latin America and most of the former Soviet Union, the new Central and East European Member States have moved rapidly to introduce transparency-supporting institutions such as freedom of information legislation, external audit and control mechanisms, and the appointment of ombudsmen to assist individuals in obtaining information about government abuses. In addition to specific information and publicity requirements built into recent directives, especially in the environmental field, the EU has indirectly helped to promote transparency within the new Member States through the external reporting and statistical capacity-building obligations associated with the accession process. And as in the old Member States themselves, these EU transparency requirements have created democratizing destabilization effects in the accession countries, as domestic actors use information provided to European bodies to challenge governmental policies and push for further opening up of public decision making (Grigorescu 2002; Vachudova 2005: 186–8).

As we have already seen in the case of the twinning programme, the enlargement process has exerted a transformative impact not only on the accession countries, but also on the EU and the old Member States, through the re-importation of governance innovations from the periphery to the centre. Other noteworthy instances of this dynamic include the following: the extension to all EU Member States of internal market scoreboards developed for benchmarking the transposition and implementation of directives by candidate countries (Sedelmeier 2005: 406); the proposed creation of a network

of independent authorities to assist the Commission in the enforcement of Community state aid rules, explicitly modelled on the experience of national monitoring authorities created during the accession process; and the institutionalization of collective evaluation mechanisms such as standing committees of national representatives, mutual monitoring procedures and joint inspection teams for border control and policing originally established to ensure the full implementation of the Schengen *acquis* in the new Member States (Monar, Chapter 10, this volume). But the most striking example of the democratizing destabilization effect of enlargement on the EU is undoubtedly the power to sanction Member States for persistently breaching the common values of the Union pre-emptively incorporated into Article 7 of the Amsterdam Treaty, which led first to the creation of a network of independent experts issuing regular monitoring reports on the situation of fundamental rights in EU Member States, and then to the foundation of an EU Fundamental Rights Agency.[29]

4 Conclusion

To establish the plausibility of a broad and deep transformation of European governance, we have necessarily focused on institutions particular to the EU. This focus could easily suggest that the changes we identify are idiosyncratic to the EU and could only arise under conditions distinctive to it. In that case, EU governance would be interesting at most as an outlier, not as a pioneer of a broader movement. But the deeper thrust of our argument cuts against this conclusion. On the contrary, our claims concerning the unworkability of conventional principal–agent relations and the concomitant rise of recursive learning mechanisms and dynamic accountability through peer review depend on general observations about shifts in the environment of decision making, particularly an increase in strategic uncertainty. Given the globe-spanning interconnectedness of economic, political, and cultural developments, it is nearly impossible to imagine conditions under which decision making could become more strategically uncertain within the bounds of the EU without changing in similar ways elsewhere.

It follows as a general test of the validity of our claims that experimentalist governance cannot be experimentalist in the sense defined here if it remains confined to the EU. For one thing, we would expect experimentalist architectures to develop as the result of independent discovery outside the EU. For another, in international competition among different types of regulatory regimes, as for example in antitrust policy or environmental protection, we would expect experimentalist architectures increasingly to prevail over alternatives, as global actors come to see how revisionary rule making remains robust in the face of uncertainty while principal–agent accountability does

not. There is evidence for both propositions.[30] But a complementary and perhaps more compelling demonstration of the direction and underlying causes of change would be an increasingly open and explicit dialogue within the EU and between the EU and its various international interlocutors concerning the choices of governance architectures posed by the innovations that we have traced here. If the claims advanced here and the following chapters are correct, then the actors in the EU have in roughly the last decade pioneered new and systematic ways of speaking about what they learn and learning about what they speak. If that is so, in the coming years we will all have cause to listen to what they say.

Notes

1. For an interpretation of subsidiarity in the EU along these lines, see de Búrca (1999, 2001).
2. For detailed illustrations from financial market regulation, energy and justice and home affairs, see the chapters in this volume by Posner, Eberlein, Monar, and De Schutter.
3. For additional examples not covered in this volume, see Sabel and Zeitlin (2008).
4. See, for example, Majone (2005). This profusion of common deliberative techniques also challenges empirical typologies of EU policy making such as that of Wallace and Wallace, which associates distinctive 'policy modes' (the 'traditional Community Method', an 'EU regulatory mode', an 'EU distributional mode', 'policy coordination', and 'intensive transgovernmentalism') with the functional and political characteristics of different policy domains. In the latest edition of their influential textbook, Wallace and Wallace themselves acknowledge both that 'it is becoming much harder to identify the contours of a single coherent EU regulatory mode' because of the proliferation of new governance arrangements, and that their ideal–typical categories increasingly 'overlap and spill into each other' in practice; see Wallace et al. (2005: 82, 487).
5. Soft law has been more formally defined as 'rules of conduct which in principle have no legally binding force, but which nevertheless may have practical effects'; see Snyder (1994: 198).
6. For earlier presentations of DDP and its application to the EU, see Cohen and Sabel (1997, 2003) and Gerstenberg and Sabel (2002).
7. The notion of a democratizing destabilization effect builds on arguments presented in Sabel and Simon (2004).
8. See especially Kristensen and Lilja (2009), European Commission (2007*b*, 2008), Madsen (2006), and Wilthagen and Tros (2004).
9. For a companion piece that applies the notion of learning from difference to the jurisprudence of the ECJ in relation to Member States and to international bodies, see Sabel and Gerstenberg (forthcoming).
10. For a judicious overview of these issues, see Barnard (2007–8, 2008).
11. For a historical sketch of the emergence and diffusion of this experimentalist governance architecture in the EU, see Sabel and Zeitlin (2008: 278–303).

12. As Karl Deutsch (1963: 111) famously observed, 'power is . . . the ability to afford not to learn'.
13. See, for example, Thatcher and Coen (2008) and Majone (2005). For initial perceptions of networked regulation as a second-best solution in data privacy, financial services, and energy, see also the chapters by Newman, Posner, and Eberlein in this volume.
14. The key decisions are *Meroni v. High Authority* (Cases 21–26/61) ECR [1962] in the EU, and Chevron U.S.A., Inc. *v.* Natural Resources Defense Council, Inc., 467 US 837 (1984) in the United States.
15. For a discussion of this 'soft law' debate in relation to the OMC, see Trubek and Trubek (2005*a*).
16. For the original concept of the penalty default in contract law, see Ayres and Gertner (1989). For its extension to information-forcing regulatory regimes, see Karkkainen (2006).
17. Other well-attested examples of penalty default mechanisms in EU regulation include the 1991 Software Directive, the 1994 European Works Council Directive, and the 2006 Registration, Evaluation, and Authorisation of Chemicals (REACH) Regulation: see Ayres (2006), Barnard and Deakin (2000), and Applegate and Baer (2006: 9).
18. The EU Social Dialogue procedure, whereby representative associations of business and labour are empowered to negotiate European framework agreements which can be transformed into legally binding directives, is a clear example of this dynamic. Only when the Council and the Parliament are prepared to legislate, and the Social Partners calculate that they can craft a mutually more advantageous deal between themselves, can such legally binding agreements be concluded—conditions which have been satisfied just three times at an interprofessional level and three times at a sectoral level since the procedure was introduced by the Maastricht Treaty in 1992: see Falkner (1998), Héritier (2003), and Obradovic (2005).
19. Following Eberlein, Héritier (2003) interprets the success of the Florence Electricity Forum, as a case of 'regulatory cooperation in the shadow of hierarchy'. But such an interpretation, we believe, is misconceived, because in contrast to the classic examples of 'bargaining in the shadow of the state' presented by Scharpf and Héritier, the EU authorities are unable to take over the regulatory functions in question themselves should networked deliberation fail. For Eberlein's own interpretation of the shadow of hierarchy concept, see his chapter in this volume.
20. An obvious fallback position is to claim that political orders are never fully coherent, and therefore always hybrid (Olsen 2009). There is obviously truth in this, but the claim ignores the equally obvious truth that in most periods one or another principle of legitimacy is dominant, and contemporaneous alternatives are acknowledged as subordinate exceptions. Seen from this perspective, hybridity is always a relevant feature of political orders but hardly their essence.
21. Craig and de Búrca (2008: 562–7) and Bignami (2004: 68–71). On judicial review of comitology proceedings, see Vos (1999*a*: 27–30).
22. For these examples, see Eberlein (this volume) and Broscheid and Feick (2006); http://emsa.eu.int/end179d001.html, last visited on 21 February 2009; Sabel and Zeitlin (2008: 283–6, 295–6).
23. CIS Strategy Document quoted in Scott and Holder (2006: 228); Water Framework Directive quoted in Barreira and Kallis (2003: 102).

24. For a particularly clear and strong statement of this interpretation, see Vachudova (2005). Much of the recent literature on EU enlargement has focused on the balance between external incentives, social learning, and lesson drawing in shaping the behaviour of candidate countries, placing primary though not exclusive weight on the causal impact of political conditionality. For authoritative overviews, see Schimmelfennig and Sedelmeier (2005) and Jacoby (2004).
25. In the case of Finland and Sweden, which joined the EU in 1995, not only did Union negotiators fail to raise the question of administrative capacity, but they also accepted vague commitments from these countries to establish the necessary procedures for implementing the *acquis* after accession: see Nicolaides (2003: 47).
26. Tulmets (this volume). See also Dimitrova (2002:177–82, quotation at 180) and Sedelmeier (2005).
27. In addition to Tulmets (this volume), see Tulmets (2005*a*, 2005*b*), Bailey and De Propris (2004), Kelley (2006), and Börzel and Risse (2007).
28. According to Koutalakis (2004: 22–4), the implementation of the *acquis* by the accession countries was more complete in pharmaceuticals than in environmental protection, at least in part, because of the closer contact between experts from the old and new Member States in PERF than in AC IMPEL before the latter's merger with IMPEL. On PERF, see also Prange (2002); on IMPEL, see Martens (2006).
29. In addition to the chapters by de Búrca and De Schutter in this volume, see Alston and De Schutter (2005*a*), de Búrca (2005*a*), and Sabel and Zeitlin (2008: 302–3).
30. For a preliminary review of this evidence as regards the United States and the WTO respectively, see Sabel and Zeitlin (2008: 323–7).

2

Innovating European Data Privacy Regulation: Unintended Pathways to Experimentalist Governance

Abraham Newman

1 Introduction

Societies have long struggled with setting the proper balance between individual freedom and government control. Civil liberties including freedom of speech or personal privacy were traditionally national concerns. But the explosion of advanced digital networks and inexpensive intercontinental transportation have transformed these issues into a new field of international cooperation and conflict. Data including webclicks, credit card records, and even retina scans increasingly traverse national borders (Farrell 2006; Newman and Zysman 2006).

The EU was among the first international institutions to address these new transnational civil liberties issues with the passage of the Data Privacy Directive in 1995.[1] The Directive required that all Member States adopt comprehensive privacy rules for the public and private sector. These rules are monitored and enforced by independent regulatory agencies—data privacy authorities. As a result of the Directive, five EU Member States—Belgium, Greece, Italy, Spain, and Portugal—adopted such regulations, Member States with existing rules had to adjust their legislation, and accession countries quickly modelled the European standard (Newman 2008*b*). This initial Data Privacy Directive has been followed by a series of additional measures, which encompass an ever-expanding set of regulations concerning the appropriate use of personal information.[2]

While the creation of a European data privacy regime has had a significant effect on patterns of information collection and processing by both governments and business, it also offers an important example of novel governance techniques emerging in the EU. Most notably, the 1995 Privacy Directive

mandated the creation of a formal horizontal transgovernmental network of national regulators, known as the Article 29 Working Party, which has been organized at the European level to oversee the implementation of the Directive (Eberlein and Newman 2008). The Working Party provides advice to the European Commission on emerging policy concerns, coordinates enforcement efforts of national regulators, and assesses protection levels in non-EU countries. In a further innovative move, the EU agreed in 2001 to establish the European Data Protection Supervisor (EDPS). The EDPS works to guarantee data protection within the institutions of the Union and consults with the Commission on emerging privacy issues, especially in the area of police and judicial cooperation. The European Commission, the Working Party, and the EDPS have actively sought to use experimentalist tools—peer review, open consultations, and regulatory transparency—to improve regulatory functioning (Sabel and Zeitlin, this volume). In a number of cases, both the Working Party and the EDPS have served as democratic destabilizers, injecting alternative viewpoints into European policy debates.

Despite these experimentalist tendencies today, the policy field was initially defined by a far more closed technocratic model. The Commission excluded most stakeholders from the drafting of the Directive and initially proposed the centralization of regulation in its own hands instead of the federated network structure of the Working Party. The original Data Privacy Directive did not apply to the European institutions and did not foresee the creation of the EDPS. This chapter explores how the field of data privacy was transformed from a top-down technocratic mode to a more open recursive set of governance tools. I use historical institutional techniques—institutional conversion, unintended consequences, and policy feedbacks—to explore this shift and identify its implications for the governance of civil liberties in Europe (Meunier and McNamara 2007; Pierson, 2004).

The chapter proceeds in four sections. The first section details the technocratic beginnings of the Data Privacy Directive, dominated by national data privacy authorities and the Commission. This is followed by a description of how closed features of the regulatory model were transformed into experimental tools. The third section examines the implications of these governance tools for politics in the field, specifically issues of representation and access to the political process. The final section concludes by addressing the implications of the privacy case for more general themes examined in the volume.

2 Closed-door policy beginnings

For much of the 1970s and 1980s, the major players in European politics were reluctant to champion supranational rules for data privacy. The European Commission repeatedly rejected calls by the European Parliament to draft

regional rules, arguing that data privacy regulations would increase the cost of doing business within the internal market. National governments argued that the issue should remain in the hands of national legislatures and these claims were backed by strong industry pressure against the Europeanization of data privacy regulation.

In the late 1980s, however, these positions changed as data privacy authorities cooperating across borders threatened the broader European project. Many data privacy authorities have the statutory authority to ban the transfer of personal information to jurisdictions that lack adequate protections. In a series of moves, data privacy officials acting as transgovernmental policy entrepreneurs disrupted flows between companies and between public bureaucracies in Europe. The Commission and the Member States realized that if they were to achieve their goal of creating a common market overseen by an interconnected public administration, they would have to create a common framework for privacy protection across Europe (Newman 2008*a*).

The drafting of the privacy directive began in earnest in 1990 and followed an extremely closed, technocratic model. The Commission, hoping to resolve the issue quickly, called on a small group of national data privacy officials to assist the Internal Market Directorate to develop legislation. Private sector stakeholders were not consulted.[3] As Heisenberg (2005: 57) observes: 'The Commission's first draft was influenced heavily by the privacy authorities who understood the existing Member State legislation, the international instruments, and the technology. During the internal drafting process, only privacy experts were involved.' In fact, the draft legislation was released to the surprise and shock of industry (Dwek 1990). While an intense period of lobbying followed, the Commission did not establish any formal mechanism to integrate systematically the views of societal stakeholders.

Additionally, the original proposal included provisions which would have concentrated rule development within the Commission (Bignami 2005). Far from being an innovative governance model, this initial proposal would have replicated the traditional Community Method. A supranational directive would set the agenda; it would be implemented through national legislation, and would be overseen by the Commission.

3 The institutional foundations of experimentalist governance

As the Directive was negotiated, however, the link between supranational oversight and national implementation blurred. Several provisions integrated novel governance forms into the enforcement process, including a networked federal oversight committee, a comitology committee, and a supranational

supervisor. Before examining the path to their creation, it is first important to detail each institution and its function.

The Article 29 Working Party is perhaps the most innovative feature of the Directive. Mandated as part of the original 1995 Directive, it held its first meetings in 1997. It consists of national data privacy authorities, the Commission, and the European Data Protection Supervisor. One of the national data privacy authorities acts as Chair of the group. The Chair is an internally elected two-year position that serves as spokesperson for the group and formally organizes the agenda for meetings. The Commission supports a secretariat in Brussels for the group, which arranges meetings, takes care of language translations, and drafts many of the recommendations and opinions of the group.[4] Since 2004, the European Data Protection Supervisor, who has jurisdiction primarily over data privacy issues within the institutions of the EU, has sat on the Working Party as well.[5]

The Working Party is responsible for advising the Commission on emerging data privacy issues and assisting in promoting enforcement harmonization within the Member States. The Working Party, for example, has made recommendations on the use of new technology such as Radio Frequency Identification (RFID) tags and possible legislative initiatives to guarantee their proper use. In an effort to harmonize enforcement, the Party has also drafted uniform notification statements that it recommends organizations collecting data use. The Directive, then, forged a federated system of regulatory oversight, formally incorporating transgovernmental networks into the supranational policymaking process (see also Eberlein, this volume; Posner, this volume). It is important to note, however, that because the Directive was passed under the first pillar concerned with the internal market, the formal jurisdiction of the Working Party is limited to such issues. The jurisdiction of the Working Party could change considerably with the passage of the Reform Treaty, which would eliminate many features of the pillar structure.

In order to accomplish its mission, the Working Party has established fifteen subgroups that meet on a variety of issues ranging from children's privacy to the Safe Harbor Agreement between the United States and Europe. Civil servants with expertise from national regulatory agencies comprise these subgroups. Although the Directive requires only a simple majority to reach decisions, meetings of the Working Party generally rely on a consensus-driven style, with opinions and recommendations reflecting the view of the broader group.

At the same time that the Directive forged this new structure for organizing national regulators, it expanded the authority of national regulators. Prior to the Directive, national regulators had varying oversight powers. Some, for example, had the power to investigate and sanction data breaches. Others had a more limited ombudsman role (Bennett 1992; Flaherty 1989). The Directive, however, spelled out a common set of enforcement powers, harmonizing investigation, and sanctioning authority at a relatively high level. The members of the

Working Party, then, come to the table with a parallel set of domestically delegated regulatory tools.

In addition to the Working Party, the Directive created a second more conventional comitology body known as the Article 31 Committee. The Article 31 Committee is comprised of national government representatives and is chaired by the Commission. This group has a rather limited mandate compared to the Article 29 Working Party, reviewing implementing decisions taken by the Commission. If it disagrees with the Commission, its opinion is sent to the Council of Ministers, which may override the Commission position by a qualified majority vote. So far the Committee has had a reactive mission, responding to specific questions as opposed to the more proactive components of the Article 29 Working Party's responsibilities. It is often involved in reviewing the adequacy of privacy protection in third countries and has participated in negotiations with the United States. Representing national governments, the Committee serves to inject its opinions into supranational negotiations. Interestingly, however, it does not have the mandate to review the opinions or recommendations of the Article 29 Working Party.

Alongside the Article 29 Working Party and the Article 31 Committee, the EU formally agreed on the creation of a European Data Protection Supervisor in 2001. The EDPS is an independent European body composed of the Supervisor, an Assistant Supervisor, and a staff. It sits in Brussels with its leadership confirmed by the European Parliament. The Supervisor and the Assistant Supervisor are guaranteed a salary on par with the European Ombudsman. Since its establishment in 2004, the EDPS has actively conducted three main tasks: supervision, consultation, and cooperation. It is a vertical supervisory body that monitors data privacy regulations within the institutions of the EU such as the Commission, the Parliament, the Council, the Court, and various EU agencies. This responsibility includes monitoring and investigating complaints filed by individuals and overseeing the implementation of European-level databases such as Eurodac, which maintains fingerprints of asylum seekers and illegal immigrants. As such European-level databases expand with the intensification of third pillar cooperation; these supervisory tasks will in all likelihood increase. In addition to the supervisory role, the EDPS performs an advisory role to the European institutions. The Commission is required to consult the EDPS on issues that fall under its authority. Over time, the EDPS has asserted itself in issues dealing with police and judicial cooperation, an area excluded from the Article 29 Working Party mandate.

Between 2004 and 2007, the EDPS has released over thirty opinions and comments and actively monitors nearly seventy initiatives under debate in European institutions.[6] These opinions and comments have often entered into parliamentary debates. It has also been recognized by the European Court of Justice as having the authority to enter opinions into the Court's cases. It has done this six times in three years. Finally, the EDPS cooperates with other data

protection authorities within Europe and abroad. Each body of the EU is required to appoint a data protection officer (there are some thirty-six in all) and the EDPS works with this network to maintain data protection levels within the institutions of the EU. This vertical network within the European political institutions injects data privacy issues into every corner of the Union. Similarly, the EDPS sits on the Article 29 Working Party and is an informal participant in the Joint Supervisory Authority that monitors databases in the third pillar. The EDPS also cooperates with foreign data protection authorities through the International Conference of Data Protection Commissioners.

Despite this structure incorporating federated national regulators, a comitology committee, and a supranational supervisor, few signs existed initially that experimental politics would take hold. The Commission had originally planned to centralize oversight and did not foresee such a complex web of peer review and multilevel input. Even after the creation of the horizontal network of data privacy authorities, the Working Party's operation was not particularly transparent. Industry, in particular, continually complained that the Working Party furthered the old technocratic model of regulation (European Commission 2003*e*). And it took nearly a decade to develop and establish the EDPS. The next section, then, explores how experimentalist tools were established in the field of data privacy.

4 Broadening the regulatory model through institutional conversion

Rather than an intentional governance strategy, experimentalist governance tools in the area of data privacy developed over time and often as an unintentional result of institutional conversion. Recent work on institutional change by Thelen (2003) and Hacker (2004) has stressed the sedimentary nature of institutional politics. Policy-makers rarely confront an issue area with a blank slate. Instead, their options are constrained and enabled by a given institutional environment. Strong policy feedbacks create incentives for groups to prevent formal policy reform. That being said, the end result is often far from simple path dependence or institutional reproduction. Instead, old institutions maybe repurposed with new goals. Actors may be brought into institutional mix and this bricolage, in turn, inspires a new form of politics.

The foundations of experimentalist politics in the policy field began with the debate over the oversight structure. The Article 29 Working Party, an example of a federated regulatory network, seems rather cumbersome when compared to the Commission's proposal for centralized authority. This supposed 'second-best' solution, however, resulted from a variety of institutional constraints facing European policy-makers. The European Treaties limit the ability of the Commission to delegate its authority to a federal independent

regulatory agency. As a result, the Commission is often forced to network national agencies and experts under umbrella organizations at the supranational level (Dehousse 1997; Majone 1997; Keleman 2002). At the same time, the existence of strong national-regulatory institutions complicated Commission efforts to centralize coordination. Data privacy agencies argued that they were best situated to oversee such concerns and allied with national industry that called on the Commission to respect the principle of subsidiarity when devising governance structures (Owne 1993). National governments with data privacy agencies and industry argued that national authorities had the capacity to oversee the directive and thus national regulators should be at the center of the supranational regulatory effort. If data privacy agencies had not existed prior to the adoption of the Directive, it is unlikely that the federated oversight network would have been established.

The Article 29 Working Party was thus a compromise solution forged out of existing institutional constraints. National regulators would be networked at the supranational level. They could use their existing national authority to assist policy coordination at the supranational level. Old national institutions were repurposed with new pan-European goals. Its creation also had a strong administrative feedback effect whereby national data privacy authorities were organized into a formal transgovernmental network with an interest in preserving the federated oversight structure (Newman 2007).

The establishment of the Working Party planted the initial seeds of experimentalist politics in the sector. The Working Party was delegated the authority to assess the implementation of the Directive, assist in the harmonization of implementation, and advise the Commission on emerging issues that might require regional policy attention. This mandate, then, institutionalized a process of ongoing assessment and peer review of the Directive and its effects and of Europe's role in the broader policy field.

The Working Party has mapped out an annual work plan, in which it identifies new issue areas that might require attention. Working groups of national civil servants are then formed. These working groups scan the issue area and make recommendations to the Working Party. A broad range of topics have been evaluated including online authentication tools, genetic data, human resources information, credit-scoring systems, and mobile location data.[7] The identification and study of these issues could not have been anticipated in the passage of the initial Directive.

In their effort to identify emerging privacy concerns, the Working Party has begun to hold public consultations on key issues. Since 2005, the Working Party has held five such consultations including issues such as RFID technology, video surveillance, and electronic medical records. The Working Party begins these efforts by publishing a working paper on the issue and requesting comment. It then tabulates the responses and posts a summary of the contributions. If members deem it necessary, the Working Party may then formulate a

recommendation for the issue area. In the area of RFID technology, the Working Party received thirty-five contributions from a broad range of respondents including firms, trade associations, universities, and a consumer association (Article 29 Data Protection Working Party 2005). One of the central questions raised by the consultation process concerned the nature of personal data and whether RFID information should be included under this definition. It became clear to the Working Party that there was considerable ambiguity in the meaning of the concept in a world characterized by constantly streaming location data. This exchange informed the 2007 Opinion released by the Working Paper on the concept of personal data (Article 29 Data Protection Working Party 2007*a*).

In addition to its ability to scan for emerging regulatory challenges, the Working Party facilitates harmonized national enforcement. As the group identifies particular enforcement issues that need to be addressed, members can use their nationally delegated power to investigate, sanction, and implement opinions reached by the Working Party. This began informally as national regulators learned from the group and then went back to their home jurisdiction and implemented best practices. Since 2004, the Working Party has begun to formalize joint enforcement practices, through which it identifies an issue area and then national regulators agree to investigate it at the national level. The results of the investigation are then reported back to the Working Party. The first such initiative focused on the health insurance sector and was conducted in the twenty-five Member States plus Norway and Iceland. Each national regulator conducted a survey of implementation in their respective markets. The survey was developed jointly by the data privacy agencies and took the better part of a year to construct. The results of the survey form the basis for a comprehensive compliance report in the sector and give notice to firms active in health insurance that regulatory oversight of data privacy issues is important (Article 29 Data Protection Working Party 2007*b*). Given the lack of a supranational regulator, as is the case in other sectors such as competition policy, this level of voluntary cooperation and horizontal peer review on enforcement is quite striking.

A second critical component of experimentalist governance in the area of data privacy is the Directive review. The initial legislation required that the implementation of the Directive be reviewed regularly.[8] Owing to national legislative delays, the review was conducted in 2002 and 2003. The initial intention of the review was to help the Commission assess Member State compliance with the Directive. Offering an additional example of institutional conversion, however, the Commission reinterpreted the review mandate. Instead of simply conducting a technical report on national transposition, it took the opportunity to bring in a wide range of stakeholders. The Commission argued that the 2001 *White Paper on Governance* and the technological nature of the policy field required a broader effort than originally envisioned (European Commission 2003*e*). Over the course of a year, the Commission interviewed national government representatives along with data privacy officials; it commissioned two expert studies; conducted an open

consultation; released two questionnaires on its web site; and held an international conference.

While the Commission resisted formal amendment of the Directive as a result of the review, it did construct a ten-point action plan to improve its implementation. These initiatives span the policy-making process from creating informal mechanisms to ensure input from national governments and stakeholders to raising individual awareness about the legislation and its effects.[9]

A critical result of the review has been to encourage transparency in the day-to-day operations of the Working Party.[10] The latter has responded on a number of fronts, enhancing both the openness of its operations and encouraging external participation. In terms of transparency, the Working Party has started to publish an annual work plan. This allows stakeholders to identify key issues that will be taken up by the regulatory network. At the same time, the Working Party has engaged in the aforementioned consultations. The results of these consultations have been used in an ongoing dialogue between the Commission, stakeholders, and regulators to improve the implementation of the Directive and to address new areas that require regulatory attention. The interaction of the federated regulatory network with the Commission's new governance approach has unintentionally produced a vibrant experimentalist setting (de Búrca, this volume).

Interestingly, the pillarized institutional structure of the EU left two important holes in data privacy protection. Passed under the auspices of the first pillar concerned with the internal market, the Directive did not apply to the institutions of the EU itself or to the third pillar dealing with police and judicial cooperation. Institutional conversion, then, created an oversight gap. National data protection authorities backed by members of the European Parliament and national governments argued that data protection regulations must be extended to the institutions of the EU itself. In the Treaty of Amsterdam, Member State governments agreed to this demand and borrowed from the German system of data protection to require the creation of the EDPS and data protection officers within each Community institution. The EDPS is a knock-on institutional fix made possible by previous political decisions to use the single market initiative as the basis for initial European data privacy reforms.

5 Unintended consequences and policy feedbacks

The push towards ongoing assessment, transparency, and vertical and horizontal monitoring has generally met the goals set out in the Commission's review, particularly easing unnecessary regulatory burdens. The move towards experimentalist strategies, however, has had several unintended consequences that have shifted the nature of politics in the field of data privacy.

First and foremost, the consultation process has provided new access for multinational firms and international lobbying organizations, which represent firms headquartered outside of Europe. Over half of the responses, for example, for the current consultation on binding corporate codes being conducted by the Working Party come from non-European sources. These include a diverse set of actors such as the American Chamber of Commerce, the United States Council for International Business, and the Japan Business Council.[11]

At the same time, many consumer protection organizations have not taken advantage of the new transparency. The Commission laments in its report on the review, 'the limited response of consumer organizations to the consultation process' (European Commission 2003*e*: 6). This is due in part to the fact that the existence of national data privacy agencies weakens the incentive for private groups to mobilize. In other words, data privacy agencies in many ways serve to resolve the collective action problem. A few transnational organizations such as Statewatch and Privacy International monitor the evolution of data privacy policy at the European level. Despite these efforts, however, the work of a handful of civil society players has been dwarfed by industry lobbying. It seems from a cursory exploration of the data privacy field that those organizations with the most resources to marshal a European presence are best able to contribute to the reassessment process.

While the Working Party has attempted to address these consumer protection issues and identify new areas of privacy concern, stakeholder input has focused on areas in which the regulatory burden of the Directive may be reduced. The Commission and the Working Party are then often in the position of justifying the strong level of protection guaranteed in the Directive. As the Commission (2003*e*: 8) reports:

> Where amendments have been proposed by stakeholders, the aim is often the reduction of compliance burdens for data controllers. While this is a legitimate end in itself and indeed one that the Commission espouses, the Commission believes that many of the proposals would also involve a reduction in the level of protection provided for. The Commission believes that any changes that might in due course be considered should aim to maintain the same level of protection and must be consistent with the overall framework provided by existing international instruments.

While it does not appear that the Directive review has undermined this level of protection, it has encouraged implementation flexibility and a reduction in regulatory bureaucracy. This presents a stark contrast to the period of legislative drafting when private stakeholders had limited influence on the goals of the Directive and its implementation.

At the same time, the formation of the Article 29 Working Party has had an important unintended consequence, fostering a new policy feedback. Policy feedbacks refer to the process by which legislation creates new political actors.

By changing resources, organization, or incentives, public policy frequently alters the constellation of political actors (Pierson 1993; Campbell 2003). This process has been most extensively documented in the social policy field, but occurs in bureaucratic transformations as well (Newman 2007).

The Working Party has become a democratizing destabilization force (Sabel and Zeitlin, this volume), leveraging its information advantage to activate different supranational political institutions. While the initial intent of the Directive was for the Working Party to serve as a source of expertise for the Commission, its opinions and reports have filtered down to other European institutions, particularly the European Parliament. Because the reports of the Working Party are public and widely disseminated, they do not provide information exclusively for the Commission. In a number of high-profile cases, the Working Party's arguments have been used by the European Parliament against the Commission. For example, the Commission struggled to negotiate a compromise with the United States over the sharing of airline passenger data. Because US privacy regulations are not deemed adequate by the EU, sharing such information for security purposes runs contrary to European privacy rules. The Commission, however, hoped to negotiate a deal that would allow European carriers to continue flying to the US. The Working Party argued in an opinion that the agreement failed to meet an adequate level of protection and called on the Commission to reassess its position (Article 29 Data Protection Working Party 2002). The Commission initially ignored the Working Party's assessment.

The argumentation of the Working Party quickly found its way into the speeches of European parliamentarians who disagreed with the Commission's proposal (Newman 2008*b*). The Working Party thus served not to provide expertise to the Commission but rather to the Parliament. When Members of European Parliament (MEPs) challenged the airline passenger data compromise before the European Court of Justice, it referenced the findings of the Working Party in support. The Working Party has destabilized the political process, becoming an independent authority that is willing to ally with the institution that best represents its concerns. The opinions and recommendations generated by the Working Party become equally available to the Commission, the Parliament, and stakeholders.

Similarly, the EDPS has leveraged its delegated authority to expand its own role in European affairs. In an important policy paper, the EDPS broadly construed its mandate to include all proposals dealing with data processing confronting the European Communities. Extending well beyond data processing by Community institutions, the EDPS has argued that its advisory role applies to first and third pillar issues as well (European Data Protection Supervisor 2005*b*). Since then, the EDPS has released opinions on issues ranging from airline passenger data sharing to the Prüm Treaty on police cooperation. Additionally, it has successfully lobbied the European Court of Justice to be

recognized as a party that can submit comments to the Court: a power it has used on several occasions to resists efforts pushed by the Council to expand surveillance efforts. The EDPS fosters and supports the efforts of the internal data protection officers within the institutions of the Union to promote data privacy issues and serves as a focal point for coordination. Notably, the EDPS drafted a position paper detailing the responsibilities of data protection officers and called for their independence (European Data Protection Supervisor 2005*a*). The EDPS then serves both as the hub of a vertical data privacy network within the EU bodies and an important advocate for its expansion and empowerment.

The EDPS has used its advisory authority (as has the Working Party) to address multiple audiences including the Commission, the Parliament, and the Court. In so doing, it has repeatedly clashed with proposals forwarded by the Council and the Commission, especially in the area of police and judicial cooperation. For example, the EDPS published an opinion that called for a maximum data retention period of twelve months (half the amount proposed by the Council Framework Decision) and condemned the final Passenger Name Record Data Transfer agreement (or the PNR Agreement) with the United States as lacking adequate privacy safeguards. This destabilization strategy provides dissenting expert opinions to non-governmental organizations and members of the European Parliament. The Commission, and to some extent the Council, must respond to the criticisms leveraged by the EDPS and justify their efforts to expand surveillance. Concerned with balancing the privacy concerns of individuals with government and business needs for data, the EDPS and the Working Party infuse European debates with a citizen perspective often underrepresented in government negotiations.

6 Conclusion

The European Data Privacy Directive is among the first serious initiatives of the digital era to address a new set of transnational civil liberties issues. As communications technologies permit the instantaneous transmission of personal data across borders, diverse national regulatory systems interact and produce conflict. The Directive guarantees that European citizens will enjoy the same level of protection no matter where they find themselves.

The Directive also is emblematic of a set of new governance tools that have been integrated into European policy-making. Most notably, data privacy is overseen by an incorporated transgovernmental network of national regulators (Eberlein and Newman 2008). Among its principal responsibilities, this network monitors and reassesses the Directive's enforcement, identifies emerging areas of concern, and shares best practices among the regulatory authorities. The network, then, serves on several levels to update and refine the

Directive. Additionally, the policy field is embedded within a system of continual review. The Commission organized an expansive evaluation of the Directive and has constructed an action plan through which the Directive will be improved. Many of these action points establish additional recursive mechanisms such as the call for consultations in the generation of best practices. Finally, the EDPS and the Working Party have established themselves as independent advisors capable of injecting destabilizing expert opinions into European policy debates.

The emergence of such recursive tools, however, did not emerge from a linear path. Rather, institutional legacies framed the options available to European policy-makers. Only sometime later were conventional approaches converted into experimentalist processes. And the effects of these strategies were often unforeseen and rather remarkable. The Working Party emerged out of a battle between the Commission and the Member States, where existing national institutional legacies offered a quick solution. The ideas contained in the Commission White Paper on Governance altered the manner in which the Commission implemented the Directive review and inspired the Commission to push the Article 29 Working Party to increase the transparency of its operations. The EDPS, itself, is a quirk that resulted from the pillarized structure of the EU.

The establishment of the Article 29 Working Party and the EDPS have created new voices in European debates that promote data privacy issues and have a clear democratically destabilizing effect. While national data privacy officials have a long tradition of lobbying European institutions, they have now become a European institution. With a permanent secretariat funded and staffed by the Commission, the Working Party has become a taken-for-granted part of European political debates (McNamara 1998). Similarly, the EDPS has broadly cast its remit to speak across data privacy issues. In many instances, their opinions come into direct conflict with the Commission and the Council, reshaping the political dynamics of regional politics.

Notes

1. See the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data 95/46/EC, 1995 O.J. (L 281) 31.
2. Additional legislation has been passed for the telecommunications sector, electronic communications, and the Commission is currently drafting a directive for the third pillar concerned with police and judicial cooperation.
3. Interview with DG Internal Market official, Brussels, March 2003.
4. While the Commission department responsible for implementing the Directive sits in on the meetings, it has yet to act as a top filter of broader Commission goals or as a reporting mechanism on the Working Party's activity. Rather, it brings practical concerns of the respective civil servants that implement the Directive from the Commission's side. Interview with Commission official, Brussels, June 2007.

5. The position of European Data Protection Supervisor was created by the 1997 Amsterdam Treaty. The formal position was then initiated in 2001 through *Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data*. Official Journal of the European Communities L 8/1 12 January 2001. Mr. Hustinx, a former chair of the Article 29 Working Party and Dutch Data Privacy Commissioner, took office as the first European Data Protection Supervisor in January 2004.
6. The opinions of the EDPS can be found at http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/45.
7. The reports of the Working Party are available at http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm.
8. Article 33 of the Directive states, 'The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32(1), on implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments'.
9. Specifically the review called for the following: (*a*) Discussions with Member States and Data Protection Authorities; (*b*) Association of the candidate countries with efforts to achieve a better and more uniform implementation of the Directive; (*c*) Improving the notification of all legal acts transposing the Directive and notifications of authorizations granted under Article 26(2) of the Directive; (*d*) Enforcement; (*e*) Notification and publicizing of processing operations; (*f*) More harmonized information provisions; (*g*) Simplification of the requirements for international transfers; (*h*) Promotion of Privacy Enhancing Technology; (*i*) Promotion of self-regulation and European Codes of Conduct; and (*j*) Awareness raising. The ongoing efforts of the work programme are available at http://ec.europa.eu/justice_home/fsj/privacy/lawreport/index_en.htm#follow_up.
10. Action steps 4–7 are specifically addressed to the Working Party. The section begins by saying, 'The Commission welcomes the Working Party's contributions to achieving a more uniform application of the Directive. It wishes to recall the importance of transparency in this process and encourages the efforts the Working Party is currently undertaking further to enhance the transparency of its work' (European Commission 2003*e* 23).
11. See http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/consultations/bindingrules_en.htm.

3

The Lamfalussy Process: Polyarchic Origins of Networked Financial Rule-Making in the EU

Elliot Posner

Over less than a decade, EU policymakers transformed the regulation of the European financial services industries. The overhaul accelerated the formation of capital and auxiliary markets inside Europe,[1] adding to already intense pressures on governments and social programs. Internationally, it is the single most important factor behind the end of US financial hegemony and has triggered the cooperative management of longstanding transatlantic disputes over cross-border activity of banks, broker-dealers, insurance companies, exchanges, auditors, and other financial services providers (Posner 2009*b*).

Because financial arrangements affect all industries and the risks borne by citizens and governments, the EU financial regulatory transformation raises questions about its real-world implications. Will the emerging financial system be qualitatively different from the US variety? Will it set off regulatory competition and, if so, will it be a race to the top or the bottom? In short, how will it alter the distribution of financial resources inside and outside Europe and the ease and cost by which governments, citizens, and firms obtain financing?

Many of the answers to these questions lie in the Lamfalussy Process, the new EU procedures for devising, transposing, implementing, and enforcing the regulations that govern European financial services industries. The Lamfalussy Process marks a historic shift away from a regulatory regime that kept the lion's share of rule-making and supervision at the national level. Under the new regime, the Council of the EU and the European Parliament (EP) extended comitology procedures (i.e. the delegation of implementation powers to the European Commission) to the existing co-decision rule-making arrangement and added a prominent role for formalized networks of national regulatory authorities. Most rules now originate in Brussels, and although national

authorities are responsible for on-the-ground implementation and supervision, EU coordination and enforcement mechanisms deeply constrain their actions.

Introduced in February 2002 in securities and in 2003 in banking and insurance, the Lamfalussy Process is still very new. This chapter, focused only on the securities sector, thus contributes to a growing body of necessarily preliminary empirical analysis on the origins and operations of these new procedures (Bergström et al. 2004; Alford 2006; Mügge 2006; Posner 2007; Quaglia 2007). It describes the new regime and explains why widespread pressures for more coordinated, coherent, and inexpensive financial regulation in Europe gave rise to the Lamfalussy Process, rather than to a more hierarchical governance scheme or some other set of arrangements.

In so doing, the chapter also contributes to this volume's aim of identifying common conditions that lead policy-makers in the EU and beyond to adopt similar regulatory solutions across multiple sectors with differing histories and problems. Its immediate theoretical ambitions thus respond to compelling empirical observations by Sabel and Zeitlin and the other contributors to this volume. The new regime in European financial regulation not only represents a deviation from prior rules and procedures but also combines distinctive governance tropes present in a number of other EU sectors. The incomplete list of shared governance forms includes two levels of legislation, European Commission rule-making that relies on networks of national regulators, peer review, open consultation, and built-in mechanisms for monitoring and reviewing the regime. A key goal of this chapter is to explain why these governance modes—comprising experimentalist architecture, in the sense used by Sabel and Zeitlin—emerged in EU financial regulation and to explore whether similar conditions are responsible for the observed pattern across sectors.

My analysis yields two main findings. First, the new formal arrangements in finance are largely the outcome of EU politics (i.e. unsettled inter-institutional and intergovernmental bargains) combined with thirty years of capacity building in financial regulation at the European level. Thus, rather than 'competition politics' driven by a global pattern of securitization and increased US competition (Mügge 2006), the formal setup of the Lamfalussy Process stems primarily from causes endogenous to the EU. This finding is consistent with approaches that envision EU political development as an autonomous historical force (Posner 2005, 2009*a*; Meunier and McNamara 2007). It also speaks directly to a major theme of this volume: polyarchy's deeply constraining effects on policymakers' choices about how to respond to demands for regulatory reform. Fragmentation of political authority all but eliminated the possibility of adopting the US agency model—a Securities and Exchange Commission (SEC) for Europe—and has thus far fostered unrelenting pressure for deliberation among existing national authorities to generate functionally equivalent regulation.

Second, the early evidence suggests that a transgovernmental body, comprising national securities regulators, has emerged as the actual fulcrum of

rule-making and supervision—a development similar to those observed in the chapters on the regulation of data privacy, food safety, and energy. Created as an advisory committee, the Committee of Securities Regulators (CESR) has become a supranational body that is larger than its constituent parts.[2] CESR, along with the European Commission, leaves its imprimatur on most stages of the rule-making process. Given the formal arrangements and the well-developed literature on Brussels' entrepreneurship, however, we might expect the Commission to have considerable influence.[3] Explaining CESR's role, by contrast, means paying attention to new research on transgovernmental networks (Newman 2008*a*; Eberlein and Newman 2008) and moving beyond analysis of formal delegations of power (Coen and Thatcher 2008). CESR's authority and considerable autonomy is in large part traceable to widespread legitimacy among market participants, the European Parliament, the European Commission, the Council, and foreign regulators such as the US Securities and Exchange Commission (SEC). Some of this legitimacy arises from the technical expertise and domestic-level legal powers of its members and their established relations to market participants. However, it also derives from the mandated practices of open consultation, coordination of policy implementation, and especially peer review.

The evidence on CESR presented below adds to our understanding of transgovernmental networks of national regulators and their role in the EU's experimentalist architecture. It provides a vivid illustration of how the birth of a new autonomous political actor flowed from the decisions of policy-makers—intent on regulatory reform, deeply constrained by the politics of a fragmented polity, and therefore inclined to make use of pre-existing actors and institutions. Building on existing networks of national regulatory authorities, however, is more than a risk-averse, pragmatic, and second-best alternative route for achieving governance goals. It also unleashes potential for autonomous political authority.

The conclusion shows how CESR's existence has permanently changed the ongoing politics of financial regulatory reform. It also uses the chapter's findings to address a host of questions about the future of EU financial regulation: Will the new arrangements in European securities regulation—taken to their limits—be up to the task? Will EU policymakers resort to more classic governance to create the desired 'legal certainty'? And will the political pressure, borne from the 2007–9 financial crisis, to improve Europe-wide prudential safeguards (an area of regulation excluded from the original Lamfalussy Process) lead to another sweeping overhaul of EU financial governance?[4]

1 Historical background[5]

The Lamfalussy Process is a core part of the broader transformation of EU financial arrangements. By financial transformation, I mean substantive rule

changes and procedural reforms that have taken the EU significantly closer to an integrated financial market. As a whole, these changes amount to a shift of financial regulation from the national level to a multilevel and networked arrangement and put in place much of the institutional and political foundations necessary for integrated financial markets.

The forging of such a market was among the earliest goals of European cooperation and was reinforced in the single market program (Story and Walter 1997; Jabko 2006). Yet until the late 1990s, progress was slow and uneven, and financial regulation trailed behind other parts of the post-SEA (Single European Act) project. The liberalization of capital accounts[6] was a necessary but woefully insufficient step, and a raft of legislation, applying the principle of mutual recognition to banking, insurance, and investment services, proved too weak to overcome differences in national regulations, legal systems, and cultures and was plagued by inconsistent implementation (Story and Walter 1997: 314–15). Scholars agree that governments considered financial arrangements as extensions of national sovereignty (Story and Walter 1997; Jabko 2006; Mügge 2006). Obstacles to cooperation reflected resistance to changing distinct and largely incompatible financial systems. Few if any scholarly accounts from the mid-1990s expected this 'battle of the systems' to change, let alone within a few years and rapidly.[7] While some analysts made vague predictions that the euro's advent would eventually lead to a single financial market, the research investigating the new currency's effects offers no theoretically driven explanation for why, when, and how EMU might prompt policymakers and companies to alter their stances towards financial integration (Gross 1998; Dermine 1999).

EU financial transformation began with a burst of legislative activity. In March 2000, the Council endorsed the Financial Services Action Plan (FSAP), a list of forty-two proposed EU laws designed to sweep aside the obstacles to financial regulatory integration (European Commission 1999*d*). Unlike other components of the Lisbon Agenda, EU decision-makers adopted almost all of the planned laws in accordance with the Commission's timetable and have now entered the next stage centered on coordinated implementation and enforcement and on improving badly performing legislation (*Financial Times* 2004; European Commission 2005*l*, 2006*h*). These changes in substantive rules continued to combine principles of mutual recognition and harmonization. Compared to post-SEA legislation, however, they differ in magnitude (i.e. the number of new laws), scope (i.e. the breadth of issues addressed), and quality (i.e. the degree to which EU legislators employed the principles of harmonization and convergence). Some new legislation was distinct from the 1990s initiatives in a fourth respect: it mandated, to a greater extent, procedures for cooperation and dispute management among national supervisors.[8]

2 The formal arrangements of the Lamfalussy Process

In its final stages, this legislative activity was accompanied by the Lamfalussy Process, an inter-institutional agreement that alters rule-making procedures and bolsters cross-border coordination mechanisms for transposition, implementation, supervision, and enforcement (Lamfalussy 2001). There are four official levels and one additional formal feature (Bergström et al. 2004, 2006). At the first level, the Commission initiates framework legislation following a consultation process with market participants and having sought advice from a newly established committee, the European Securities Committee (ESC). ESC comprises member state representatives and is chaired by a Commission representative. CESR also has a role, as it may offer the Commission advice on its own or the latter's initiative (European Commission 2001*g*). Once the Commission submits a proposal, the normal co-decision procedures apply. At the second level, the Commission implements the legislation by devising detailed rules with the assistance of ESC (acting in its second capacity as a regulatory committee) and CESR. After consulting ESC, the Commission asks CESR for advice. CESR develops its views through broad and open consultations with stakeholders. The Commission then draws on CESR's advice to propose measures that ESC must approve. At the third level, CESR coordinates transposition and ensures consistent implementation and supervision by its members, who retain their national responsibilities to oversee domestic securities markets. At the fourth level, the Commission acts as the overseer of the treaty, monitoring compliance and initiating legal action when necessary. Finally, an inter-institutional monitoring group (IIMG), comprising six independent experts chosen by the Commission, Parliament, and the Council (two each), identifies blockages and ensures that the Lamfalussy Process is meeting its stated goals of speedier and more flexible rule-making. The presence of 'sunset clauses' (four-year expiration dates on the Commission's implementation powers) in framework laws also guarantee that the EU's institutions will periodically revisit the basic foundations of the arrangements.

The designers obviously intended at least some of these formal arrangements to function in accordance with the four key elements of the experimentalist architecture Sabel and Zeitlin identify in this volume. Levels two and three separate the creation of broad legislative goals by politicians from the elaboration of detailed rules by civil servants. The role of the IIMG implies a built-in monitoring and reporting mechanism; peer review was explicitly mandated as part of CESR's coordination role; and Ecofin, the EP, and the Commission left the 'independent regulators committee' to devise its own rules of procedures and operational arrangements (European Commission 2001*g*; European Council 2001: pt. 6). The EP's insistence on using 'sunset clauses,' moreover, incorporated into these new procedures a formal recursive mechanism, which recently took the form of

a new comitology bargain. The result was an increase in the EP's oversight powers—and not only in the area financial regulation (Almer 2006).[9] Finally, it is possible to think of CESR as a 'bridging device.' The established and accountable national authorities who comprise the body lend legitimacy to the gradual transition from old domestic regimes to supranational and networked modes of governance.

3 The origins of the Lamfalussy Process

Because of its current effects and future potential impact inside and outside Europe, the EU financial transformation has become the subject of study for scholars interested in the origins of financial governance arrangements. Two recent contributions differ on a critical point: to what degree were large financial services providers the main drivers behind change? Mügge (2006) argues that in the 1990s large national financial services companies, which used to be part of government-finance coalitions in favor of protecting distinct domestic arrangements, switched their public policy preferences towards the development of pan-European markets and regulations. By contrast, finding little evidence of early political mobilization by these firms, I argued in previous work that the new preferences of financial services companies represented more a reaction to than a cause of financial regulatory change—a finding also consistent with Grossman's evidence (Grossman 2004; Posner 2007). The transformation, I maintain, is primarily the product of a slow-moving institutional change process; in the late 1990s, policy entrepreneurs were able to quicken the pace by turning the euro's introduction and rising US competition into an opportunity for the pro-integrationist agenda.

This chapter does not engage this core issue of the debate. Yet in investigating whether and how autonomous EU politics and processes caused and shaped the form of the Lamfalussy Process, it contributes to one aspect of it. The near-consensus among national finance ministries, market participants, Brussels civil servants, and members of the European Parliament to adopt the new arrangements makes it difficult to identify the policy entrepreneurs and to map out the winning and losing coalitions. Sold as a way to facilitate the passage, implementation, and effectiveness of the FSAP legislation, the Lamfalussy Process is a spillover of the earlier actions and its creation reflects the momentum they generated. Alexandre Lamfalussy's Committee of Wise Men invoked the apparently persuasive argument that procedural change was an urgent matter, necessary to speed up the legislative program and ensure that regulation did not diminish the FSAP's potential benefits (Lamfalussy 2001: 7–8). Nobody wanted to be on the record as impeding procedural reforms.

It is somewhat easier to explain the form the Lamfalussy Process took by conducting a genealogical investigation. Doing so suggests the inadequacy of explanations based on global ideological diffusion and material pressures, as the specific components of the formal arrangements and their aggregation display a deep genetic linkage to increasingly standard modes of EU governance. First, the division between framework and detailed legislation and the extension of comitology procedures to financial regulation binds the disparate parts of the Lamfalussy Process into a single whole and connects finance to the governance of other sectors as described by Sabel and Zeitlin. Why do we find this common thread across sectors? Governance arrangements in the financial arena, like in others, are very much an expression of unsettled inter-institutional and intergovernmental political bargains.[10] In particular, the adoption of the Lamfalussy Process marks a breakthrough in a long-standing impasse (Pollack 2003: 140–4; Bergström et al. 2004). Ever since the Commission first proposed it in 1989, governments (unwilling to cede powers to the Commission in a highly sensitive area) and the EP (seeking to rebalance asymmetric oversight powers) had blocked the extension of comitology to securities regulation (Bergström et al. 2004: 7–10).

Inter-institutional and intergovernmental EU politics thus account well for the extension of comitology to financial services and, specifically, for the Commission's formal rule-making role and the creation of ESC as a consultative and oversight body. It also helps to explain the procedures in the Lamfalussy Process that distinguish between framework laws and detailed rules and institutionalize open consultation. Delegating implementation, to be effective, implies leaving the detailed rules to civil servants in conjunction with technical experts, and to be perceived as legitimate, needs mechanisms that give access to affected parties. These approaches to EU law-making evolved gradually from the introduction of comitology procedures (Sabel and Zeitlin 2008), made their way into the Commission's 1998 'Financial Services' document (European Commission 1998), and reflected the Prodi Commission's approach to EU governance in general (Almer and Rotkirch 2004), rather than global best practice or a functional solution to the problems of regulating financial services in an age of mobile capital.

EU balance-of-power politics, however, is an insufficient explanation for the creation of CESR and its formal and informal roles in the Lamfalussy procedures. The European Commission originally proposed the introduction of comitology in the financial sectors with ESC but without CESR. The Lamfalussy Committee, concerned less about inter-institutional and intergovernmental battles and more about feasible ways to improve financial rule-making capacity, emphasized the need for a body that could provide technical and regulatory expertise and garner widespread respect among market participants (Lamfalussy 2001: 86). Its recommendation to create CESR by formalizing the Forum of European Securities Commissions (FESCO) was thus based largely on pragmatism, reflecting an EU pattern of formalizing networks of national authorities across

multiple regulatory domains including data privacy, telecommunications, and energy (Newman and Eberlein 2008; Coen and Thatcher 2008; Thatcher and Coen 2008). Instead of choosing an ideal model like the risky French plan for a European SEC that would have had to be forged from scratch, the Committee's recommendations built organically on what was already in place (*Economist* 2001). This approach—which won broad appeal—ensured that arguably the most important innovation of the new Lamfalussy Process (see below) is in fact an incremental addition to a small and largely unnoticed attempt to coordinate EU securities regulation five years earlier (*Economist* 2001; *Shirreff* 1999; *Financial Times* 2000). Given the widespread reluctance to risk the creation of a single regulator for Europe, the Wise Men felt they had no real other alternative. FESCO was already organized and national securities regulators, responsible for devising and implementing financial rules at home, were the only actors with pre-existing expertise and legitimacy.

In sum, by the time the Lamfalussy Committee consulted with market participants in 2000 and 2001, financial services firms had had two years to mobilize in response to the FSAP and substantially directed the Wise Men toward pragmatic solutions. Nevertheless, their choices were deeply constrained by EU politics and previous efforts to integrate EU financial regulations.[11] Given that EU politics in this context is an outgrowth of a polity characterized by multiple poles of authority, my conclusions about the origins of the Lamfalussy Process generally support Sabel and Zeitlin's claim that polyarchy is a key condition of experimentalist governance across EU sectors. But my evidence also reveals how the presence of national authorities lends itself to a particular governance form: regulatory bodies that foster and formalize transgovernmental networks.

4 The operation of the Lamfalussy Process

The genesis of the Lamfalussy Process, then, lies in forces tied to the European integration process. How does it operate in practice? The evidence is still thin. At the time of writing, it had only produced four EU framework laws in the area of securities regulation.[12] I am aware of only a few early scholarly assessments of its operations (Bergström et al. 2006; Thatcher and Coen 2008). Its recent introduction is not the only reason that analysis is in short supply. The new balance between multiple levels and types of financial governance in Europe feeds into an existing methodological bias that diverts attention away from EU-level governance phenomena. At least in political science, analysts tend to study finance at either the international or domestic level.[13] Research projects that begin at the domestic level in Europe, however, will likely underestimate the importance of the Lamfalussy Process and EU legislative initiatives. This is because regional rules have gradually formed an increasingly thick layer atop existing, albeit changing, domestic financial systems. In

the current division of labor, national securities regulatory agencies (which, for the most part, only date to the 1980s and 1990s) are still legally responsible for implementing and enforcing transposed EU rules. On the ground, it is easy to conclude that seemingly distant developments such as rule-making through co-decision and comitology or cross-border supervisory cooperation have little effect on the nation's financial governance. Yet in the estimation of one of Lamfalussy's Wise Men with intimate knowledge of British financial regulation, 90 percent of national rules today originate in Brussels.[14]

There are competing and complementary expectations about the operations of the Lamfalussy Process. Several scholars have expressed skepticism that the Council and EP will in practice delegate rule-making within the sector (Bergström et al. 2006: 12–18.). According to this view, detailed regulations governing finance have too many distributive consequences for the EU's legislators to delegate rules of any importance to the Commission and CESR. The expectation is that detailed rules would make a mockery of the so-called 'framework' legislation; that the Lamfalussy Process would not make rule-making faster or more flexible; and that CESR's role (along with that of the Commission) at Level 2 would be relatively unimportant (Coen and Thatcher 2008). In related arguments addressed in subsequent sections, real influence at Level 3 either stays in the hands of national supervisors (leaving CESR stunted in a classic intergovernmental cooperation trap) or rests with the largest banks and other financial services companies (Mügge 2006).

Evidence from the creation process of two directives, presented in the most comprehensive study to date on the subject, suggest that concerns about the separation of framework and technical rules have been overblown and oversimplified. The EP and the Council have made ample use of the newly established implementation procedures, demonstrating that both bodies have relinquished control over implementing measures, even contested ones. In addition, the legislative process has moved more quickly than in the past (Bergström et al. 2006). The IIMG's January 2007 interim report, based on wide consultation with practitioners, offers additional evidence (that includes the two later directives) of faster and more efficient rule-making processes (IIMG 2007: pt. III). While widespread usage of CESR's Level 2 consultation process by market participants does not necessarily indicate meaningful delegation,[15] it is hard to imagine why firms would expend so much energy and resources on an impotent legislative body.[16]

Even if some framework directives contain more detail than Lamfalussy's team hoped (and there is evidence of both the Council and EP maintaining control by insisting on minute details in Level 1 legislation), CESR has been asked to advise the Commission on measures of extraordinary importance to financial companies. In fact, because the EP and Council could not find common ground in the creation of MiFID at Level 1, difficult political issues were left for CESR to decide at Levels 2 and 3.[17] The 2006 inter-institutional agreement on comitology, moreover, diminishes Parliament's incentives to include

technical details in framework legislation by giving it more power over Level 2 measures. Lastly, there has also been a general call for all parties—CESR, Commission, EP, and Council—to reduce the amount of details at all levels to avoid overly legalistic behavior on the part of market participants (IIMG 2007).

Another skeptical hypothesis dismisses the relevance of the Lamfalussy Process and new modes of governance in general, arguing instead that EU rule-making is increasingly driven by formal processes and judicialization (Kelemen 2006). Scholars tend to agree that one legacy of the Americanization and liberalization of European finance in the 1980s and 1990s is increased juridification. But they disagree on its effects and meaning (Kelemen and Sibbit 2004, 2005; Levi-Faur 2005). Although this chapter examines some of the preliminary evidence in later sections, no studies yet systematically assess the variant of this proposition that attributes a rise in adversarial legalism for determining financial rules to deepening levels of European integration (Kelemen and Sibbitt 2004; Kelemen 2006). Such a study would have to show (*a*) a Europe-wide rise in levels of judicialization; (*b*) different levels of judicialization before and after the EU financial transformation; and, (*c*) a causal connection between the two phenomena.

A final hypothesis, by contrast, not only expects the Council and EP to delegate authority to the European Commission but also for the implementation stages of the experimentalist architecture and, in particular, the Lamfalussy Process to become increasingly autonomous from inter-institutional and intergovernmental battles (Posner 2005; Newman 2007). Contrary to the expectations of skeptics grounded in principal–agent theory (Coen and Thatcher 2008), early evidence suggests that such a pattern has emerged in the rise of CESR as an independent body (Bergström et al. 2006; Mügge 2006).

4.1 CESR's expanded role

CESR's influence has seeped beyond its mandate as an advisor at Level 2 and a coordinator at Level 3. Several types of evidence support this claim. Market participants consider CESR to be influential within the EU legislative framework. In response to CESR's July 2007 questionnaire about its own performance, 18 of 24 respondents described its influence as 'quite high' or 'very high' and none 'quite low' or 'very low.'[18] The Commission, Parliament, and Council, moreover, have taken measures to push CESR back within the boundaries of their respective interpretations of its mandate (Bergström et al. 2006). For example, CESR's propensity to initiate work on Level 2 rules before the ink was dry on framework legislation (the so-called parallel working) was not mentioned in the Lamfalussy Report and raised concerns about indirect and inappropriate influence on Level 1 directives.[19] Parallel working has the potential to quicken the legislative process. There have been efforts to limit it to already agreed and uncontroversial measures (a process requiring the EP and Council feed CESR early drafts). Still, the Commission and Parliament continue to exhibit discomfort, frequently invoking the

limits to Level 3 committee powers (European Parliament 2007: pts. 53, 61; 2005*b* pt. 20: European Commission 2005*l*: 3.1 (2)). And other evidence of 'pushback' is plentiful. In addition to the mandated annual reports to the Commission (European Commission 2001), both the Ecofin Council and the EP forged new mechanism to improve oversight of and communications with CESR. In 2005 in order 'to develop regular relations with CESR and to increase their democratic accountability,'[20] the EP's Economic and Monetary Affairs committee initiated on-site visits and insisted that CESR send Parliament all documents that the Commission, ESC, and Council receive. In 2007, Ecofin asked CESR to report on its supervisory operations directly to the Council's Financial Services Committee (Council of the European Union 2006*a*; EU Financial Services Committee 2006).

Ecofin's closer monitoring is largely a reaction to the most significant display of CESR's expansive new role. While early attention focused on CESR's influence in rule-making at levels 1 and 2, its success in shaping the debate on supervisory arrangements did even more to establish its status as an independent and important player in EU securities regulation. As the FSAP legislative program neared completion in 2004, CESR stormed out of the supervisory starting box with the October 'Himalaya Report,' stealing the initiative from the European Commission and others (CESR 2004). Ecofin's May 2006 clarification of the EU supervisory framework demonstrates the degree to which CESR's sometimes power-enhancing ideas about fulfilling a vague mandate for converging supervision became the focal points of subsequent discussion for all three Level 3 committees and gained widespread acceptance and support.[21] Not every measure in the Himalaya Report resonated beyond CESR's Paris offices. For instance, the suggestion of new legal powers to make binding EU decisions (and thereby revisiting the basic Lamfalussy bargain) was likely a strategic move and went nowhere at the time (though similar recommendations began to circulate with the advent in 2007 of the subprime mortgage crisis).[22] Still, in its May 2006 conclusions, Ecofin highlighted four of CESR's main recommendations for enhancing supervisory cooperation: that member states ensure convergence of supervisory powers; that CESR experiment with internal mediation mechanism for dealing with conflicts among members; that CESR members test delegating supervisory powers to other members; and that CESR set up IT data sharing arrangements.

CESR has similarly demonstrated an ability to act independently and as a unified actor in other debates. In the aftermath of the Enron and Parmalat scandals, for instance, CESR's members, acting in unison, used their memberships in IOSCO to outmaneuver national politicians considering new oversight for rating agencies (Mügge 2006: 1015–16). Before making a report to the Commission in April 2005, CESR's members voted in favor of an IOSCO initiative that left the status quo largely in place and simultaneously ended serious debate in Europe—at least until the 2007 financial crisis began to gather steam.

CESR has also assumed other international roles, placing it in a legal no-man's land. It has working programs with the US Securities and Exchange Commission and the US Commodity Future Trading Commission and informal ties to the US Treasury as well.[23] These roles emerged as the Treasury and European Commission (also without a clear legal mandate) entered an institutionalized dialogue to resolve long-standing financial regulatory disputes (Posner 2006). CESR was the natural European counterpart of the SEC and CFTC for advancing greater transatlantic regulatory coordination.

In sum, CESR pushed beyond its anticipated role in the legislative process, established itself as a central agenda setter in the debates about fulfilling mandates to overcome cross-border differences in supervision, and represents the EU, sometimes behaving independently, in international contexts. Like all political actors, CESR does not win every battle or decisively shape every piece of legislation. But the above observations put to rest notions that CESR remains closely tethered to a 'discretion zone' anticipated in the original delegation of powers. The organization has clarified, defined, and stretched its own rule-making and supervisory mandates set by the Council, the EP, and the Commission. As illustrated in the chapters by Eberlein, Newman, and Vos, moreover, the position of CESR in the EU's new financial arrangements has striking parallels to similar bodies comprising national regulators in the governance of other sectors.

5 Explaining CESR's autonomous role

What explains CESR's ascendance? Some of its newfound informal authority no doubt derives from its members' expertise, legally based national powers, and ability to self-fund the new body, as recent research on transgovernmentalism would lead us to expect (Newman 2008*a*). Serendipity also played a part, as CESR's unsought international roles bestow stature and legitimacy. Yet CESR's emergence as an autonomous body, bigger than its constituent parts and more independent than the formal delegation of powers would suggest, is probably also the product of two governance modes, typical of the EU's experimentalist architecture, and therefore traceable to the polity's unsettled and fragmented political authority.

First, CESR's institutionalized open consultation process has enhanced its reputation as an expert technical body in touch with fast-changing market developments and the preferences of key financial participants. Although several respondents to CESR's July 2007 questionnaire made suggestions for improving the consultation process and expressed numerous complaints about its early operations, taken as a whole these comments illustrate CESR's awareness of practitioners' concerns and conflicts, integrating them into its advice to the Commission and guidance on supervision, and thereby deriving legitimacy as a financial

rule-maker and supervisor.[24] Such legitimacy from market participants creates pressure, especially on the Commission, to accept CESR's advice and justify deviations from it. The IIMG, for one, has urged the Commission to provide explanations wherever it veers from Level 3 committees (IIMG 2007: pt. 39).

Second, CESR's authority has benefited from internal capacity-building processes that include coordination through peer review, transparent benchmarking, ongoing deliberation, and, more recently, conflict-resolution mechanisms.[25] CESR's ability to coordinate implementation and supervision will be the most crucial test. Thus far, however, as the Himalaya Report and the other activities of CESR exemplify, it has succeeded in creating political and organizational capacities. As the previous sections demonstrate, CESR can act as a single unit, advance an independent agenda, and maneuver effectively within the EU political framework. At its best, CESR accurately estimated the political temperature on the extent to which it could press for more powers. In hindsight, given its unclear legal parameters, it might have adopted some of the new supervisory mechanisms on its own (e.g. internal mediation mechanisms, informational sharing devices, and experiments in delegating authorities). But in winning widespread support first, it has increased the tools available for carrying out tasks with firm political backing.

CESR's application of a vague mandate to carry out peer review shows how new governance modes contribute to organizational capacity and political skills. CESR created a permanent group, comprising 'internal coordinators' from each member and observer state, which reviews the national implementation of EC laws as well as CESR guidelines and standards.[26] The group establishes criteria for judging implementation, issues opinions on each country's performance, gives views on specific problems, and creates ad hoc groups to address particular technical problems. CESR has been able to use the results and the experience of the peer-review process to develop and promote an autonomous agenda. The ongoing interactions among members appear to have built trust and eased internal decision-making, allowing for bold initiatives, like the Himalaya Report.[27] More concretely, CESR has used the results of the peer-review process to create new political facts and advance its positions. The Himalaya Report argues that coordinated implementation requires equivalent powers among supervisors. It contains evidence, derived from the peer review process and later used by other political actors, of asymmetries of power among national securities regulators (CESR 2004: Annex 3; EU Financial Services Committee 2006).

5.1 Alternative perspectives

The above analysis dealt explicitly with several, but not all, of the competing hypotheses presented above. Before concluding, I therefore address the others. Some commentators, as we have seen, depict EU arrangements like the Lamfalussy Process as vehicles of economic globalization that further the agenda of

transnational companies. Their expectation is that the Lamfalussy Process and especially the establishment of open consultations provide preferential access to well-organized interests, namely, large financial services providers with pan-European businesses. Preliminary evidence suggests that CESR has become an ally of pro-integrationist firms (Bergström et al. 2006; Mügge 2006). There are, however, problems with drawing such conclusions about inherent institutional proclivities from CESR's early positions. To some extent, its decisions have reflected prominent voices in the open consultation process as well as best practice as established in international forums traditionally dominated by US officials. Both of these influences are likely to change. Responding to criticism of lopsided participation in the open consultation process, for example, the European Commission created the Financial Services Consumer Group (FSCG) to give a political voice to alternative interests (Lamfalussy 2005).[28] European representatives in international financial forums have not used their new bargaining powers to challenge basic governance principles established under US financial hegemony. But the distinctive rule-creation processes, especially the deliberative exercises housed within CESR, may (especially in the turmoil of financial crises) produce regulatory solutions that diverge from those produced in the United States. Were such contrasting ideas about best practice to emerge in the future, European regulators would be well positioned to pursue an independent course and generate international support for it.

Finally, there are conflicting expectations about the effects of supranational financial governance in Europe. Will deeper regulatory integration in a politically fragmented Europe give rise to an autonomous and influential rule-making body that relies on informal processes, or will it spur formalism and adversarial legalism? In evaluating the judicialization proposition, it is important to distinguish between two different logics. One argues that formal rule-making and thereby rising levels of adversarial legalism flow more or less directly from financial liberalization. The other contends that political fragmentation leads to adversarial legalism. It is entirely possible that only one of these explanations captures the pattern of adversarial legalism observed by Kelemen and others in the area of financial regulation. In the politics of finance literature, for example, levels of judicialization are linked more convincingly to the twenty-five years of national financial liberalization than to degrees of political fragmentation (Moran 1991).

There are additional reasons to take a skeptical view of the political fragmentation thesis. Fragmented polities do not necessarily produce formalization. The evidence presented above lends support to Sabel and Zeitlin's opposing argument that multipolar or polyarchic distributions of power may also be scope conditions of experimentalist governance. Debate in response to the Himalaya Report appears to bolster their argument further. A near-consensus has emerged in favor of pushing networked governance to its limits, intensifying CESR's non-binding deliberation and decision-making mechanisms without replacing

them with hierarchical forms. Few national or EU decision-makers have preferred more formalization in the form of a European agency or increased formal powers for Level 3 committees—despite tremendous pressure to lower regulatory costs, increase flexibility, improve safeguards against systemic risks, and establish legal certainty for market participants.[29] Instead, as the conclusion demonstrates, policy-makers have thus far insisted on reforming the current non-binding decision-making apparatus.

This evidence combined with the findings in other chapters cautions against applying the judicialization proposition in an overly deterministic fashion. The drive for legal certainty by market participants in the context of multipolar power distributions might well result in formalization and adversarial legalism. But the constraints of polyarchy act as a countervailing force, at least over long spans of time. Recognizing these constraints and wanting to stretch the new governance arrangements in European finance as far as they will go, EU member governments, the European Commission, and the EP have placed CESR and its sister committees in banking and insurance under tremendous pressure to improve their capacity to converge national implementation, interpretation, and supervision (Council of the European Union 2006*a*). In order to achieve this aim, policy-makers have shown surprising creativity by being willing to discuss issues and make adjustments unimaginable just a few years ago. Currently on the table are the harmonization of sanctioning powers among national regulators, the insertion of EU coordination as part of national agencies' mission statements, and the replacement of consensus-based decisions with qualified majority voting (though keeping the non-binding nature of such votes). If implemented, this list would blur the line between classical hierarchical and experimentalist forms of governance, making it impossible to know a priori the extent to which rule interpretation by judges or other 'final' traditional decision-makers might be balanced or replaced by rule-making by such a body. More broadly, it suggests there is a false dichotomy between the choices presented in recent policy analyses between evolutionary consensus-building among national authorities and a new EU agency-like body with a single rule book and sanctioning powers (Veron et al. 2007: 6–8). A CESR, enhanced along the above lines, would be a new type of creature, fitting neatly into neither category and raising the critical question of whether it could satisfy the regulatory needs of markets and governments.

6 Conclusion

In sum, the Lamfalussy Process, a variant of the experimentalist architecture found across multiple sectors within the EU, largely reflects unsettled political relationships rooted in balance-of-power struggles. In the context of immense pressures to produce pragmatic regulatory solutions, such contests pushed

policy-makers to build on existing arrangements. These findings not only help to explain CESR's central role but also suggest that analogous causal paths lie behind the emergence of similar groupings of national authorities in other regulatory areas.

In addition, the empirical record reveals the potential for such bodies to transform themselves into powerful and autonomous political actors. In the case of EU financial regulation, the presence of CESR and its ability to advocate for itself and reshape the political environment in which it operates has profoundly altered the debate about future governance.[30] By early 2008, it was clear that new models for reforming the original Lamfalussy set-up (should it prove inadequate) had replaced the traditional idea of resorting to a Europe-wide hierarchical agency modeled on the SEC.[31] The existence of CESR and the other so-called Level 3 committees (CEBS, the Committee of European Banking Supervisors, and CEIOPS, the Committee of European Insurance and Occupational Pensions Supervisors) is among the main reasons for this change.

As the 2007–2009 financial crisis unfolded, the need to reform prudential arrangements to ensure against the risks of systemic banking crises—a topic too politically sensitive for the Lamfalussy Committee to address in 2000 and 2001—overwhelmed all regulatory reform discussions, including those concerning the conduct of business and maintenance of securities markets (Council of the European Union 2008). Within a few months, the reform agenda had shifted. The question of whether a rule-making body comprising independent authorities—relying on deliberation and consensus rather than binding decision-making powers—could satisfy the regulatory needs of markets and governments was swept aside by urgent questions about the ability of the Lamfalussy process to mitigate a run on banks and a crisis of confidence. The attention to systemic risk will likely mean a new layer of governance to coordinate the three separate realms of EU financial regulation: securities, banking, and insurance. Mirroring calls in the United States to cast aside depression-era arrangements that separate the regulation of commercial and investment banks, EU policy-makers have already moved in this direction (Council of the European union 2008). Whatever the final form of the future coordination mechanism, EU power politics will constrain the available choices, making it likely that CESR and its banking and insurance counterparts will remain intact and continue rule-making via some form of the current experimentalist techniques.

Finally, EU financial governance transformation has already brought an end to US regulatory dominance at the international level. In the first post-hegemonic phase, EU representatives have successfully pressured US officials to compromise over long-standing conflicts. The resulting transatlantic cooperation—and therefore continuation of the current global financial regime—stems in large part from shared principles established under decades of American leadership. What will happen in future phases if distinctively American style financial regulation loses its luster and appeal in the aftermath

of the current crisis? The presence in the EU of the new experimentalist governance arrangements is likely to be among the most decisive factors.

Notes

1. See the European Commission's *Financial Integration Monitor,* europa.eu; the ECB's *Financial Integration in Europe*, www.ecb.int; and reports by the Capital Markets and Financial Integration in Europe Network, www.eu-financial-system.org.
2. Commission Decision of 6 June 2001 (2001/527/EC).
3. I discuss this literature in Posner 2009*a*: Ch. 2.
4. Prudential regulation aims to reduce the risk of systemic crises. The architects of the Lamfalussy Process limited the new regime to the regulation of markets and conduct of business (Lamfalussy 2000, 2001).
5. Parts of this section are based on Posner (2007).
6. Council Directive 88/361/EEC.
7. The term 'battle of the systems' comes from Story and Walter 1997. Several authors, however, do consider the post-SEA EC financial legislation as a significant achievement (Coleman and Underhill 1995; Jabko 2006).
8. See, for examples, Art. 129 of the Capital Requirements Directive (Directive 2006/48/EC of the EP and of the Council, 14 June 2006) and Chapter 2, Arts. 56–62 of the Markets in Financial Services Directive (Directive 2004/39/EC of the EP and Council, 12 April 2004).
9. Council Decision of 17 July 2006 (2006/512/EC) amending Decision 1999/468/EC. Even with the inter-institutional agreement, Parliament's continued demands promise frequent review of the basic delegation agreement. For example, the EP continues to press for observer status in Level 2 committees (i.e. ESC). See European Parliament 2007: point 44.
10. For evidence that financial regulation is a central forum for the on-going inter-institutional power struggles, see Almer (2006).
11. Jabko (2006); Posner (2005).
12. The four are the Market Abuse Directive, Prospectus Directive, Transparency Directive, and Markets in Financial Instruments Directive (MiFID). A modified version of Lamfalussy Level 2 and 3 procedures also apply to the implementation of the UCITS III Directive because the UCITS Contact Committee transferred its responsibilities to the ESC and CESR. See www.CESR-EU.org.
13. Exceptions include Coleman and Underhill (1995); Story and Walter (1997); Underhill (1997); Posner (2005, 2009*a*); Jabko (2006); Mügge (2006).
14. Comment made at 'The New Transatlantic Agenda and the Future of Transatlantic Economic Governance' Workshop, the Robert Schuman Centre for Advanced Studies at the European University Institute, Florence, 18–19 June 2004.
15. Large financial services firms can easily produce commentary at the EU-level, while continuing to rely on traditional national lobbying channels (Coen 2007). Also, Grossman argues that firms revert to conventional relationships with national officials when facing uncertain political arrangements (Grossman 2004).
16. See CESR's consultation sections, especially on MiFID level 2 measures, www.cesr-eu.org.

17. See UBS Investment Bank comments in response to CESR's July 2007 Questionnaire on the Assessment of CESR's Activities, www.cesr-eu.org.
18. The question reads: 'How would you assess the influence of CESR in the EU legislative framework?' The possible answers were: 'Very Low, Quite Low, A Fair Amount of Influence, Quite High and Very High' (www.cesr-eu.org.).
19. IIMG 2007 gives an overview of the issue.
20. Quoted from press release, 19 May 2005, www.henri-weber.fr/article/articleview/2202/1/1870/.
21. At that meeting, Ecofin endorsed FSC and Commission reports that adopted much of CESR's agenda. European Commission (2005*l*); Council of the European Union (2006*a*); EU Financial Services Committee (2006); McKee (2006).
22. See Tommaso Padoa-Schioppa's letter to Ecofin, dated 26 November 2007.
23. www.cesr-eu.org. See 'Documents' for CESR's role in EU–US relations.
24. 'Questionnaire on Assessment of CESR's Activities Between 2001 and 2007', www.cesr-eu.org.
25. CESR's website (www.cesr-eu.org/index.php?page=groups&mac=0&id=23).
26. See CESR's website (www.cesr-eu.org/template.php?page=groups&id=23&keymore=1&BoxId=1).
27. According to CESR's charter, unlike decisions related to Level 1 and 2, decisions concerning the coordination of supervision require unanimity. It is unclear whether this applied to the Himalaya Report.
28. ec.europa.eu/internal_market/finances/fscg/index_en.htm.
29. Council of the European Union (2006*a*); EU Financial Services Committee (2006); European Commission (2005*l*); European Parliament (2006; 2007). Also, see comments in response to CESR 2004, www.cesr-eu.org. An important exception can be found in Italian Finance Minister Tommaso Padoa-Schioppa's letter to Ecofin, dated 26, November 2007. Also of note are Véron (2007) and Pauly (2007).
30. For a similar conclusion about CESR's path-changing role as well as that of other EU bodies of national regulators, see Thatcher and Coen (2008).
31. The Lamfalussy reports discuss the infeasibility of a European SEC (Lamfalussy 2000, 2001).

4

Experimentalist Governance in the European Energy Sector*

Burkard Eberlein

1 Introduction

This chapter looks at the energy sector as a promising field to study the emergence of 'experimentalist governance' (Sabel and Zeitlin 2008) techniques designed to coordinate the decentralized activities of 'lower-level' units at the supranational EU level. It shows that experimentalist techniques emerged in a context of profound sectoral transformation characterized by (*a*) high strategic uncertainty and technical complexity and (*b*) coordination deficits of traditional governance methods in a multipolar and highly politicized context where no single actor has the capacity to impose a solution. It investigates the use of experimentalist techniques in a specific but crucial area of internal energy market building and regulation: the interconnection of network infrastructures in view of creating a single power grid for commercial transactions.

The cross-border integration and management of electricity networks poses more demanding challenges than in other network industries such as telecoms or railways. The key physical attribute of electricity is that it cannot be stored, but must instead be produced and consumed simultaneously.[1] While the industry can be divided into production (generation), transport (transmission, distribution), and retail (supply), supply needs to match (strongly fluctuating) demand at any given time for the physical network to be in balance. Therefore, electricity is not a good that could simply be shipped from A to B like on a rail network. Furthermore, electricity and gas run on network infrastructures (power grids and pipelines) with strong natural monopoly features. Unlike in modern telecommunication services, there is no competition between alternative networks or ways of supply (fixed line, mobile network, and cable TV).

* This chapter draws on material presented in Eberlein (2005, 2008).

An increase in the volume of flows on the electricity network (through increased trade in a liberalized market), or an increase in the number of embedded generators (that feed into the grid), has the potential to destabilize network operations. Grid management becomes even more complex when different regional networks (owned and operated by different utilities) are interconnected and host significant in and outgoing flows, which is an intended feature of an integrated market on the European scale.[2] Grid integration also raises the issue of who carries the costs (network maintenance and investment) of cross-network flows. At the same time, uninhibited cross-border trade (the condition for price arbitrage to work) requires sufficient physical interconnection capacity between different national networks. However, European networks were not designed with this cross-border purpose in mind; interconnectors are underdeveloped, typically controlled by market incumbents, and it is costly and time-consuming to construct new transmission capacity (due to land use issues). In sum, scarce interconnection capacity and the grid (and cost) management of increased and more complex flows on a natural-monopoly type of infrastructure are key regulatory challenges in EU electricity market integration.

The paper finds that experimentalist techniques play an important role in addressing these challenges, as they help generate workable policy solutions, incrementally adapt regulatory approaches and rules, and revise short- and medium-term goals in the light of implementation experience. However, the coordination capacity of these techniques is limited by distributive conflicts that may result in opportunistic behaviour and deliberation failures. In this case, credible threats to remove the status-quo option, cast by governmental actors vested with sanctioning powers, are essential to unblock decision impasses and to reinstate deliberative, experimentalist modes of rule development. The Commission uses sanctioning and rule-making powers under competition law and internal market legislation in order to break deadlock and advance its market-creation agenda. The chapter argues for a perspective that views *experimentalist and these more traditional forms of authority-based governance as complementary rule-making avenues with different capacities and scope conditions*.

The chapter is organized as follows: Section 2 it introduces the broader energy sector and its transformation from national monopolies to European market integration. Section 3 looks at the emergence of experimentalist techniques in electricity sector governance while Section 4 discusses the use of various experimentalist techniques in specific institutional sites. In Section 5, the paper seeks to assess the contribution of experimentalist techniques to EU-level coordination. Empirically, the focus is on the policy challenge of interconnecting national power transmission systems in a European market. Sections 6, 7, and 8 discuss the complementary relationship and scope conditions of experimentalist and traditional, authority-based techniques. The conclusions summarize the argument of the chapter.

2 Europeanizing energy

Energy is a key input factor for modern market economies, and it is crucial to any project of regional market integration. Two of the founding treaties of what was to become the EU, the European Coal and Steel Community (1951) and Euratom (1958), originated in the energy sector. Yet, energy policy has since remained a strongly decentralized policy area. Several attempts to establish energy policy as a Community task failed, and EU scholars have traditionally ranked energy policy as 'one of the weakest policy areas' of the EU (Matlary 1997: 13).

The main reason is that Member States have been keen to keep tight control over a sector that they consider of strategic economic importance (Padgett 1992). Moreover, energy supply in gas and electricity was typically regarded as an essential infrastructure or public service that involves politically sensitive public interest concerns. This, combined with natural monopoly attributes, resulted in vertically integrated monopolies and heavy government involvement, and often public ownership. Finally, vast differences between national power sectors, in terms of the mix of primary energy sources, the degree of import dependence, and of ownership structure, undermined attempts at EU-level harmonization.

Against this background, the progressive EU liberalization of energy markets beginning in the mid-1990s is remarkable and constitutes a 'watershed in Community energy law and policy' (Cameron 2002: 36). Unlike developments in sectors such as telecommunications, energy market liberalization was much less driven by technological change and global competition (Bartle 2005). While energy liberalization could also build on the neo-liberal reform agenda that injected the market norm into infrastructure and network industries, its success hinged more on bringing the sector into the political drive to complete the single market in the late 1980s and early 1990s (Jabko 2006).

Yet, the emergence of EU market-reform policies was slow and protracted (Schmidt 1998; Eising 2002). Market reforms were highly contested and opposed by a powerful coalition of incumbent utilities and key governments. The Commission refrained from using its direct competition law powers and opted for the negotiated decision route of Council legislation, albeit 'in the shadow of Community Law' (Schmidt 1998).

It took over five years to achieve consensus in the Council. The resulting legislation did accept the general principle of market opening and the need for common rules in a European market. But, as a political compromise, it was weak in terms of providing a coherent set of EU-level rules. The 1996 Electricity Directive and the 1998 Gas Directive[3] prescribed only limited market opening and granted Member States a large margin of discretion regarding key regulatory issues such as the regime of access to the natural monopoly of transmission wires. Furthermore, the legislation failed to establish rules for the interconnection of national grid systems and for cross-border trade more generally. The 2003 Directives

for Electricity and Gas[4] made progress towards establishing a more robust EU framework of rules designed to both open and interconnect national markets. They set a firm date for full market opening (July 2007 for all customers); put into place stricter rules for national network access regimes and the legal unbundling of vertically integrated utilities; and made it mandatory for Member States to have independent regulatory authorities with a minimum set of powers and responsibilities to regulate national markets (for details see Cameron [2005]).

Yet, the current regulatory structure remains two-tier with a high degree of 'subsidiarity': there is a broad legislative framework on the EU level, but—with the important exception of EU competition law—detailed rule development, implementation, and enforcement rests with lower-level units. These include government ministries, competition authorities, and courts (as well as self-regulatory arrangements by industry). But the key actors are national regulatory authorities, which are required, by EU legislation, to cooperate with one other and the Commission in order to develop a level playing field in an integrated European market.

The institutional forum for 'self-coordination' among national regulators is the European Regulators Group for Electricity and Gas (ERGEG), an advisory group to the Commission created in 2003.[5] National energy regulators are also organized in the Council of European Energy Regulators (CEER), an independent association predating ERGEG's formation. The regulatory addressees, consumers, and other energy market stakeholders informally contribute to regulatory discussion and rule development in the context of two Regulatory Fora that were created by the Commission right after the first round of legislation in 1998 and 1999: the Florence Forum for Electricity Regulation, and the Madrid Forum for Gas Regulation (about which more later; see also Eberlein [2003, 2005]).

The 2003 legislation created yet another layer of policy coordination insofar as the Regulation (1228/2003) on conditions for access to the network for cross-border exchanges in electricity introduced a comitology procedure by which the Commission, assisted by Member States, can adopt guidelines for principles and methodologies regarding tarification (of network use) and capacity allocation (of scare interconnection capacity). Finally, several private actor groups have formed associations to represent their interests in the two Fora settings in particular, and at the EU level more broadly. In electricity, the European Association of Transmission System Operators (ETSO) represents the interests of owners of regulated transmission systems vis-à-vis the Regulators Group, whereas Eurelectric represents the entire electricity industry.

3 The emergence of experimentalist governance

Sabel and Zeitlin (2008: 273–4) define experimentalist governance as consisting of 'four key elements: establishment of framework goals and metrics;

elaboration of plans by ''lower-level'' units for achieving them; reporting, monitoring, and peer review of results; and recursive revision of goals, metrics, and procedures in light of implementation experiences. The most crucial feature of experimentalist governance is its *recursive* character'.

This procedural perspective on rule-making, that conceptually allows viewing collective rule-making as a continuous, incremental process in which means and ends are being redefined resonates well with a key feature of energy market governance: its unfinished and uncertain process character. As set out earlier, the first energy directives (1996 and 1998) in particular only provided a weak EU framework. Rather than viewing these (and later) directives as conclusions of drawn-out negotiations, it may be more useful to understand them as stages of a continuous and uncertain process of market creation. Put differently, the Community method (legislation) had delivered a framework goal: that is, building a single energy market, without providing clear guidance (or hierarchical constraints) to the lower-level units, that is, to the Member States as to how to implement this broad goal in regulatory practice.

Experimentalist practices in the energy sector emerged in this context, in a technically complex, strategically uncertain, *and* highly politicized policy environment, which traditional governance approaches were unable to address properly, both in political and cognitive terms. *Politically*, the legislative bargaining process had clearly demonstrated that, given the contested nature of the issue and the weak political mandate, regulatory solutions to ensuing issues of market design and integration could not be imposed in a hierarchical, top-down manner. This is a strong form of the constellation described by Sabel and Zeitlin (2007: 4) as 'multi-polar or polyarchic distribution of power, in which no single actor has the capacity to impose her own preferred solution'. In this perspective, the introduction of experimentalist techniques that are non-hierarchical and include all stakeholders can be interpreted as *depoliticization strategy*.

More fundamentally, in *cognitive* terms, there was simply no kit of regulatory solutions available that could have been imposed on lower-level units, even under a scenario of power centralization. Electricity (and to a lesser extent) gas liberalization was a new policy challenge with little experience to draw on. Very few jurisdictions had experimented with energy market liberalization. Britain provided the only example of full-scale electricity liberalization (1990), and the British reform template was actually very influential in the development of EU reforms. However, the integration of different national electricity and gas systems in a large regional market was almost entirely virgin territory,[6] which raised a host of poorly understood technical issues. Hence, workable solutions were not easily available but had to be developed incrementally and collectively, drawing on the expertise of industry actors in particular.

4 Institutional sites and experimentalist functions

The main institutional sites for the collective development of regulatory rules were initially the *Electricity Regulatory Forum (Florence Process) and the Gas Regulatory Forum (Madrid Process)*. Going beyond traditional consultation mechanisms, the Forum idea was to provide a novel platform for informal and open discussion and voluntary regulatory cooperation. Chaired by the Commission, regular meetings brought together, twice a year, national regulatory authorities and ministries, and important industry actors and stakeholders, in particular the transmission system (network) operators, representatives of the electricity and gas industries, as well as industry consumers and traders and power exchanges. In addition, smaller and specialized working groups convened more frequently in between full Forum sessions. The Forum was designed to work as informal body that would develop, in a deliberative fashion and outside of the (polarized) political arena, legally non-binding rules that would be broadly recognized as best practice, according to professional standards of expertise. These best-practice standards would then be fed into the political channels for legal endorsement (Energy Council).

The key policy challenge for the Forum in both electricity and gas was to develop a system of cross-border trade, the linchpin of an integrated energy market. In order to create a truly internal energy market, as explained earlier, two specific issues needed to be addressed: the tarification of cross-border electricity, or gas flows, and the allocation and management of scarce interconnection capacity between national transmission systems. In what follows, I will empirically limit myself to the electricity example (see also Eberlein [2005]).

The Forum as institutional venue performed *three different experimentalist governance functions*, as defined by Sabel and Zeitlin.

Firstly, the Forum as collective body of lower-level units and sector stakeholders *elaborated, in a deliberative fashion, a workable implementation plan*, a European cross-border tarification system that would allow significant progress towards the framework goal of an interconnected grid system for commercial transactions. A first important step in this direction was the identification and comparison of available, technically feasible regulatory alternatives for transmission pricing (the calculation of network costs incurred by transactions). This search process relied both on abstract–scientific knowledge (provided by electrical engineers) and on the available practical experiences with transmission pricing from other jurisdictions that had implemented market reforms (England and Wales, Norway, New Zealand, USA). Experts from these jurisdictions were invited to give presentations to the first Electricity Forum meeting.

Out of a range of technically feasible solutions, the Forum then consensually opted for a 'best-practice principle' for the governance of transmission tarification: the so-called non-transaction-based approach. Put simply, this means that network costs are not determined on the basis of individual market transactions

(sales contracts) but that they are calculated on the basis of real physical flows between transmission system operators, a system that facilitates trading and that was strongly supported by the Commission. Based on this principle, the Forum progressively developed a postage stamp tariff system that would grant network users access to the entire European grid at a flat rate.

Secondly, the Forum provided mechanisms to *review and monitor the actual progress* made towards a workable cross-border tarification (and congestion management) system. At one level, the Forum is simply an additional mechanism for peer (and Commission) review of individual Member State progress towards competition- and integration-friendly regulatory policies. More importantly, however, the Forum is organized as a continuous and collective regulatory dialogue between the regulators and the regulated industry, represented by peak associations, with active third-party participation by users and other stakeholders: the regulatory addressees, that is, the transmission system or network operators (these are often, in fact, the former or current network divisions of vertically integrated utilities) have to engage in a joint process of rule-making. The Commission actively encouraged the creation of a new 'European Association of Transmissions System Operators' (ETSO), not least in order to have a single partner for the dialogue with regulators, user groups, and the Commission. (In the same way, the Commission supported the creation of a Regulators Group.)

In the Forum process, ETSO has to respond constructively to regulatory needs and demands, formulated by the Regulators Group and by network users, and to justify how its position contributes to the achievement of joint objectives in the internal market context. This does not rule out opportunism or failure to deliberate, but it makes it more transparent. In fact, Forum meetings are typically organized in such a way that the Regulators Group, and/or the Commission, table certain issues or regulatory proposals (e.g. first drafts of best-practice guidelines) to which the regulatory addressees, represented by ETSO, and other stakeholders, then respond with their positions. In subsequent meetings, progress towards implementation of guidelines is reported on and discussed, with the input by affected stakeholders (traders, industry consumers). A good example is the lengthy development of the cross-border tarification system and the associated inter-TSO compensation fund towards a postage stamp tariff, a solution that was incrementally achieved through a succession of revisions to various proposals and guidelines. More generally, progress is made and expressed in terms of developing and revising guidelines and best-practice documents over a longer period of time, a practice that shades into the third experimentalist function.

Thirdly, the Forum has also been the source of *significant recursive revisions of policy objectives and procedures*. The most interesting and consequential case is the emergence of the so-called Mini Fora in the area of congestion management that later developed into a major initiative of the Regulators Group to develop sub-EU, regional markets, as an intermediate 'stepping stone to a single EU

market'.[7] The Forum discussions on methods of congestion management at critical interconnectors of the European grid system had revealed the need to tackle the issue on a regionalized basis. The 11th Electricity Forum meeting (September 2004) decided to convene a series of the so-called Mini Fora. Seven sub-regions for electricity grids were identified, and the Mini Fora (with a similar composition of Forum actors on a regional basis) were required for each region 'to provide a detailed timetable for the introduction of at least day-ahead co-ordinated market based mechanisms, such as auctions'.[8]

The European Regulators Group (ERGEG) developed this approach into the 'Electricity and Gas Regional Initiatives', officially launched in 2006. It divides the EU into seven electricity (and three gas regions), each with a responsible 'lead regulator' from one country of the regional group, a Regional Coordination Committee (composed of regulators), and mechanisms to establish a regulatory dialogue between TSOs and market operators ('Implementation Group') and 'Stakeholder Groups' on a regional basis. The key idea is to 'promote real and practical improvements in the operation of the EU gas and electricity markets'. This development is interesting as it signals a reassessment of the regulatory challenge and a revision of medium-term goals, even if the long-term framework goal, the single energy market remains the same: interconnections between grid systems can only be developed on a 'local basis'.[9] This reassessment also responds to independent regional initiatives, in particular to the government-driven Pentalateral Energy Forum (Electricity), a market integration initiative between the grid systems of the Central West Region. At the same time, as the regulators realize, this strategy raises new monitoring challenges, as a EU-level body, probably ERGEG, needs to ensure that regional initiatives are coherent with a future single market, and do need reopen issues on which EU agreement has already been achieved.

As this latter example of intermediate goal revision demonstrates, the network of energy regulators, organized in the (Commission advisory) Regulators' Group ERGEG and in the Council of European Energy Regulators (CEER) is a second, more specialized institutional site where experimentalist techniques can be identified. ERGEG and CEER are key platforms for the joint elaboration and continuous improvement of regulatory concepts and solutions among regulators. The role assigned to CEER and subsequently ERGEG in the EU regulatory process requires individual regulators collectively to speak with one voice and hence find agreements on EU-level positions. In fact, the Commission very much relies on ERGEG to formulate guidelines for the development of specific regulatory policy.

Moreover, ERGEG and CEER provide mechanisms of monitoring, reporting, and peer review among national regulators: individual regulators seek to protect their reputation and credibility by complying, as much as national discretion allows, with professional standards of best practice as they are developed by their European associations (Majone 2000). In turn, the integration into formal,

recognized EU-level networks enhances the legitimacy of individual regulators and their capacity to inject EU-level concepts, by way of their regulatory authority, into the domestic arena, thus contributing to EU-level harmonization of regulatory practices (Eberlein and Newman 2008).

Furthermore, it is important to note that there are *other institutional arrangements relevant for energy sector governance that may perform experimentalist functions*. For example, the Commission publishes annual benchmarking reports on the gas and electricity internal market that provide detailed comparative assessments of how individual jurisdictions perform in terms of specific indicators that measure progress towards various reform goals (market opening, network access, unbundling, etc.).[10] Finally, as argued by Sabel and Zeitlin (2008: 274), the energy sector demonstrates that a single institutional mechanism, such as annual benchmarking reports, can perform several experimentalist functions: these reports provide comparative assessments of national regulatory approaches and their effectiveness; they serve as collective monitoring and review mechanisms, naming and shaming underperformers; and they are also stock-taking exercises that may lead to reassessments of challenges and revision of goals, as noted earlier with regard to the shift in focus from single-market building to the bottom-up building of regional markets as revised intermediate goal.

5 Experimentalism and EU-level coordination

How far do experimentalist techniques contribute to effective EU-level coordination in energy sector governance? What are the strengths and weaknesses of 'decentralized coordination'?

First of all, it is important to highlight the limited *scope* of experimentalist techniques in energy-sector governance, and, by extension, the limited scope of this analysis. The investigation focuses on only one area, the interconnection of network infrastructures in view of building a single grid for market integration, an area where we find significant experimental activities. But the governance of energy markets is as much if not more shaped by decentralized decisions on the mix of primary energy sources for generation, or by national policies towards utility restructuring, for which there are no equivalent coordination processes in place. Nor is there a Forum to discuss the collateral implications of energy market integration on security of supply or on environmental sustainability, let alone a Forum to discuss whether full market integration is a desirable and realistic goal. At the same time, the area of network infrastructure integration as one aspect of market creation is embedded in and shaped by broader energy policy concerns: climate change, high energy prices, or security of supply, all of which have more recently deflected political attention and regulatory activity away from market-creation policies.

In short, the present analysis does not capture the many levels at which energy governance takes (and may take) place, and the variety of collective rule-making patterns it involves.

That said, the investigation of experimentalist avenues in a limited area of infrastructure integration has shown that techniques like the Forum process were *successful in identifying and elaborating workable regulatory solutions to practical challenges* of an emerging internal energy market that was in many respect little more than a work in progress. Moreover, the Forum context provided a platform for a structured dialogue between regulators, regulates, and stakeholders. Regulatory networks between national agencies (CEER and ERGEG) provide a more specialized institutional site for rule development and harmonization.

The successful elaboration of the cross-border tarification system is the best example: the Regulation on Cross-Border Trade, as part of the 2003 legislative package,[11] essentially codified the substantive principles that the Forum had developed with regard to tarification and capacity allocation, and that now form the basis of grid interconnection policies in Europe.

At the same time, this example reveals the effectiveness limits of experimentalism. The strength of Forum processes lies in *rule development, but not in distributive rule enforcement (production vs. distribution)*. The process was stalled several times by distributive conflicts between network operators and network users (about issues of cost and transparency), and between different Member States (especially between transit countries that host a large volume of cross-border flows and export countries that have an interest in low-cost transmission). Agreements on best-practice principles did not remove political conflicts of interest around specific agreements with distributive implications, where no win–win solution could be identified, and when deliberation failed to work. In short, the politically contested nature of the policy area resurfaced. In this perspective, the fact that a Regulation on Cross-Border Trade had to be included in the legislation can be adduced as evidence that the Forum failed to reach agreement on a voluntary basis.

In these constellations of *impasse*, the Commission typically threatened to invoke its formal powers and make use of (and/or actually engaged in) *alternative avenues of collective rulemaking, not least in order to induce actors to cooperate, and abandon opportunistic behaviour* (Eberlein 2008).

Essentially, there are *two traditional avenues of rulemaking in the energy sector* (and in many other sectors as well). The Commission can table new *legislative proposals* that contain rules that are being blocked in forum processes. However, the Commission ultimately depends on approval by Council (and Parliament), where the same type of distributive conflicts may hamper agreement, although technically at least, majority voting may allow political resistance by a minority of Member States to be overcome. The aforementioned Regulation on Cross-Border Trade in Electricity, which was part of the second, 2003 legislative package, is a case in point, as it was first introduced at a moment of impasse

in the Forum process. The new comitology procedure created by the 2003 legislation gives the Commission additional powers of *delegated regulation* in the area of cross-border trade, which can be invoked in case of stalled deliberation, but may also be used directly to bring about implementing rules of framework goals.

More recently, the Commission adopted a third liberalization package, on the heels of its successful push for a new European energy policy.[12] The package, passed in revised form in the summer of 2009 by the Council and Parliament, includes more aggressive measures to fully separate ownership of network operation from generation and supply activities, the creation of an Agency for the cooperation of national regulators, with binding decisions on cross-border trade issues, and a new European Network of Transmission System Operators to promote better collaboration and investment in cross-border networks.[13] These proposals are a clear signal to vertically integrated utilities in particular that EU (and national) authorities are willing to address current malfunctions of decentralized cross-border network integration and management by a tighter legislative framework and more rigorous EU regulatory monitoring.

The second alternative avenue is to *invoke and use direct competition law powers* that are mostly relevant to the energy sector in the two areas of antitrust and merger control. The shadow of a Commission decision and/or Court ruling under competition law, which threatens to make opportunistic parties worse off than a compromise reached under experimentalist arrangements, has accompanied the Forum processes all along. The Commission has initiated several cases of suspected abuse of dominant position in relation to the conduct of network operators in electricity and gas (Cameron 2002: 321–2), but with little systematic effect. The Commission then moved more aggressively and broadly to police and attack anti-competitive conduct. In June 2005, it launched a formal energy sector competition inquiry.[14] Based on the findings, which revealed major shortcomings of electricity and gas markets, individual investigations of major European utility companies were being pursued. This competition-law route may help to unblock the opposition of integrated utilities to further unbundling measures in the context of the third liberalization package mentioned above (further discussed in the following text). As a matter of fact, in February 2008, the major German utility E.ON offered to sell its electricity grid, in an effort to appease the Commission and settle antitrust investigations that could have resulted in hefty fines.[15]

6 Experimentalist architecture and rule-making avenues

Sabel and Zeitlin (2008: 306–7) suggest integrating these alternatives avenues of rule-making into the experimental architecture by conceptualizing them as 'penalty default' and 'destabilization' or 'disentrenchment' mechanisms that

help to 'shift the regulatory focus from rules to frameworks for creating rules'. In essence, then, the threat of legislation and competition law would help to rein in opportunistic behaviour and to reinstate experimentalism, not to complement it or even less take its place as rule-making device.

The threat in a destabilization regime is assumed to be effective not because the public authority has the credible capacity to change the default position of opportunistic veto players in some broader rational public-interest perspective. Rather, it effectively induces actors to (return to) deliberate in good faith because any hierarchically imposed solution will be dysfunctional and thus menacing: 'the best ''solution'' available to authorities acting themselves is so manifestly unworkable to the parties as to count as a draconian penalty and an incalculably costly disruption of their capacities to control their own fate' (Sabel and Zeitlin 2008: 308).

Yet, the divide between deliberative-experimentalist and more traditional, authority-driven forms of governance need not be so stark. To reduce the role of formal authority to sanctioning powers or threats that help 'jolt' actors back into deliberative mode would not do justice to its contribution to rule-making. A more combinatorial perspective would focus instead on the *interaction of different avenues of collective rulemaking, each with specific capacities and scope conditions*. In this perspective, Community legislation and competition law are not inherently dysfunctional as rule-making routes; nor are they isolated from experimentalist techniques, or solely linked to them via a threat or destabilization mechanism. Importantly, legislation can serve to effectively codify the achievements of recursive, deliberative rule-making at a given point in time. As mentioned earlier, the 2003 Regulation on cross-border trade formalized many of the regulatory results of the Forum process. Hence, legislation may be thought of as lending authority to solutions developed by deliberative-recursive mechanisms.

The important point is that different avenues or modes of rule-making should not be viewed as alternatives or substitutes but rather as complementary.

7 Complementary avenues and scope conditions

Notwithstanding this logic of complementarity, different modes may be of greater or lesser importance in the policy process, depending on the presence of certain, more or less favourable contextual or *scope conditions*. Evidence from the electricity sector suggests that experimentalist techniques were most important at the very beginning of the process of market creation, in a technically complex and new policy domain, when strategic uncertainty and dependence on functional expertise by industry and regulatory actors were at the highest level (*favourable scope conditions*). As technically complex issues are better understood and regulatory solutions have been formalized to some extent

in legal rules, experimentalist techniques decline in relative importance. Also, distributive implications of regulatory solutions may become more apparent further down the policy process road, restricting the effectiveness of experimentalist techniques in constellations that cannot be transformed into win–win outcomes and where deliberation is prone to failure (*restrictive scope conditions*).

This is not to say that the demand for recursive rule development in sectoral governance will be continuously reduced, let alone eventually eliminated, by an inexorable expansion of the formal decision-making apparatus. Progress towards the construction of an integrated electricity market may, by the same token, generates new regulatory challenges; for example, once some of the regional electricity markets, conceived as necessary intermediate step to an EU-wide market, have been successfully integrated, the question arises how the diversity of the experiences in the different regional settings can then be harnessed (and harmonized) to advance to a truly European market model. Similarly, once a truly integrated European power grid with sufficient interconnection capacity is in place, industry and regulators will have to manage a unified network that is of a different order of complexity than the current system of limited interconnections between national systems. The increase of embedded generation, due to the anticipated aggressive promotion of decentralized, non-fossil fuel generation (wind power), will be a particular challenge if thousands of additional entry and exit flows need ultimately to be managed at the scale of a seamless European network (although balancing power will be primarily a regional matter).

That said, *actors do not confront these situations with the same level of strategic uncertainty as at the beginning of the market-creation process*. While they will face some qualitatively new or even unanticipated challenges, they can nevertheless draw on broad frameworks and guiding principles that have been developed at previous stages of market building. These frameworks and principles, often codified in formal rules, help reduce (cognitive and political) uncertainty and search costs: actors have a clearer idea of where to look for solutions, and on which palette of regulatory options they can draw. Having accumulated relevant experience in the sector, they are not condemned to act like a regulatory Sisyphus.

In sum, to point out scope limitations does certainly not imply that experimentalist techniques should be viewed as a transitory phenomenon, nor that they could be simply replaced by hierarchy, in the form of some putatively 'definitive' rule-set. It is evident that the third legislative package—even if we assume for the moment that there are no political limits to further centralization—will still need to be implemented and interpreted on the national level. Legislation can obviously not address all current and future regulatory contingencies and needs, especially in such a technically complex policy area, and across 27 heterogeneous jurisdictions. Competition law is even less able to substitute for detailed, recursive rule development. Based as it is on single-case procedures, it is more of a negative control instrument, a check on and incentive for the type of fine-tuned regulatory development performed by

experimentalist processes—although it can have important signalling effects and redefine the area of legitimate agreement (Schmidt 1998).

In sum, the need for recursive processes of collective rule development and coordination can be expected to persist, but their relative importance for overall sector governance may vary across issue areas, and decline over time with a reduction in strategic uncertainty, *depending on specific contextual conditions*.

Furthermore, recursive experimentalist techniques are not restricted to novel institutional sites of stake-holder participation where there may have first emerged. In the electricity and gas sector, the inclusive and informal Forum process has certainly over time lost relative importance to more formalized avenues of rule-making: to transgovernmental cooperation by national regulatory authorities that have a supranational mandate to bring domestic authority to bear in the implementation of EU rules (Eberlein and Newman 2008); and to the direct development of guidelines on cross-border trade by the Commission under comitology procedures. Yet, we see an ongoing layering of different institutional sites and actor groups, all of which are functionally involved in sector governance, and which may contribute to recursive processes of rule development across institutional sites.

As mentioned earlier, the recently adopted third liberalization package includes the creation of an Agency for the cooperation of energy regulators, with binding decision-making powers, which will reinforce EU regulatory coordination on cross-border issues as currently performed informally by the European Regulators Group ERGEG. The role and responsibilities of the regulatory addressees and counterpart, the Transmission System Operators, will also be formalized through the establishment of a quite powerful Network for Transmission System Operators. Taken together, these changes bring the energy sector closer to the networked agency model, as currently practised mainly in areas of social and risk regulation (e.g. in drug authorization).

8 Complementarity and interaction of rule-making avenues

To stress the complementary and 'scope-bound' role of experimentalist and more traditional, authority-based forms and techniques of governance already goes a long way towards understanding how these different avenues of rulemaking interact with each other. Much of the literature on these interaction effects focuses on the 'shadow-of-hierarchy' concept (Scharpf 1997; Héritier and Lehmkuhl 2008) whereby delegated, private or public–private deliberation or bargaining takes place in the shadow of unilateral public regulation.

As demonstrated earlier, a narrow reading of this concept, which assumes that public authorities could simply step in and take over the functions delegated to

private actors or arm's length agencies should deliberation fail, is clearly misguided. EU public authorities in particular lack the administrative and technical capacity and the political legitimacy to perform many regulatory functions themselves. For some major, structural decisions (as opposed to local, adaptive, incremental rule-making), one could argue, however, that the problem is not one of cognitive and administrative capacity to adequately deal with complex challenges and arrive at workable solutions. Rather, it is one of lack of political power.

A good example is the current discussion about full ownership unbundling of vertically integrated utilities, a proposal that the Commission included in the third liberalization package. Market experience, and the investigations under the competition sector inquiry, have shown that the lack of full independence of transmission system operators (from the generation and supply arm of integrated utilities) favors discriminatory network access practices vis-à-vis competing generators or traders, and that it sets the wrong incentives for (much needed) investment in the aging and strained power grid infrastructures. However, several Member States are opposed to breaking up their big utility companies as they seek to bolster these companies as 'national champions' in the European and global market. In a similar manner, the high market concentration in generation, which demonstrably stifles competition, could and should (in a market-creating perspective) be remedied by market-power mitigation arrangements under which dominant operators are required to divest or release generation capacity to third companies. Rigorous antitrust monitoring would ensure that mergers do not recreate market concentration. Again, the road block is political opposition by Member States, not a lack of knowledge about the nature of the challenge and about cause–effect relationships.

This does not imply that stronger centralization of EU regulation, for example, by creating a powerful federal regulator, will necessarily lead to superior regulatory solutions. Benefits of such arrangements need to be carefully weighed against the costs of over-centralization in a heterogeneous market environment. An EU super-regulator, while able to take structural, framework decisions would suffer from lack of detailed knowledge about how to adjust rules and remedies to local conditions in an incremental fashion.

In sum, if the 'shadow of hierarchy' is meant to indicate a capacity of substitution (for deliberative-experimentalist processes), it is a misleading concept for describing interaction effects. But it would be also misleading to reduce hierarchical intervention to a dysfunctional and disruptive penalty as this misses the (albeit limited) rule-making contribution of authority-based forms of governance.

The shadow-of-hierarchy concept does not necessarily imply or require the capacity of public authorities to take over regulatory functions fully. It can incorporate the notion of hierarchical intervention, not as a full substitute,

but as a potentially disruptive and thereby effective device to induce the parties to deliberate and cooperate in good faith: a threat of hierarchical intervention credibly removes the status-quo option and threatens to replace it with a default outcome that is less desirable than a compromise under voluntary cooperation.

We can again refer to the debate about ownership unbundling of utilities, and more specifically to the deficiencies of the current self-regulatory role of network operators in granting network access and providing transnational interconnections. EU authorities would certainly not be able to practically take over the functional role of 'network manager' for the entire European grid system. However, the Commission's threat to use competition law (backed up by the recent sector inquiry and its findings) and to propose further legislation to press for ownership unbundling of individual utility companies has, for example, induced these parties to offer regionalized integration (pooling) of individual transmission networks between neighboring countries under the control of independent network pools.[16]

9 Conclusions

The energy sector, a field in profound transformation in the wake of market reforms, provides rich evidence of the use of experimentalist techniques in EU governance when policymakers are confronted with technically complex, uncertain, and multipolar political environments. However, the detailed investigation of one specific area of single energy market integration, the interconnection of national grid systems, reveals that the coordination capacity of experimentalist techniques is limited by distributive conflicts that may result in deliberative impasses. In these situations of deadlock, the threat of hierarchical interventions can help to induce parties to (return to) deliberate in good faith. The Commission uses sanctioning and rule-making powers under competition law and internal market legislation in order to break deadlock and advance its market-creation agenda. The chapter argues for a perspective that views experimentalist and more traditional forms of authority-based governance as complementary rule-making avenues with different capacities and scope conditions.

Notes

1. Natural gas can (*a*) be stored and (*b*) be transformed into liquefied natural gas (LNG) and then transported without pipelines (on dedicated container vessels). However, storage capacity is limited and has natural monopoly features. LNG technology requires its own infrastructure (terminals) and is costly.
2. A report investigating the blackout that affected 15 million European costumers in November 2006 found that lack of coordination between the companies responsible

for transmitting electricity was the main reason for the incident. Europe has experienced a number of similar system disturbances since 2003, due to malfunctions of interconnected power systems that are strained by higher levels of cross-border exchanges (see the report by the European Regulators' Group for Electricity and Gas [ERGEG] at http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_ADMIN/ PR-07-03_ERGEG_FinalReport_Blackout_2007-02-06.doc).

3. Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L027, 30 January 1997; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L204, 21 July 1998.
4. Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L176/37, 15 July 2003; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L176/57, 15 July 2003; Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L176/1, 15 July 2003.
5. Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas (2003/7 96/EC).
6. On a smaller regional scale, Nord Pool, the Nordic Power Exchange, was created in 1993 to allow for electricity trading across borders, initially between Norway and Sweden. While some lessons could be drawn from this recent experience, it was an open question if and how they could be transferred to the EU market.
7. See ERGEG Regional Initiatives Annual Report, Progress and Prospects, March 2007, accessed at: http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_RI/Progress% 20Reports/RegionalInitiatives%20annual%20report.pdf.
8. Conclusions, Eleventh Meeting of the European Electricity Regulatory Forum, Rome, 16–17 September 2004, p. 5 (accessed at: http://ec.europa.eu/energy/electricity/florence/doc/florence_11/conclusions.pdf). The issue is how to allocate scarce interconnection capacity; auctioning is considered as the most market-friendly approach, as opposed to, for example, grandfathering or pro rata rationing between operator share and new demand.
9. In the words of Andris Piebalgs, Energy Commissioner and Sir John Mogg, Chair of ERGEG: 'The transition to a single market, in a single step, would be extremely difficult, if not impossible to achieve. Focusing on the development of regional markets as a stepping stone towards the single market is the clear way forward towards its achievement' (Foreword by Commissioner Piebalgs and ERGEG Chair, ERGEG Regional Initiatives Annual Report, Progress and Prospects, March 2007, p. 3, accessed at: http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_RI/Progress% 20Reports/RegionalInitiatives%20annual%20report.pdf.)
10. See benchmarking reports on internal electricity market implementation at: http://ec.europa.eu/energy/electricity/benchmarking/index_en.htm.
11. Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L176/1, 15 July 2003.

12. In January 2007, the Commission tabled proposals for new legislation in the context of a broader push for a stronger EU energy policy. These included initiatives to strengthen the regulatory coordination between national agencies and plans to press for ownership unbundling of the major utilities. The background was that fresh concerns about Europe's security of energy supply (Russian–Ukrainian gas dispute), rising energy prices, and the climate change issue provided political momentum for a stronger EU role in energy policy (http://ec.europa.eu/energy/energy_policy/doc/01_energy_policy_for_europe_en.pdf).
13. For details see: http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm.
14. The final report of the inquiry was adopted on 10 January 2007. For details see: http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html.
15. 'Eon agrees break-up to appease Brussels', Financial Times, 28 February 2008.
16. 'Stromkonzerne wollen Zerschlagung entgehen' (Utility companies seek to escape break up), *Süddeutsche Zeitung*, 5 March 2007; for the Commission's position see 'Kroes threatens to break up EU power monopolies', *Financial Times*, 10 March 2006.

5

Networked Competition Governance in the EU: Delegation, Decentralization, or Experimentalist Architecture?

Yane Svetiev

1 Introduction

Competition law in the EU has a constitutional dimension. The promotion of competitive principles was a foundation of the common market project. Hence the provisions necessary to protect those principles were entrenched in the Treaty of Rome (and even earlier in the Treaty of Paris establishing the European Coal and Steel Community), as was done with the 'market-making' provisions guaranteeing the four freedoms. Given the direct applicability of the Treaty's competition provisions and the absence of a strong local antitrust tradition in the Member States, competition-enforcement was an area of rapid top-down harmonization driven by the Commission (Lehmkuhl 2008: 139–40). Moreover, competition law is frequently cited as an example of successful harmonization at the European level: not only was it the 'first supranational policy' (McGowan and Wilks 1995), but national laws over time have also come to substantially reflect the content and procedures of European competition law. Thus, if substantial harmonization of federal and national laws in a particular field is to be seen as the ultimate objective of European integration, that objective was well on the way of being achieved in competition law by the 1990s (Wylie and Rodger 1997: 488).

By contrast to more traditional accounts, which describe different policy mechanisms in the EU as largely idiosyncratic, each reflecting a distinct European policy mode (Wallace et al. 2005), the aim of this volume is to track the emergence, across a number of different EU policy fields, of a governance architecture with a set of common salient features. This architecture does not fit neatly into standard conceptions of harmonization or subsidiarity, and it provides an apparent underlying rationale for a set of mechanisms that have

been implemented to deal with problems in different policy areas, all with very different starting conditions. Where experimentalist governance has emerged the novel mechanisms may be perceived, even by those participating in them, as the best available alternatives to an otherwise preferable approach. Thus, some of the governance mechanisms discussed in the volume have emerged almost accidentally out of successful attempts to solve concrete regulatory bottlenecks without those involved consciously reflecting on the question of regulatory design. Others have emerged from cases in which, upon conscious reflection, policy-makers view a 'soft' EU mechanism as the best that can be achieved at a particular point in time, either because immediate top-down harmonization is not politically feasible, or because it is otherwise undesirable. Yet, over time those soft commitments may harden into concrete obligations of disciplined monitoring and comparison.

Among the policy fields examined in the volume, competition law provides an interesting test case for the hypothesis that experimentalist governance has emerged as a preferred regulatory architecture in the EU. This is because at approximately the same time as regulators in other fields were experimenting with alternatives to the classic Community Method, the Commission initiated a process of reforming the *institutional* arrangements for implementing European competition law. Since competition law was already regarded as a successful example of harmonization, this process of reform was neither a response to a sudden regulatory crisis, nor did it occur on a blank slate. Quite to the contrary, those reforms were implemented against the background of the accumulated experience of arrangements that, with some drawbacks and limitations, were perceived as largely successful and merely in need of adjustment so as to deal with the 'big bang' expansion in 2004. Apart from the fact that the Commission was in the driver's seat for the reforms, the process benefited from what has been described a, a stable 'epistemic community' of repeat players (antitrust practitioners and academics) (van Waarden and Drahos 2002) continuously engaged in vibrant discussion and debate, not only about individual cases and interventions, but also about the advantages and drawbacks of European competition policy mechanisms compared to other systems.[1] At the time the reforms were initiated by the Commission, institutional issues were not at the centre of ongoing debates. Instead, this epistemic community was in the midst of a robust debate about the future direction of substantive European competition law so that it would be able to respond effectively to the challenges presented by novel production realities in Europe and more broadly.

While this process of designing the new competition regulation was driven from the top/centre, from the experimentalist architecture perspective it is notable that the Commission identified the decentralization or devolution of implementation responsibilities as one of the principal purposes of the modernization process. Namely, the reforms were specifically intended to relieve the Commission of some of its competences, thereby increasing

the involvement of national agencies and courts in implementing *European* competition law.

As much of the subsequent commentary suggests, the devolution of the Commission's competencies could be consistent with at least two different regulatory architectures. One view of devolution is as a process of top-down delegation of responsibilities from the Commission to national authorities, now authorized to implement harmonized European competition law. This view is consistent with traditional notions of harmonization in European law, and assumes that the Commission can design optimal substantive rules for the implementation of competition law. If the Commission had sufficient bureaucratic manpower, allowing it to effectively monitor firm conduct across the (now-expanded) Community, and faced no objections from the Member States, it could enforce the optimal rules by itself. According to this view, delegation of responsibilities to national authorities achieves two purposes: it ensures that (harmonized) competition law is enforced without swelling the size of the Competition Directorate in Brussels, while at the same time giving national authorities a stake in the implementation process. National Competition Authorities' (NCAs) stake is quite limited: they have little autonomy of action in developing European competition law and merely act as the Commission's agents. The Commission's role is to focus on areas in which it has exclusive implementation responsibilities and to ensure that national authorities comply with the harmonized rules in the exercise of their delegated powers. Ensuring proper compliance by the national agencies is particularly important when at least some of them suffer from insufficient enforcement capacity, or expertise, or may be more susceptible to capture by local interests.

The second characterization is that devolution would result in genuine decentralization of responsibilities to Member States, allowing their authorities to engage in rule generation as well as enforcement, resulting in at least the potential for divergent approaches to regulating firm conduct and inter-firm interaction. The underlying assumption of those who favour decentralization is that Member States can design optimal competition rules at the national level, taking into account local market circumstances, and economic and social objectives, as well as the circumstances and regulatory approaches of other Member States. Yet, even staunch proponents of subsidiarity recognize that national regulation in areas such as competition law must be coordinated to be efficacious (given cross-border externalities and opportunities for arbitrage). The role of the central (Community) institutions is to guarantee a minimum level of competition enforcement so as to avoid regulatory races to the bottom (whatever such races might involve in competition law (Fox 2000)), and to create (fairly hard) rules for allocating cross-border cases to the respective national authorities, thereby avoiding conflicting national interventions against a single firm (or group of firms).

It is worth noting that both the delegation and the decentralization views sidestep at least three important questions of regulatory design. First, both views fail to address the question of how the responsible regulator (whether federal or national) accesses the knowledge about underlying regulatory problems and possible solutions, knowledge which is essential for both rule writing and enforcement. Secondly, both views fail to provide an account of how the regulatory mechanism copes with an underlying environment that is both uncertain and highly dynamic. The dynamic nature of the environment makes the writing of rules to guide future conduct extremely difficult, creating a need for residual discretion, while increasing the confounding factors that burden rule enforcement (both against regulated entities and against national authorities). Thirdly, both views of devolution fail to address the accountability problems inherent in each. The standard democratic deficit argument can be levelled against the delegation approach, where even in a static environment the actions of, and the rules generated by, the federal bodies are seen as removed from the oversight or control of European citizens. Making national authorities agents of the Commission, rather than the Member States, only makes the problem worse. Moreover, a dynamic underlying environment worsens the accountability problem on either view, because of the need to provide the implementing regulator with residual discretion to deal with previously unforeseen-and unprovided-for circumstances. Finally, there is also a more subtle accountability question, having to do with the accountability of those who supply the knowledge relevant for rule generation, as well as the knowledge necessary to fill *ex post* the gaps left by the rules (in other words, the accountability of the epistemic community).

2 Experimentalist governance and the reforms of European competition law

Most of the commentary on the modernization of institutional arrangements for EU competition law emphasizes the level of centralization and harmonization of the former regime, as well as the consolidation aspects of the Commission's reforms. Thus, the standard interpretations of the Regulation range from the view that the new mechanisms and processes are a minor change in form with little substantive significance, to the position that the Commission has, in the guise of decentralization, consolidated its grip on competition law. Some have gone so far as to suggest that this consolidation aims at harmonizing the substantive content and values of European competition law, so as to make it more 'purist', or 'neoliberal', or consistent with the 'Anglo-Saxon' variety of capitalism, even if these were not charges that one could level against European competition law as it historically developed.

In light of such interpretations, it is worth asking whether recent developments in competition law are inconsistent with the governance trends described in this volume. If this is so, this may either provide evidence against the claim that a trend towards experimentalist governance mechanisms is emerging in the EU or it may be explained by features of the competition regime which make it unsuitable for such an architecture.

Sabel and Zeitlin argue that the European Competition Network, created by the Modernization Regulation, may have extended the experimentalist governance architecture so as to 'rationalize' previously centralized regulation (Sabel and Zeitlin 2008). Traditional competition law implementation in the EC was shaped by the early priorities of European integration and the role of competition law in that context. Centralized regulation and early harmonization of hard competition rules reflected the importance of market integration as an objective of competition policy, the lack of a common competition tradition (or 'culture'), and the resulting diversity in regulatory approaches and implementation capacity even among the original Member States. Since the principal policy objective was largely one-dimensional (the elimination of private barriers to cross-border trade and competition), a uniform and centralized approach to the generation and implementation of law was appropriate. Regulatory diversity was, by definition, inimical to the primary goal of market integration.

One aim of this chapter is to argue that changes in both the (weighting of) policy objectives and the underlying economic environment, even abstracting from the question of enlargement, made the prior centralized approach to competition enforcement untenable. As the negative market integration objective receded in importance in competition as in other regulatory fields, antitrust decision-making increasingly began to involve more nuanced analysis, requiring the refinement and balancing of different policy objectives. Such balancing was made more difficult by the complexity and dynamism of production relationships brought about not only by European integration itself, but also by other processes that have made market environments more volatile. Not only do such developments make it difficult to rely on harmonization of hard rules and vertical integration of implementation, but they also put a premium on learning as an important element of the regulatory architecture. This is because whatever regulatory architecture is chosen, it must rely on provisional rules, which leave room for adjustment as the authority learns about shifting market conditions and underlying problems.

Learning in such an environment may come from a number of different sources. Most obviously, regulators who have to deal with hitherto unfamiliar circumstances can access knowledge about how other regulators have dealt with similar problems. Moreover, regulators can disrupt habitual and routinized patterns of problem solving by learning about different possible solutions for similar situations. In an expanding Community, national regulators from states

which lack a strong tradition in a particular policy area can learn simply by observing those who have built up more substantial enforcement capacities. Regulators can also collectively learn about areas where greater harmonization and/or centralization is likely to produce better outcomes or more efficient remedies and vice versa. Finally, competition authorities can learn from firms and undertakings about novel inter-firm arrangements, the purposes for implementing such arrangements, the degree to which those purposes were fulfilled in specific cases, and whether any resulting benefits are distributed beyond the entities involved to other actors, such as consumers.

Another objective of this chapter is to argue that the Modernization Regulation provides for sufficient devolution of responsibilities and latitude to national authorities and courts to pursue diverse and novel solutions to competition problems in ways that recognize a variety of interests and objectives potentially implicated in such interventions. To do this, contrary to most contemporaneous interpretations, I argue that the Regulation does not ineluctably lead towards greater Commission hegemony in implementation of competition law and the imposition of a particular narrow vision of competition policy in the EU, nor can such a trend be discerned from the available evidence since its implementation in 2004. To the contrary, the new network has features that can make it an important mechanism for disseminating learning about regulatory interventions by national authorities and the Commission, reviewing such interventions, and using the information gathered so as to advance the identified objectives of competition policy and the metrics used to gauge their attainment. Finally, the residual powers of intervention vested in the Commission need not be viewed as instruments of command and control, both because, if exercised, they are checked by requirements for justification and peer review, and because they may play a different role in building up implementation capacity among network members.

Apart from the creation of the network and the procedural innovations introduced, two other features of the reform package contribute towards the emergence of an experimentalist architecture in this field. These are the expansion of the applicability of EU competition law (even in proceedings carried out by national authorities and before national courts) and the failure to harmonize competition remedies among the Member States. On the one hand, it could be argued that this simply reflected political realities and constraints: while most national laws had already substantially converged towards the EU template, remedial traditions in the various member states vary greatly. On the other hand, this approach ensures that comparisons of divergent approaches pursued within the network will focus on the underlying problems and interests of competition policy (as opposed to textual divergence among national laws), as well as on the design and the effects of solutions implemented for those problems.

3 European competition law—principal features of the traditional approach

Historically, the regulation of competition in EU Member States was characterized by a great deal of diversity. Many European countries did not have specific legal or administrative instruments for regulating competition prior to joining the EC. Quite apart from the complete absence of competition laws, statist intervention in the economies of these countries led to policies which ran counter to what we might view today as competitive principles. For example, state policy often supported horizontal arrangements among competitors as a way of providing stability for producers or as mechanisms of adjustment to significant shocks affecting a particular industry. In addition, it was common for the state bureaucracy to be directly involved in price setting. The resulting forms of organizing production, including inter-firm cooperation, may often seem suspect (as either exclusionary or collusive) when viewed through the prism of antitrust law. For example, in some states participation in trade associations was common, and association deliberations often involved many of the parameters over which firms may compete. Similarly, producers would rely on mechanisms for partial vertical integration into downstream markets, so as to ensure the consistency of supply and ultimate quality delivered to customers. State policy played a direct role in economic relationships, not only through tolerating cooperation with competitors or dealers, but also through setting up governmental authorities to provide essential services (in industries that came to be described as natural monopolies) or supporting firms as national champions for strategic trade policy reasons (Fear 2008: 269–71, 279).

As was the case with the Sherman Act in the United States, the European competition law regime at its inception was not primarily motivated by concerns about allocative or productive efficiency. Given the absence of a common tradition of regulating competition, including the absence of a shared commitment to a particular vision of competition or business organization across different Member States, competition law was not an apparent candidate for early harmonization. The reasons for the early harmonization and entrenchment of European competition law were largely political: competition law was a mechanism to support the project of economic integration and a bulwark against the re-emergence of totalitarian regimes.

Specifically, the founders of the European Community recognized that the removal of government (tariff or quota) barriers to the movement of products across national boundaries that could be undone through restrictive private arrangements, such as supply agreements or cartels along national lines that would effectively prevent the entry of outside producers. The Treaty obligations to dismantle trade barriers could therefore be circumvented by governments turning a blind eye to arrangements that foreclosed foreign competitors, or by tolerating aggressive market behaviour of national monopolies (including

state-owned companies with a soft-budget constraint) that would deter entry of foreign producers. In addition, governments could provide subsidies to local enterprises, giving them an advantage over, and keeping at bay, producers from other Community members.

In the postwar period, governments in Europe and elsewhere were under pressure due to active US antitrust enforcement both at home and abroad. Apart from robust enforcement at home, the United States aggressively promoted the proliferation of antitrust laws as a vehicle for buttressing democracy, by breaking the nexus between the concentration of economic power and political power. The support from large national firms and industrial cartels was seen as the key reason behind the emergence and strength of totalitarian regimes, including in pre-war Germany and Japan. Unsurprisingly then, in Europe the view of antitrust as a tool for guaranteeing democratic control over economic power found intellectual support in the German ordoliberal school and informed the development of the German competition laws, which, in turn, substantially influenced the content and procedures of European antitrust (Buxbaum 2005: 477–83).

In such an environment, it is little surprise that Community law was of primary importance in the development of competition law. For the first few decades, the European Commission 'uniquely used competition law as a tool of economic integration' with a principal focus on 'arrangements that hindered cross border selling activities by traders' (Forrester 2000: 1034). National authorities, where they existed, were left with a small residual role, primarily limited to dealing with conduct or mergers of only local significance, and lacked the capacity to present a significant challenge to the Commission. Nor was the availability of judicial review by the European Court of Justice a significant constraint on the Commission's development of competition law. The ECJ's review of the Commission's competition decisions was largely limited to procedural rather than substantive matters, given the perception that competition was a technocratic area of regulation where the Commission had specialist expertise (Neven 2006). In addition, the ECJ's jurisprudence was largely supportive of the Commission's expansive interpretation of the treaty provisions as a way of unblocking barriers to the common market (Lehmkuhl 2008: 140, 145). It was not until the subsequent establishment of the Court of First Instance, which took over responsibility for the growing competition case law, that the Commission was faced with more significant judicial scrutiny and pushback in its decision-making (Lehmkuhl 2008: 148, 154–5).

4 Emerging problems and pressures for change

The Commission's effort to reform the institutional framework for competition law was prompted by the confluence of a number of concerns and challenges

emerging through the late 1990s. The administrative burden of the system of notifications on the Commission made at least some reforms inevitable. In addition, a set of more general concerns about the efficacy and accountability of the European competition regime became salient given the broader re-evaluation of the integration project occurring in this period (Wesseling 1997). Finally, although the modernization project was principally billed as procedural or institutional, the process was initiated at a time of substantial debates about the future direction of substantive EU competition law.

4.1 Administrative burdens

Because of the potential scope of the Treaty's competition provisions, their proper enforcement through case-by-case review of arrangements or conduct potentially restricting competition has always presented a substantial administrative burden on the Commission. Article 81 covers all arrangements (not just formal agreements) restraining trade in the common market, but virtually any inter-firm arrangement will restrain trade at least to some degree. The adoption, in the former Regulation 17/62, of the mechanism of *ex ante* notification of agreements for review and clearance resulted in large numbers of notifications (given that this was the best way for firms to insure against a subsequent finding of violation) and very few actual exemption decisions (Forrester 2000: 1032). Apart from creating a substantial administrative burden, the notification mechanism had a fairly low-expected payoff, both in terms of identifying problematic agreements (since those were less likely to be notified) and in learning about the competitive significance of notified agreements.

Since case-by-case review of firm conduct that engaged the restrictive trade practices, abuse of dominance and state aid prohibitions was always untenable, the Commission developed a number of mechanisms through which to alleviate the burden and deal collectively with a large number of agreements that were unlikely to raise competition concerns. Thus, *de minimis* arrangements falling below certain thresholds were exempted from notification and clearance obligations. However, the most significant tool for reducing the Commission's competition workload was the promulgation of block exemptions. Block exemptions provide a general exclusion from the requirement for notification and review of inter-firm agreements that might appear to fall under the Art. 81 prohibition, but contain provisions or templates that either make them less likely to be anticompetitive or more likely to have procompetitive effects. For block exemptions to be an effective tool of implementing competition policy, the Commission must be able to rely on its knowledge and experience with particular conduct or contractual arrangements either generally or in specific industries, so as to be able to identify safe harbours for contracting practices or specified conduct, and such practices must in turn be

sufficiently similar to those used by other firms. Finally, given the large volume of notifications and the clearance process backlog, the Commission, rather than performing a genuine and thorough review of the competitive significance of a proposed merger or acquisition, began to rely on a speedier review procedure which would result in the issuance of informal (though ultimately non-binding) comfort letters.

The volume (and resulting backlog) of notifications under Art. 81, which was only going to increase substantially following enlargement, provided the impetus for institutional reform, but the *ex ante* notification and clearance procedures had other, much more significant, flaws. Specifically, these procedures provided the Commission with very limited opportunity for learning both about the competitive significance of the agreement under review, and about dynamic changes in patterns of production more broadly. The Commission's assessment of competitive significance of a particular inter-firm arrangement was based primarily on the documentary record supplied by the parties at a time when the negotiation of the proposed arrangement was completed, but prior to its full implementation. Where the review of an arrangement is based on such a limited record, it is likely to be pro forma, and yet any attempt to expand the record would slow down the clearance process and introduce further uncertainty in the business environment. Thus, practitioners in the field viewed the notification system as 'useless' in discovering true competition concerns (Forrester 2000: 1044).

The limited opportunities for learning afforded to the competition authority are particularly acute in a dynamic environment for at least two reasons. First, the implementation of a particular agreement over time may affect competition in ways that are imperceptible *ex ante* at the time the Commission must give clearance. Second, if the Commission has no mechanism for learning about changes in the patterns of production over time, *ex ante* review and clearance may largely be focused on the problems of the past. Alternatively *ex ante* review can also impede the emergence of potentially beneficial production arrangements, if the Commission is suspicious about their likely impact on the public interest in cases where it is unfamiliar with the nature of the agreement or the competitive dynamics in the industry in the future.

The enlargement of the Union with an additional ten Member States was going to worsen the administrative burden not only by increasing the number of firms and the volume of inter-firm arrangements subject to notification, but also by increasing the heterogeneity of market environments and production relationships regulated by EU competition law. The competitive conditions in the markets of the formerly socialist transition economies were (and continue to be) quite different from those of the more mature market economies of the older Member States, as were the possibilities for and forms of anticompetitive conduct. Thus, prior templates developed by the Commission in its implementation of European competition law were not going to provide a complete or

even relevant guide to competition enforcement in the new Member States. Greater heterogeneity places greater analytic strain on the Commission and makes it even more difficult to rely on block exemptions to relieve the administrative burden. In such an environment it becomes even more crucial for the decision-maker to have access to multiple sources of learning, including about peculiarities of local circumstances prevailing in the new Member States. Complicating matters further was the fact that new Member States were also the ones less likely to have the tradition, experience, and capacity to enforce their recently enacted competition laws.

4.2 Legitimacy

The need for highly centralized implementation of European competition law was traditionally justified by the primacy of the market integration objective, as well as the fact that many Member States lacked sufficient tradition and capacity to enforce competition law. However, Community-level action, particularly when implemented through executive bodies like the Commission, has been vulnerable to the criticism that it lacks democratic input and the allegation that it is more attuned to the interests of business. The principal sources of input into the Commission's competition decision-making were third parties affected by the conduct or merger in question, combined with comitological input from experts of the Member State authorities, neither of which would be viewed as either representative or accountable in the traditional sense. For instance, in cases such as the GE–Honeywell merger or its action against Microsoft, the Commission's identification of competitive concerns was chiefly informed by complaints from and consultation with competitor firms. Yet the practice of consulting firms with a considerable stake in the competition problem leaves the Commission open to the criticism that its decisions are unduly affected by business lobbying, without proper consideration of more diffuse interests, such as those of consumers. A common view emerged that, in antitrust, the Commission pursued 'its policy path almost undisturbed by democratically legitimated actors, including the Council and the European Parliament' (Lehmkuhl 2008: 149).

Over time, the Commission's dominant role in the implementation of competition law inevitably came under various pressures, from a number of different sources, including the Member States. As Member State authorities built up their administrative and analytic capabilities, they began more forcefully to question the Commission's decisions as well as its general primacy in the competition field, particularly in cases of conflicting priorities or views of a particular problem (Lehmkuhl 2008: 146, 149). But the NCAs were not the only source of pressure on the Commission. Once negative integration receded in importance as a guide to Community action, the debate in competition law, as elsewhere, began to focus on positive integration. Highly

centralized areas of Community law and regulation, dominated by repeat players and experts (the competition epistemic community is often argued to be the most monolithic and stable), were seen to chiefly promote negative market integration and suffer the greatest democratic deficit. Even if NCAs were not particularly forceful in putting pressure on the Commission's competition decision-making, the enforcement of European *competition* law often impinges upon *other* areas of national intervention or regulation. In other words, the enforcement of the treaty competition provisions (and especially the prohibition on state aid) often constrains other regulatory or redistributive efforts at the national level (Lehmkuhl 2008: 143). As a result, other stakeholders within the Member States were often key opponents of the objectives and outcomes of the Commission's competition law decision-making.[2]

4.3 Conceptual dilemmas: the direction of substantive European competition law

Coinciding with the Commission's initiation of institutional modernization was an ongoing debate about the future substantive development of European competition law, which had commenced by the early 1990s (Gerber 2008). That debate was prompted by the recognition that going forward, the rather blunt objective of market integration would not provide a sufficient guide for action in many antitrust cases. The problem was brought into focus by numerous cases involving an international (extra-European) dimension that were reviewed not only by the Commission, but also by other antitrust regulators (Lehmkuhl 2008: 146). How would the specific values and objectives of European competition law apply to corporate actors and conduct outside the EU, which had effects within the EU? Would the unique values and objectives of the EU yield in cases with a significant international dimension? Or alternatively, was it possible to converge on a minimum threshold criterion that could also provide a justification for competition law intervention by the Commission. If such a criterion exists and the Commission can establish that it is satisfied in a particular case, this showing could provide a sufficient justification for the intervention of the European courts (in their exercise of judicial review), not only for Member States, but also for other (international) regimes that might have a stake in the competition problem.

In this context, developments in US antitrust law since the 1970s have been the source of both inspiration and suspicion for European competition officials and citizens. In that time, US antitrust lost its more activist stance against business agglomeration and exclusionary conduct, to become a more narrowly tailored tool for the promotion of economic efficiency (or consumer welfare). Under US law, an antitrust intervention is justified if an arrangement between firms or unilateral firm conduct does or seriously threatens to reduce market-wide output and increase the price of the product for the firms' customers.

Parallel with this conceptual shift there has also been a shift in instruments away from the description of forms of abusive conduct in antitrust doctrine towards the use of economic (theoretical and empirical) modelling in an attempt to forecast likely anticompetitive effects of the conduct in question. For various reasons, this has also produced an antitrust policy which is far less ambitious and is more deferential to business conduct (Svetiev 2007).

Europe has not been immune to this trend. A number of recent decisions and internal reforms within the Commission's Competition Directorate appears to give more than just a nod to what has come to be known as the 'economic approach'. Thus, the Commission has created the post of Chief Competition Economist as part of DG Comp, and has significantly increased the availability of economics expertise in its deliberation and decision-making. Recent policy or enforcement pronouncements, such as that on vertical restraints for example, are much more influenced by economic thinking compared to the concerns that animated the Commission's earlier approach. Finally, in some recent interventions involving mergers or complaints of abuse of a dominant position; the Commission has increasingly tended to rely on analysis of the ultimate effects of the merger or conduct, including reliance on substantial economic expert input, even if consideration of such effects is not formally part of the relevant legal doctrines (Völcker 2005: 1712, 1721). Through such cases, the Commission may be trying to signal that reliance on economic expert input need not mean that competition policy would inevitably become less interventionist.

The responses by the European courts and the Member States to these developments indicate that European competition law has not converged upon a particular vision. A number of the Commission's merger decisions were reversed by the CFI finding that in deciding to prohibit certain mergers it had misapplied the economic efficiency criterion (*Airtours/First Choice*,[3] *Schneider Electric*,[4] and *Tetra Laval*[5]) (Schmidt 2004: 1571). Given the consistent reversals in the merger area in the early years of this decade, a number of questions could be posed about the Commission's apparent commitment to relying on robust economic analysis in its decision-making, including (*a*) whether its economic analysis in those decisions was too superficial; (*b*) whether it relied on economic efficiency arguments to justify a decision, which was in fact based on other considerations; (*c*) whether the courts found unpersuasive the arguments that particular merger was exploitative in the narrow sense of restricting output and raising customer prices, and (*d*) whether this is likely to create a deregulationist bias in European competition law as has generally been the experience in the United States since the 1970s. The ECJ, by contrast, in its 2007 decision in *British Airways* affirmed the Commission's decision on rather formal doctrinal grounds, ignoring much of the underlying economic analysis.

Member States, and their competition authorities, have also been active participants in this substantive discussion. The NCAs of some Member States, such as United Kingdom and Ireland for example, who have invested and developed

capacity to conduct efficiency-based analysis, have advocated a methodological shift towards this narrower conception of competition law (Vickers 2005). Others, by contrast, view this narrowing of the interests that competition law protects with suspicion, as a threat to the unique concerns and tradition of European competition law and European integration processes more broadly. Moreover, for European citizens and social actors, limiting competition regulation to questions of economic efficiency may represent yet another example of a bias towards business interests and negative integration.

4.4 Competition law in a changing production environment

Much of the commentary on recent developments in the EU focuses on the extent to which European competition law has converged on US antitrust, both procedurally (by emphasizing *ex post* enforcement as opposed to *ex ante* regulatory processes in the Article 81 realm) and substantively (by relying on economic analysis of competitive effects). The two processes can be viewed as both mutually supportive and consistent with the 'delegation' view of modernization. In particular, if the Commission has delegated responsibility for the implementation of competition law to NCAs, rigorous economic analysis can provide a common language for all network participants in analyzing competition-law cases. If all authorities analyze the cases in the same way and using the same toolkit, it matters not which authority is charged with a particular case. Moreover, according to this view, the availability of a common normative framework and language makes the Commission's task of monitoring the compliance of NCAs considerably easier (Gerber 2008).

However, any discussion of the appropriate role and form of competition intervention in moderating firm conduct and inter-firm arrangements would be incomplete if it was not sensitive to developments in the production environment. This is because changes in the production environment will influence the types of problems that come before the competition authorities, as well as the efficacy of their policy instruments. Questions such as what are relevant aspects of market power, how such power can be used to harm other firms or ultimately customers, and whether competition law intervention can provide a corrective to such exercise of power cannot be answered without considering the firm's objects, the way in which the firm organizes production so as to achieve those objects, including the ways in which the firm competes against and/or collaborates with other firms.

The restructuring of production patterns in the European economy was both an unavoidable and an intended effect of the common market project. By participating in an integrated common market, European firms had easier access not only to new buyers for their products, but also to new upstream suppliers and methods of production (Vitols 2004: 335–6). This is precisely why the Commission and the ECJ in the early competition jurisprudence

emphasized the importance of breaking up national arrangements for production and distribution, which in turn encouraged firms to disintegrate existing patterns of production and look for new sources of inputs and collaborators. The effect of European market integration on firms and modes of production was further amplified by greater openness of the European market to investment and trade from outside the Community, particularly in manufacturing.

The opening up of markets to foreign competition together with advancements in technology have brought about a fundamental transformation in models of business organization. Specifically, the more volatile market conditions created by foreign competition and rapid changes in technology, and the difficulties firms face in coping with the resulting uncertainty of such environments, have revealed some of the inherent problems with vertically integrated hierarchy as a model for organizing production. Vertical integration was the paradigmatic mode of organizing production for much of the twentieth century, viewed as a way to deliver efficient outcomes through bringing various stages of activity in-house. Vertically integrated organizations were said to remove the scope for opportunistic conduct in decentralized production with specialized independent units, such as non-disclosure of information or hold-up in relationships involving mutually specialized assets. Even in stable environments, those at the top of the hierarchy face difficulties in eliciting information from subordinates relevant to rule design, the monitoring of rule compliance with rules and goal or project selection. More volatile (and thus less predictable) environments amplify the confounding influences on outcomes and, as a result, brought the limits inherent in the hierarchical model of the firm into sharper focus.

Greater volatility in market conditions has been a principal driving force towards vertical disintegration in production. In an environment where yesterday's world is highly unlikely to recur, the principals of the hierarchy can not simply rely on past information or habitual patterns to determine the firm's future projects or production modes. Instead, the firm must innovate continuously and for that purpose must constantly be able to access new sources of knowledge. To manage this profound and ongoing uncertainty, rather than bringing various production stages in-house, modern business organizations tend to focus on core activities and collaborate with other independent entities. The principal object of the firm in such an environment is to engage in constant and robust innovation in new products and processes, rather than to deliver an existing product to market at the lowest cost (Roberts 2004; Sabel 2006). Given the complexity of products, it is difficult for a single firm to remain at the edge of all relevant technologies. Thus, innovation is not a unilateral process based purely on internal know-how and R&D expenditure, but rather involves scanning the market for ideas and opportunities for collaborative innovation executed jointly with other firms (including users or upstream firms [von Hippel 2005]).

Such changes in the organization of production have a number of important implications for competition policy. The tendency towards collaborative production and innovation increases the number of cooperative arrangements and strategic alliances between independent business entities. This in turn increases the analytic and administrative strain on the competition authority if such arrangements are to be examined for potential anti-competitive effects. In traditional arms-length production and exchange, inter-firm collaboration is a source of concern because it could be used as a guise for price fixing or other forms of anticompetitive coordination. To analyze the competitive significance of such collaboration in the new environment may require consideration of any positive dynamic effects (including on innovation) and possibly balancing them against the collusive potential to harm consumers or to exclude others. The burden on the competition authority is amplified not only by the increased number of inter-firm arrangements that might engage Art. 81, but also by the fact that the traditional methods of vetting these arrangements through *ex ante* review or block exemptions are particularly unsuitable.

Meaningful *ex ante* review is more difficult because of the heterogeneity and provisionality of novel inter-firm agreements for co-design and joint production. Firms rely on co-design and collaborative production to manage uncertainty in a turbulent environment. By their nature, these arrangements are exploratory and parties recognize that they will be subject to ongoing revision. *Ex ante* review of their competitive significance is therefore inherently incomplete. Even the parties themselves recognize that both the specific measures and the objectives of the agreement will likely evolve with the accumulated experience in implementing it. For similar reasons, regulating such arrangements through block exemptions does not provide a particularly attractive alternative. As Forrester (2000: 1031–2) has pointed out, because the list of contracting devices identified in block exemptions provide a safe harbour from a subsequent finding of antitrust violation, they become 'compulsory standards in the eyes of the industry'. Arrangements that contain innovative, and therefore 'unblessed', features would clearly be discouraged by reliance on block exemptions.

Focus on the rapid changes that take place in modern markets has also led to greater attention on innovation effects in competition decision-making. Recognizing that the firm's principal goal is to innovate, and that the main form of inter-firm competition is through development of new products and processes, competition authorities have struggled to address the question of how to account for innovation in their decision-making, in itself a very challenging task. One standard view (not only in Europe) was that competition policy faced a trade-off between the goals of competition and innovation (or industrial progress). This trade-off is supported by the Schumpeterian view of short-run monopoly profits as an incentive for innovative endeavour, as well as industrial

policy arguments about the need to foster national champions as effective competitors in international markets. To some extent such a view is embedded in EC competition law, since Art. 81(3) specifically allows the Commission to authorize certain inter-firm arrangements, even if they restrict competition, so long as they are likely to result in industrial progress that benefits the Community.[6]

Novel production relationships may turn this reasoning on its head. New forms of business organization suggest that the firm may disintegrate production in order to be better able to innovate. Moreover, since innovation is an ongoing aspect of production (with back-and-forth information and feedback flows between producers, suppliers, and customers), it is difficult to segregate the process into research and innovation (where cooperation is treated with greater laxity) and subsequent production and distribution (where arms-length or competitive relationships are preferred). Finally, the importance of innovation puts in doubt the notion that competition law can be focused principally on short-run consumer prices and, by corollary, that it need not be concerned about the effects of alleged anticompetitive conduct on other firms unless that conduct attenuates pricing pressures in the market.[7]

These observations suggest that the modernization reforms could not simply have consolidated an emerging equilibrium for European competition law that was based on consensus about the goal of static short-run allocative efficiency and the tools of rigorous economic analysis, a consensus which made it possible for responsibilities to be delegated to NCAs without a loss of substantive control by the Commission. Such a view would be incomplete not just for historical or political reasons, but also because the context in which the reforms were initiated and implemented placed such a narrow conception of the goals and instruments of competition policy into considerable doubt, an issue to which we will return.

5 The modernization regulation and the creation of the European competition network

The discussion in the previous section provides the necessary background to consider the specific features of the new framework for implementing competition law created by the Modernization Regulation. It suggests that the institutional and procedural reforms took place in a period of transition in the development of European competition law: the passing of an era during which cruder analytics were used to end nation-based discrimination in production and distribution and promote cross-border competition, together with substantial uncertainty about the form of competition policy that would emerge. The remainder of the chapter provides a brief description of the principal features of the systemic reforms introduced by the Modernization Regulation.

The purpose of that review is to highlight those aspects of the new framework that can be used to manage both the instability of production environments and the heterogeneity of the jurisdictions in which European competition law must operate.

It is often noted that the Modernization Regulation initiated no substantive changes in the content of Community competition law: no changes were introduced to the text of the treaty provisions, nor was there any attempt to intervene to 'legislatively' amend the legal standards that have emerged in the jurisprudence of the Commission and in applying the treaty provisions. Nor was a key feature of the reforms to boost the bureaucratic manpower of DG Comp to enable it to deal with the notification backlog, as well as the added workload associated with enforcing Community competition law in an enlarged Union, where the new Member States had even weaker competition-policy traditions.

The principal change to the institutional arrangements, including the relationship between the central and the national authorities, related to the procedures for implementing Art. 81. Specifically, the Commission was relieved of the notification and clearance responsibilities for arrangements that potentially restrain trade, but those functions were not reallocated to the Member State authorities. Instead, both paragraphs 1 and 3 of Art. 81 are directly applicable, as had already been the case with Art. 82 of the Treaty. As a result, the Commission and the NCAs have parallel competencies to enforce both Art. 81 and Art. 82. With respect to Art. 81, in the absence of *ex ante* clearance procedures, firms must assess the likely competition exposure of any arrangement, and can be subject to an *ex post* enforcement action by any competent authority that investigates the arrangements should it come to the view that it contravened EU competition law.

The second key feature of the new architecture is the European Competition Network ('ECN'), which includes both the Commission and the Member State competition authorities. The ECN represents a conscious effort to link the implementation capacities of the NCAs with that of the Commission given their joint responsibility for implementation. Apart from having parallel competence to implement European (as opposed to national) competition law, as will be seen, NCAs are left considerable scope to both decide cases and shape their own competition priorities. Yet, the freedom to act afforded to the NCAs is constrained: by the requirement that national authorities report their decisions to the Commission and other authorities in the network and by the Commission's power to intervene either by initiating its own proceedings or by providing its views about a particular case to a national authority or court.

As already mentioned, it is also important that no attempt was made to harmonize competition remedies in different Member States as part of the modernization package. Implementation of effective remedies has long been recognised as a key constraint on competition enforcement generally and this problem is especially acute in cases involving fast-changing technology and market environments. Both the US and European enforcement efforts against

Microsoft were concluded with complex remedial architectures involving outside technical-expert assistance—a Technical Committee of Experts in the US and the Monitoring Trustee in the EU (Svetiev 2007). As I have argued elsewhere, enforcers had to rely on innovative remedial mechanisms which, to some extent, blurred the distinction between *ex ante* regulation and *ex post* antitrust enforcement (Svetiev 2007: 668). Through incorporating a number of different channels—for reporting of existing efforts, for peer review, and for internal self-evaluation (by Microsoft as the defendant)—these remedies provided an alternative regulatory regime for resolving concrete problems and disputes that would disrupt inter-firm relationships and collaborative innovation (Svetiev 2007: 669–70, 694). One advantage of such remedies is that, instead of playing a static monitoring and verification role, they generate knowledge about the underlying competitive problems and they adjust over time to deal with those problems. Thus, to the extent that remedial design is a key issue in many modern competition cases, remedial heterogeneity can be a key source of learning from difference in the ECN.

Both in the lead up to the promulgation of the Modernization Regulation and in the years following its implementation, commentators offered various characterizations of the ECN: most viewed the creation of the network as a consolidation of the Commission's grip over competition policy in the Community. By contrast, one commentator described the new network as an 'architecture of enforcement [which] is unusual among EU policies and as experience accumulates, its functioning may be a useful source of inspiration in other areas' (Neven 2006: 746).

I argue that neither of the above characterizations is entirely accurate. When we examine the detail of the Modernization Regulation, as well as the accumulated experience of the operation of the new system since 2004, it becomes evident that the concern about the ECN being used to enforce a particular top-down vision of competition policy (with the Commission as principal conductor) may have been overstated. Moreover, it will become apparent that the architecture of the ECN is not as unusual and unique as may first appear. Instead, it shares common features with a number of other (experimentalist) policy mechanisms discussed in this volume. This should come as no surprise, given that competition policy is an area where the need to generate learning is acute and where static analysis is particularly unsuited as a guide for decision-making. Therefore competition policy is a field in which experimentalist governance should be expected to emerge.

The argument proceeds in two steps. First, key features of the ECN (as created by the Modernization Regulation) are examined, as well as some of the available experience from its operation, and compared to an experimentalist governance architecture. The second step is to argue that neither the design of the ECN nor its operation are likely to result in the complete dominance by the Commission and the imposition of a top-down vision of competition policy on the other network participants and that instead it creates the scope for all participants to contribute towards the development of the new European competition law.

6 ECN as an experimentalist governance architecture

Sabel and Zeitlin (2008; this volume) identify the following principal features or characteristics of an experimentalist governance architecture in the EU:

- the Member States' and EU institutions jointly identify framework goals and measures for gauging their achievement;
- lower level (national) actors are free to advance those goals as they see fit; subsidiarity in this framework means autonomy for the lower level (national) actors to propose changes to the rules, given experience with their implementation;
- lower level actors regularly report on their performance as measured by the agreed indicators and participate in peer review, which compares results of regulatory interventions to the objects pursued and results of other national authorities and
- framework goals, indicators, and procedures are periodically revised by the actors who set them with the assistance of other participants who have been identified as indispensable in the process of implementation.

Each of the above features will be considered by reference to specific elements of the modernization package, as well as policy developments arising within the ECN since its inception.

6.1 Setting framework goals and measurements

The identification of the appropriate overall goals of competition policy has always been deeply contested. For instance, policy-makers have long recognised that market concentration, as well as other aspects of market structure, firm capabilities, and interactions between firms, can impact many policy objectives, including research and development and innovation, the ability of firms to compete in global markets, the level of employment and work conditions, environmental goals and even civic-political goals of maintaining democratic control over business agglomerations (Motta 2004: 22–30). Yet it is impossible to draw simple unidirectional and robust lines of causation between market structure or specific forms of firm conduct and those policy goals. The atomistic decentralized form of production and exchange presented by the textbook paradigm of perfect competition is largely useless as a guide to decision-making, as are simple structure-based variables more generally. Moreover, different national conditions may increase the salience of certain goals as opposed to others: the nexus between economic and political power may be of particular interest in a transition economy even if not in a more mature market economy.

Given such potential goal heterogeneity, nothing in the text of the Modernization Regulation or the design of the ECN suggests either (*a*) that the Commission

has to dominate the goal-setting process or (*b*) that the Commission is imposing a particular variant of the goals of competition policy and abandoning the more heterodox policy goals traditionally pursued through Community competition law. In particular, the Modernization Regulation does not endorse the view that competition policy should be targeted only on exploitative conduct which affects short-run consumer prices, nor does it have anything to say about limiting the methodological or analytic tools for implementing European competition policy.

Once we move from the global goals of competition policy, towards the local goals of specific policies and forms of intervention, it becomes apparent that even in areas that may be viewed as uncontroversial in the antitrust enforcement community, the members of the ECN have proceeded by setting out framework policy objectives, together with mechanisms for their evaluation and revision. Given the identified objectives, apart from the creation of certain minimum standards, there is scope for competition authorities to develop their own solutions, including by setting more onerous national measures than those provided for in the common document.

The Model Leniency Programme (MLP) provides a good example of a policy area in which ECN members within a short period 'jointly identified a common concern' and put in place a joint solution in the form of a model programme (Dekeyser and Jaspers 2007: 22). The aim of the model programme is to ensure that, in a world of parallel competencies to enforce Art. 81 by both the Commission and Member State authorities, firms who take part in cartels are not discouraged from applying for leniency in cases where they renounce their participation in such bodies and supply sufficient information to the authority to uncover the cartel and mount a prosecution against the participants. Specifically, the Model Programme:

> sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme. The ECN Model Programme does not prevent a CA from adopting a more favourable approach towards applicants within its programme. (MLP par. 3)

According to Dekeyser and Jaspers (2007: 15–16), because of its 'innovative and unique working methods', the Model Programme is regarded as a 'striking example of the new era of ECN cooperation' and an illustration of the ways in which ECN cooperation can 'achieve results beyond the legal obligations' set out in the Modernization Regulation.

6.2 Freedom for lower-level actors to advance those goals as they see fit and to propose revisions to the rules

Beginning again with the macro level, the provisions of the Modernization Regulation contemplate a greater autonomy of action for Member State actors.

The scope of direct application of Community competition law is widened, and national authorities and courts have greater freedom to select cases in which they wish to intervene, to decide those cases, and to tailor appropriate remedies, which the Regulation does not harmonize.

The framework document of the ECN Model Leniency Programme identifies a set of objectives that the individual CA programs should achieve, including: encouraging entities to come forward with information about secret cartels, to come forward early, to provide comprehensive information which would assist the prosecuting authority, and in a way that protects the effectiveness of its investigation, not to be discouraged by the parallel competencies of various NCAs etc. However, the document also recognizes that complete harmonization of the specific measures of different NCAs is neither possible nor desirable:

> While it is highly desirable to ensure that all CAs operate a leniency programme, the variety of legislative frameworks, procedures and sanctions across the EU makes it difficult to adopt one uniform system. The ECN Model Programme therefore sets out the principal elements which, after the soft harmonisation process has occurred, should be common to all leniency programmes across the ECN. This would be without prejudice to the possibility for a CA to add further detailed provisions which suit its own enforcement system or to provide for a more favourable treatment of its applicants if it considers it to be necessary in order to ensure effective enforcement. (Explanatory Notes (EN) par. 8)

The framework leniency document also describes a number of possible tools that NCAs can implement in order to achieve the objectives of the Programme. Yet in many cases it leaves the decision whether to implement a particular tool and, if so how, up to the individual NCA. To aid that process, a number of examples of possible tools that NCAs may decide to incorporate have been provided, including

- to select the types of sanctions that can be imposed on natural persons, as well as the appropriate protection from individual sanctions afforded to employees or directors (EN 15);
- whether to make 'markers'—holding a leniency applicant's place in the queue once it applies for leniency and while it conducts internal investigations—available to a firm and if a marker is to be available, the appropriate duration of the marker (EN 35);
- whether CAs will accept oral applications for leniency and, if so, in what circumstances (EN 48) and
- the way in which a CA will assess the quality of cooperation of an applicant, based on the timing, quality and nature of evidence supplied. The Joint framework programme suggests that, in making that assessment, each jurisdiction should be guided by the objective that there should be a 'significant difference between immunity from fines and reductions of fines in order to make applications for immunity significantly more attractive' (EN 24).

The new competition architecture also contemplates greater autonomy of action for firms as the regulated entities, particularly in entering into arrangements that are subject to the Art. 81 proscription. Under the new regime, firms must assess whether inter-firm arrangements of which they are a party constitute a violation of competition law themselves and a firm cannot obtain advance administrative clearance. Firms are therefore given much greater freedom to choose the contractual arrangements for production and distribution, and to adjust them to suit changed circumstances without having to rely on prior templates or incur the additional burden of seeking administrative clearance. The participating firms, namely the actors with the greatest information about the purpose and likely consequences of a proposed arrangement, now self-assess whether the arrangement is anti-competitive and must decide whether to take the risk to proceed with a potentially illegal deal.[8]

Because of the abandonment of *ex ante* notifications of inter-firm arrangements, the leniency programme takes on an added significance as a learning mechanism about production relationships. The familiar pattern of conduct captured by the prohibition on cartels is said to involve no uncertainty about competitive effects: these are agreements among firms to fix price or allocate geographic markets with the explicit purpose of eliminating price competition and gouging consumers. Even if we limit attention to such scenarios, it can be argued that a leniency policy is likely to capture only cartel agreements that are inherently unstable or just before their expiry (Friederiszick and Maier-Rigaud 2008: 98–9). Consider, by contrast, a world in which some degree of inter-firm coordination is essential and there is considerable uncertainty about future effects of a collaboration agreement (e.g. beneficial cooperation may evolve into exclusionary or exploitative conduct over time). The uncertainty is not only limited to the competition authority, but also the firms involved. In such an environment, a leniency policy that encourages firms to approach a competition authority in cases where anticompetitive concerns (or effects) emerge over time can be a very effective learning mechanism (much more effective than *ex ante* notification) and yet it is likely to have features very different from a policy singularly focused on hard core cartels for homogenous products. This provides an important reason for allowing flexibility in the design of national leniency policies and a comparison of the *type* and *quality* of information gathered by each authority.[9]

6.3 Regular reporting of implementation activities and results and peer review of the outcomes

Participants in the ECN are subject to an explicit and new obligation to cooperate and exchange information with other NCAs in the network. Art 11(1) imposes a general mandate that European competition law be implemented through 'close cooperation' between Member States and the Commission. Art

11(4) provides that each national competition authority must inform the Commission of its intent to adopt a decision under European competition law,[10] which information may also be made available to other NCAs. Art 11(5) provides that NCAs may consult the Commission on any case where European competition law is to be applied. Finally, under Art 15(2) Member States must forward to the Commission a copy of any written judgement of national courts applying Art. 81 or 82.

The reporting obligations and opportunities for mutual consultation are particularly important features of the new competition regime. For instance, the obligation to report intended decisions, as well as written completed judgements is significant in light of the fact that the Modernization Regulation does not harmonize competition law remedies across the Member States, nor does it provide further textual guidance on the substantive antitrust standards to be followed by national authorities and courts. This suggests that, rather than imposing a particular vision of competition law on Member States, the Modernization Regulation creates scope for both the Commission and national actors to learn from the interventions and outcomes pursued and reported by the multiple NCAs now charged with implementing European competition law.

Competition law is a policy area in which policy makers have a great deal to gain from the reporting and evaluation of particular interventions. There are often a multitude of ways to deal with particular production and innovation bottlenecks and disputes, and these can range from the crudest of tools (such as damages payments for anticompetitive conduct) to much more fine-tuned quasi-regulatory schemes for particular industries that may be implemented in lieu of, or following, antitrust interventions. Moreover, there is also very little evidence on (*a*) whether the enforcement of competition law makes an appreciable difference to the smooth operation of markets and relatedly (*b*) what the actual market outcomes are in the world following an antitrust intervention. For that reason, even in the United States, the federal antitrust authorities (the Federal Trade Commission and the Department of Justice) have instituted procedures for the *ex post* monitoring of outcomes from antitrust enforcement decisions, including merger decisions (Kovacic 2001; Froeb et al. 2004; Svetiev 2007).

The Modernization Regulation also formalizes certain previously established practices of consultation and peer review, primarily of decisions of the Commission, but with the potential for such procedures to be expanded to a wider set of decisions in the network. The Regulation refers specifically to the Advisory Committee on Restrictive Practices and Dominant Positions, which consists of representatives of all the NCAs who participate in the ECN, and formalizes the role of this body. The Committee must be consulted prior to the Commission taking any formal decision on infringement or fines (Art. 14 (1)) and the Commission must inform the Committee of the manner in which the Committee's opinion was taken into account (Art. 14(5)). If the Committee provides a written opinion, it can mandate the Commission to publish that

opinion (Art. 14(6)). Moreover, and perhaps most importantly, any national authority as well as the Commission can request that a Committee meeting include on its agenda a case dealt with by a national competition agency (Art. 14(7)). Therefore, peer review of a decision or other intervention by a national authority in a case involving European competition law can result from a request of the national authority dealing with a specific case, a request by another national competition authority, or the initiative of the Commission.

Quite apart from formalization of the procedures for consultation and review of individual cases by the Advisory Committee, the creation of the network has led to reliance on working groups involving the Commission and NCAs to address concrete issues on more than just an ad hoc basis. The ECN has increased the intensity of such agency cooperation involving to a much greater extent 'the expertise and commitment of the officials of [NCAs] who chair working groups and contribute policy papers and/or conduct surveys' (Dekeyser and Dalheimer 2005: 121). Both the groups and the topics of discussion are not static: they can be formed as specific issues or problems arise and dissolved when the purpose is fulfilled, which in turn suggests that a 'description of the ECN as it stands today, may therefore be obsolete in a few months time' (Dekeyser and Dalheimer 2005: 121).

6.4 Revision of framework goals and measurements by the authorities that set them with participation from other indispensable actors

The Modernization Regulation does not specify what use is to be made of the information reported by members of the network. There are two views about the way in which such information is going to be used. Namely, the reporting obligations on NCAs can be viewed as a mechanism through which the Commission consolidates its grip on competition regulation: by receiving regular reports about local implementation initiatives, the Commission is better able to intervene where it considers that the local authority is not following the harmonized rules. In a similar vein, to the extent that the Commission has limited resources to review the substance of the interventions reported by national authorities, the reporting requirement could result in a mere bureaucratic imposition that will burden national authorities, but with no substantive effect on policy outcomes.

Alternatively, the obligation for NCAs to report initiatives and decisions from specific interventions can provide a key-learning tool for members of the network. For example, interventions by authorities considered to have greater implementation capacity and credibility (such as the United Kingdom, France, Germany and Italy[11]) can be used by the smaller and less credible authorities to inform their own decision-making. Moreover, information generated from reporting and from peer review of the Commission's and NCA implementation initiatives, can also be used to reassess and reformulate the framework goals of

competition policy and/or the measurements used to gauge the attainment of those goals. The report of an antitrust intervention by the authority of a Member State in a particular sector, immediately generates a set of inquiries about the same problem by other national authorities (and the Commission), including (*a*) the structure and performance of the same industry or firms in various Member States; (*b*) other constraints on competition in the sector (such as environmental or employment or safety standards and the relative outcomes for those parameters across different Community members); (*c*) whether the particular conduct or practice at issue is regulated through competition law or some other type of policy in different Community members. Such comparisons help clarify the interests and goals that may be involved in a competition problem in a particular sector in a way that a singular focus on a particular outcome (such as structure or consumer prices) may not because the narrower focus consciously attempts to obscure the policy trade-offs involved. Not only does the ability to view the problem from a multitude of perspectives illuminate the interrelationships and trade-offs between different policies or goals that may not be immediately apparent, but thereby it can also transform the definition of the problem itself. Thus, Dekeyser and Jaspers (2007: 11) observe that the operation of the network since 2004 has 'shown that the sharing of experiences within the ECN can influence national policy reflections and streamline national procedures beyond individual cases'.

(i) *The Model Leniency Programme*

On the question of collecting cartel information through a leniency program, network members identified the need for some joint action soon after the ECN came into existence (Lassere 2005: 127). While ideas such as a one-stop shop or substantive harmonization (based on then current best practices) through a regulation were initially considered (Lassere 2005: 127), instead the network opted to 'develop jointly a detailed model . . . programme' setting out overall objectives and possible instruments, based on the experience of a number of national authorities that 'had operated successful programmes for a long period' (Dekeyser and Jaspers 2007: 16–17). Three principles were relevant to the design of the programme: the concern that certain forms of divergence between the leniency programmes of authorities with parallel-implementation competence could 'dissuade applicants' from approaching *any* authority, the respect for the heterogeneity of institutional and procedural frameworks in which different NCAs operate, as well as the goal not to 'prejudice . . . the possibility for an authority to add further detailed provisions' or 'adopt a more favourable treatment' if it considers it necessary for effective enforcement (Dekeyser and Jaspers 2007: 16–19).

While the ECN Model Leniency Programme was billed as an instrument for soft harmonization (Dekeyser and Jaspers 2007: 16), the process of convergence envisaged is dynamic—the shape of the programme will evolve

based on the experiences gathered from network members and other concerned actors. Specifically, the Model Programme contemplates that the members of the network will use the experience gathered by the various authorities from their individual national schemes so as to review its own tools and objectives:

> The ECN Model Programme may be reviewed on the basis of the experience gathered by the ECN members. In any event, no later than at the end of the second year after the publication of the ECN Model Programme, the state of convergence of the leniency programmes of ECN members will be assessed. (MLP par. 31)

This mandated comparison of experiences can produce important information about the types of mechanisms that uncover information about hard-core cartels (whether at their inception—which would be preferable—or closer to their expiry), as well as mechanisms that uncover new types of exploitative or exclusionary conduct that should be of interest to competition authorities and that may otherwise have been completely off the radar screen. By receiving information from concerned firm-participants in a collaborative venture, authorities may also learn about beneficial forms of inter-firm coordination, which may otherwise have been prohibited or discouraged.

(ii) *Policy objectives and instruments in a dynamic environment*

As already mentioned, both in its general policy formulation and in deciding specific cases, the Commission has increasingly relied on economic tools of analysis and expert input and, over time, it has enhanced its *internal* access to competition economics expertise (Neven 2006). This tendency has generally been welcomed, as it considers the business purpose and likely effects of conduct or mergers scrutinized under the competition laws and focuses attention on the types of harm that competition authorities should aim to prevent. For instance, in a number of cases the Commission relied upon economic arguments about likely consumer welfare effects to prohibit proposed mergers, and yet it disagreed with the US antitrust authorities examining the likely price effects of the same merger (GE–Honeywell[12]) or was reversed by the CFI. More robust economic analysis in such cases may indeed reveal the absence of likely price effects for customers of the merging entities, yet it may also force the decision-maker to explain other competitive concerns that have led to a decision to challenge the conduct more carefully (even if they are only provisional), and tailor the remedy narrowly to ameliorating, and perhaps even testing, such concerns.

More fundamentally, the antitrust economics toolkit is largely or wholly static, and its application in a fast-changing production environment can make apparent the limits and constraints of the toolkit itself, forcing participants in the network to consider revisions of the overall framework goals of competition policy, as well as its instruments of analysis and implementation.

There is evidence that such a re-evaluation is already taking place, and not surprisingly, the evidence comes from authorities that have achieved a degree of maturity in applying efficiency analysis to antitrust problems. In a recent comment on the use of competition economics in EU antitrust decision-making, Diana Coyle, an economist formerly with the UK competition authority, noted the challenges presented by dynamic production environments for standard economic analysis. She noted that static analysis is generally of 'limited use' in modern antitrust-case law because 'many inquiries now face the argument that technology is changing the relevant market definition'. Moreover, structure-based analysis is limited because 'many markets overlap' and it 'isn't helpful to draw a sharp boundary before going to analyse competition in the defined market'. Tellingly, Coyle concludes that:

> [F]or these reasons the panoply of economic tools such as SSNIP tests and HHI indices are decreasingly interesting. The analytical action is in the dynamic assessment of competitive effects, where the tools of economics are less well codified and more matters of judgment. (Coyle 2006: 787)[13]

Given that antitrust problems can often reflect a concrete production (or innovation) bottleneck, experimentalist interventions could be an appropriate response to resolve specific cases, while a broader experimentalist architecture can be used to disseminate ongoing learning from such interventions across different jurisdictions. Precisely due to rapid changes in the underlying environment, the boundaries of markets and the definition of an antitrust problem in a particular case may require ongoing revision. This undermines the robustness of static (structure-based) tools of analysis, making it necessary for decision-makers to be able to access knowledge about the market in 'real time' to inform their interventions. The absence of robust relationships between structural variables or types of conduct and performance in a dynamic market makes it difficult to write rules applicable across temporal and industry contexts. Moreover, such an environment puts a premium on local knowledge: to determine whether the loss of a particular firm is likely to lead to a reduction in competition (including dynamic competition) depends upon knowledge of the capabilities of that firm to innovate, generate knowledge, and collaborate, rather than on structural proxies of market concentration.

7 Risks and concerns about the ECN

Critics of the institutional reforms have focused on those aspects of the Modernization Regulation which could present obstacles to a genuine decentralization of responsibilities and the emergence of Member States as independent sources of normativity and knowledge in the development of competition policy (Riley 2003*a*; Wilks 2005*a*, 2005*b*). As already mentioned,

attention has focused on provisions of the modernization package that create the potential for a procedural and substantive consolidation of European competition law. The principal argument is that the ECN would be used by the Commission not only as a tool for maintaining hegemony over the *implementation* of competition law, and thereby also as a mechanism for imposing a particular *vision* of competition and production on Member States (Wigger and Nölke 2007). According to this view, rather than being a vehicle for 'cooperation and coordination' (Monti 2003), the ECN creates a 'system of supervision and control' of NCAs by the Commission (Wilks 2005*a*). An analysis of the context in which the reforms have taken place as well as the details of the provisions in question suggests that such concerns have been overstated.

7.1 Towards a neoliberal European economy?

A number of commentators have suggested that the creation of the ECN will strengthen the bias of EU economic regulation that favours negative integration objectives at the expense of other potential concerns. Thus, Wilks notes that in the case of competition-law modernization 'policy makers in the Commission were seeking a commitment to a neoliberal European economy, to the privileging of competition as against employment or social welfare, and to a pan-European integrated market that may imply major shifts in the location of economic activity' (Wilks 2005*a*: 437). Wigger and Nölke (2007: 505), writing from a varieties of capitalism perspective, have suggested that DG Comp favours a particular vision of capitalism, which recent reforms seek to promote:

> [C]urrent changes in EU antitrust regulation can be understood as a substantial shift from the Rhenish to the Anglo-Saxon variety of capitalism. From this theoretical perspective, changes in policy goals and enforcement practices threaten to undermine the comparative advantages of the organized-market economies within the Union. Short-term efficiency considerations are likely to take precedence over wider socio-economic concerns, such as the protection of SMEs or technology transfer through inter-firm collaboration. Not only the substance of antitrust regulation, but also its mode has been attuned with the laissez-faire variety of capitalism.

Note however that these concerns assume that it is possible to give content to concepts such as a 'neoliberal European economy' or a 'purist' antitrust policy that privileges competitive markets vis-à-vis employment or social welfare objectives.[14] One of the key lessons of the development of competition policy in both the United States and Europe over the past few decades has been that strategic uncertainty is particularly acute in antitrust decision-making. Methods of *ex ante* analysis of competitive significance are highly imprecise, even for a modest policy goal such as short-run static efficiency. The heterogeneity of production relationships not only makes such generalizations difficult, but also suggests that it may often be appropriate to pursue differentiated policy

goals in different markets. At a high level of generality, it is unclear whether a more aggressive competition policy implies more state intervention or whether it makes an economy more 'neoliberal'. Moreover, antitrust interventions can also reveal additional, and previously unappreciated, consumer interests and policy objectives, other than output, price, or innovation.[15]

Even if we restrict attention to static competition, the notion of a 'purist' competition policy can be consistent with at least three broad generalizations, each of which involves very different implementation and enforcement strategies. One type of 'purist' competition policy may aim at allocative efficiency of competitive markets of the textbook variety, and therefore be highly interventionist against mergers, collaborations, or monopoly conduct so as to replicate atomistic competition as much as possible. A second alternative view is that competition policy should pursue short-run (allocative) efficiency, while the enforcement authorities can rely on sufficiently robust economic-modelling (as opposed to crude structural proxies) as an aid in distinguishing conduct, practices, or mergers likely to lower market-wide output and increase consumer prices. Finally, the third alternative is the Chicago School variant of an efficiency-focused antitrust policy, which is sceptical of the ability of enforcement authorities and courts to distinguish between anticompetitive and efficiency-enhancing conduct, and would therefore severely restrict antitrust policy to policing hard-core price fixing cartels and be highly deferential towards any conduct that may be characterized as unilateral or vertical.

Nothing in the recent procedural and substantive reforms, the history, or the context in which European competition operates makes it inevitable that the implementation strategy should converge on any of the equilibria outlined above. European competition law, perhaps in part due to the diverse competition traditions of the Member States, has always had a fairly heterodox view about the kinds of competitive or industrial arrangements that would lead to the achievement of various policy goals. Thus, even during the period in which the atomistic view of competition was dominant in US antitrust (supported by the structure-conduct-performance paradigm in industrial economics), European law recognized that allowing firms to achieve a certain critical size or enter into cooperative arrangements would be necessary to achieve efficiencies, international competitiveness, investment in R&D, or improvements in the methods of production and distribution. Moreover, although cartels have come to be viewed as the bane of competition and the principal target of antitrust law, some form of cooperation and coordination among rivals to achieve orderly adjustment to shocks in particular industries was often thought appropriate and desirable in the industrial traditions of many European states (Fear 2008: 277).[16]

In the field of dominant firm conduct, European competition law has to this day maintained a highly vigilant stance, even if such vigilance is not justified by a showing of a high likelihood that consumers would be exploited through

future price rises. By contrast, informed by the mushrooming economic literature about the benefits of vertical integration for generating organizational efficiencies through eliminating opportunistic or free-rider conduct by upstream or downstream collaborators, US antitrust law has adopted a far more relaxed approach to unilateral conduct, even by dominant firms. Neither the Commission, nor the European courts have embraced such an approach wholeheartedly and as a result it is not uncommon for US companies to allege competitive misconduct by other US companies (all of which participate in worldwide markets) before European, rather than US, competition authorities; with the complaints brought before the European Commission by US competitors of Microsoft being a recent vivid example (European Commission 2004*a*).

The adoption of any notion of a purist competition policy in the EU would also be inconsistent with the obligation that a number of overarching goals of European integration must be considered as part of any action by the European institutions. Thus, at the time when the principal objective of Community action was to bring down barriers to market integration and achieve free cross-border trade, market integration was also a key objective of European antitrust (even in cases where such interventions may not have advanced productive efficiency or consumer welfare). Similarly, and particularly since the adoption of the Lisbon Strategy, environmental and social goals, such as sustainability and social cohesion, must be considered as part of any EU-level action, which includes competition policy interventions. Therefore, the Commission and the NCAs have a sufficient legal justification to consider such goals in competition policy decision-making, provided they can develop legitimate methods for doing so (methods that can be justified to, and accepted by, other participants in the network, as opposed to being seen as subterfuges for national champion industrial policy).

Flexibility and sensitivity to the particular problems and policy interests in specific markets are the key to successful implementation of competition policy. Global competition and technological change force not only firms, but also policy-makers to question and re-examine the relevance and robustness of existing methods of production and innovation. In a heterogeneous environment competition law ought to be sufficiently nimble to allow for the possibility that different considerations and policy frameworks may be relevant in different markets depending on the level of technological change and the degree of integration into the European or global economy. In some cases, an authority may be faced with a market largely isolated from foreign competition and dominated by a formerly state-owned monopoly, in which classic antitrust concerns about abuses of dominant position and foreclosure of competitors with reasonable prospects of maintenance of monopoly prices may prevail. In markets that are highly integrated into the global economy and characterized by rapid technological advances, dynamic forms of competition will be more salient, forcing the authority to consider whether the impugned

conduct or merger will lead to a loss of the types of institutions, or the incentives to participate in the types of inter-firm relationships that stimulate this form of competition.

7.2 Commission hegemony and further consolidation

When considering the relationship between the Commission and the NCAs within the ECN, there is no reason to believe that the new arrangements will dislodge the Commission from its principal role in the implementation and development of European competition law. After all, the reforms were initiated, designed, and coordinated by the Commission itself at a time when it was not facing significant pressures from the Member States to devolve responsibilities to national authorities. Indeed, much attention has been focused on provisions in the modernization package that consolidate the Commission's position as the key actor in the implementation of European competition law, including the increased scope of application of European competition law (even by NCAs), the Commission's power to intervene in national proceedings under European competition law, as well as its power to commence its own proceedings in a particular case and override decisions reached by an NCA. It has been argued that those features are consistent with the view that modernization involves a devolution of a very limited kind: a delegation of implementation powers to the NCAs, under the watchful eye of the Commission.

Yet a closer analysis of the detailed provisions of the modernization package reveals that the exercise of such powers by the Commission is not entirely costless, since it generates obligations of reason-giving and justification, which can generate further deliberation within the network. Similarly, the NCAs' powers to implement European competition law more broadly, combined with the obligation to inform other network participants about specific interventions and, if necessary, justify those interventions, create scope for bottom-up learning through informed divergence in the application of competition law as between Member States.

7.2.1 INCREASING THE SCOPE OF DIRECT APPLICATION OF EUROPEAN LAW

The fact that a 'single substantive competition law within the EU' (Gerber and Cassinis 2006*a*: 11) has displaced national law as the basis for many NCA interventions need not be viewed as a reduction in the sources of diversity and normativity in EU competition decision-making. Given the broad language of the Treaty competition provisions, even when combined with subsequent doctrinal or regulatory encrustations, NCAs are left with a considerable manoeuvre space in applying European competition law to resolve specific antitrust problems. Moreover, since neither the language of the Treaty or regulations,[17] nor court doctrines are likely to be a significant guide (and therefore constraint) on NCA decision-making

in specific cases, the success or failure of interventions will depend upon the remedies implemented to resolve the concrete problems that led to an antitrust complaint (Svetiev 2007). Yet it is precisely in the area of remedy formulation that the modernization package involves no effort at harmonization.[18]

Expanding the scope of application of *European* (as opposed to national) competition law also eliminates potentially confounding arguments from the dialogue that takes place within the network. If national authorities were to apply local law to cases involving cross-border commerce, they might seek to justify particular interventions by relying on the differences, whether subtle or substantial, in the textual expression of the relevant competition law (between Member States' laws, or between national and European law). Such arguments are likely to weaken the accountability of NCAs in the process of reporting and peer review, and thereby reducing the level of trust in the ECN. Not only are such arguments less pertinent (and more likely to be distracting) where the potential concerns and objectives that underlie competition policy in different states are similar, but they can also be used to conceal nationalistic concerns (or other forms of local capture) that may have led an NCA to apply national competition law to a particular problem in a particular way.

By requiring the direct application of European law both by the Commission and by the NCAs, the new regime clarifies the tasks of the authorities with respect to reporting and cooperating with the other ECN members: namely the authority must focus on the concrete concerns that lead to an antitrust intervention and the objectives pursued, the decision that was reached, the remedies that were implemented, and the outcomes achieved. Thus, the scope for informed divergence and mutual learning is neither based on, nor confounded by, textual diversity among national laws, but on comparison of how the common European law is applied to particular problems, the methodology of analyzing the antitrust concerns, and the remedial action, if any, that was taken to correct the problem.[19] As Maher (2008: 1733) observes the fact that network members are all charged with enforcing European competition law reinforces a

> sense of shared objectives and may help to develop a sense of common interest within the network. Where there is a sense of shared identity, then the Network can also provide moral support to an NCA facing challenges domestically. . . . [T]he exchange of information within the network will enhance the status of the members who enjoy improved information flows.

7.2.2 THE COMMISSION'S POWER TO INTERVENE IN LOCAL PROCEEDINGS UNDER EU LAW

The powers granted to the Commission under the Modernization Regulation to intervene in local proceedings under Community law have been referenced as another potentially homogenizing influence on the development of European competition law, even in decisions by national authorities and courts. Apart

from its role in the ECN, the Commission has been granted powers to intervene in national court proceedings. Art. 15(1) of the Modernization Regulation provides that 'courts of the Member States may ask the Commission to transmit to them information . . . or its opinion on questions concerning the application of the Community competition rules'. In addition, under Art. 15(3) the Commission can act on its own initiative, '[w]here the coherent application of [Art 81 or 82] so requires', to 'submit written observations to courts of Member States' and also to make oral submissions with the permission of the local court.[20]

However, these provisions of the Modernization Regulation may also be viewed through the lens of the overall objective to strengthen the capacity of local competition institutions (authorities and courts) particularly in those Member States where competition enforcement has a weak tradition (European Commission 1999*a*: 26). Otherwise, the limits on the capacity of national institutions to properly apply competition law to individual cases will impose a limit on the bottom-up learning that can take place within the ECN. In a specific case, the fact that the Commission has transmitted an opinion in proceedings before a national court does not guarantee that the outcome favoured by the Commission would be reached by the court. Yet, an intervention by the Commission providing its own view of the problem may expose the potential that a national authority or court has become captured or improperly influenced by local interests, thereby forcing the court to provide a more searching justification where there is a perception that a decision is reached on an improper basis. And in cases of genuine disagreement, even if the Commission presents its own position, the national court would still be able to diverge from that position, particularly if the course followed can be supported by a compelling justification.

Under Art. 11(5) of the Regulation, NCAs can also consult the Commission in cases involving the application of Community law. Similarly, paragraph 46 of the Network Notice provides that the Commission can make 'written observations' before the NCA makes a final decision, where it has been notified of a contemplated decision under Art. 11(4). Dekeyser and Jaspers (2007: 9), writing from the Commission's perspective and on the basis of the operation of these provisions since 2004, conclude that the 'possibility to submit (oral or written) comments has proven to be a very useful tool that has triggered creative, informative, and productive dialogues with the concerned national competition authority'.

7.2.3 THE COMMISSION'S POWER TO OVERRIDE A NATIONAL AUTHORITY

The provisions that reserve the Commission's power to override national authority decision-making under European competition law are taken as the most compelling evidence in favour of the view that the national authorities are mere agents of the Commission with delegated implementation power. Specifically,

where the Commission initiates proceedings in a particular case under European competition law, Art. 11(6) of the Regulation provides that NCAs are relieved 'of their competence to apply Article 81 and 82 of the Treaty'. In addition, national courts and competition authorities in applying Art. 81 and 82 to agreements, decisions, or practices 'which are already subject of a Commission decision' cannot 'take decisions running counter to the decision adopted by the Commission' (Art. 16). National bodies 'must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated'.

Apart from the fact that the foregoing distribution of powers is not new (European Commission 1999*a*: 25), their retention as part of the new institutional arrangements would serve a number of purposes other than reinforcing the Commission's hegemony over the direction of competition policy. Even from an experimentalist governance perspective, the scheme of decentralized and coordinated authority to apply competition law to conduct that is not limited territorially in scope or effect, must achieve a number of objectives. One objective of such a scheme is to permit local experimentation as a source of bottom-up learning for all network participants. But another objective is to avoid subjecting regulated entities to conflicting and irreconcilable mandates from different authorities in the network. The potential that different authorities in the ECN could reach conflicting decisions in a given case may be of particular concern where the competition regime contemplates the imposition of fines. And even where no fine is imposed or contemplated, conflicting decisions from network authorities may not only substantially increase the cost of compliance for firms, but at the same time undermine the efficacy of the collective learning from a particular intervention. In some cases, multiple interventions to deal with identical conduct would introduce additional confounding factors thus making it more difficult to trace market outcomes to a specific competition remedy.

In addition, the obligation to refrain from reaching decisions which directly conflict with those of the Commission in a particular case does not completely eliminate NCAs' ability to devise implementation strategies and competition remedies based on their own understanding of specific competition problems. Even assuming that the Commission is highly active in deciding antitrust cases, the provisions giving primacy to its decisions need not constrain the national authorities' ability to intervene autonomously in competition cases where they have a genuine concern and justification. NCAs would still have outlets to demonstrate and correct for localised competitive problems through the application of national law. In addition, where the Commission has already reached a formal decision with respect to a particular undertaking or agreement, such a decision would not cover all other agreements or practices, including all agreements or conduct by the specific undertakings involved in the Commission's intervention. This leaves some scope for national intervention through

the selection of a different set of relevant facts to which the Commission's decision does not apply.[21] In other words, a national actor would be free to craft its own remedy to conduct agreements not addressed by the Commission's decision and the extent to which its approach can diverge from that of the latter would likely depend upon the strength of the justification provided to network participants.[22]

The Commission's power to commence its proceedings and thereby relieve an NCA from competence to decide a particular case may also be necessary in a network in which implementation capacity across the different NCAs is quite different and where there is significant potential for local capture or the subversion of competition policy to local industry policy objectives inconsistent with the market integration goal of the EU. Importantly, it is unlikely that the Commission would be able to exercise this power arbitrarily, since a significant disagreement with the NCA concerned can trigger an obligation to provide a justification. The NCA can trigger that obligation if it does not agree with the Commission's decision to commence its own proceedings or with the Commission's approach to the concerns raised by the case, by requesting that the case be placed on the agenda of the Advisory Committee on Restrictive Practices and Dominant Positions (Art. 14(7) par. II). This obligation of justification and peer review furthers the learning objectives of an experimentalist architecture and may also be viewed as a penalty default in cases where the NCA is failing in its duties.[23] Note however that while the power to relieve the national actor of competence cannot be exercised by the Commission arbitrarily, the mechanism for resolving disagreements is neither an appeal in the traditional sense, nor judicial review by the Community courts.[24] Should it disagree with the Commission's approach, a NCA could not appeal to a final arbiter to resolve questions such as which authority should have responsibility for the case or how the case should be resolved. Such a power has not been granted to any entity in the ECN: in the case of disagreement 'discussions take place between the concerned authorities' (Dekeyser and Jaspers 2007: 5–7).[25] In other words, the Commission, as well as the NCA, are subject to an obligation to offer persuasive justifications for their actions and positions to other participants in the network.[26] Further deliberation, not hierarchical action, provides the only dispute resolution mechanism in the regime.

8 Conclusion

The traditional approach to implementation—based on highly centralized responsibilities for the development and implementation of competition policy in the hands of the Commission—was a reflection of the context that gave birth to European antitrust law. Namely, the diversity of market traditions and industry settings, insufficient experience in competition enforcement at the

Member State level, and the fear of continued market fragmentation through private restraints meant that negative integration was the primary object of competition law intervention. In its competition decision-making, the Commission applied fairly crude analytical tools, with particular emphasis on whether a particular practice, conduct, or merger would restrain or discriminate against cross-border trade. Beyond the integration objective, competition cases were often analyzed through the lens of market concentration and against the background of dominant firms resulting from the privatization of former government service providers in many European nations.

While the backlog of notifications (which would only have worsened following enlargement) provided the impetus for some reform to the regime, other problems made it necessary to retool the European approach to competition enforcement both procedurally and substantively. The Commission's task was made increasingly more complex by the greater diversity of contexts in which European competition law was to apply, as well as a recognition that singular attention on market integration or concentration did not provide an adequate focus for modern competition policy. While strategic preferences often do not provide a reliable guide for action in competition law, the doctrinal and analytical tools (even if focused on market outcomes and aided by economic analysis) provided provisional hypotheses at best, which required further testing and re-examination. The importance of innovation and dynamic forms of competition in a volatile environment further undermined the reliability of the static toolkit for analysis: both firms and regulators operate in a profoundly uncertain world.

The purpose of this chapter is to provide an alternative to the commonly held view that the modernization package was a reflection of a new equilibrium in European competition law, which enabled the Commission to delegate implementation tasks to NCAs, while also retaining effective control over their decision-making and the development of antitrust policy. According to this view, the use of economic analysis provides a common language of objectives and tools of analysis that makes both monitoring and mutual understanding between participants in the ECN easier (Gerber and Cassinis 2006*b*: 53–4). Yet the modern firm copes with the deep uncertainty of a volatile environment through disintegration, collaboration, and experimentation: rather than investing too much in a single version of the future, the firm chooses its projects by collaborating with multiple partners based on deliberately provisional plans subject to disciplined and recursive revision. One premise of this chapter is that the regulatory response to such an environment is similar, and that regulation of the experimentalist kind is more likely to be both effective and accountable. The argument presented is that the modernization of competition policy in the EU, seen in its entirety, leaves considerable scope for experimentalist governance and the early development of policy on leniency or private rights of action adopts the logic of such a governance architecture.

The provisions which leave residual override powers in the Commission must be understood against the background of the obligations of justification and peer review that are triggered when those powers are exercised. The object of such powers of intervention is (*a*) to provide a penalty default for local authorities that fail to exercise their powers to implement European competition law or do so for improper purposes and (a) to guard against excessive conflict in the regulation of specific conduct, which could make it near-impossible for the regulated entity to comply with conflicting edicts and difficult to engage in disciplined comparison of goals and results.

The Commission is unlikely to hijack the network and impose its own version of competition policy on the Member States, not least because there is no evidence that the Commission has such a monolithic vision. In its prior decision-making the Commission has distanced itself from a pure focus on static short-run efficiency, and the legal doctrine is quite robust in support of a more heterodox view of antitrust as well. Moreover, the positive goals of integration, such as environmental protection or cohesion, have to be affirmatively considered in decision-making under Community law, providing an outlet for the richer consideration of policy trade-offs. Most importantly, as part of the modernization package, competition remedies have not been harmonized across the Member States. In this environment, national authorities have sufficient scope to pursue innovative solutions to concrete competition law problems, subject to the obligations of reporting, consultation, and peer review vis-à-vis other network participants. Thus, rather than a mechanism of 'supervision and control', the European Competition Network can provide the architecture for disciplined comparison of measures and results, enabling the authorities participating in the network to learn through monitoring the successes and failures of peer authorities.

Notes

1. According to van Waarden and Drahos (2002), the emergence of the 'competition epistemic community' as a channel for the exchange of information, ideas, solutions and arguments contributed towards convergence among the member states even in the absence of a formal effort at harmonization of national laws.
2. For example, national energy policy may be seen to favor the merger of two local suppliers, and yet such a merger might be restricted by European competition law as either impermissibly increasing market concentration and/or as being inconsistent with the market integration objective. In explaining its decision that the Spanish company Telefónica violated Article 82 through its pricing policies for broadband internet access, the Commission explicitly noted that the decision was against the company and 'not against the Spanish regulator' and that the Commission did not seek to undermine the authority of the Spanish telecommunications authority (European Commission 2007*a*).

3. Case T-342/99 Airtours *v.* Commission [2002] ECR II-2585.
4. Case T-310/01 Schneider Electric *v.* Commission [2002] ECR II-4071.
5. Case T-5/02 Tetra Laval BV *v.* Commission [2002] ECR II-438.1
6. By contrast, US judges declared that it was impermissible to consider arguments that certain conduct should be permitted because it achieved industrial progress, if this came at the expense of competition.
7. European competition law traditionally has not drawn as sharp a distinction between the welfare of consumers and that of other market participants as the relevant variable in antitrust decision-making. For example, the market integration objective was never focused on the ultimate effects on consumers, or even on the question of production efficiency (rather market integration was viewed as a good in itself). Similarly, certain overriding objectives of European Community law and action, such as cohesion or the advancement of SMEs (Motta 2004: 22, 26–7), may require explicit consideration of the impacts of conduct or mergers on competitors. A more nuanced view of emergent forms of inter-firm collaboration suggests that such collaboration is used as a source of knowledge in the process of innovation. This view supports the proposition that the welfare of consumers cannot be wholly divorced from that of firms in the market, and yet it also has to be distinguished from the view that competition law should be used to prop up and maintain inefficient competitors (Fox 2003).
8. Whether this amounts to greater or lesser supervision of firm conduct from competition authorities depends upon the view one takes of (*a*) whether parties in fact notified agreements which had a clear anticompetitive purpose or effect to the Commission under the prior Regulation; (*b*) whether the Commission was able to perform a meaningful *ex ante* review of such agreements even assuming that their terms and competitive significance was fixed over time; (*c*) whether the Commission was able to effectively monitor such agreements to verify that the agreements were not anticompetitive as implemented. If there are reasons to suspect negative answers to any of the foregoing questions, then even without any other change in the implementation architecture, it is not clear that the *ex post* approach will result in lesser detection of anticompetitive arrangements.
9. There are other provisions of the Modernization Regulation that indicate sensitivity to this problem. For example, under Art. 10 the Commission can declare either Art. 81 or Art. 82 to be inapplicable to an agreement or an association decision, a power which Recital 14 suggests may be suitable for 'new types of agreements or practices' and which is subject to a public notice and comment requirement (Art. 27(4)). Similarly, pursuant to Art. 7, the Commission can find that a violation was committed without imposing a sanction, or that a violation was committed in the past.
10. The reporting obligations only relate to NCA decision-making under European competition law, but European law now covers a greater proportion of the work of national authorities and courts. The reporting obligation also extends to decisions under Art. 29(2), whereby NCA may withdraw the benefit of a Commission block exemption in the territory of the Member State if it comes to the conclusion that an agreement or concerted practice is anticompetitive, despite the fact that it falls within the terms of a valid block exemption. While this gives NCAs additional flexibility in applying European competition law, an Advisory Committee can be convened to consider such a decision (Gerber and Cassinis 2006*a*: 13).

11. This categorization of implementation capabilities of NCAs is due to Riley (2003*b*: 658).
12. Case COMP/M.2220 General Electric/Honeywell [2001] OJ L48/1.
13. Coyle's observations from a practitioner's perspective are now also reflected in an emerging academic literature pointing out the limits of the standard economic toolkit in analyzing competitive effects in dynamic contexts, and pointing out the need to identify new theoretical paradigms and engage in fact intensive analysis of firm innovation capabilities in each individual case (Katz and Shelanski 2007; Svetiev 2007).
14. Observers of the German economy have cautioned that attempts to characterize a particular German production system should not be 'taken too literally' as 'descriptions of reality' given that the 'degree of homogeneity of institutions and production strategies across and even within industries' may be less pronounced than ordinarily assumed in academic research on the topic. Moreover, developments (quite apart from competition law) have led to significant changes in the organization of German firms as well (Vitols 2004: 332–3).
15. One such example comes from the United States. In a recent decision, the U.S. Federal Trade Commission cleared a proposed merger between Google, Inc. and DoubleClick, Inc. on antitrust principles concluding that it would not substantially lessen competition in any relevant market. However, in the course of review, the FTC recognized that the 'acquisition raised concerns about consumer privacy in the online advertising marketplace that were not unique to the proposed merger' and subsequently developed and released a 'set of behavioural marketing principles that could be used by businesses' to protect online privacy (Federal Trade Commission 2008: 4).
16. This more relaxed approach to competition between rivals and between downstream and upstream producers was often a source of friction between US antitrust authorities and European governments during the height of the postwar activist extra territorial enforcement of US antitrust law.
17. Art. 81 broadly prohibits agreements and other forms of concerted action which have the 'object or effect' of 'prevention, restriction or distortion of competition', while Art. 82 prohibits the abuse of a dominant position (both in terms broadly similar to the key US antitrust provisions of the Sherman Act). Similarly the new Merger Regulation is addressed to mergers which 'would significantly impede effective competition, in the common market or in a substantial part of it' (Council Regulation (EC) No 139/2004 Art. 1(2)).
18. Consider as one example the increasingly popular view within the EU-competition epistemic community that the availability of antitrust damages in private party law suits is a key element of effective antitrust enforcement. While such suits in Europe are presently a rarity, the modernization package itself did not put in place any concrete measures to increase the availability of private actions in either European or national courts. Instead, the remedial diversity resulting from individual NCAs applying European competition law could enable the members of the ECN to test or refine this view, possibly coming to a more nuanced conclusion, whereby damages are seen as an effective remedy against hard core-cartels with no purpose other than exploiting consumers, even if they should not be generally available in all competition cases. Both the Commission and the ECJ have indicated that mechanisms should

be put in place to enable those harmed by antitrust violations to be compensated (European Commission 2005*a*: 4–5), while at the same time avoiding the 'excesses of the US antitrust litigation model' (Pheasant 2007: 229). The UK Office of Fair Trading has led the way in this effort with a discussion paper pointing to some of the successes and short-comings of existing arrangements in the UK (Office of Fair Trading 2007). Germany has traditionally been far more skeptical about such a shift in enforcement emphasis towards private parties (Buxbaum 2005: 489–91).

19. Such an effect is further reinforced by the fact that, as Gerber and Cassinis (2006*a*: fn 41) explain, the reporting and consultation obligations of Art. 11 of the Modernization Regulation extend to 'national investigations in which a conflict is envisaged between domestic laws . . . imposing or allowing certain conduct' and European competition law provisions, despite the fact that in such cases 'NCAs have the obligation to disapply the conflicting domestic rules'.
20. It is worth noting that rights of intervention and participation in proceedings before the national courts are not limited to the Commission. The Regulation also upholds a minimum right of participation of local *authorities* before their own national *courts*, if a broader right was not already available under the national law of a Member State (Art. 15 (3) and (4)).
21. The House of Lords in the United Kingdom has endorsed such an approach in considering the effect of Art. 16(1) of the Modernization Regulation in a case where a UK court had apparently arrived at a contrary conclusion to a Commission decision, but where there was no formal conflict with the prior Commission decision that considered the legality of similar agreements in the same market (Demetriou and Gray 2007: 1437). According to the Law Lords, the UK court was to treat the Commission's decision as 'evidence properly admissible . . . which given the expertise of the Commission may well be regarded . . . as highly persuasive', but that it was free to arrive at a different assessment of the matter at issue (Inntrepreneur Pub Co (CPC) *v.* Crehan, [2007] 1 A.C. 333, 357 (Lord Hoffmann)).
22. The preclusive effect of a Commission decision extends only to 'the same agreements or practices regarding the same companies on the same relevant geographic and product market' (Gerber and Cassinis 2006*a*: 17). For instance, following the Commission's decision finding that Microsoft violated European competition law, US antitrust authorities argued that it was inappropriate for the Commission to implement a separate remedy in circumstances where the company was already subject to a US antitrust remedial decree. In response, EU enforcers pointed out that its decision related to different conduct and practices by Microsoft (targeting work group servers and media players), not the ones considered in the US antitrust litigation and decree (relating to Microsoft's conduct against the Netscape browser). As the then EU competition Commissioner Monti (2000) explained, the European complaint presented a 'different case to that which was brought against Microsoft by the Department of Justice in the US'.
23. The Commission's power to relieve a national authority of its implementation responsibilities can also be viewed as a penalty default in cases where an NCA is failing in the performance of its duties. For example, it is envisaged that the Commission may commence proceedings pursuant to Art. 11(6) where the network member already dealing with the investigation is 'unduly drawing out proceedings' (Council of the European Union 2002*b* par. 21C).

24. The ECJ has rejected the possibility that a NCA could make a preliminary referral directly to the European courts on issues of the interpretation of European competition law, noting that under the new Regulation, network members are 'required to work in close co-operation with the Commission' (C-53/03 Syfait & Others *v.* GlaxoSmithKline plc, [2005] ECR I-4609, [34]).
25. Dekeyser and Jaspers (2007: 9) have noted that in light of the successful exchange of views that takes place with respect to specific cases, the Commission 'has so far not deemed it necessary to ''de-seize'' a [NCA] from its competences'.
26. The ECN Cooperation Notice (par. 55–6) provides that, where a Member State NCA is already dealing a particular case, the Commission must provide sufficient information to network participants about its intention and its reasons for taking over that case and do so in advance so that network members can request a meeting of the advisory committee before the Commission initiates its proceedings (Gerber and Cassinis 2006*a*: 17).

6

Emerging Experimentalism in EU Environmental Governance*

Ingmar von Homeyer

1 Introduction

A major development which has characterized EU environmental policy in recent years is the rise of experimentalist governance. Existing mechanisms of top-down environmental regulation have been underpinned and complemented by mechanisms relying on broad framework goals, locally devised implementation measures, information provision, and recursive procedures to encourage policy learning from experience. In contrast to more traditional mechanisms, these structures frequently operate on the basis of long time horizons of ten, twenty, or more years for implementation. Drawing on two main examples—the EU Sustainable Development Strategy and the Water Framework Directive—this chapter discusses the factors which led to the emergence of experimentalism in EU environmental governance, together with its characteristics and functioning.

Over the years the EU has emerged as a key driver of environmental policy in Europe. It is therefore not exaggerated to conclude that the 'environmental policy agenda of EU member states [...] is now largely determined by the need to implement prevailing European law and to anticipate and shape European measures and action plans' (Jänicke and Jörgens 2006: 173). Based on provisions of the EU Treaty to complete the Internal Market and on explicit sectoral competences, the EU has adopted a large number of laws and other measures covering most areas of environmental policy. The EU also plays an increasingly active role in global environmental policy where it has, for example, championed efforts to combat climate change.

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Since its beginning in the early 1970s, EU environmental policy has in theory been guided by successive Environmental Action Programmes (EAPs) covering medium-term periods between five and twelve years. But the policy impact of the EAPs was low, not least because they lacked effective implementation mechanisms beyond occasional stocktaking exercises by the European Commission's Directorate General (DG) Environment. In practice EU environmental policy was mostly shaped by more contingent processes, in particular—but not only—converging interests of a relatively small number of pioneering Member State governments and/or their environment ministries, DG Environment, and the European Parliament Environment Committee (Jordan 1998: 13, 16).

However, the governance arrangements underlying EU environmental policy are in flux. More specifically, arrangements resembling what Sabel and Zeitlin (2008, this volume) call 'the new architecture of experimentalist governance in the EU' are emerging. This experimentalist governance architecture (EGA) may improve the supply of information and knowledge to policy makers and coordinate and mobilize support for implementation of EU measures at national and sub-national levels. As a result, the EGA promises to provide opportunities for pursuing longer-term environmental goals and better integration of different environmental challenges and of economic and social considerations.

The EGA is characterized by institutions which support recursive policy-making and learning from the experience of lower-level units. Recursiveness requires Member State governments and EU bodies jointly to evaluate and justify their performance at regular intervals. Among other things, this creates opportunities for continuous adjustment and learning. According to Sabel and Zeitlin (2008, this volume), the following more specific functions characterize the EGA:

- Establishment of framework goals and metrics;
- Elaboration of plans by 'lower-level' units for achieving them;
- Reporting, monitoring, and peer review of results; and
- Recursive revision of goals, metrics, and procedures in light of implementation experience.

The emergence of EGA-like structures in EU environmental policy is a relatively recent phenomenon dating back to the second half of the 1990s. The two main case studies of the Water Framework Directive (WFD) and the EU Sustainable Development Strategy (EU-SDS) presented below, represent early examples of the emerging EGA, with the adoption of the WFD and the EU-SDS dating back to the years 2000 and 2001, respectively. The analysis of the EGA characteristics of the WFD and the EU-SDS therefore relies on comparatively extensive experience. In addition, both measures are examples of types of EU environmental measures—strategic initiatives, and comprehensive framework directives—to which several other cases of the EGA in EU environmental policy also belong.

This chapter proceeds as follows: Section 2 presents an illustrative overview of EGA-related EU environmental measures beyond the EU-SDS and the WFD. A discussion of the general factors and trends supporting the emergence of the EGA in EU environmental policy follows. Sections 3 and 4 discuss the EU-SDS and the WFD, respectively. Each of these sections begins with an introduction presenting issue-specific factors which influenced the decision to adopt the measures in question. The analysis then looks at the level of correspondence between the institutional features of the EU-SDS/the WFD on the one hand, and a number of functions typically associated with the EGA on the other hand. In a second step and focussing mainly on the key EGA mechanisms of recursiveness and learning, practical experience with the EU-SDS/the WFD is discussed. The conclusion summarizes the findings and examines the links between the EU-SDS/the WFD and the emergence of the EGA in EU environmental policy more generally.

2 The EGA in EU environmental policy

EU environmental measures featuring EGA characteristics have multiplied in recent years. In particular, the European Commission adopted seven so-called 'thematic strategies' on air pollution, waste management, the urban environment, pesticides, the marine environment, soil protection, and resource management in 2005 and 2006. Along with most of these strategies, the Commission published proposals for legislation—frequently framework directives—such as the Marine Strategy Directive or the Waste Directive. Table 6.1 provides an overview of these measures together with a preliminary assessment of their EGA characteristics, which is based on a textual analysis of the strategies and legislative proposals.

The analysis suggests that the EGA features described by Sabel and Zeitlin are common among these measures. Most characteristics appear to be either fully

Table 6.1. Overview of institutional EGA features of the thematic strategies

	Air	Marine	Pesticides	Resources	Soil	Urban	Waste
Legislation	Yes	Yes	Yes	No	Yes	No	Yes
Framework goals and metrics	(+)	+	(+)	+	+	+	+
Reporting obligations, monitoring	(+)	(+)	+	(−)	(+)	(−)	(+)
Peer review	(−)	(−)	+	(+)	(+)	+	+
Periodical review	(+)	(+)	+	+	+	(−)	(+)
'Lower-level' plans	(+)	+	+	+	+	(+)	+

+ fully present; (+) partly present; (−) somewhat present; — not present.

or, at least, partly present. However, there is significant variation among the strategies. In the case of the air pollution and the urban strategies, two of the five EGA characteristics are only 'somewhat' present. What is more, the potential of the strategies/associated legislation to function according to the requirements of the EGA is likely to vary significantly. Additional factors not represented in Table 6.1, such as pronounced differences in the substantive scope of the thematic strategies, the existence and scope of earlier EU legislation in a given area, and the availability of established institutional support mechanisms for the strategies/framework legislation, such as permanent advisory and expert committees, can be expected to influence their operation. Because the design of certain strategies corresponds more to the EGA than that of others and, more importantly, there is considerable variation in scope and contextual conditions, some strategies/associated legislation may eventually turn out not to conform to the EGA. Nevertheless, the adoption of the strategies/associated legislation and their characteristics attest to the rise of EGA-type measures in EU environmental policy.

In addition to the thematic strategies, there are other EU environmental measures that resemble the EGA. Some of these measures resemble the EGA in that they oblige Member States and/or other lower level units to achieve certain targets, but leave it mostly to these units to decide what is needed to reach them. Lower level units must also report regularly on implementation to the European Commission. A related but somewhat weaker similarity with the EGA concerns provisions requiring the original targets to be reviewed at a time close to the deadline for their full implementation. The 1994 Packaging Directive (Directive 94/62/EC on Packaging and Packaging Waste) provides an early example of this type of measure. This Directive requires Member States to reach certain reuse and recycling targets and to submit implementation reports to the Commission, but leaves it mostly to the Member States to develop appropriate collection, reuse, and recycling systems. New targets were to be agreed in late 2007. The 2002 WEEE Directive (Directive 2002/96/EC on waste electrical and electronic equipment) resembles the Packaging Directive with respect to setting recovery and recycling targets, flexibility in national implementation, reporting, and target revision, but it puts a stronger emphasis on producer responsibility and periodic revision of targets.

In the area of air quality legislation, the 2001 NEC Directive (Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants) provides another example of legislation resembling the EGA with respect to flexibility in national implementation and corresponding reporting obligations. The Directive specifies national emission ceilings for several air pollutants which are to be met in 2010 and requires Member States to develop programmes specifying appropriate measures. This flexibility is combined with corresponding reporting obligations. However, although the 2010 emission

ceilings are explicitly considered to merely reflect interim targets, the Directive does not oblige the Commission to propose revised targets beyond 2010. In the meantime, the revision of the Directive has been subsumed under the Thematic Strategy on Air Pollution, mentioned above, and the associated Commission proposal for the CAFE Directive (Directive on Ambient Air Quality and Cleaner Air for Europe, COM(2005) 447).

A major similarity of a group of other EU environmental measures to the EGA is their emphasis on the incomplete or provisional character of implementation decisions and corresponding mechanisms to review and update these decisions. The European Emission Trading System (EU ETS)—the Union's main instrument to combat climate change—is highly relevant in this context. It is recursive in that it consists of a succession of multi-annual emission trading periods which is coupled with reviews and revisions. National allocation plans (NAPs) and common EU rules and guidance documents governing them are drawn-up and reviewed for each period. The first emission trading period from 2005 to 2007 was essentially a testing phase. A fundamental revision of the original Emission Trading Directive (2003/87/EC), which will govern the third trading period starting in 2013, has already been adopted in 2008 at the start of the second trading period. While the revised Directive will replace the NAPs with a system of centralized allocation at the EU level, it contains several important recursive elements, such as an annual review and, if necessary, re-regulation of the carbon market, and a system of benchmarking for the allocation of free emission allowances based on the most efficient technology. The EU Climate Change Committee (a 'comitology' committee) will have to decide on many important implementing decisions. In addition, the European Climate Change Programme (ECCP)—a framework for broad stakeholder and expert consultation—and the information exchange forum of national competent authorities to be established by the Commission under the revised Emission Trading Directive provide opportunities for peer review and mutual learning.

The Sevilla Process under the Integrated Pollution Prevention and Control (IPPC) Directive (96/61/EC) provides another example. This process involves a broad range of governmental and non-governmental experts in the formulation of reference documents (BREFs) defining best available techniques (BAT) which must be taken into account by Member State authorities when issuing permits for large scale industrial or agricultural activities falling under the IPPC Directive. Because the BREFs must be up to date and take account of technological and economic development they remain provisional and are subject to review procedures. Many decisions taken under the Registration, Evaluation, and Authorization of Chemicals (REACH) Regulation also remain provisional and can be reviewed at the initiative of Member State authorities. This applies to the identification of priority substances for evaluation, changes to the list of substances requiring authorization, restrictions concerning

certain substances, as well as labelling and classification. Authorization for substances of very high concern is time limited and subject to monitoring and review. In addition, several important provisions of the REACH Regulation itself are subject to a review. Except in the case of information requirements for substances produced in small quantities, however, these review obligations are a one-off exercise, though the Commission is required to produce a general report on the operation of the regulation every five years based on reviews of implementation by Member States and the new EU Chemical Agency (Scott 2009).

Other EU environmental measures most clearly resemble the EGA insofar as they pursue very broad framework goals and are vague with respect to substantive tools for implementation, which need to be developed in the process of implementation. The EU Network for the Implementation and Enforcement of Environmental Law (IMPEL) provides an example. IMPEL was established in 1992 and comprises high-level national officials responsible for implementation and enforcement of environmental legislation. The European Commission is also a network member and provides the Secretariat. Based on annual and multi-annual work programmes which are regularly reviewed, IMPEL conducts, among other things, peer reviews, information exchange, pilot projects, cross-national comparisons, and identification of best practices to improve implementation and enforcement (http://ec.europa.eu/environment/impel/index.htm; Martens 2006, 2008). Similarly, the European Commission's 2003 legally non-binding Integrated Product Policy initiative (IPP) (European Commission 2003*f*; Scheer and Rubik 2006) combines very broad framework goals with very vague provisions dealing with substantive implementation. IPP aims to reduce the environmental impact of products taking into account the whole life cycle. It utilizes a network structure that is less exclusive but otherwise similar to IMPEL to monitor developments at national level and exchange information, identify priority products and suitable implementation tools, and conduct analyses and pilot projects.

3 Factors affecting the emergence of EGA

The rise of the EGA in EU environmental policy benefited from several similar and interrelated general conditions which emerged in the 1990s: the refocusing of the environmental agenda on persistent environmental problems; the rise of the sustainable development paradigm; efforts to integrate environmental concerns into sectoral policies; challenges to the legitimacy of EU environmental policy; and the adoption of new policy instruments. While the EGA benefited from these general trends, the adoption of the EU-SDS and the WFD was also affected by more specific conditions which will be discussed below.

3.1 Persistent environmental problems

To some extent, the rise of the EGA is a response to the success of traditional EU environmental policy which has addressed the most visible and pressing environmental problems, such as high levels of air and water pollution. This was achieved mainly by making the application of 'end-of-pipe' clean-up technology—for example, filters and waste water treatment—mandatory, while the polluting activities as such continued without major further adjustments. However, as many of the most pressing problems had been addressed in this way by the late 1980s, attention shifted towards what has been called 'persistent environmental problems', such as climate change and the loss of biodiversity. These problems are characterized by

- a relatively close causal link between the problem and the operating logic of the economic sectors causing the problem. Consequently, the effectiveness of technical fixes is limited and problem solutions require changes in the behaviour of sectoral actors.
- high complexity: frequently, the sources of persistent problems are diffuse and involve a large number of actors, including important indirect contributors. In addition, cause and effect tend to be significantly delayed.
- low 'visibility': due to the 'creeping' character of many persistent problems, measures must be taken well in advance of the manifestation of serious effects. However, this means that such measures must deal with uncertainty and react to models of the future and scenarios rather than direct threats. The resulting low problem visibility and uncertainty reduces political pressure for action.
- global dimension: persistent environmental problems often have an important global dimension in the sense that, ultimately, they can only be addressed effectively by internationally coordinated measures. This tends to create political barriers to change as issues relating to social justice (e.g. differentiated contributions by developed and developing countries), national sovereignty, and weak international enforcement mechanisms need to be taken into account (cf. Jänicke and Jörgens 2006: 169–71).

Relying on recursiveness and learning the EGA can, arguably, extend and 'reprogramme' EU environmental policy in a way that increases capacities to respond to persistent environmental problems. In particular, using learning mechanisms offers the possibility of intervention in the functioning of economic sectors causing persistent environmental problems while minimizing negative effects on their effectiveness and efficiency. Similarly, learning-based governance may be particularly suitable to accommodate local conditions without undermining legitimate differences. Learning is also less dependent on problem 'visibility' than governance arrangements relying more strongly on politicization of issues.

Recursiveness allows for long-term, flexible responses which can accommodate uncertainty and the 'creeping', causally complex character of persistent environmental problems.

3.2 Rise of the sustainable development paradigm

The adoption of Agenda 21 at the 1992 Rio Summit was crucial to the rise of the sustainable development (SD) paradigm which has subsequently been embraced by a large number of countries and organizations. In particular, many countries adopted national sustainable development strategies (NSDSs) following the follow-up Rio + 5 Summit in 1997 which had set a 2002 target date for doing so.

The EGA benefited from the rise of SD because SD is associated with governance functions—recursiveness and learning—which are similar to those underlying the EGA. This becomes clear, for example, if one looks at the guidelines for designing SD strategies. According to the OECD Resource Book for SD strategies, being 'strategic is about developing an underlying vision through a consensual, effective, and iterative process; and going on to set objectives, identify the means of achieving them, and then monitor that achievement as a guide to the next round of this learning process' (Dalal-Clayton and Bass 2002: 29). SD strategies therefore 'move [. . .] towards operating an adaptive system that can continuously improve'. Similarly, the European Sustainable Development Network (ESDN) concludes that 'overall, the guidelines for SD strategies put a strong emphasis on procedural and institutional aspects of an iterative governance process [. . .]' (ESDN, http://www.sd-network.eu/?k = basics%20of%20SD%20strategies).

3.3 Efforts to integrate environmental concerns into sector policies

In legal terms, the rise of SD in the EU was reflected most prominently in the inclusion in the 1997 Amsterdam Treaty of Article 6 TEU, calling for the integration of environmental concerns into the definition and implementation of Community sectoral policies. The so-called Cardiff Process of environmental policy integration was the most direct consequence of the adoption of Article 6. In December 1997, the Luxembourg European Council asked the Commission to present a strategy to implement Article 6, 'in particular with a view to promoting sustainable development'. The June 1998 European Council in Cardiff called on three sectoral Council formations—Agriculture, Energy, and Transport—to pioneer the development of environmental integration strategies. Subsequently, this list of Council formations was extended to include, among others, the General Affairs, Internal Market, Industry, and the Economic and Financial Affairs Councils. According to the December 1999 Helsinki European Council, '[r]egular evaluation, follow-up and monitoring must be undertaken so that the strategies can be adjusted and deepened' to facilitate the integration

process. The Commission and the Council were expected to 'develop adequate instruments and applicable data for these purposes' (Presidency Conclusions, Helsinki European Council, 10–11 December 1999, par. 47).

At least in theory the Cardiff process shares important functions and institutional characteristics with the EGA. This applies to recursiveness and features such as the use of targets, indicators, and regular monitoring and evaluation. But the significance of learning is less clear and, more importantly, the range of actors included in the Cardiff process was too narrow. In particular, the Process was limited to the EU level and, further, to the Council. In practice the Cardiff process came to a gradual standstill after the initial drafting of environmental integration strategies by the Council formations concerned. Despite repeated calls by the European Council for follow-up and the 'Commission's intention to carry out an annual stocktaking of the Cardiff process of environmental integration' (Presidency Conclusions, Brussels European Council, 20–21 March 2003, par. 58), there was little systematic follow-up and the Commission only produced a single, belated stocktaking report in June 2004. Recursiveness and learning did not materialize beyond initial steps (cf. Jordan and Schout 2006).

3.4 Legitimacy challenges and new policy instruments

In the 1990s the legitimacy of EU environmental policy and governance came under increasing political pressure. The challenges were based on concerns relating to economic issues, such as costs, competitiveness, and employment effects, and also to subsidiarity and democracy. Traditional EU environmental policy instruments mandating emission limits and 'end-of-pipe' clean-up technology were deemed to be inefficient, too expensive, and ill-adapted to local conditions, in particular if they were to address persistent environmental problems. The British and German governments were most vocal in calling for greater flexibility and subsidiarity. At the same time, the traditional 'permissive consensus' among the general public in favour of the EU began to erode and the Union's democratic credentials were questioned. This put further pressure on established patterns of environmental governance.

Against this background, 'new instruments' were expected to increase efficiency, flexibility, and legitimacy. Economic instruments, most prominently the carbon dioxide emission trading scheme, and also information-based measures, such as eco-labels and eco-audits, were adopted to enhance efficiency. However, the use of economic instruments has so far remained limited at the EU-level, not least because of Member States' resistance to EU measures affecting taxation (Knill and Lenschow 2007: 239). To increase flexibility and subsidiarity, the EU also introduced target-based measures, in particular framework directives allowing lower level units significant discretion. Procedural legislation—for example, to improve public access to environmental information and

consultation of civil society and stakeholders—was expected to increase effectiveness and democratic legitimacy.

In general, the use of these new instruments seems to provide a beneficial context for the EGA. For example, procedural legislation requiring public access to environmental information, impact assessment, and public participation creates opportunities for the diffusion of knowledge, learning, and peer accountability. Framework directives allow for experimentation with different approaches at the national or sub-national level and the diffusion of good practice. Similarly, economic and information-based instruments leave room for variation and testing of different approaches. In fact, the growing diversity of policy instruments and of the respective practices itself forms a pool of options from which lower level units operating under the EGA may draw inspiration and information.

In sum, the evolution of EU environmental governance in the 1990s created a fertile ground for EGA-type governance arrangements which appear to be more suitable to address persistent environmental problems and to integrate environmental concerns into sectoral policies than traditional EU environmental governance. Governance arrangements associated with the SD paradigm are similar to the EGA, in particular in that they, too, rely on recursiveness and learning. Finally, the rise of new environmental policy instruments at the EU-level tends to support the emergence and functioning of the EGA. These instruments are often highly flexible, tend to broaden the number of actors involved in policy-making, and create favourable conditions for learning and peer accountability.

4 The EU sustainable development strategy[1]

The EU Sustainable Development Strategy (EU-SDS) provides an example of an initially unsuccessful, but still evolving case of EGA-type mechanisms in EU environmental governance. The EU-SDS was first adopted in 2001 and was then significantly revised in 2006. Its evolution illustrates the need for involvement of national-level actors and an appropriate organizational underpinning of the EGA.

The factors supporting the emergence of the EGA in EU environmental policy more generally contributed significantly to the adoption and revision of the EU-SDS. The substantive focus of the Strategy was clearly shaped by the growing concern for persistent environmental problems. In fact, all of the main environmental priorities of the Strategy—climate change, natural resource management, threats to public health, sustainable transport, and sustainable production and consumption—concern these problems.[2]

The rise of SD at the global level also had a profound impact on the adoption of the EU-SDS. The 1997 Rio + 10 Summit had called for the adoption of

national SD strategies in time for the subsequent follow-up meeting in Johannesburg in 2002. Against this background, the December 1999 Helsinki European Council invited the Commission 'to prepare a proposal for a long-term strategy dovetailing policies for economically, socially and ecologically sustainable development to be presented to the European Council in June 2001' (Presidency Conclusions, Helsinki European Council, 10–11 December 1999, par. 50). However, Member State positions diverged and the 2001 Gothenburg European Council merely 'welcomed' the Commission proposal for the EU-SDS, adopting a broadly similar, but much less detailed text as part of its summit conclusions. In practice the original Commission proposal retained some relevance, reflecting its higher specificity, and also because the European Council invited the Council 'to examine, for the purposes of implementing the strategy, the proposals in the Commission communication, in particular its proposals for headline objectives and measures' (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 25). Because the Commission proposal and the Council conclusions focused mainly on the domestic implications of sustainable development for the EU, another document on the 'external dimension' was adopted in 2002.

Environmental policy integration also had a significant impact. Under the heading 'Integrating environment into Community policies', the original 2001 EU-SDS invited 'the Council to finalise and further develop sector strategies for integrating environment into all relevant Community policy areas' (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 32)—a reference to the Cardiff process mentioned above. Sector specific references to environmental policy integration include the Common Agricultural and Fisheries Policies (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 31). The 2006 renewed EU-SDS does not refer explicitly to environmental policy integration, but mentions wider integrative concepts, in particular the integration of economic, social, and environmental considerations ('policy integration', Council of the European Union 2006*b*: par. 6), which is one of the guiding principles of the renewed EU-SDS. It also calls for 'sustainable development [...] to be integrated into policy-making at all levels' (Council of the European Union 2006*b*: par. 10). Concerning specific substantive issues, the renewed EU-SDS often implies environmental policy integration. The two priorities 'climate change and clean energy' and '*Conservation* and management of natural resources' [emphasis added] provide the clearest examples implying integration of environmental concerns into energy policy and policies affecting the conservation of natural resources. In addition to suggestive section titles, the renewed EU-SDS also explicitly states that energy policy should be consistent with the objective of environmental sustainability. Similarly, in the section on natural resources the renewed EU-SDS calls for 'greening' the Common Agricultural and Fisheries Policies.

Legitimacy concerns and the discussion regarding new instruments had a less significant impact on the original EU-SDS. Under the heading 'a new approach to policy making' the Strategy addresses legitimacy concerns inviting Member States to consult widely and establish appropriate processes (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 24). Regarding new policy instruments there are two main proposals: economic instruments are to ensure that prices better reflect true costs to society (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 22) and all major legislative Commission proposals were to be subjected to a sustainability impact assessment (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 24). The renewed EU-SDS retains similar priorities, but provides more detail on economic instruments (Council of the EU 2006*b*, par. 22–24) and consultation and public participation. Among other things, an 'open and democratic society' and involvement of citizens, business, and the social partners are mentioned as guiding principles.

In addition to the general factors supporting the emergence of the EGA, there were a number of more specific influences on the formulation and adoption of the 2001 EU-SDS. Several Member States—in particular the Scandinavian countries which had only recently joined the EU—strongly supported the Strategy. The early preparations for the EU-SDS also coincided with plans for the adoption of the Lisbon Strategy which aimed to turn the EU into 'the most competitive and dynamic knowledge-based economy in the world, capable of faster sustainable economic growth, with more and better jobs and greater social cohesion'. This posed the problem of coordination between these two EU initiatives. The 2001 Gothenburg European Council eventually declared that the EU-SDS 'adds a third, environmental dimension to the Lisbon Strategy' (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 20). Thereby the Council effectively turned the EU-SDS into the third pillar of the Lisbon Strategy (alongside growth/competitiveness and full employment/social cohesion). As argued below, the Lisbon Strategy subsequently continued to exert a significant influence on the EU-SDS because of a common reporting and review cycle and because it was revised shortly before the EU-SDS.

4.1 Institutional features

This section examines the extent to which the original and the renewed EU-SDS exhibit institutional characteristics corresponding to the core functional elements of the EGA.

4.1.1 FRAMEWORK GOALS AND METRICS

The 2001 EU-SDS identifies key environmental priorities, such as climate change and sustainable transport. However, it does not contain sufficiently specified

framework goals and metrics. In addition to excessively general goals, such as 'strong economic performance must go hand in hand with sustainable use of natural resources [...]' (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 31), the EU-SDS merely repeats several more specific commitments which had already been adopted in other contexts. Examples include the indicative targets of the Renewable Energy Directive and the aim in the EU 6th Environmental Action Programme to halt the decline of biodiversity by 2010. While the original Commission proposal contains somewhat more specific and original framework goals—such as '[b]y 2020, ensure that chemicals [...] do not pose significant threats to human health and the environment' (European Commission 2001*e*: 11)—the 2001 EU-SDS merely invites the Council to 'examine' these 'headline objectives' (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 25).

In contrast to the original EU-SDS, the renewed Strategy contains more specific objectives which may constitute more effective framework goals. However, as with the 2001 Strategy, these objectives are not original, but reflect previous EU commitments. The renewed EU-SDS distinguishes between 'overall objectives' and more specific 'operational objectives and targets'. Together, these may often be regarded as framework goals. For example, the overall objective for the priority area 'climate change and clean energy' is to 'limit climate change and its costs and negative effects to society and the environment' (Council of the European Union 2006*b*: par. 13). This is combined with an extended set of more specific commitments including targets and time frames which had previously been adopted in different contexts, including those mentioned in the 2001 EU-SDS.

4.1.2 'LOWER LEVEL' PLANS

Plans elaborated by lower-level units hardly feature in the original EU-SDS, which merely 'invites' Member States to adopt national SD-strategies (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 23). At the time many countries had in fact already produced national SD strategies (NSDSs) or were in the process of doing so in preparation of the upcoming 2002 Johannesburg World Summit on Sustainable Development. Against this background, it seems to be particularly problematic that the original EU-SDS lacked any provisions dealing with links between the EU and the emerging national SD strategies. The renewed EU-SDS conforms much better to the EGA in these respects than its predecessor. According to the renewed Strategy all Member States are expected to have adopted NSDSs by June 2007. More importantly, the EU-SDS is used as a basis for EU-level review of NSDSs: 'Future reviews of NSDSs should be undertaken in the light of the revised EU-SDS [...] bearing in mind specific circumstances in the Members States' (Council of the European Union 2006*b*: par. 40).

4.1.3 REPORTING, MONITORING, AND PEER REVIEW OF RESULTS

In line with the designation of the 2001 original EU-SDS as the environmental pillar of the Lisbon Strategy, the Commission's annual synthesis report to the Spring European Council was identified as the appropriate reporting tool for the EU-SDS. The Spring ('Lisbon') European Council reviewed the origial EU-SDS on the basis of this report. In addition, the Council was expected to identify suitable 'headline indicators' to monitor and evaluate the performance of the EU-SDS (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 25). The EU-SDS itself was subject to a more fundamental review at the beginning of each new Commission's term. While the EU-SDS gave responsibility for coordinating 'horizontal preparation' (Presidency Conclusions, Gothenburg European Council, 15–16 June 2001, par. 24) to the General Affairs Council, it did not identify a specialized or lower-level body for dealing with the EU-SDS on a more day-to-day basis. Given the absence of such a body, it is not surprising that peer review was not foreseen under the original EU-SDS.

The renewed EU-SDS contains more elaborate reporting and monitoring provisions than the 2001 Strategy—not least because it creates independent reporting and monitoring procedures which are no longer linked to the structures serving the Lisbon Strategy. According to the renewed EU-SDS, the Commission submits a progress report covering implementation of the Strategy in the EU and the Member States to the December European Council every second year (Council of the European Union 2006*b*: par. 33). To facilitate national level input, Member States are expected to appoint representatives to serve as EU-SDS focal points and provide 'the necessary input [for the Commission's report] on progress at national level in accordance with National Sustainable Development Strategies' (Council of the European Union 2006*b*: par. 37).

Two sets of indicators are envisaged to monitor EU-level performance of the EU-SDS. To prepare its biannual progress report, the Commission will 'draw on a comprehensive set of sustainable development indicators (SDIs)', taking into account the EUROSTAT SD-Monitoring Report and other relevant factors (Council of the European Union 2006*b*: par. 33). A second, more limited set of indicators will also be used for monitoring the EU-SDS at the EU-level 'and for communication purposes'. These indicators resemble the 'political' headline indicators used for monitoring of the original EU-SDS. They are to be endorsed and regularly reviewed by the Council (Council of the European Union 2006*b*: par. 36). In addition to regular Council review of the 'political' indicators, the Member States and the Commission are to continue to develop, and to biannually review, indicators in the EUROSTAT working group on SDIs—which produces the SD Monitoring Report—to 'increase their quality and comparability as well as their relevance to the renewed EU-SDS' (Council of the European Union 2006*b*: par. 35). The renewed EU-SDS is itself to be reviewed in 2011 at the latest.

In contrast to the original EU-SDS, which lacked provisions for peer review, the renewed EU-SDS envisages a voluntary, phased peer-review process in which different groups of Member States engage in annual peer reviews of NSDSs or specific themes featuring in these strategies (Council of the European Union 2006*b*: par. 41). The Commission is to use the results of the peer reviews as input into its biannual progress reports (Council of the European Union 2006*b*: par. 37). In addition, the renewed EU-SDS suggests that the European Sustainable Development Network (ESDN) could help to identify priority areas and examples of good practice as well as facilitate exchange of experience (Council of the European Union 2006*b*: par. 42). ESDN is an informal network of European national officials and experts dealing with NSDSs. The European Commission holds an observer status.

In sum, the analysis of the institutional features of the EU-SDS suggests that, despite ambitions such as building 'an effective review' (Council of the European Union 2006*b*: par. 25), the 2001 Strategy failed to establish strong institutions to perform this and other functions associated with the EGA. In particular, framework goals and metrics were insufficient; provisions for planning by 'lower level' units were very weak and did not establish any procedural or substantive links with the EU-SDS; reporting and monitoring requirements lacked institutional anchoring in sufficiently specialized bodies and there were no provisions for peer review. The analysis therefore suggests that, although the aspirations and broad contours of the 2001 EU-SDS are strongly reminiscent of the EGA, the concrete institutional arrangements foreseen appear to be too weak to effectively perform the required functions.

By contrast, the institutional characteristics of the 2006 revised EU-SDS correspond more closely to the EGA and, on the whole, can be expected to be more effective than those of the original Strategy. While framework goals and metrics remain somewhat vague and lack originality, they tend to be more concrete than those of the original EU-SDS. Provisions on planning by lower level units were strengthened and links with the EU level were established. Reporting and monitoring are institutionally anchored in various specialized bodies, such as the national focal points and the working group on SDIs. Peer review has also been incorporated into the EU-SDS.

4.2 The EU-SDS in practice

How do the institutional characteristics of the EU-SDS translate into practice? More specifically, have they allowed the EU-SDS to effectively perform key EGA functions, in particular recursiveness and learning? Starting with an analysis of recursiveness, the following discussion looks at the implementation of the original and the renewed EU-SDS and discusses the revision of the Strategy between 2004 and 2006.

4.2.1 RECURSIVENESS

Recursiveness of the original EU-SDS tended to be very weak in substantive terms. The annual review by the Spring European Council remained a largely pro forma, ineffective exercise. Similarly, the Commission's spring progress reports focused mainly on economic issues and employment, paying much less attention to the environmental priorities highlighted by the EU-SDS (Homeyer 2007; Pallemaerts et al. 2007: 32–3). Only three out of a total of fourteen 'headline indicators' used in the reports focused on environmental issues. The SDS's four key environmental priorities were only partly covered. The fact that the exclusively economic and social aims of the Lisbon Strategy were never adjusted to take account of the newly added environmental dimension is a particularly striking example of failed recursiveness. Against this background, DG Environment stated in 2005 that 'to many actors the environment still appeared as an add-on to the rest of the [Commission's Spring] Report in 2002 and 2003' (European Commission 2005*n*).

Recursiveness of the original EU-SDS was somewhat stronger in procedural than in substantive terms. In 2003, the Spring European Council attempted to strengthen the role of the EU-SDS in the context of the Lisbon Strategy, noting the Commission's 'intention to carry out an annual stocktaking of the Cardiff process of environmental integration and a regular environment policy review [which are] to be taken into account in [. . .] Spring reports, starting in 2004' (Presidency Conclusions, Brussels European Council, 20–21 March 2003, par. 58). This decision was a reaction to the lack of integration of the EU-SDS into the previous two review cycles. As illustrated below, the 2004–6 fundamental review of the EU-SDS itself is another example of recursiveness, although it was significantly delayed because the new Barroso Commission, which took office in 2004, decided to review the Lisbon Strategy first.

Significant instances of substantive recursiveness can be identified in the context of the 2004–6 review of the EU-SDS. Perhaps most importantly, the 2004–6 review redefined the relationship between the EU-SDS and the Lisbon Strategy. Whereas the 2001 Gothenburg European Council saw the original EU-SDS as providing an environmental dimension to the Lisbon Strategy, the renewed Strategy 'forms the overall framework within which the Lisbon Strategy, with its renewed focus on growth and jobs, provides the motor of a more dynamic economy' (Council of the European Union 2006*b*: par. 8). This redefinition of the relationship between the two strategies reflected the experience of the failed coordination of the EU-SDS with the Lisbon Strategy. Similarly, the somewhat improved specification of framework goals and metrics in the renewed EU-SDS appears to have been motivated at least partly by the negative experience with the 2001 Strategy.

The review of the EU-SDS also featured significant recursiveness in process terms. Again, one of the most important examples concerns the relationship

with the Lisbon Strategy. The establishment of an independent review cycle for the EU-SDS reflected the experience with the previous, incomplete, and superficial reviews in the context of the Lisbon Strategy. It seems less clear to what extent the second set of major procedural innovations—the obligation to designate national focal points and submit NSDSs for review in light of the EU-SDS—can be attributed to recursiveness. The revision of the Lisbon Strategy, which immediately preceded the revision of the EU-SDS, led to similar innovations. It therefore seems possible that, rather than experience with the original EU-SDS, the Lisbon Strategy innovations provided the main impetus for these reforms.

Because there has been little experience so far with the renewed EU-SDS, its performance in terms of recursiveness is difficult to assess. The independent EU-SDS reporting and review process and the creation of expert bodies dealing with the EU-SDS—in particular the national SDS coordinators group chaired by the Commission's Deputy Secretary General, but also the informal ESDN network—seem to provide significantly improved opportunities for recursive governance. More specifically, the independent review cycle ensures that reporting on the environmental dimension is no longer 'buried' in the 'Lisbon' Spring Reports, but an SDS progress report is instead presented for review by the European Council. The establishment of the coordinators' group means that there is now a permanent, specialized body charged with organizing the review process. This body is more likely to focus on previous experience with the EU-SDS than the General Affairs Council which was responsible for coordinating the original SDS.

4.2.2 LEARNING

In substantive terms, the original EU-SDS and the 2004–6 revision resulted in very limited learning. Perhaps most importantly, the original EU-SDS contributed to indicator development. Shortly after its adoption, EUROSTAT established the Sustainable Development Indicators (SDI) Task Force, bringing together national and Commission officials and other experts. An initial, comprehensive set of '12 headline, 45 core policy and 98 analytical indicators' was presented in 2005 (EUROSTAT 2005; European Commission 2005*o*). The 2004–6 revision of the EU-SDS resulted in a somewhat better specification of framework goals and metrics which can be interpreted as an instance of moderate learning. The same applies to the new designation of the EU-SDS as a 'framework' for the Lisbon Strategy. However, it remains to be seen whether, and how, these changes will influence the implementation of the renewed EU-SDS.

Concerning processes, it is difficult to identify major instances of learning in the framework of the original EU-SDS despite the significant recursiveness described above. The annual Environmental Policy Review (EPR) and Cardiff (environmental integration) stocktaking reports were introduced to improve

SDS-related reporting. However, these innovations soon turned out to be ineffective. In the absence of further guidelines, the format of the EPR remained unclear. More specifically, this resulted in a lack of specific focus and purpose and a seriously belated first EPR. Subsequent reports encountered similar problems. Due to a lack of political support from Member States and the Commission, the 2004 Cardiff stocktaking report (European Commission 2004*f*) remained a one-off exercise. Consequently, the two environmental reporting innovations failed to improve the coverage of the EU-SDS in the Commission's spring reports and the review by the European Council. On the contrary, the 2005 and 2006 Spring Reports no longer contained separate chapters on environmental issues. The environment was merely mentioned in a number of references which were widely scattered throughout the reports (cf. Pallemaerts et al. 2007: 33).

In contrast to the original EU-SDS, learning in the framework of the 2004–6 revision of the Strategy resulted in several process changes, in particular the obligation for Member States to produce NSDSs and appoint national focal points, the introduction of an independent reporting and review process for the renewed EU-SDS, and better opportunities for peer review, sharing of experience, and the identification of good practices. Although it is too early to establish whether these measures will succeed, they appear more promising than the process innovations which had been introduced under the original EU-SDS. This is partly because the revision of the EU-SDS could build on broader and longer experience than innovations introduced under the original Strategy. Experience gained with the implementation and reform of the Lisbon Strategy was relevant in this respect. Such experience was readily available in the Commission where the Secretariat General was in charge of the reviews of both the Lisbon Strategy and the EU-SDS. It is therefore not surprising that some of the SDS's main procedural changes are similar to those of the Lisbon Strategy which had been decided upon only a few months earlier. Like the Lisbon Strategy, the original EU-SDS had failed to generate sufficient commitment and innovation at national level. And like the creation of national reform programs and coordinators in the relaunched Lisbon Strategy, the inclusion of NSDSs and national focal points in the renewed EU-SDS aims to increase 'ownership' and stimulate mutual learning.[3] The decision to decouple the EU-SDS reporting and review process from the Lisbon Strategy reflected not only the initial failure to effectively coordinate the two, but also the subsequent failures of the EPR and Cardiff stocktaking.

The fact that a broad and long consultation process involving a range of state and non-state actors accompanied the 2004–6 revision of the SDS also suggests that learning played a significant role in the revision process. Starting in early 2004 with an elaborate internet consultation launched by the Commission, the review of the EU-SDS was accompanied by numerous hearings, workshops, conferences, and so on. The Commission published two formal

communications on the SDS review and the European Council adopted a set of SD guiding principles. Drawing on hearings and workshops involving, among other things, several environmental NGOs and ten Council formations, the Austrian EU Presidency provided political leadership during the final stages of the revision process (cf. Kopp 2006). The knowledge gathered in the run of this consultation process created additional opportunities for learning.

In some cases the tensions characterizing the relationship between the EU-SDS and the Lisbon Strategy prevented learning. This is illustrated by the failure to adopt adequate procedures regulating this relationship. More specifically, the newly introduced designation of the EU-SDS as a 'framework' for the Lisbon Strategy was not translated into corresponding coordination procedures. In fact, the only relevant provision is vague and may create tensions with its overriding, long-term character because it instructs the Council to take 'account of priorities under the Lisbon Strategy for growth and jobs' when reviewing the EU-SDS (Council of the European Union 2006*b*: par. 38). More importantly, for its part the Lisbon Strategy contains no provisions requiring consideration of the EU-SDS.

While it is too early for a reliable assessment of the actual implementation of the renewed EU-SDS, several implementing measures which point to improved conditions for learning have been taken. For example, the activities of the national SDS coordinators group have been extended beyond reporting on NSDSs to include exchange of experience and best practice, discussion of progress made on peer reviews, and provision of input and suggestions on new SD policy initiatives (cf. Berger and Steurer [2007]). The Commission has also made co-financing available to support peer reviews of NSDSs and selected themes. By mid-2007 the French and Dutch NSDSs had been reviewed. A total of eight Member States was involved in these review processes. Several participants and Commission officials have given positive assessments of the results (Berger et al. 2007: 20–4). In addition, the European Economic and Social Committee (EESC) has established an SD Observatory. According to the renewed EU-SDS the EESC 'should play an active role in creating ownership [. . .] and is invited to prepare input to the biennial progress report of the Commission including a collection of best practices of its members' (Council of the European Union 2006*b*: par. 39).

Despite the significant improvements over the original EU-SDS, serious problems remain. The group of national NSDS coordinators had only met occasionally by the end of 2008—once in 2006 and once in 2007 to prepare the first review of the EU-SDS. Insufficient interest on the part of the European Commission is blamed for this by some observers. At Member State level, there was little interest in a follow-up to the first NSDS peer review exercises (Berger and Zwirner 2008: 10). However, the activities of the informal European Sustainable Development Network (ESDN) to some extent compensated for the limited role of the

coordinators' group and the lack of interest in the peer review exercise. ESDN provided regular updates and analyses and held several conferences and workshops, which were well attended by national officials and experts, on different aspects of the EU SDS and NSDSs.

The continuing lack of coordination with the Lisbon Strategy, and perhaps also the Energy and Climate Package adopted by the spring 2007 European Council, stands out as problematic. As a result of the divergent priorities identified in each of these strategies, the capacity of the EU-SDS to provide strategic direction is diminished both at the EU and national levels. In addition, the proliferation of targets and reporting obligations under the different strategies carries a risk of 'process fatigue' and a corresponding lack of commitment among policymakers (Begg and Larson 2007: 8).

As the Lisbon Strategy does not extend beyond 2010, first discussions on a potential successor to the Lisbon Strategy and coordination with the EU-SDS took place in 2008. However, any results heavily depend on the new European Commission and Parliament which will take office in late 2009. They may also be influenced by the findings of the 'Horizon 2020–2030' reflection group on the future of the EU which was created by the December 2007 European Council and is to present results in mid-2010. The resulting strategic decisions may also provide a new stimulus for the NSDS coordinators' group and the EU-SDS peer review process.

In addition to these EU-level developments, increasing political interest in NSDSs in several Member States, such as Germany, may also contribute to a renewed interest in the coordinators group and peer review processes. In particular, while most NSDSs were drawn up independently of the EU-SDS, they are now being revised for the first time in light of the European strategy (Berger and Zwirner 2008: 10). This alignment between the national and the EU strategies may lead to a stronger interest in the EU-SDS.

In sum, this analysis of the institutional characteristics of the EU-SDS and its functioning suggests that despite featuring some institutional arrangements which correspond to the EGA, the original EU-SDS was insufficiently recursive and generated only very few instances of learning. The lack of recursiveness and learning can partly be attributed to the fact that the reporting cycle of the original EU-SDS was part of the Lisbon Strategy, while specific bodies which could have generated recursiveness and learning and pushed for better integration between the two strategies were not created. The fact that the original EU-SDS was not linked to national SD strategies reinforced this tendency. Consequently, the original EU-SDS remained a largely pro forma 'add-on' to the Lisbon Strategy.

The 2006 revised EU-SDS partly addresses these deficits. It now has its own, independent reporting cycle. In addition, NSDSs have been linked to the EU-SDS, and a specialized body—the group of national SD coordinators—was created to increase national input and improve the coordination of the

EU-SDS process. Mechanisms and fora specifically promoting learning on the basis of peer review have also been established.

Whether or not these innovations will lead to a significant improvement of the functioning of the EU-SDS remains to be seen. New tensions between the EU-SDS and the Lisbon Strategy may emerge in the absence of improved procedures to coordinate these two substantively interdependent strategies. It also remains unclear whether Member States will be sufficiently committed to the EU-SDS/NSDSs, although the successful revision of the EU-SDS despite an initial lack of political support by the Commission, the ongoing revision of NSDSs in light of the EU SDS and activities in the framework of the ESDN suggest that there is a considerable degree of commitment from at least some Member States.

5 The water framework directive

The Water Framework Directive (WFD) provides another early example of the EGA in EU environmental policy. As was the case with the EU-SDS, the WFD had to be amended—albeit in a non-legislative way—to improve implementation. But, unlike the EU-SDS, the WFD was amended only a few months after its adoption. As a result of this early amendment, significant progress has been made in the implementation of the WFD.

Following several years of highly antagonistic negotiations among Member State governments, the WFD was eventually adopted in 2000. The WFD itself, as well as its implementation, differ in two major ways from most earlier pieces of EU environmental legislation: First, the Directive is very general and open-ended: 'Far from being a single piece of legislation as that term is normally understood, the WFD is better seen as the initiation of a comprehensive program designed to guide further action by the EU and the Member States' (Trubek and Trubek 2007: 554). The way in which the WFD defines overall aims provides a good example of this open-endedness. The Directive states that Member States must achieve 'good water status' by 2020. However, it is left to the implementation stage to define what good water status means in practice. Similarly, the concrete requirements of the river basin plans—the overarching instrument that is to deliver good water status—are also to be developed at the implementation stage.

The Common Implementation Strategy (CIS) is the second main feature rendering the WFD different from previous EU environmental legislation. The CIS was established following the adoption of the WFD which, however, does not provide for the CIS. Involving representatives from DG Environment and Member States as well as technical experts and stakeholders, the CIS was created to support implementation of the WFD. More specifically, it was established to facilitate the elaboration, testing, and validation of

technical guidance documents and best practices as well as the sharing of experience and information in order to avoid the duplication of efforts and to limit the risk of a bad application (CIS 2001: 3–4). Although CIS output, such as the guidance documents, is legally non-binding, it has already had a significant influence on the implementation of the WFD (for an overview, see Scott and Holder 2006).

In many ways the adoption of the WFD reflects the factors which affected the emergence of the EGA in EU environmental policy more generally. With its comprehensive focus on river basins rather than specific pollutants or sources of pollution, one of the main objectives of the Directive is to address persistent environmental problems caused by excessive water consumption and diffuse sources of pollution, for example in agriculture. The WFD embodies a shift of EU water policy towards the sustainability paradigm and supports the integration of environmental concerns into various sectoral policies. In particular, water is explicitly treated as an economic as well as an environmental resource. Among other things, this is reflected in various flexibility clauses—for example, allowing subsidized water services for low-income households (Page and Kaika 2003: 5)—the use of economic valuation, and other economic instruments, such as provisions for cost recovery. Stakeholder participation and decentralized planning at the level of river basins is, among other things, meant to increase the democratic credentials of the WFD.

In addition to these general trends, the specific characteristics of the WFD also reflect certain institutional and political constraints on the execution of EU competencies. EU law stipulates that environmental measures 'affecting quantitative management of water resources', and also town and country planning as well as land use, must be adopted unanimously by Member State governments (Article 175 TEU). This contrasts with environmental legislation in other areas, where the Co-Decision Procedure and its less restrictive requirement of support by a qualified majority of Member States applies. As a result of the WFD's broad scope, the Directive to some extent affects areas falling under the more restrictive procedure, in particular quantitative management of water resources. This complicated the adoption of the WFD primarily because several southern European Member States, such as Spain, Italy, and Greece, opposed EU measures which could result in a restriction of water supplies. The Spanish response to the Commission's original WFD proposal was particularly vocal. The Spanish government raised sovereignty concerns and argued that measures affecting water quantity may have serious negative economic repercussions (Kaika and Page 2003: 6).

Against this background of exceptionally high political sensitivity in some Member States and the potential application of restrictive EU decision-making procedures, the WFD's vagueness and open-endedness can partly be interpreted as a concession to political pressure and an effort to ensure that the WFD would not fall under the legislative unanimity rule.[4]

5.1 Institutional features

The WFD/CIS is characterized by a number of institutional features which may support EGA functions.

5.1.1 FRAMEWORK GOALS AND METRICS

The WFD/CIS is built around a clear—though vague—framework goal: the achievement of 'good water status' by 2015. Metrics and benchmarks to assess progress towards the achievement of the Directive's aim have been, or are to be, established. They range from quite specific chemical and ecological criteria to entire reference sites to ensure that 'good status' means the same in all Member States despite different local and regional conditions. The so-called intercalibration exercise is expected to result in the harmonization of ecological quality status assessment systems for all surface waters.

5.1.2 'LOWER LEVEL' PLANS

The WFD/CIS resembles the EGA in that it requires 'lower level units' to prepare plans for achieving 'good water status'. More specifically, Member States are obliged to develop comprehensive river basin management plans. These plans are key to the implementation of the WFD on the ground.

5.1.3 REPORTING, MONITORING, AND PEER REVIEW OF RESULTS

The WFD also features EGA characteristics such as regular reporting, monitoring, and peer review. Because full implementation of the WFD stretches over almost three decades, it has been divided into three management cycles with the last extension of deadlines ending in 2027. While some reporting obligations only require one-off reporting, many of the crucial aspects of the Directive are subject to reporting every six years. This applies, for example, to submitting updates of the environmental and economic analysis of river basin districts (Article 5), programmes of measures (Article 11), and river basin management plans (Article 13). Similarly, the Commission is obliged to report on implementation of the WFD every six years (Article 18).

In addition to the monitoring facilitated by the various reporting requirements, Member States are expected to develop and implement comprehensive monitoring of the chemical and ecological status of river basin districts using common technical specifications to be established by the WFD regulatory committee (Article 8). Standardized and coordinated reporting and monitoring is also supported by the Water Information System Europe (WISE) which is not formally part of the WFD, but has been developed under the CIS (CIS 2003*a*).

The CIS equips the WFD with what comes close to a system of multilevel peer review. Essentially, the CIS has established a nested hierarchy of expert fora, ranging from the more political to the more technical. The water experts

draft, review, and adopt guidance documents and other CIS output drawing on their technical and scientific expertise as well as country specific knowledge and experience. At the top of the CIS hierarchy is the meeting of the Water Directors. A Water Director typically heads the water division in a national environment ministry. Draft documents are prepared by a number of working groups (WGs) with more specific tasks. For example, the 'Ecological Status' WG has been charged with developing harmonized or comparable criteria for good environmental quality as well as monitoring and assessment systems (CIS 2006: 16).

Steering and preparatory groups as well as drafting groups and highly specialized expert networks and workshops support the WGs. In addition there are the so-called ad hoc structures, in particular the strategic steering groups looking specifically at links between the WFD and other policy sectors and expert fora directly advising the Commission (CIS 2006: 12–14). Usually, a clear majority of the participants in these networks are national officials. However, external scientific experts and stakeholders, such as economic actors and environmental NGOs are also well represented, in particular in the more specialized fora.

5.2 The WFD/CIS in practice

The following analysis presents significant instances of recursive policy-making and learning in the framework of the WFD/CIS.

5.2.1 RECURSIVENESS

The WFD has a comprehensive scope and long time frame for implementation but lacks detailed substantive provisions. The resulting complexity and uncertainty necessitate a recursive governance approach where existing WFD measures need to be continually adapted in response to the successive implementation of individual WFD measures, the accumulation of experience, and changing circumstances. This means that operational objectives, metrics, and procedures must remain provisional and need to be regularly reviewed and revised. Two main factors provide a basis for recursive adjustment. First, as mentioned above, the WFD comprises numerous provisions requiring periodical monitoring, reporting, and review of plans and measures. Second, by incorporating national and sub-national experts in the review and revision processes, the CIS creates better opportunities for cross-level, vertical feedback. Thereby the CIS strengthens the link between actual implementation experience at national and sub-national levels and EU-level monitoring and review processes.

In 2007, the Commission completed the first interim review of implementation on the basis of national reports (mandated by Articles 3 and 5 WFD). Focussing on administrative arrangements for implementing the WFD and on

the analysis of river basins by national authorities, the review illustrates, among other things, the link between the monitoring and review provisions of the WFD on the one hand, and the CIS on the other hand. Along with some progress, for example concerning national administrative arrangements, the review reveals shortcomings in the economic and environmental analyses of river basins submitted by Member States (European Commission 2007*f*: 7–8).[5] In an instance of recuseiveness the review refers back to the CIS when addressing these results. It states that the Commission would in future focus its support of the CIS on improving economic instruments and the assessment of ecological status (European Commission 2007*f*: 11).

The CIS itself has been revised in 2003, 2005, and 2006. In each case the Water Directors reviewed the CIS and adopted updates of the CIS work programme which concerned both substantive and organizational aspects. For example, in 2003, the CIS was restructured. This resulted in a significant reduction of the number of working groups and in the adoption of measures to increase the accountability of CIS structures below the level of the Water Directors (Scott and Holder 2006: 231–2). Similarly, reflecting the completion of tasks and shifting priorities, the Working Group on Integrated River Basin Management was dissolved in 2006, while the *ad hoc* stakeholder forum on floods was transformed into a more permanent working group (CIS 2006: 8).

CIS substantive output, such as the guidance notes and similar documents, is also intended to be reviewed and revised, albeit on a more *ad hoc* schedule than the CIS work programme (Scott and Holder 2006: 230–1). Some CIS documents explicitly mention the preliminary status of CIS output. For example, the guidance note on the planning process states that it 'is a *living document* [original emphasis] that will need continuous input and improvements as application and experience build up in all countries of the EU and beyond' (CIS 2003*b*: i).

5.2.3 LEARNING

The evolution of the CIS so far suggests that, first, different types of learning have characterized different phases and, second, that there is a trend towards more inclusive and mutual types of learning. Initially, the CIS focused on the development of non-binding guidance notes designed to support implementation at national and sub-national levels (European Commission 2007*f*: 44). Activities at this stage were dominated by several large Member States, such as Germany, France, and the United Kingdom, leading key working and drafting groups. Reflecting the strong influence of these countries, learning resembled an asymmetrical diffusion process in which most information flowed from these countries towards the remaining, less experienced and less influential Member States. The fact that, when it comes to implementation of the WFD, the smaller, and in particular the (then) future Central and Eastern European

Member States, tended to draw more heavily on the guidance notes than the large, 'old' Members further increased the prevailing asymmetry (Interviews VROM, 26 May 2005; European Commission, 23 June 2005).

On the whole, the uptake of the guidance notes at the national and sub-national levels varied strongly not only among Member States but also among different guidance notes. For example, the 2006 CIS work programme states that 'there was only limited or no use made of the CIS Guidance Documents' (CIS 2006: 2), whereas the Commission finds that the guidance documents on the identification of heavily modified water-bodies were 'widely used' (European Commission 2007*f*: 26). The Commission itself drew heavily on the reporting guidance notes when evaluating Member States' implementation reports (European Commission 2007*f*: 15, 23).

When the pilot river basins were launched, learning took on a more experimental form in that the guidance notes were to be tested in these projects. An early result which was based on the first experiences with the pilot river basins was a CIS document (CIS 2004*a*) on the principles of the WFD environmental analysis (Article 5) (cf. European Commission 2007*f*: 24). However, the original idea to use the pilot river basins as laboratories for testing and refining CIS recommendations was only partly realized because many early results tended to be disconnected and too specific to local settings (Interview, 13 June 2005). Nonetheless, the pilot river basins are still used for testing of, and providing feedback on, a broad range of CIS output and recommendations (cf. CIS 2006: 30, 37, 41, 60, 62) and ongoing efforts to link the pilot river basin projects more closely to CIS output can be viewed as a possible instance of procedural learning.

Learning within the CIS was, at least initially, often based on contributions by a few Member States which took the lead in the working groups and on the experience gained in the pilot river basins. More recently, the Water Directors have tried to promote more inclusive and mutual forms of collective learning. According to the 2007–9 CIS work programme, the structure of the CIS is to be adapted to reflect 'a clear preference for 'less documents, more information exchange'' (CIS 2006: 5). The Water Directors are also trying to achieve greater active participation in the CIS by all Member States (Interview, VROM, 23 June 2005). This shift towards more mutual learning and peer review has led to a reduced focus on the elaboration of guidance notes and on the pilot river basins. The new approach relies on collectively documenting, comparing, and evaluating a broad set of Member State practices and experiences. 'Ecological status classification'—one of the priority activities under the 2007–9 work programme—illustrates the recent shift: the exercise 'aims to compare approaches in the Member States'' by 'collating case studies and sharing experiences on Member States' approaches. [...] Based on this information it will be evaluated if further guidance [...] will be needed. Further tasks will include comparison of alternative approaches to set

maximum and good ecological potential for heavily modified water bodies' (CIS 2006: 17).

To some extent, the increased emphasis on cross-national comparison, mutual learning, and peer review reflects, and also depends on the progress made so far in implementing the WFD. The early implementation measures have provided a growing number of Member States with relevant experience which can now be compared and evaluated. This new experience, which has been gathered in all Member States, provides a basis for a more inclusive peer review by the Water Directors in which the representatives of the initially less influential Member States participate more actively.

The evolution of learning within the CIS from a diffusion approach strongly dominated by a small group of Member States to experimental learning in the pilot river basins, to more inclusive mutual learning and peer review can itself be seen as a learning process. The frequent revisions of the CIS work programme, which allowed for periodical reflexive analysis of the effectiveness and efficiency of its working methods, contributed to this learning process (cf. CIS 2004: 3–6).

This analysis shows that the implementation of the WFD is a highly dynamic process. Already in its initial stages this process displayed institutional and functional characteristics corresponding to the EGA. The WFD itself features framework goals and metrics, 'lower level' plans and numerous reporting, monitoring, and review requirements. However, due to the Directive's comprehensive scope, long time frame, and lack of substantive provisions, these were difficult to implement. Therefore, the Commission and the Water Directors created the CIS early on in the implementation process. The CIS supports learning on the basis of peer review. The results helped to translate framework goals and metrics as well as reporting and monitoring requirements into operational concepts. In this the CIS was itself a recursive learning exercise, with learning evolving through several revisions of the CIS work programme from diffusion, to experimentation, to inclusive, mutual learning. Yet, implementation of the WFD is a long-term process. Although the CIS has helped to keep deadlines, implementation has so far hardly gone beyond implementation planning—a process that is scheduled to take nine years (CIS 2001: 1). The effectiveness of the WFD/CIS 'on the ground' has so far hardly been tested.

6 Conclusions

Over the last thirty or so years 'traditional' EU environmental policy based on legal harmonization and driven by an alliance of environmentally progressive EU Member State governments, DG Environment, and the EP Environment Committee has helped to reduce emissions from point sources, provided for cleaner water and air, banned hazardous substances, and so forth. However,

since the early 1990s, several developments prepared the ground for the emergence of governance patterns resembling the EGA in EU environmental policy. Among these trends were the rise in persistent environmental problems and in the sustainable development paradigm on the political agenda, efforts to integrate environmental concerns into sector policies, challenges to the legitimacy of 'traditional' EU environmental policy, and experimentation with 'new' policy instruments. EGA-type governance may increase the effectiveness and efficiency of EU environmental policy in addressing the challenges associated with persistent environmental problems and a reorientation towards sustainable development. For example, EGA characteristics such as flexibility, recursiveness, and learning may help to answer to problems of uncertainty and local differences, the need to limit costs, and to change engrained production and consumption patterns.

The EU-SDS and the WFD/CIS share basic institutional characteristics and functions with the EGA. In particular, policymaking is recursive and utilizes peer review to facilitate learning. However, it would be misleading to assume that the EU-SDS and the WFD/CIS were designed from scratch to correspond to the EGA. The history of both measures suggests that, at least at the time of their adoption, the EGA was an emerging, rather than a fully developed concept in EU environmental policy. In both cases the measures initially adopted featured only rudimentary EGA characteristics which, taken on their own, did not facilitate recursiveness and learning. In the case of the EU-SDS it took five years until the potentially more effective, renewed EU-SDS was adopted, which corresponds more closely to the EGA than the original Strategy. By contrast, the CIS was quickly added to the WFD, providing a recursive learning mechanism to facilitate the Directive's implementation.

As a result of the delayed emergence of fuller EGA characteristics in the case of the EU-SDS, practical experience allowing for an empirical assessment of the degree of recursiveness and learning facilitated by the renewed Strategy is still very limited. The little evidence that is already available, and the successful revision of the EU-SDS itself, suggests that the renewed EU-SDS generates more recursiveness and learning than its predecessor, in particular at national level. However, considerable constraints remain, not least as a result of unresolved tensions with the Lisbon Strategy. As the CIS was quickly added to the WFD, the assessment of recursiveness and learning can draw on several years of experience in this case. However, because of the twenty-year time frame for the implementation of the WFD this experience primarily concerns implementation planning, rather than actual implementation 'on the ground'. Even in the case of the WFD/CIS—which has generated significant recursiveness and learning so far—the assessment must therefore remain preliminary.

Although the EU-SDS and the WFD/CIS broadly correspond to the EGA, they differ strongly from each other in terms of their scope and functions in the political process. Despite its unusually comprehensive scope, the WFD/CIS

remains a sub-sectoral environmental measure with an ultimate focus on a specific issue: water quality. By contrast, the EU-SDS is a cross-sectoral 'mega strategy' (Begg and Larson 2007) comprising seven different priority areas. While the WFD/CIS is ultimately expected to lead to significant improvements in water quality, such direct effects can hardly be expected of the EU-SDS. Because of its extremely wide, cross-sectoral scope, the EU-SDS is not equipped to produce and impose original sectoral goals and targets. Instead it mostly relies on pre-existing commitments. The Strategy primarily seems to serve a different function which might be described as follows: the EU-SDS expresses the existence and political importance of certain pre-existing goals and targets *vis-á-vis* competing objectives articulated in other cross-sectoral or sectoral strategies and political discourses. Nonetheless, it is essential for the credibility and effectiveness of the EU-SDS that it contains sufficiently concrete and ambitious goals and targets. Only then can environmental and sectoral actors adopt measures to implement the Strategy.

Against this background the recent adoption of the thematic strategies and accompanying legislative proposals for EGA-style framework directives and the creation and revision of the EU-ETS seems to be a factor which is likely to have a positive impact on the further implementation of the objectives of the EU-SDS and, to a lesser extent, also of the WFD. Given the comprehensive scope of the Strategy's framework goals, these can only be achieved by a very wide array of measures at EU and lower levels, which may often also be linked to the international or global level. This will require long-term intra- and cross-sectoral coordination. As a cross-sectoral macro-strategy, the EU-SDS itself clearly lacks the necessary coordination mechanisms and capacities. By contrast, the thematic strategies and accompanying legislative proposals provide instruments, such as highly specific national plans and EU-level review, to coordinate multiple measures in support of their respective framework goals. Although the framework goals formulated in the thematic strategies and the associated legislation are not identical to those of the EU-SDS, there is a strong overlap. The implementation of the EU-SDS is therefore likely to benefit considerably from an increase in long-term, intra- and cross-sectoral coordination capacities as a result of the adoption of the thematic strategies and EGA-type framework legislation.

Similar arguments apply to the WFD. Despite its wide coverage, many factors affecting water quality and consumption remain outside the scope of the WFD. This is particularly obvious in the case of the marine environment, which is covered by the recently adopted thematic strategy on the Protection and Conservation of the Marine Environment and the associated Marine Strategy Directive. Coordination between the WFD and the Marine Strategy/Directive has been close and is likely to intensify. In fact, the Marine Strategy Directive was in many respects modelled on the WFD. The Water Directors guided the extensive consultations preceding the adoption of the Strategy/Directive

(European Commission 2006*i*: 18) and the Marine Strategy itself calls for regular discussions between the Commission and the Water Directors to build on 'past practice' (European Commission 2005*o*: 6). Besides the Marine Strategy, the Soil and Pesticides thematic strategies and EU measures to address climate change deal with issues of considerable significance for water quality and, consequently, the WFD.

Notes

1. The discussion focuses on the environmental dimension of the SDS. Although the social dimension has been strengthened in the renewed SDS, the environmental dimension clearly remains dominant.
2. The 2006 revised EU-SDS added sustainable production and consumption to these priorities.
3. Interview with Alexander Italianer, European Commission, Deputy Secretary General and chair of the SDS Coordinators Group, in Berger and Steurer (2007). For a critical review of the relaunched Lisbon Strategy and its governance, see Zeitlin (2008).
4. Shortly before the adoption of the WFD, the European Court of Justice (ECJ) finally dismissed the Spanish government's claim that the WFD should fall under the restrictive Article 175 (Kaika and Page 2003: 11).
5. In addition the Commission identified numerous serious transposition failures.

7

Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation?

Ellen Vos

1 Introduction

Since its very inception, the Community has addressed foodstuffs in order to eliminate barriers to trade, created by national food regulations, and replaced many national rules by Community rules. This body of legislation was developed on a rather *ad hoc* basis, partly due to the many interests involved, ranging from economic interests and health and consumer protection to ethical and cultural concerns. The outbreak of the 1996 BSE crisis demonstrated that this approach was insufficient to ensure the free circulation of foods across the whole Community market, while at the same time adequately protecting human health and safety (Chalmers 2003). The Community thus called for even greater centralization and stricter rule setting as well as reform of existing institutional patterns.[1] At first sight, therefore, EU food safety regulation with its highly regulated and centralized 'Brussels' character does not therefore seem to be an obvious candidate for experimentalist governance. At the same time, however, the history of food regulation demonstrates that this is a politically sensitive area *par excellence* where straightforward top-down Community–Member State solutions will not work. The food safety domain seems to be a good example of strong centralization combined with a 'double' decentralization (or decentralized experimentation); with the new European Food Safety Authority (EFSA) relying in turn on national food safety agencies. This chapter will therefore analyse this domain through an experimentalist lens, tracing the emergence of a new architecture for food safety governance. To this end, it will closely examine all four constitutive elements of experimentalist governance, as identified by

Sabel and Zeitlin (2008, this volume): establishment of framework goals and metrics; input by lower-level units; reporting, monitoring, and peer review of results; and recursive revision of objectives in the light of these results (Section 4). Before so doing, it will first present the specific characteristics of the food safety area (Section 2) and the shortcomings of EU food safety regulation revealed in the aftermath of the BSE crisis, highlighting the need for reform (Section 3).

2 From market integration to food safety regulation

The Community institutions were not originally designed to deal with food safety and, more generally, consumer protection. Food safety was touched upon only indirectly through Community regulation taking market integration as its primary objective. In the 1970s, the Community institutions operated under the general axiom 'if it moves, harmonise it',[2] thus seeking to replace all national legislation in the food area with incredibly detailed Community-level legislation, for example detailing precise requirements on the composition of chocolate.[3] It was this kind of legislation that made people fear of having in future only 'Euro-food' (Welch 1983–4). Unsurprisingly, difficulties were encountered in reaching unanimity on these compositional requirements, touching upon sensitive questions of culinary cultures and national traditions.[4] During the following years, the slow and cumbersome decision-making process of this 'traditional approach' to harmonization became unsustainable. Moreover, pragmatic considerations obliged the Community to assume an explicit mandate for protecting consumer health and, in particular, food safety (Vos 1999*b*).

At the beginning of the 1980s, therefore, thinking about Community-level harmonization changed: harmonization of each and every national law was no longer pursued, relying instead on the principle of mutual recognition—developed in the *Cassis de Dijon* case[5]—accompanied by a strategy of harmonizing only areas where trade barriers were justified according to the criteria developed in the Court's case law (European Commission 1985*a*: pt. I, par. 2; 1985*b*: par. 61).[6] This new thinking abandoned the detailed regulation of compositional rules and concentrated on a horizontal approach regulating the substances processed into food to ensure their safety.[7] At the same time, greater use was made of the possibility to delegate powers to the Commission to implement the more generally phrased framework directives adopted by the Council and later also the European Parliament (under co-decision), combined with the obligation to consult committees composed of national representatives. This technique had already been practiced since the 1960s, when a cautious institutional departure from the strict Community Method towards reliance on a 'committee model' occurred. This model was based on the

consultation of committees composed of scientific experts, national officials, and representatives of various interest groups, which were established to provide the Commission with technical and scientific expertise and socio-economic and national viewpoints on specific topics. This New Approach subsequently formed the main device for the Community regulation of food issues from the mid-1980s till the mid-1990s, enabling the European institutions to reduce much of their workload by concentrating on the adoption of only a 'few' directives.

Yet, it soon clear became that this approach, too, did not have the desired result of completing the internal market for foods. Instead, the free movement of goods requirements together with the specific nature of risk regulation forced the Community to deepen its involvement in foodstuffs regulation. This deepening entailed an increasing reliance by the Commission on the committee model, which was seemingly working well (Joerges and Neyer 1997*b*). Yet, the revelation in 1996 by an advisory body to the British government [the Spongiform Encephalopathy Advisory Committee (SEAC)], that there could be a link between BSE and new variant Creutzfeldt–Jacob disease, shattered this 'rosy' picture of EU food safety regulation.

Although the Commission immediately reacted and banned the export of British beef,[8] with hindsight it appears that the Community's *ad hoc* approach to foods and particularly its existing committee model suffered from severe deficiencies. Evidence of mismanagement by the European institutions was disclosed by the Temporary Committee of Inquiry into BSE, set up by the European Parliament in July 1996.[9] The Medina Ortega Report issued by this Committee revealed that in 1990–4, when the disease had reached crisis levels, the Commission had suffered from poor internal management and decision-making procedures had not been transparent. Furthermore, it found that the relationship between scientific and political decisions had been blurred, that some national interests had exerted too much weight in the decision-making process, and that the resulting legislative controls had not been effectively implemented. The Report was particular critical of the committee model (especially comitology), which it found complex, non-transparent, and undemocratic (European Parliament 1997). The Report concluded that the EU institutions, the Commission in particular, had failed to take protection of public health seriously, having attached greater importance to national agricultural and industrial interests.

Unsurprisingly, this series of shortcomings severely damaged the credibility of the EU authorities as regulators and risk managers, triggering an unprecedented crisis of confidence among both citizens and national officials in the way beef was produced and regulated at the EU level. This widespread indictment of the Community's approach to food safety and its inability to deal effectively with the BSE crisis clearly called for immediate action.

3 Regulatory rule-making in response to catastrophe

Threatened with a censure motion by the European Parliament after the publication of this Report, the Commission could not avoid announcing regulatory reform to address these apparent flaws in the governance of the EU.[10] The Commission stressed that, in order to restore consumers' confidence in EU food legislation, scientific advice had to reach the highest standards of independence, excellence, and transparency, thereby responding to the criticism that the decision-making process in this domain was obscure and not independent (European Commission 1999*b*). A first institutional reform concerned the scientific committees. These committees had been administered by various Directorates-General of the Commission (e.g. the Scientific Veterinary Committee by DG VI—now DG Agriculture—and the Scientific Committee on Food by DG III—now DG Internal Market), whose independence had appeared doubtful, to put it mildly. Responsibility for all scientific committees was therefore placed under the refurbished DG for Health and Consumer Protection (SANCO),[11] while also subjecting them to the principles of independence, excellence, and transparency.[12] In addition, the Commission promoted greater openness, accountability, responsibility, effectiveness, and coherence in the European policy-making process (European Commission 2001*b*), while also committing itself to set out criteria for stakeholder involvement (European Commission 2002*b*).

At the same time, regulatory rule-making on food safety was considerably tightened. Before the BSE catastrophe, many regulatory initiatives on food safety had been heavily influenced by free trade concerns. Above all the Commission took the lead in developing a new, more coherent body of food safety governance arrangements, proclaiming a novel integrated approach under the slogan 'From the Farm to the Fork' (also 'From Stable to Table', or 'From Plough to Plate') (European Commission 1999*b*). This approach was largely supported by the Council[13] and the European Parliament[14] and resulted in the adoption of Regulation 178/2002, better known as the 'General Food Law'.[15] The new approach covered the whole food chain, all sectors of the food industry (feed production, primary production, food processing, storage, transport, and retail sale), the Member States, the external borders of the EU, the EU as a whole, decision-making organs at international and Community level, and all phases of policy making.

At an institutional level, the General Food Law created an independent agency, the European Food Safety Authority (EFSA), since it had become apparent that the reform of the scientific committee system had not been sufficient to restore confidence in EU regulation.[16] The strengthening of science by means of such an independent agency and the establishment of criteria for its quality, transparency, and independence can be regarded as a typical response to the BSE crisis, although the influence of the WTO's reliance

on science should certainly not be underestimated.[17] In addition, the General Food Law created a comitology committee, the Standing Committee on the Food Chain and Animal Health, based on the existing Standing Committee on Foodstuffs and other pre-existing comitology committees.

4 Elements of experimentalist governance in the food safety domain

In order to identify whether the food safety domain involves the four main elements of experimentalist governance, we will closely examine the regulatory arrangements currently in place.

4.1 Establishment of framework goals and metrics

The first element of experimentalist governance, the establishment of framework goals and metrics, can be found in the General Food Law that sets forth the goals and principles governing foodstuffs. These goals are very much influenced by the mishandling of the BSE crisis, and in particular the accusation that the Community had given precedence to agricultural concerns over health protection. The primary goal of the General Food Law is therefore a high level of protection of both health and consumers' interests, relegating the effective functioning of the internal market to second place:[18] the bottom line being that 'food shall not be placed on the market if it is unsafe'.[19] This Law does not merely seek to protect consumers' health, but also aims to protect them against fraudulent practices, adulteration of food, and other misleading practices. It also requires that fair trade, animal health and welfare, plant health, and the environment to be taken into account, where appropriate.[20]

To be sure, setting health protection and free movement of goods as goals for foodstuffs regulation is in itself not a novelty. As mentioned earlier; the European institutions have already done this for many years: first the Council alone under the traditional approach of the 1970s and later also with the European Parliament, under the new approach of the 1980s. What is new, however, is that, with the accusations of blurred responsibilities and politically coloured scientific opinions by the Ortega Medina Report in mind, the Council and the Parliament have laid down general concepts and principles that should govern the food safety domain, for example the concept of risk analysis[21] and the precautionary principle. With the introduction of the concept of risk analysis, the General Food Law, strictly separates risk assessment from risk management. It confers on the new agency, EFSA, the task of risk assessment and on the Commission that of risk management.[22] At the same time, it clarifies the responsibilities for the three stages of risk analysis, while emphasizing that the primary responsibility for food safety lies with the food and feed

business operators.[23] In addition, it stipulates that the provision of scientific advice should be guided by the principles of excellence, independence, and transparency, while also requiring transparency and participation in decision making.

4.2 Elaboration of plans by 'lower-level' units

In this perspective, it can be said that, more than ever before in this domain, the Council and the Parliament have attempted through the General Food Law to establish the framework under which the 'lower-level' units, the Commission, EFSA, Member States, stakeholders, and individuals (operators) should operate. In this manner, EFSA, national food safety authorities, and other individual national experts must provide input in the risk assessment phase and the Commission in the risk management phase, together with representatives of national ministries in their capacity as members of the Standing Committee on the Food Chain and Animal Health, as well as Member States in the implementation and enforcement of food regulation. The communication of risks is assigned to both EFSA and the Commission, while Member States also play a role. In addition, other stakeholders are also involved in decision making. Both the Commission and EFSA have made efforts to institutionalize stakeholder participation by the setting up two different groups. The General Food Law furthermore reserves an important role for private actors, the business operators, who are responsible for marketing safe foods.

4.2.1 EFSA, NATIONAL AUTHORITIES, AND INDIVIDUAL EXPERTS

EFSA was created for several reasons. Firstly, its creation addresses the problem of confidence by guaranteeing greater independence, excellence, and transparency, while also strengthening the scientific basis of food safety regulation.[24] Secondly, the establishment of an independent agency with its own scientific staff, who can collect data and prepare opinions, redresses other more practical problems. Previously, the scientific committees coordinated by DG SANCO had come under ever growing strain because of the increased need for quick, reliable, and scientifically sound advice on food safety which they were unable to satisfy. Thirdly, putting the existing scientific and steering committees under the umbrella of EFSA, addresses the problem of fragmentation under the old, pre-BSE committee model and creates a more coherent common basis for food safety. Ultimately, EFSA's creation can be understood as yet another step towards the Europeanization of science and the scientization of EU food safety regulation.

This trend and the growing prominence of EFSA in decision making are confirmed by the following observations. First the European legislator has assigned EFSA an impressive number of tasks. In addition to the formulation

of scientific opinions, EFSA will *inter alia* need to provide the Commission with scientific and technical support, promote and coordinate the development of uniform risk assessment methodologies, commission scientific studies, collect scientific and technical data, set up networks, identify emerging risks, and assist the Commission in crisis management.[25] With the allocation of this broad range of tasks to EFSA, the Community institutions undoubtedly indicated their desire to take science more seriously than before. In so doing, they deliberately designed EFSA as a networked agency with only 350 staff members, instead of following the example of its American counterpart, the Food and Drug Administration (FDA), which has 9,000 employees.[26]

Second, EFSA takes a proactive stance. It actively uses its capacity for self-tasking and taking up problems or issues that it considers important, without being asked by the Commission, the Parliament, or Member States. It is also actively discussing with DG Research which topics it would like to see as subjects for future research.[27]

Third, the Commission has always followed EFSA's scientific opinions until now. The Commission's dependency on EFSA can be explained by the lack of in-house scientific expertise, which often forces its desk officials, who prepare dossiers and decisions, to request the help of scientists in formulating the terms of reference for risk assessments (Vos and Wendler 2006). One Commission official underlined this dependency by comparing the relationship between the Commission and EFSA to that of two people driving a car: a blind driver (the Commission) and a direction-giving passenger (EFSA) (Vos and Wendler 2006: 122). It is thus hardly surprising that the strict separation between risk assessment and management on paper tends to become blurred in practice. Although the need for a separation between the scientific assessment of risks and their regulation by policy makers is broadly accepted by all actors in the field (Gabbi 2007), a grey zone between both spheres is acknowledged to exist in practice. This is not only expressed in the regular interactions between EFSA and the Commission, but also by the fact that risk assessors like to frame their findings in a rather prescriptive manner whilst risk managers also like to have some guidance from these opinions for their decisions (Vos and Wendler 2006: 133).

Fourth, there are preliminary indications that at least for priority setting, the Commission prefers to first ask EFSA for advice instead of consulting the Member States through comitology, which was previously the general practice. Discussions in the comitology setting seem now to take place only at a second stage.

Fifth, another indication of EFSA's growing importance is the Commission's usage of the former's scientific opinions to defend its position at the international level within the Codex Alimentarius Commission (Masson-Matthee 2007).

EFSA has absorbed the pre-existing committees, such as the Scientific Veterinary Committee and the Scientific Committee on Food. It is composed of a Management Board, an Executive Director, a Secretariat, an Advisory Forum, a Scientific Committee (the former Scientific Steering Committee), and, currently, eleven Scientific Panels (including the pre-existing scientific committees dealing with food safety).[28] Importantly, third countries that have concluded an agreement with the EU in the field of food safety may also participate in EFSA.[29] EFSA's main task is to provide 'the best possible' independent scientific opinions on all matters that directly or indirectly influence food safety to the Commission, Parliament and Member States.[30] EFSA is therefore the main actor responsible for risk assessment at the EU level. It is also required to communicate risks to the public. Importantly, as was the case already with the former Scientific Committee on Food, EFSA too needs to be consulted by the Commission on all matters involving public health.[31]

Lessons of the BSE crisis have led the General Food Law to require a high level of transparency of EFSA activities,[32] both with regard to the outcomes of its work and the processes leading up to them, thereby ensuring the widest possible access to the documents it holds, receives, or has drawn up, with the exception of commercially sensitive information.[33] EFSA has been active in developing and spelling out the application of this principle, detailing the information that is displayed to the public or kept secret, for example, in the interests of commercial confidentiality.[34] For example, it has on its own initiative—and in contrast to the practice followed by other agencies—opened up its Management Board meetings through live Web streaming and placed draft opinions on various issues on its web site to be commented on by interested parties. While opening up its opinions and other documents, EFSA has been reluctant to open up the debates leading to its scientific opinions. In fact, allowing access to meetings of scientific bodies is considered to be particularly troublesome, as this could lead to external pressures on scientists and hence to a further politicization of their work, which was precisely the problem in the BSE crisis.[35] Indeed, EFSA keeps discussions within its Scientific Forum and Panels confidential so that participants feel able to discuss issues freely and thereby achieve high quality opinions.[36] Yet, leaving the construction of sound science only within a closed setting of certified experts may lead to a technocratic approach that one would wish to avoid. Applying the 'theatre metaphor' developed by Stephen Hilgartner (2000) to EFSA's activities may offer us a way out of this dilemma. In this manner, the work within EFSA's Scientific Committee and Panels can be analysed as a backstage production of an onstage performance. And just like in the theatre, the activities that take place backstage cannot be displayed without radically changing the meaning of the performance onstage. In this perspective, EFSA should retain its practice of closed meetings ('backstage' of a theatre play), but create at the same time public spheres in which different viewpoints are exchanged and discussed.[37]

Two closely related tasks of EFSA deserve particular attention in our analysis of experimentalist governance in the food safety domain: the creation and coordination of a network of organizations operating in the relevant fields in the Member States and the promotion and development of more harmonized risk assessment methodologies. I will briefly discuss the first task here and the latter in the section on recursive learning below. We noted already that EFSA's Advisory Forum plays an important role in its networking obligations. As a formal organ of EFSA, this Forum is composed of representatives of the national competent authorities, a representative of the Commission with observer status, and the Executive Director as Chair. It thereby introduces the Member States into the Agency, compensating for their lack of representation on the Management Board.[38] The Forum must ensure consultation and collaboration with Member States in the risk assessment stage of food safety regulation.[39] In addition, it should encourage the creation of networks of similar authorities and reduce the possibility of duplication of work whilst ensuring collaboration whenever emerging risks have been identified.[40] EFSA's 2006 strategy for cooperation and networking determines that members of the Advisory Forum must establish 'Focal Points' in the Member States.[41] These Focal Points are the national networks of risk managers, national authorities, research institutes, consumers, and other stakeholders. They must keep EFSA and the other members informed of developments in their countries in the field of risk assessments and science more generally. The network of Focal Points will be responsible for organization and cooperation of risk assessment institutions in the Member States.

EFSA's Advisory Forum can therefore be viewed as an inter-Member-State platform where information about possible risks is exchanged and knowledge pooled.[42] The EU framework thus involves national authorities in an ongoing interaction and exchange with EFSA, especially through the regular deliberations of the Advisory Forum and the numerous processes of data collection and information exchange between both levels. This is inherent to EFSA's design as a networked agency, dependent on its national counterparts.

Analysis of EFSA's role on paper and in practice discloses EFSA as a *primus inter pares* in a decentralized network of food safety actors and authorities—through its Advisory Forum as well as through the networks of organizations that are active in the relevant areas. Importantly, the precise position and powers of EFSA in this network strongly depend on the field in which it operates. For example, on a centralized issue such as genetically modified (GM) food, EFSA seems much more to operate like a European 'super-agency' than in other fields such as campylobacter (Vos and Wendler 2006). To be sure, also acting more as a 'super-agency', EFSA may and, in some cases must, request national competent authorities to carry out safety or environmental assessments, while the national authorities still function as the first contact point for the applicant in this procedure.[43] In this manner, EFSA can be conceptualized as the apex of an

interdependent network with various national authorities and other actors in a 'multilevel procedural labyrinth' (Dąbrowska, this volume).

Of pivotal importance in the cooperation processes, and new in the food safety area, is the identification and resolution of disputes arising from scientific divergence between EFSA and national authorities.[44] In this context, EFSA can best be viewed as a kind of 'watchdog' looking out for potential divergences between itself, national authorities, and other European bodies (Szawlowska 2004). Where EFSA's Advisory Forum discovers such a divergence, the 'conflict clause' laid down in the General Food Law imposes a duty of cooperation on it and on these authorities to try to 'settle' their diverging opinions on a bilateral basis.[45] But if they cannot reach a compromise and 'substantive divergence over scientific issues' persists, they must submit to the Commission a joint document in which the contentious scientific issues are clarified.

This procedure seems to indicate that EFSA should be considered part of the network, and ensures that its views are not automatically imposed on national authorities. Instead, EFSA will act as a point of reference in the Europeanization of science and the development of a common framework for food safety. Interestingly, however, this formal procedure has not yet been invoked in practice, and according to an interviewed EFSA official, it is unlikely that it will ever be used. The drafting of a joint document in cases in which no agreement can be achieved is viewed as particularly critical and problematic as it could undermine the credibility of either party involved in the conflict. This gives the parties strong incentives to come to an agreement outside the written procedure. Two cases of diverging opinions between EFSA and a national authority that had arisen in the past, have therefore been dealt with informally (Vos and Wendler 2006: 116). Hence operation of the conflict clause can best be interpreted as a destabilization mechanism, making it very unattractive for both EFSA and the national authority to go through the formal procedure and write down their disagreements.[46] This seems to induce both parties to reach a mutually satisfactory compromise rather than risking public undermining of their credibility by documenting of disagreement. Ultimately, the 'conflict clause' can therefore be regarded as a non-hierarchical mechanism that advances further discussion between EFSA and national (or other European) authorities or organs and fosters the learning objective of cooperation between these 'lower-level' units. In this way, the conflict clause provisions resemble similar arrangements in another very centralized field which has recently experienced the development of a decentralized network, namely, competition policy (Svetiev, this volume).

These provisions underline the fact that national authorities continue to play a role in risk assessment. In addition to their specific role within the Advisory Forum, they provide scientific data to EFSA under the so-called Scientific Co-operation on Questions Related to Food between Member States ('SCOOP'), which was already set up in 1993[47] and continues to exist under

the General Food Law.[48] In some fields, however, Member States appear rather reluctant to provide such data (Vos and Wendler 2006). Further support to EFSA in the conduct of risk assessment by national authorities occurs through Community Reference Laboratories, which are responsible for coordinating National Reference Laboratories that each Member State is required to nominate for particular fields of food safety regulation.[49] These laboratories are therefore the cornerstone of a variety of European networks of risk assessment institutions, linking them to the Community level and more specifically EFSA. For each of these networks dealing with specific sectors of food safety governance, the relevant Community Reference Laboratory will disseminate information about analytical methods and advances in the technical field, organize comparative testing and conduct training courses for staff from the National Reference Laboratories. It is noteworthy that some fields formerly coordinated by Community Reference Laboratories, and thus by specific national authorities, are now gradually being taken over by EFSA, such as the monitoring of and data collection on campylobacter.[50] Moreover, data collection activities that were formerly conducted in the framework of SCOOP have now been transferred to EFSA, as in the case of aflatoxins (Vos and Wendler 2006: 83).

Individual experts will also play a role in EFSA risk assessments. Like the European Medicines Agency, EFSA intends to use individual experts to carry out (parts of) risk assessments, both internally, with in-house staff at its science department, and externally, with national experts as ad hoc members of working groups of the Scientific Committee and the Scientific Panels to help produce scientific opinions in relevant fields.

4.2.2 THE COMMISSION AND NATIONAL REPRESENTATIVES THROUGH COMITOLOGY

The General Food Law continues to recognize the Commission as a risk manager who elaborates and applies the legal rules set forth in general legislative acts adopted by the Parliament and the Council. The strong reliance on the committee model under the New Approach of the mid-1980s resulted in an 'ideal' situation in which the Scientific Committee on Food gave scientific advice, the Standing Committee on Foodstuffs gave political approval of the risk management measures, and the Advisory Committee of Food gave the socio-economic input by interest groups. Yet, it was already clear that at that time the Commission was no longer enamoured by the Advisory Committee of Food and no longer consulted it.

It was particularly the Commission's interaction with national representatives within the framework of comitology, before the BSE crisis still praised as offering a framework for cooperative and deliberative multilevel policy-making in which all participants engaged in the search for the common good (Joerges and Neyer 1997*b*), which came under fire in the Medina Ortega report that judged it to be obscure, complex, and undemocratic. In the post-BSE era,

comitology structures were changed to shed more light on their practices and to allow the European Parliament more influence. This change was not so much a direct consequence of the BSE crisis, as a response to the more general need to open up comitology. Following that change, comitology became much more visible. Committees are, for instance, now required to adopt their own rules of procedure and follow the Community's policy of open access to their own documentation. Moreover, the Commission is obliged to inform the Parliament of the committee agendas, the draft decisions it sends to the committees, and the voting results, as well as to produce a summary of the meetings and to issue annual reports on committee activities.

As a direct consequence of the BSE crisis, several comitology committees dealing with food were absorbed into one: the Standing Committee on the Food Chain and Animal Health (SCFCAH), with eight different sections. Like EFSA, this refurbished Committee also encounters the problem of coherence and fragmentation that existed in the pre-BSE era. Interestingly, in contrast with the pre-BSE practice of the former Standing Committee on Foodstuffs, where members seemed free to discuss solutions without any ministerial backing and where a formal vote was rarely taken (Joerges and Neyer 1997*b*), today, more than ten years after the outbreak of the BSE crisis, various Commission officials interviewed felt that committee members consult more often with their national ministries and that in certain areas such as GM food or contaminants, some participants tend to come to meetings with clear instructions and/or have clear positions (Vos and Wendler 2006). This small-scale empirical research seems to suggest that in the food safety domain, which in the pre-BSE era was heralded by Joerges and Neyer (1997*b*) as an example of deliberative supranationalism, there is now less deliberation and more bargaining. It appears that meetings of the Standing Committee deliberately start in the morning so as to give participants an opportunity to get feedback from the Member States and allow the Commission to alter its proposal by the evening, thus enhancing the possibility of reaching agreement on the measure. This is perhaps not surprising in view of the highly politicized character of food issues in the BSE aftermath, particularly with regard to GM issues (Dąbrowska, this volume). This analysis however does not contradict Joerges's general view that comitology is key for the coordination of viewpoints between the Commission and the Member States and operates as a conflict of laws rule between the EU and Member State level (Joerges 2007).

Despite the improved mechanisms to ensure transparency, many stakeholders still complain about the obscurity surrounding the refurbished SCFCAH, in particular the problematic access to documents (Vos and Wendler 2006: 129). This is confirmed in the debates on the GM approval procedure where Member States have clearly voiced their discontent with the transparency of the procedure and the operation of the Standing Committee.[51] Whilst stakeholders would like to see meetings of the Committee opened up further,

the Commission insists on holding them behind closed doors, thus 'protecting' national representatives from the eyes of the public and their Member States, in hopes of allowing a freer, more deliberative discussion. Here a similar argument to that presented earlier concerning the closure of meetings of risk assessors within EFSA could be developed in relation to the transparency of activities of comitology in risk management, thus extending the theatre metaphor. It is noteworthy in this regard that on 30 November 2007, DG SANCO convened a joint meeting of the Stakeholder Dialogue Group and Advisory Group on the Food Chain, Animal Health and Plant Health in the presence of chairs of the different sections of the Standing Committee. Herewith the Commission may have taken a first step towards creating a public sphere on comitology where persons can ventilate concerns and exchange ideas.

Last but not least, there is a special procedure to settle conflicts about free trade or non-compliance with the General Food Law between the various Member States, the so called, 'mediation procedure'. This procedure falls outside of the Standing Committee and is especially designed for conflicts between Member States. It can thus be viewed as the risk management counterpart of the 'conflict clause' established for scientific divergences described above. Here the Commission is assigned the role of mediator to resolve the conflict, and it may ask EFSA for advice.[52] This procedure indicates that the Community legislator did not want to burden the SCFCAH with conflicts between a small number of Member States, although the latter has been assigned broader tasks that formally lay outside of the comitology procedure and may, at the request of the Commission or one of its members, examine 'any issue' relating to the food directives/regulations, which foresee a comitology procedure.[53] Like the conflict clause in relation to scientific divergences, the mediation procedure might also operate as a potential destabilization mechanism, forcing Member States try to resolve this issue informally and on a bilateral basis. On the other hand, it may be that Member States prefer to discuss their conflicts within the broader setting of the Standing Committee. Unfortunately, we have no empirical evidence on this matter and can merely signal that there is no sign that this procedure has operated in practice.

4.2.3 OTHER ACTORS: STAKEHOLDERS AND THE GENERAL PUBLIC

In order to regain trust in the aftermath of the BSE scare, Community institutions promised to take stakeholders and the public more seriously. Generally participation of stakeholders in risk management is much more accepted than in risk assessment. Up to 2005, consultation in the risk management phase occurred on a case by case basis, depending on which organizations had a specific interest in a particular topic and on the individual Commission officials involved. Soon after the introduction of the General Food Law, however, stakeholders demanded a more structured and institutionalized approach to

consultation. Hence in 2004, the Commisison set up the Advisory Group on the Food Chain and Animal Health, replacing the former Advisory Committee on Foodstuffs. According to its founding decision, the Advisory Group comprises a maximum of forty-five members from EU-level organizations representing stakeholders' interests.[54] It must be consulted by the Commission on food safety issues. In principle, the Commission convenes two meetings per year, but it may also organize additional meetings where necessary. Within this forum, the representatives of consumers, industry, retailers, and farmers' organizations are consulted and informed by the Commission, which may also invite external experts and observers to attend. The Group adopts its own rules of procedure on a proposal from the Commission, which supplies the secretariat. The Commission is also responsible for making public the draft agenda and minutes of the Group in an attempt to ensure a high level of transparency for its work.

As regards the risk assessment phase, it seems generally accepted that participation is reduced to data and information provision and is not applied to the actual science making (Vos and Wendler 2006). The General Food Law instructs EFSA to ensure effective contacts with consumer representatives, producer representatives, processors, and any other interested parties. EFSA too has therefore institutionalized stakeholder participation, by means of its Consultative Stakeholder Platform set up in 2005. The latter seems above all to be a response to stakeholders' demands for an opportunity to discuss scientific matters with EFSA. EFSA tries to reach its stakeholders directly by producing a growing number of *ad hoc* publications dealing with scientific aspects of food and feed. Moreover, its Scientific Committee regularly issues guidelines on various topics such as the format of EFSA's scientific opinions and procedures to improve transparency.[55]

The general public has no specific role but is allowed to comment on various documents through online consultation procedures organized by both EFSA and the Commission.[56]

In this way, we can say that both risk assessment and management relating to EU food safety takes place in a decentralized system of governance, with an important role reserved for national authorities, representatives, and external experts. But stakeholders organized at the European level also seem to have gained an increasing role in this system.

4.3 Reporting, monitoring, and peer review

Although one would have expected to find, after the introduction of the General Food Law, a general annual report on the operation of the 'Farm to Fork' approach to food safety, in practice the Commission still issues *ad hoc* reports on specific legislation, as before the BSE crisis. Significantly, however, the Commission's Food and Veterinary Office reports annually on Member States' compliance with EU food and feed safety requirements. In so doing, the

Office aims to 'contribute to the development of European Community policy in the food safety, animal health and welfare and plant health sectors'.[57] Interestingly, Eurostat reports the statistics on the integrated approach and has issued a pocket handbook 'Food: From Farm to Fork', which aims to 'shadow the approach taken by the European Commission on Food Safety Policy' (Eurostat 2006). The Commission touches more generally upon food safety policy in the context of its consumer and health policy programmes (European Commission 2005*b*). In its review of the consumer strategy for 2002–6, the food safety domain is also briefly addressed, explaining plans to set up the Advisory Group on the Food Chain and Animal and Plant Health.[58]

A more structured approach is followed as regards the monitoring procedure for serious, direct or indirect, risks to human health, the Rapid Alert System for Food and Feed (RASFF). In its annual reports, the Commission provides information about the functioning of this monitoring network, including the number and origin of notifications, the countries involved, the products, and the risks identified.[59] At a general level, it reports on the working of committees, as required by the Comitology decision (European Commission 2006*a*).

The Rapid Alert System itself provides a tool for the exchange of information between food and feed central competent authorities in the Member States in cases where a risk to human health has been identified and measures have been taken, such as recalling or banning of the products concerned. This monitoring system quickly alerts all relevant actors of, for example, the spread of virus diseases or the presence of contaminated food on the market. It was created in 1979 as a network of contact points in the Member States, based on the installation of a 'red' telephone (a direct line with the Food Unit of DG III) (Deboyser 1989: 223–30). The General Food Law seeks to improve this system and opens it up to applicant countries, third countries, or international organizations on the basis of special agreements. Building on this early warning mechanism, it empowers the Commission to take emergency measures regarding imports from third countries.[60] To this end, the Commission is obliged to draw up a general plan for crisis management in close cooperation with EFSA and the Member States.[61] The General Food Law moreover requires the Commission to report on the experience acquired from working with the Rapid Alert system and emergency management. The Rapid Alert system may thus also be regarded as a recursive learning system. Analysis of the annual reports and the regulatory practice provides some examples suggesting that this system operates as a mechanism for reviewing, revising, supplementing, and introducing new EU food safety legislation. For example, where the 2006 Annual Report signals that as in previous years mycotoxins are the hazard categories with the highest number of notifications, we observe an intensification of legislative measures, improving methods of sampling and analysis for their official control,[62] setting special conditions on the import of certain

foods contaminated with aflatoxins from 'problem countries' in 2005 and 2006,[63] and amending maximum levels for certain contaminants in food, consolidating the existing legislation in this field.[64] In addition, the Commission asked EFSA to review scientific studies on ochratoxin A—subject of many notifications under the Rapid Alert—conducted by the former Scientific Committee on Food. As EFSA recommended reducing ochratoxin-contamination of foods and establishing monitoring programmes to describe known sources of exposure and identify potential emerging sources,[65] the Commission is currently considering reviewing its maximum levels set for this mycotoxin.

Another example concerns the problem with food packaging inks (isopropylthioxanthone—ITX), which in 2005 was detected in baby milk, other milk products, and juices packaged in beverage cartons, and was notified under the Rapid Alert System. In response, industry committed itself to cease using this substance in milk and juice packaging. 'To avoid similar contamination incidents',[66] the Commission reacted by adopting in 2006 compulsory provisions on good manufacturing practice for the use of such inks.[67]

The Rapid Alert System thus seems an important part of a Community-wide, regular, scientific-based control mechanism to ensure the safety of food and feed. By establishing the obligation to immediately notify irregularities on the national market, it creates a mutual information exchange between Member States and the European Commission as well as between the states themselves. Through the Rapid Alert System the Community and the Member States can learn where Community legislation needs to be adapted, supplemented, or introduced.

Other monitoring systems that have been established concern the official controls performed by the Commission to verify compliance with its feed and food law, animal health, and welfare rules,[68] and the specific monitoring rules on zoonoses, including salmonella and campylobacter.[69] As regards the latter, the Community set up a 'Community Reporting System for Food-borne Outbreaks under Directive 2003/99/EC', a Web-based system where national reporters enter data into a table and a text form. The data collected is managed and stored by EFSA and analysed by the Danish Institute for Food and Veterinary Research, its designated Zoonoses Collaboration Centre, which prepares a draft summary report. Both EFSA and the European Centre for Disease Control (ECDC) comment on the draft report and should agree on the final wording. The Community Summary report is then validated by Member States and published by EFSA.[70] This reporting system is likewise an important recursive learning system since, alongside the Rapid Alert System, it informs the Community authorities of potential problems and may provide the basis for legislative initiatives.[71]

Also important in this regard are the reporting and peer review mechanisms set up by the Commission through the Impact Assessment Board. In line with

the Commission's general strategy for better regulation, each proposal for a new piece of legislation, including in the food safety domain,[72] must include an impact assessment report (European Commission 2002*a*). In 2006, the Commission created an Impact Assessment Board to ensure more consistent and better quality impact assessments.[73] This Board comprises officials from departments with the most direct expertise in the three broad dimensions—economic, social, and environmental—of integrated impact assessment and nominated *ad personam* by the President. In its 2007 activity report, the Board stated that it had screened 102 impact assessments; four assessments concerned food and feed regulation.[74] This screening mechanism seems to be an important tool for monitoring individual legislative initiatives proposed by the different Commission departments and for recursive learning through peer review, as the Board gives detailed recommendations for improvements to the individual departments. Moreover, on the basis of its systematic screening of 102 impact assessments, the Board may obtain a broader insight into the problems that occur at the micro level of the individual impact assessments and thus contribute to recursive learning and redefining of objectives, for example to further develop impact assessment methodology. In its 2007 report, for example, the Board points to the need for greater consistency of analysis across the key steps of impact assessment and a clearer definition of problems, objectives, and options.[75]

Eurobarometer opinion polls can also be used as monitoring instruments. In view of the loss of public trust in the Community's science-based decision-making, both the Commission and EFSA commissioned in 2005 a special Eurobarometer survey to assess how Europeans perceive risk, focusing in particular on food safety, and how they perceive EU authorities and their legislative acts. In their view, such a survey (which appeared in 2006[76]) could contribute to the development of policy initiatives and communication in relation to risk issues.

In June 2006, Director-General Madelin set up a Peer Review Group to assist DG SANCO in reviewing its experience of stakeholder involvement and to identify best practices and improvements to the existing consultation system. In February 2007, this group came up with 10 recommendations, namely, to establish a stakeholder dialogue group, improve transparency through better 'forward planning', give more and better feedback, engage the 'un-engaged' and pay attention to the local level, to improve data quality, define representativeness, be aware of stakeholder asymmetries, be more flexible and allow for a longer consultation timeframe, improve coordination between DGs, and enhance the transparency of comitology.[77] As an outcome, a more permanent body has been created, the Stakeholder Dialogue Group, which advises the Director-General of DG SANCO on procedural issues concerning stakeholder participation rather than about the content of individual initiatives.

EFSA issues annual activity reports, as required by the General Food Law, and adopts work programmes to plan its future activities. Given its centrality to food safety regulation, it is important that EFSA is subject to an effective system of supervision and control,[78] whereby regulatory mandates can constantly be reviewed (Everson 2005). The General Food Law thus makes EFSA's Executive Director responsible for budgetary matters and performance monitoring, while the Management Board is its steering body and responsible for appointing the Executive Director. EFSA's budget is controlled by the Council and the Parliament, whilst the latter has also important powers of signing off on the implementation of the budget by EFSA's Executive Director, which it appears willing to use. EFSA is also subject to legal control concerning disputes for compensation for non-contractual liability of its staff.[79] As laid down in the General Food Law, EFSA's activities must be reviewed every six years. EFSA underwent its first external evaluation in December 2005, which was carried out by two external consultancies specialized in technology and agro-food. This might be considered a form of peer review. This evaluation reported that in general EFSA's structures and organization were functioning satisfactorily and that its scientific work and added value were well received, whilst it had established good relations with stakeholders. Points of criticism concerned EFSA's workload, the need for additional structures and working procedures, its move to Parma, and the insufficient participation of Member States in networking with the Authority.[80] Most of these points, except the one concerning the move to Parma, have been addressed by EFSA.

More specifically relating to EFSA's detailed scientific views, the conflict clause, as a destabilization mechanism, may also work in theory as a kind of peer review system, offering a platform whereby national authorities could challenge the Authority's views in a non-hierarchical setting. In this context two remarks are in order. First, as regards the non-hierarchical setting, in all likelihood the relations of EFSA with some national authorities will in practice be more hierarchical than with others. This concerns particularly the authorities established in the new Member States who do not yet have much expertise and obtained considerable help from EFSA in their creation. Moreover, smaller Member States may not have expertise in all fields covered by EFSA, whilst in some fields it may become difficult to find national experts who are not involved in the work for the Authority, as is for example the case for the Netherlands. This confirms the earlier observation that EFSA operates in some fields as a 'super-agency'. Second, the conflict clause will not help in legal cases where the opinion of EFSA is at stake. In the *Pfizer* case,[81] for example, the judges who were asked to assess an opinion of a European scientific committee had real difficulties in understanding the scientific issue at stake. They nonetheless had to rule and got stuck in the dilemma of being forced to pronounce on the scientific merits, which were clearly beyond their competence (van Asselt and Vos 2006). Here two alternatives could be envisaged: such cases

could undergo a kind of peer review outside of the court system, or courts would operate a peer review mechanism, instead of 'second-guessing' the science themselves.

4.4 Recursive revision of objectives in the light of results

There are several examples of recursive learning on food safety policy. For example, recursive revision of legislation is provided for by certain acts, which require reports on the implementation of a specific directive or regulation and reflection on whether any amendments are necessary.[82] In addition, we noted already that the Rapid Alert System may be considered as a form of recursive learning, while the annual reports issued by the Food and Veterinary Office also aim to contribute to the EU's policy-making on food safety. Moreover, we could consider the General Food Law itself as an expression of recursive learning in this area, based on the analysis and revisions undertaken by the Commission in its Green and White Papers, which were in turn a response to the critiques expressed in the Medina Ortega report on the handling of BSE. Instruments such as the Eurobarometer survey are also used to learn about citizens' risk perception and trust.

Clearly EFSA's annual reports and its review serve as learning instruments. Furthermore, the production of guidance documents by EFSA to clarify its approach to risk assessment as regards specific foods may be considered as a form of recursive learning. These documents are widely used by industry and others involved in food production as well as stakeholders and other bodies concerned with food and feed safety. When developing guidance documents, EFSA often holds meetings and public consultations to dialogue with stakeholders and others. Of high interest for recursive learning is EFSA's increasing use of the internet. For example, through its EFSAnet, EFSA tries to build up communities of internal and external members of the scientific panels to share documents. Currently, EFSA's Extranet is primarily intended to share documents and other information with members of the Advisory Forum. In this way, the Extranet could be considered part of EFSA's 'backstage' activities. Whether such an exchange of documents between the users will result in recursive learning remains to be seen. It might be that if EFSA indeed opens up parts of this Extranet to stakeholders, as it has announced plans to do,[83] this could operate as a public sphere for exchanging views and documents, thereby compensating for the discussions that take place in closed 'sites'.

One task of EFSA is particular of importance for recursive learning: the development of a common approach to risk assessment. The need for more harmonized approaches was already identified long before the outbreak of the BSE crisis, as in many cases, the relevant authorities of each Member State applied their own methodologies in carrying out risk assessments, making it difficult to integrate and compare the results.[84] EFSA now aims to

develop a common approach to risk assessment in all Member States and hence, to strengthen its position as a point of reference in the Europeanization of risk assessment.[85] Of interest to our examination of the emergence of a new architecture for food safety governance are EFSA's plans to use many soft mechanisms in developing a strategy for cooperation and networking with Member States and establishing a common approach to risk assessment, such as creating a European database for exchanging and collecting scientific data and information; sharing best risk assessment practices; offering a programme of risk assessment courses, involving experts from Member States; building harmonized methodologies of risk assessment; and promoting coherence in risk communication through practices like early warning and pre-notification of press releases.[86] Importantly, in this strategy, EFSA devotes considerable attention to operating a recursive process of learning from best practices at national level.

Within the comitology framework, too, we may observe a kind of learning process. For example, Member States want the scientific concerns they raise within the GM authorization procedure to be taken more seriously by EFSA. At the same time they have called for revision of the comitology procedure, so as to allow for greater transparency, ensure that the Commission cannot authorize a GM product if a majority of Member States opposes it, while also demanding that the Commission justify its approvals of GMOs by explaining why it has disregarded issues raised by Member States. In meeting these critiques, EFSA will need to respond better to Member States concerns.[87]

Importantly, both stakeholder fora created by the Commission and the EFSA seem to operate as recursive learning processes. EFSA's Stakeholder Platform was created to exchange information and discuss science with them. One EFSA official interviewed viewed it as a two-way learning process, in which the Authority would be able to obtain information from the stakeholders and also learn how it can serve them better (Vos and Wendler 2006). This view is also shared by most of the stakeholders involved in the Platform. Whilst the Commission's Advisory Group has a similar potential, in practice it is experienced by some stakeholders as more of a one-sided information exercise by the Commission to the stakeholders rather than a mutual learning process (Wendler and Vos 2007).

Taken together, these 'bits and pieces' make it clear that there is much learning potential. For reasons of transparency and coherence it would be preferable to have a single general report on EU food safety policy.

5 Conclusion

This analysis of the food safety domain reveals that it contains a number of key characteristics of experimentalist governance. In this highly centralized

domain, which has been a subject of EU intervention since the 1960s, we may observe a new trend towards greater decentralization. This is due particularly to the EU's desire to address the political concerns of Member States and the misgivings raised by the BSE crisis, by making its decision-making more credible, more trustworthy, more publicly acceptable, and generally safer. The response to the BSE crisis and distrust of the Community institutions and decision making has been inclusion of new actors, foremost EFSA, national authorities, and stakeholders, at both a scientific and political level. As in other domains covered in this volume, we thus observe in the food safety domain increasing resort to 'soft' deliberative mechanisms, such as networking, exchange of information and knowledge, reporting, monitoring, and peer review, which in turn constitute potentials for recursive learning.

At a scientific level, we thus observe a systematic inclusion of 'lower-level' actors in food safety regulation: EFSA, national food safety authorities, and stakeholders. This is also the reason for EFSA's design as a networked agency that is strongly linked to national counterparts. Although some doubts have arisen in the literature about the added value of EU agencies (Schout 1999), it is precisely this carefully designed architecture of networking between the national and European levels, incorporating national capacities into European science making, which I would consider the main added value of EFSA. Open-ended goals laid down in the General Food Law, in particular the instruction to create networks with similar organizations and stakeholders working on food safety issues have made EFSA develop various novel initiatives to link up more closely with these actors, such as the network of National Focal Points which keeps it informed of ongoing activities at Member State level. Above all, national authorities are included in EFSA itself, through its Advisory Forum, which can be regarded as a platform for exchange of information and knowledge between Member States.

EFSA's answer to some Member States' antagonistic behaviour towards science making at the European level, in particular regarding GMOs and British beef, has therefore been to include national authorities even more in its activities. Although several mechanisms, such as the conflict clause, have been established to ensure a non-hierarchical relation between EFSA and the national authorities, it is at the same time apparent that the former is gaining an ever more prominent role, taking on tasks that were previously carried out by the latter.

At a political level, we note that comitology, the oldest form of new governance (Scott and Trubek 2002), operative in this field since the 1960s, already addressed the need to depart from the strict Community method by organizing forums for deliberation and problem-solving between the Commission and the Member States. Post-BSE, this older structure—refurbished as the Standing Committee on the Food Chain and Animal Health—still offers recursive learning potential, as the debates on the GM authorization procedures

demonstrate. Yet, the increasing scientification of food safety regulation and the Europeanization of science seem to give Member States lesser influence within the context of comitology than in the pre-BSE era. A first example of this trend seems to be the intensification of the relation between the Commission and EFSA at the expense of that between the Commission and national representatives within the Standing Committee.

Stakeholders in particular have gained importance in both science and policymaking in the aftermath of BSE. Although they are not entirely new actors in the field (the Commission set already up a committee of stakeholder representatives in the 1970s), the EU's eagerness to regain public trust has led to various initiatives for greater stakeholder participation, varying from the possibility of commenting on specific draft proposals to the establishment of institutionalized fora for deliberation with EFSA and the Commission. The latter may be regarded as compensating for the closed science and policy making within EFSA's Scientific Committee and Panels and comitology. Such initiatives could form as a first step towards the creation of public spheres in which different viewpoints of stakeholders, the public, risk assessors, and risk managers are exchanged and discussed.

Taken together, the various elements discussed in this Chapter seem to indicate the emergence of a new architecture of experimentalist governance for food safety governance. In this architecture, however, EFSA seems likely to develop into a true *primus* inter pares, at the *apex* of interdependent and deliberative networks of national authorities, while the latter concentrate on particular fields of risk assessments (e.g. salmonella, campylobacter) and will ultimately come to operate as specialized branches of the European Authority.

Notes

1. See for excellent recent accounts of the food sector: MacMaoláin (2007) and Alemanno (2007).
2. Lord Cockfield, Speech of 22 February 1988, delivered in London to the Federation of British Electrotechnical and Allied Manufacturers, quoted in McGee and Weatherill (1990: 583). See also the Council's 'General Programme for the elimination of technical barriers to trade that result from disparities between the provisions laid down by law, regulation or administrative action in the Member States', adopted on 28 May 1969, OJ C 76/1 (1969).
3. Council Directive 73/241/EEC relating to cocoa and chocolate products intended for human consumption, OJ L 228/23 (1973), as amended by Directive 2000/36/EC, OJ L 197/19 (2000).
4. For example, the negotiations on the Directive on fruit jams, jellies, marmalades, and chestnut puree took fourteen years. See Welch (1983–4: 57).
5. Case 120/78, Rewe-Zentral AG *v.* Bundesmonopolverwaltung für Branntwein, ECR (1979: 649).

6. See the earlier Commission Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*'Cassis de Dijon'*), OJ C 256/2 (1980). See Barents (1981: 296–9); Gormley (1981: 454–9); Welch (1983–4: 62ff).
7. See, equally, European Commission (1989).
8. Commission Decision 96/239/EC on emergency measures to protect against bovine spongiform encephalopathy, OJ L 78/47 (1996).
9. OJ C 261/132 (1996). See also European Parliament Resolution on the Commission's information policy on BSE since 1988 and the measures it has taken to ensure compliance with the export ban and to eradicate the disease, OJ C 261/75 (1996).
10. See *inter alia* Joerges (2002).
11. These Committees have now been brought under the responsibility of the European Food Safety Authority.
12. Commission Decision 97/579/EC, OJ L 237/18 (1997).
13. For example, 2213th Council meeting,—Consumer Affairs, Brussels, 8 November 1999.
14. A4-0009/98, EP Resolution on the Commission Green Paper on the general principles of food law in the European Union (COM(97)0176-C4-0213/97).
15. Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (*OJ* 2002, L31/1), as amended by Regulation (EC) No 1642/2003 of the European Parliament and of the Council of 22 July 2003 (*OJ* 2003, L 245/4).
16. See for an analysis of its creation, Buonnano (2006).
17. See for an analysis Scott (2007).
18. Article 1, Regulation 178/2002.
19. Article 14, Regulation 178/2002.
20. Article 8, Regulation 178/2002.
21. The General Food Law herewith establishes a link with the general definition of risk analysis of international bodies, foremost the WHO and the Codex Alimentarius, the most relevant bodies for food safety regulation at the international level. *Procedural Manual of the Codex Alimentarius Commission—Twelfth Edition*; see: <http://www.fao.org/DOCREP/005/Y2200E/y2200e00.htm>; <http://www.fao.org/docrep/W5975E/w5975e07.htm>; <http://www.who.int/foodsafety/publications/micro/riskanalysis_definitions/en/>.
22. Article 3(10); Article 6, Regulation 178/2002.
23. Article 17, Regulation 178/2002.
24. See, for example, speech of former Commissioner D. Byrne, 'Food safety a top priority in the EU', Informal Agricultural Council, Biarritz, 5 September 2000, <http://europa.eu.int/comm/dgs/health_consumer/library/speeches/speech54_en.html>.
25. Article 23, Regulation 178/2002.
26. For an analysis of the FDA, see for example, Hawthorne (2005); Hilts (2003).
27. Interview with EFSA official, June 2005.
28. For more detail, see Vos and Wendler (2006).

29. Article 49, Regulation 178/2002. The study of how this works in practice falls outside of the scope of this contribution.
30. Article 22 (2); Article 23(a), Regulation 178/2002.
31. See for example Article 7, Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC, OJ L 338/4 (2004).
32. Article 38, Regulation 178/2002.
33. For more detail, see Vos and Wendler (2006: 102–5). The General Food Law makes explicit reference to scientific opinions, stating that conclusions of scientific panel opinions should 'in no account' be kept confidential, Article 39(3), Regulation 178/2002.
34. See for example the decision of the Management Board concerning implementing measures of transparency and confidentiality requirements, MB 10.03.2005—10.
35. See in general Bal et al. (2002: 315).
36. MB 16.09.2003—adopted; Decision concerning access to documents, Article 7(i).
37. See in the context of the Gezondheidsraad, Bal et al. (2002: 318).
38. Contrary to other European agencies, EFSA is the only agency that has a Management Board without formal representatives of Member States. EFSA's Management Board is thus composed of 14 independent experts and one representative of the Commission, Article 25(1). The Members are appointed by the Council on the basis of a list of experts drawn up by the Commission, see Council Decision 2002/179/EC of 15 July 2002 appointing the members of the Management Board of the European Food Safety Authority, OJ C179/9 (2002).
39. Article 27(4), Regulation 178/2002.
40. Article 36, Regulation 178/2002.
41. As endorsed by the Management Board on 19 December 2006, MB 19.12.2006—6.
42. Article 27(4), Regulation 178/2002; Vos and Wendler (2006).
43. Articles 5 and 6, Regulation (Ec) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 268/1 (2003).
44. Article 30, Regulation 178/2002.
45. Article 30(3–4), Regulation 178/2002.
46. The fact that recently the Commission tried to force EFSA to clarify a divergency between the Opinion of EFSA and the French Authority AFSSA in relation to the risk of TSE in ovine and caprine animals by invoking the conflict clause (Request of 20 April 2007 from the European Commission on the basis of Regulation (EC) 178/2002, Article 30 (4)—Clarification on the divergence over scientific issues with the Agence Française de Sécurité Sanitaire des Aliments) is highly interesting. EFSA however replied that in its view there was no such divergency attributing difference to the fact that AFSSA's opinion touched also upon risk management issues (EFSA reply of 22 June 2007 to the European Commission's request for clarification on the basis of Regulation (EC) 178/2002, Article 30 (4)).
47. Council Directive 93/5/EEC of 25 February 1993 on assistance to the Commission and cooperation by the Member States in the scientific examination of questions relating to food, OJ L 52/18 (1993).
48. See for example the report on the occurrence data of Fusarium toxins in food of April 2003 <http://ec.europa.eu/comm/food/fs/scoop/task3210.pdf>.

49. Regulation (EC) No 882/2004 of 29 April 2004 of the European Parliament and the Council, on official controls performed to ensure the verification of compliance with feed and food law, animal health, and animal welfare rules, OJ 2004 L165/1.
50. Regulation (EC) No 2160/2003 of the European Parliament and of the Council of 17 November 2003 on the control of salmonella and other specified food-borne zoonotic agents, OJ L 325/1 (2003). Directive 2003/99/EC of the European Parliament and of the Council of 17 November 2003 on the monitoring of zoonoses and zoonotic agents, amending Council Decision 90/424/EEC and repealing Council Directive 92/117/EEC, OJ L 325/31 (2003). Before the establishment of EFSA, the monitoring for zoonoses was for a long time carried out by the German *Bundesinstitut für Veterinärmedizin* and, afterwards the *German Institut für Risikobewertung*.
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53. Article 59, Regulation 178/2002.
54. Article 3(1), Commission Decision 2004/613/EC of 6 August 2004 concerning the creation of an advisory group on the food chain and animal and plant health, OJ L275/17 (2004).
55. See: http://www.efsa.europa.eu/en/science/sc_commitee/sc_documents.html>.
56. See for the consultations organized by the Commission: http://ec.europa.eu/food/consultations/index_en.htm, and by EFSA: http://www.efsa.europa.eu/EFSA/PublicConsultations/efsa_locale-1178620753812_OpenConsultations.htm.
57. See the annual reports by the Food and Veterinary Office of DG SANCO, http://ec.europa.eu/food/fvo/annualreports/index_en.htm.
58. Commission Staff Working Document, Review of Consumer Policy Strategy 2002–6, 'accompanying document' to the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee EU, Consumer Policy Strategy 2007–13, SEC(2007) 321.
59. See, for example, for 2006: <http://ec.europa.eu/food/food/rapidalert/report2006_en.pdf>.
60. Article 53, Regulation 178/2002.
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62. Commission Regulation (EC) No 401/2006 of 23 February 2006 laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs, OJ L170/12 (2006).
63. Commission Decision of 12 July 2006 on special conditions governing certain foodstuffs imported from certain third countries due to contamination risks of these products by aflatoxins, OJ L 199/21 (2006).
64. Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs, OJ L 364/5 (2006).
65. See: <http://www.efsa.europa.eu/EFSA/Scientific_Opinion/contam_op_ej365_ochratoxin_a_food_en1,0.pdf>.
66. Rapid Alert System for Food and Feed, Annual Report 2006, p. 36.
67. Commission Regulation (EC) No 2023/2006 of 22 December 2006 on good manufacturing practice for materials and articles intended to come into contact with food, OJ L 384/75 (2006).

68. Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health, and animal welfare rules, OJ L191/1 (2004).
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73. See: <http://ec.europa.eu/governance/impact/iab_en.htm>.
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82. For example, Regulation 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant origin and amending Council Directive 91/414, OJ L 70/1 (2005).
83. EFSA Extranet policy paper, 19 June 2006.
84. See, the First Report on the Harmonization of Risk Assessment Procedures, Adopted by the Scientific Steering Committee at its meeting of 26–27 October 2000; the Second Report on the Harmonization of Risk Assessment Procedures, Adopted by the Scientific Steering Committee at its meeting of 10–11 April 2003, 4 and 8.
85. For more detail, see Vos and Wendler (2006).
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8

EU Governance of GMOs: Political Struggles and Experimentalist Solutions?*

Patrycja Dąbrowska

1 Introduction

Regulation of genetically modified organisms (GMOs) has long remained one of the most challenging policy domains in the EU. This chapter examines the complexities of this controversial sector, arguing that its governance has been transformed into a novel regime embodying numerous experimentalist solutions typical of the new EU architecture more generally (Sabel and Zeitlin 2008, this volume). These experimentalist features, which are often overlooked by current scholarship, can be identified both at the level of rule making and rule application.

At the same time, the adequacy and legitimacy of EU governance of GMOs may be questioned if comitology decision-making processes on market approval of products are accompanied by political bargaining rather than deliberative modes of problem solving. The limited incidence of deliberation in these committees is linked not only to political differences over risk issues between Member States, but also to defects in the comitology procedure and a certain reluctance of EU and national authorities to make use of the available means of proactive conciliation.

But since the experience of committee voting on GMOs demonstrates that authoritative, centralized decision making does not produce legitimate policy outcomes, but seems instead to have intensified political conflict, this chapter argues that the best way to improve the effectiveness of the

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overall governance process in this area leads through the enhancement of deliberative practices. The improvement of deliberation can be attained through available experimental tools such as mutual learning, revisability, informal cooperation, and administrative and scientific networking. Simultaneously, the new GMO regime offers important routes for greater accountability through ongoing review of policy objectives, proceduralization, and transparency.

2 Initial harmonization and background

The first attempt at harmonizing the biotechnology sector was undertaken by the European Community in the early 1990s. The initial approximation of national rules took the form of a horizontal directive, setting standards for the deliberate release into the environment of genetically modified organisms ('Old DRE Directive').[1] Further Europeanization of the GMO field was completed in 1997 by the regulation on novel foods and novel food ingredients ('Novel Food Regulation') applicable to the marketing of GM foodstuffs.[2] These two acts formed the core of the old Community regime on gene technology and harmonized authorization procedures prior to the commercialization of transgenic products (MacKenzie and Francescon 2001).

The principal goal of both acts was to ensure that no GMO would be placed on the Community market without prior written consent, following an appropriate environmental risk assessment. This system was based on mutual recognition of national marketing approval procedures, supported by comitology decision making (Christoforou 2004: 640).

Unfortunately, this early regulatory framework soon attracted criticism, and by the end of the 1990s increasingly appeared to require urgent reform. The rapid development of genetic engineering and growing demand for progressively sophisticated regulatory solutions which could respond to challenges posed by modern technologies led the provisions of the Old DRE Directive and the Novel Food Regulation to become outdated. The arguments about the drawbacks of Community legislation and disagreements over the use of transgenic products heralded the emerging GMO regulatory crisis which became visible during the authorization of GM Bt-176 maize in 1996 when all Member States declared their strong opposition but the Commission pushed ahead against the will of fourteen out of fifteen states voting in the comitology committee (Hervey 2001: 322; Dąbrowska 2006).

Consequently, the approval of Bt-maize opened a Pandora's Box of regulatory inadequacies concerning biotechnology and became a clear manifestation of the GMO crisis in the EU. Firstly, the comitology system did not function satisfactorily in approvals of biotechnology products (cf. Abels 2002: 8–9), although it had been promoted by scholars such as Joerges and Neyer (1997*b*: 273)

as an excellent method of deliberative problem solving, providing an efficient means of social regulation and constituting a special way of legitimizing Community policy. The key problem in the approval of GMOs under the old regime was a result of the specific voting rules in the Council under the Old Comitology Decision,[3] under which a qualified majority of Member States was needed for approval of the Commission's proposal but unanimity was required for its rejection. Hence, the applicable procedure (the old *filet* variant; Vos 1999*b*) provided no mechanism for the inclusion of the views of almost all Member States (Toeller and Hofmann 2000: 36, 42). Thus, it seems that in the case of Bt-176 maize the inadequacy of this system was primarily the result of the specific functioning of the old comitology voting rules, and not a problem intrinsic to comitology *per se*. Later cases prompted the argument that the problem was also a consequence of the substantive political controversies surrounding the use of transgenic products, which made rational deliberation and normative reasoning in the committees profoundly challenging (see below).

Secondly, the approval of Bt-176 maize showed that the Community regime provided no possibility for taking into account the opinions and concerns of the European public, which cast further doubt on the democratic legitimacy of its authorization decisions.

Thirdly, the positive opinions issued by three Scientific Committees involved failed to remedy the situation, because the Commission's scientific expertise lacked the necessary credibility following the alleged malfunctioning of such committees during the BSE saga (Vos 2000*a*: 227; this volume; Krapohl 2004: 189).

Moreover, alongside these problems, rapid technological progress exacerbated the inadequacy of the EU's regulatory framework, which appeared increasingly archaic, especially in view of the growing controversies over the commercialization of GMOs and the intensifying need for the improvement of safety conditions in marketing transgenic food (Douma and Matthee 1999: 156; Vogel 2002). Thus by the end of the 1990s, the EU lacked a comprehensive legal framework which could ensure a high level of protection in this field (European Commission 1996: 10–11; von Schomberg 1998).

It appeared that the old regulatory system was not able to respond to challenges posed by modern biotechnology. After the crisis over the approval of Bt-176 maize, Member States became increasingly reluctant to authorize *any* new GMO product, invoking safety reasons and public concerns. This reluctance reached its apogee during the Environmental Council in June 1999 when Member States declared a *de facto* moratorium on GMO approvals (Council of the European Union 1999: 14; 2001: 5; Sheridan 2001).

The moratorium lasted for over five years and caused understandable international tension because of its potential incompatibility with World Trade Organization (WTO) rules. Finally, in May 2003, the United States, Canada,

and Argentina, requested the establishment of a WTO panel to rule on the matter. The WTO Panel's report confirmed, *inter alia*, that the European Communities 'acted inconsistently with its obligations under the SPS Agreement' (Article 8 and Annex C(1)(a)) by applying the *de facto* moratorium and by delaying procedural approval steps for twenty-one products in the pipeline. The national safeguard measures were also found unlawful (Joerges 2006; Gruszczynski 2006).

The claim at the WTO against the EU's biotechnology policy introduced a new element in the political reality influencing European internal strategy (cf. de Búrca and Scott 2000). For example, after the case at the WTO had started, the Commission denied in principle the existence of the moratorium by arguing that delays in approvals and the extensive duration of procedures were caused by the need for a comprehensive risk assessment of products.

3 GMO politics and the initial definition of policy objectives

The GMO crisis of the 1990s triggered the need for new solutions in the EU. At the same time, the political tensions between national authorities surrounding the use of transgenic products, the failure of the Community institutional structure to provide for a resolution of conflicts, the WTO case, and the opposition of the public in the Member States to GMOs prompted a strong belief that the new regulatory regime required more centralized hierarchical decision making based on authoritative scientific opinions, and the expansion of total harmonization based on the Community Method to regulate risk assessment, traceability, labelling, and all aspects of GMO marketing.

This standpoint was shared by most of the Commission (GMO policy falls under the remit of many DGs, most prominently Health and Consumer Protection and Environment) and the Member States in the Council (Council of the European Union 2000, 2002*a*), the institutions primarily responsible for the definition of objectives in the GMO field at the time. Traces of this initial policy approach can also be found in the White Paper on Food Safety (European Commission 1999*b*), and in the explanatory memoranda for the new and currently applicable GMO Directive of 2001 ('DRE Directive') and GMO Regulation of 2003 ('GMFF Regulation').[4]

A similar view has been advanced by many writers on GMO policy in the EU/international relations literature (e.g. Pollack and Shaffer 2005*a*; Poli 2004: 18ff; Brosset 2004: 555).[5] These authors claim that highly politicized issues such as biotechnology, which involve a clash of fundamental value preferences between (and within) Member States, cannot be resolved through consensual and deliberative means, but only by authoritative decision making

imposed on parties to the debate, for example, through a qualified majority vote, or the exercise by the Commission of its delegated powers.

4 Contested application of experimentalist governance in the GMO field

4.1 Promising arguments for authoritative decision making: let's centralize it all using the community method!

Accordingly, the politicized nature of gene technology, the conflicting values underpinning its regulation, and heated debates about GMO safety provided promising arguments for the Community legislators to base the new system on the so-called centralized procedure for GM food and feed authorizations led by the European Food Safety Authority (EFSA), which was also made responsible for risk assessment (Dąbrowska 2006). Although EFSA has not been granted powers to approve products in any food sector, including GMOs, it was accorded specific, *quasi*-decisive powers, especially within the remit of risk assessment (Chalmers 2003; Vos, this volume). On the other hand, risk management decisions based on EFSA's scientific opinions are taken, as under the old regime, by the comitology committees composed of Member States representatives, or by the Commission in the absence of a qualified majority either in committees or in the Council.

Moreover, the new GMO regime displays the following features of the Community Method. First, the core of the legislative regime takes the traditional Community form of binding laws (DRE Directive and GMFF and Traceability Regulations), which contain numerous command-and-control-like provisions (Poli 2004; Pollack and Shaffer 2005*a*). In their legal form and basis, they continue the old GMO regulatory system ensuring the protection of public values and the smooth operation of the common market. Moreover, after the GMO crisis, EU regulators reacted with a massive number of provisions and rules—over fifteen pieces of legislation that regulate GMO marketing were introduced at various levels of Community governance, in comparison to three or four in the old framework. When GMOs are commercialized, not only do the DRE Directive and GMFF Regulation apply, but also all possible types of regulatory acts, Commission Decisions, Regulations, Recommendations, and numerous guidance documents (Dąbrowska 2006).

From this perspective, no drastic policy change which would definitely move the area of biotechnology in the direction of a more flexible, minimum-harmonization, environmental-type regulation has occurred (cf. Scott 2000: 259; Lenschow 1999: 39). It can thus be argued, that the legislative instruments which were adopted during the GMO regulatory reform placed authority predominantly in the hands of Community institutions because

they took the form of regulations, and not directives (Pollack and Shaffer 2005*b*: 22).

Secondly, many aspects of GMO commercialization, which were earlier left to the Member States, have been harmonized at the Community level, for example, environmental risk assessment (ERA) methodology, objectives of post-market monitoring, details of labelling rules, and institutional structures and procedures. At the same time, many entirely new aspects of GMO marketing, which had not been sufficiently known previously, have entered the regulatory system for the first time, for example, the identification of GMO events by qualitative or quantitative detection methods, sampling and testing of GMOs necessary for effective traceability, and coexistence of GM and non-GM crops (Dąbrowska 2006).

This move generally indicated the Member States' wish for greater harmonization of national approaches although allowing for various degrees of flexibility in specific cases (European Commission 2004*g*: 8, 13). It also resulted from the need to enhance the trust of Member States (and their publics) in the EU rules applicable to the marketing of transgenic products, whose modification and development was aimed at improving the overall level of protection for human health and the environment (Jazra Bandarra 2004).

4.2 The reality of legislating on risk and administering GMOs—input of lower-level units is unavoidable

Straightforward acceptance of the above considerations would mean that the application of the classic Community approach was to be extended. While there is some truth to this impression, it represents a misleading oversimplification of EU governance of GMOs. Although it seemed at first that the modification of the GMOs regulatory regime towards an extensive Community harmonization and centralization of scientific authority within EFSA would help resolve political tensions and safety concerns, as well as enable the effective functioning of the EU approval procedures, it had already become clear during the adoption of the new Community legislative framework on GMOs that these assumptions were incorrect (Dąbrowska 2006; Frade and Leitão Marques 2004; see also Chalmers 2005: 652–54; Ostrovsky 2007: 132–4; Bernauer and Caduff 2004: 18–20).

Thus scholars who argue that the new GMO regime has become more centralized and should be solely based on hierarchical authority often overlook signs of experimentalism because they build their argumentation around strict, oversimplified dichotomies (centralization vs. decentralization, hard vs. soft law, Community Directives vs. Regulations, political bargaining vs. deliberation), which are not useful for the analysis of risk regulation regimes and EU governance more generally (Sabel and Zeitlin 2008, this volume). Therefore, analysis of the GMO regime should instead focus on the *function* of the regulatory

elements concerned, as suggested by Sabel and Zeitlin (2008, this volume), and the reasons behind them—the unavoidable requirements of risk governance, and the necessity for the democratic legitimization of the GMO policy—which allow for a deeper understanding and characterization of its framework.

Accordingly, beyond the 'classic' Community legislation on GMOs, there are numerous features in the new regulatory regime which are typical of experimentalist EU governance as identified by Sabel and Zeitlin (2008, this volume): firstly, the participation of lower-level units in policy-making and implementation (this section); secondly, practices of redefinition of objectives and reporting, monitoring, and policy revisability (sections 6 and 8 below); and thirdly, mutual accountability through proceduralization and transparency (section 7 below).

4.2.1 ELEMENTS OF SOFT REGULATION AND STAKEHOLDER PARTICIPATION IN POLICYMAKING

The role and number of soft measures have substantially increased in Community governance of GMOs because there was a need to regulate certain areas at the EU level while it was unworkable and unattainable to tackle them through rigid and binding rules. This is especially true of certain technical and scientific aspects of GMO risk regulation, including new conditions, which *ex definitione* require, on the one hand, flexibility in interpretation and application, and easy adaptability to changes, and on the other, a common understanding of their content and scope. In other words, the struggle for better GMO regulation revealed the need for soft rules which would allow for flexibility in implementation and differentiation of legal solutions, but at the same time offer a coordinated Community approach. Thus, the main reasons for relying on soft regulation in the GMO regime were the following: either soft guidance was needed to complement binding framework regulation or further harmonization by directives and regulations was impossible because of the diverse conditions in the Member States and the nature of applicable standards.

For example, at an earlier period, concepts such as traceability of GM products or validation of their detection methods were not yet known so it was not feasible to regulate or harmonize their application and effective operation. In effect, the more complicated the scientific aspects regulated by binding norms, the greater the need for soft provisions which would supplement them and provide for effective application.

Soft regulation of the GMO regime is often combined with the participation of stakeholders at various levels of government in the policy-making process. Some relevant examples follow.

(a) Firstly, when one scrutinizes the new GMO rules, several acts contain references to private standards of the European Committee for Standardization

(CEN), the International Organization for Standardization (ISO), and the Organisation for European Co-operation and Development (OECD).[6] Private standards are developed by CEN in cooperation with a wide range of stakeholders including Member States' standardization authorities, the business sector, and international bodies such as ISO (Vos 1999*b*). The involvement of the private sector allows for the exploitation of novel technologies, relevant expertise, and know-how in the drafting and development of rules (Schepel 2005). Moreover, regulation becomes much more flexible and adaptive to the changing technological environment when these rules are rendered voluntarily applicable.

Thus, not only is this evidence of the participation of 'lower-level' units, but also of the privatization of the GMO regime and its internationalization through direct reference to norms which are external to Community law.

(b) The second example concerns the sampling and testing of GMOs, which it was not technologically feasible to regulate through binding harmonization. Yet, some regulation was necessary to ensure the effectiveness of traceability in a coordinated way. For this reason, technical guidance on sampling and testing was adopted by the Commission based on the work of the Community Reference Laboratory (CRL) and consultations with committee experts both under the GMFF Regulation and the DRE Directive.[7] Additionally, the CRL adopted guidance documents and explanatory notes with practical instructions for applicants concerning the requirements of validation of GMO detection methods, and their technical and scientific aspects.[8] The fact that the content of the explanatory notes relates directly to binding Community Regulations means that they further implement them (Dąbrowska 2006).

The adoption of these acts constitutes an example of the network-like process of adoption of GMO rules with a highly technical specialized content where equal actors linked in heterarchical relations exchange views. During the creation of the normative content the CRL works closely with the European Network of GMO Laboratories (ENGL), the rules of which are revised on a regular basis as scientific knowledge and experience evolves.

(c) Thirdly, the conditions of environmental risk assessment and market surveillance regulated generally by the DRE Directive are further elaborated by the guidance documents adopted by EFSA after broad consultation and co-operation with stakeholders (EFSA 2004*a*). In order to prepare these documents, EFSA organized two broad consultation processes involving submission of public comments via Internet, workshops and roundtables with stakeholders, and the subsequent reshaping of the drafts in light of the input received. EFSA itself has given reassurance that the views of the public and interested parties expressed in the working group meetings and submitted during the consultation processes were taken into account, after having been considered by the members of the GMO Panel for their scientific relevance.

In my view, the procedural and institutional structure of the consultation processes permit the conclusion that the guidelines were adopted with the aim of direct inclusion and reflection of the various views of civil society organizations (Dąbrowska 2007).

(d) Finally, the most prominent example of GMO experimental governance is the Community regulation of coexistence of GM and non-GM products. This took the form of an Open Method of Coordination (OMC)-type procedure, where guidelines were set at the EU level, with the objective of ensuring the development of national strategies and exchange of best practices.[9] In order to achieve this objective, firstly, Member States are expected to follow the respective guidelines, but have substantive autonomy in choosing the appropriate policy instruments. Implementation occurs at a national or regional level, while applying the subsidiarity and proportionality principles. Secondly, the guidelines establish quantitative and qualitative indicators and benchmarks, which allow for the comparison of best practices. Thirdly, the appropriate translation of the guidelines into national and regional policies is also safeguarded by the Recommendation. Accordingly, the text describes the possible decentralized implementation of measures, with emphasis on the appropriate scale and specificity of the measures, and underlines the need for horizontal cooperation at local level, for example, farms in the neighbourhood. Finally, the Recommendation provides for the monitoring and peer review mechanisms typical of the OMC. Thus, the Member States are invited to periodically monitor and revise the coexistence measures in order to verify their effectiveness, leading to the exchange of information at European level, and the organization of mutual learning, and coordination of further research in this area. The sharing of research results between Member States is strongly encouraged.[10] The Recommendation also promotes the inclusion of all the relevant stakeholders in the implementation of these coexistence practices (Dąbrowska 2006).

4.2.2 THE COMMISSION AND PUBLIC–PRIVATE NETWORKS IN GMO APPROVALS: JRC AND ENGL

Furthermore, the establishment of the Community Reference Laboratory for GMOs as assisted by the European Network of GMO Laboratories was a crucial institutional development which emerged in the new GMO system as an embodiment of experimental governance and the pathway for participation of 'lower-level' units. The 'Molecular Biology and Genomics Unit' of the Institute of Health and Consumer Protection operating within the Joint Research Centre (JRC) of the European Commission was appointed to act as this laboratory.[11]

The Consortium Agreement which created ENGL was signed in Brussels in December 2002. Currently, ENGL comprises over one hundred (July 2009) national control (enforcement) laboratories appointed by any of the national authorities operating under the GMO legislation. These include not only governmental laboratories belonging to national ministries, but also public and private research institutes, agencies, and testing centres.[12]

Under new approval procedures, the CRL and the ENGL were accorded interesting powers, namely, (*a*) evaluating the data provided by an applicant for GMO authorization for the purposes of testing and validation of the sampling and detection method; (*b*) testing and validating the detection method, and (*c*) submitting a full evaluation report to EFSA, which prepares an opinion on any GM product. In practice, the work of the CRL goes hand in hand with EFSA's risk assessment because the validated method for detection, including sampling and identification for the GM transformation event is an obligatory component of the latter's positive opinion. In effect, all decisions for marketing approval of GM products must contain a reference to their detection methods, and authorization can only be granted if this is validated by the CRL with the assistance of ENGL (Dąbrowska 2006; cf. European Commission 2005*k*: 35). Both the method and the results of the validation are made publicly available.[13]

The validation of the detection method submitted by an applicant is thus a result of a complex process where the CRL and national laboratories coordinated by ENGL's working validation task force cooperate to achieve the final result, giving the green light to subsequent approval of a GM product (when other conditions are fulfilled). In addition, CRL/ENGL often collaborate with other institutes of the JRC, in particular the Institute for Reference Material and Measurements which produces reference material essential for the validation of detection methods. CRL and ENGL also work closely with applicants (JRC 2002; SCFCAH 2005*c*: 2). In order to facilitate the development of harmonized detection methods, biotechnology firms also collaborate with ENGL on a voluntary basis and specific rules are currently under development to regulate applicants' participation in the costs incurred by the CRL and its network. They usually provide details on DNA sequences needed to detect their GM material in products. Finally, it is important to note that once ENGL has validated a method within the approval procedure (i.e. has determined its robustness); this is then submitted to international standardization bodies such as CEN to be codified as an international standard. Thereafter all private and public laboratories can use it (European Commission 2002*c*).

In more abstract terms, the need for new regulation of the commercialization of GMOs which are the result of genetic engineering, a highly advanced technology, especially the necessity for sophisticated product standards to ensure public health and environmental well-being, compelled the turn to networking in the authorization procedure, whereby public and private laboratories collaborate (with the input of applicants).

The standards imposed on GM products reached such a technically complicated level that they require experimental work and its peer review by experts, which can only be generated through multifaceted relations among research bodies, and demand the flexibility and adaptability to technological progress which can be easily achieved in a network structure. The more technologically advanced the object of regulation, and the higher the level of protection sought, the more specialized knowledge and research resources demanded, which cannot be supplied solely by the public (EU/national) authorities.

4.2.3 NEW MEANS FOR OUT-OF-COURT DISPUTE RESOLUTION

Further examples of experimentalist governance can be traced in the new GMO regulatory regime in the form of several out-of-court mechanisms for participating actors at all levels to resolve conflicts between them (before GMO approval is granted or rejected). These constitute means for information exchange and risk communication which function as horizontal cooperative links between authorities. This demonstrates legislators' growing awareness of the importance of deliberation-fostering channels for settlement of politicized clashes on GMOs (cf. Sabel and Zeitlin 2008).

(a) A first example are working groups established within the respective comitology committees for GMOs. These are composed of national experts and meet regularly (usually convened by the Commission) to facilitate mandatory exchange of information on experience gained from implementation and risk prevention. Working groups deal with specific issues with direct significance for product approvals and marketing, such as herbicide resistance, BT toxicity, antibiotic resistance-marker genes, post-market monitoring, and ease of access to and exchange of information (e.g. CCA 2004).

As a result of regular exchange of views in such groups Member States have arrived at a common understanding of many specific provisions of the DRE Directive (European Commission 2004*g*: 4). These discussions assist national representatives in the clarification of contentious issues, influencing their voting positions in individual product approvals. Although working groups meet on an informal basis, their work can nonetheless help to resolve conflicts within the official GMO authorization procedure.

(b) Second, two secure electronic networks operate within the GMO regulatory framework to ensure communication about risks and exchange of all relevant documents throughout the approval procedure (GMOREGEX and EFSAnet). These allow for the publication and exchange of documentation relating to any product dossier under the DRE Directive and the GMFF Regulation. Both acts specify elaborate provisions concerning the documentation which must be mandatory exchanged and made mutually accessible

between the Commission, Member States, and EFSA (i.e. complete GMO approval applications, national comments on products, objections to risk assessment reports and replies to them, any supplementary information submitted by the applicant, opinions of EFSA and consulted CAs). Both systems also contain comments from the public, but so far citizens have no access to them.

GMOREGEX (GMO REGister and EXchange of information) is supervised by the Community Reference Laboratory and the Commission's Joint Research Centre (JRC 2003: 3). It constitutes a GMO portal with links to a similar electronic system required by the Cartagena Protocol and the GMO Register under the DRE Directive. A further objective of this database is to maintain an automated system enabling and supporting all activities related to the exchange of information on biotechnology between Member State CAs, the Commission, the general public, and scientific bodies.[14]

EFSAnet is a system supervised by EFSA where complete electronic versions of applications submitted to the GMO Panel under the GMFF Regulation (including confidential information) are made available to Member States, the Commission, and the members of the GMO Panel, and where national CAs may submit their comments when consulted. This tool is operational, and according to EFSA allows for smooth cooperation between the authorities concerned.[15]

(c) Lastly, the new 'method' introduced in the GMO regulatory framework to foster the settlement of disputes is mediation between Community and national administrative authorities. This takes the form of two special mediation clauses designed to help resolve conflicts between EU/national administrative and scientific authorities about risks of products undergoing approval.

The 'mediation procedure' under the DRE Directive (Art. 15) constitutes a transitional phase between the national and Community phase of the authorization procedure. Its initiation is not mandatory, and can be convened informally at the request of any participating authority. The scope of the matters to be discussed is *de facto* unlimited and there is no specific form of meetings, though the duration is limited to forty-five days. During the mediation process, national CAs can also meet a notifier to ask for additional data and clarify concerns. These informal meetings can include presentations of notifications by companies and responses to the requests or questions of the authorities (EFSA 2004*b*).

There is also a special 'mediation clause' in the General Food Law (GFL) (Art. 60) which can be employed in authorization proceedings for GM food when a specific conflict between Member States arises. Accordingly, where a Member State believes that a food safety measure taken by another Member State is (*a*) incompatible with the provisions of the GFL or (*b*) likely to affect the functioning

of the internal market, it refers the matter to the Commission, which immediately informs the other Member State concerned. The two Member States and the Commission are then obliged to '*make every effort to solve the problem*'. When agreement cannot be reached, the Commission can additionally request an opinion on any relevant contentious scientific issue from EFSA. This means that the Commission calls upon a scientific mediator, the EFSA GMO Panel. This provision has yet to be employed, and so it still needs further interpretation (Vos, this volume).[16]

Importantly, in both cases, the Commission has been assigned the role of an intermediary who circulates the documents, can intervene between the parties, and must seek EFSA's scientific opinion in response to national comments and objections. Clarification of controversies through the use of these mediation clauses would have the advantage either of completing the authorization process at national level, thereby avoiding the need for comitology decisions, or resolving conflicting views before the comitology process begins and enhancing deliberation therein.

Finally, in addition to these mediation procedures, a new Article has been introduced that establishes a specific mechanism for dispute settlement between scientific experts, namely, the *divergent scientific opinions clause*. This provision is especially designed to clarify and resolve scientific disagreements between EFSA and national institutions (Vos, this volume).

4.2.4 ELEMENTS OF DECENTRALIZATION UNDER APPROVAL PROCEDURES FOR GM FOOD AND FEED

A final element of experimental governance in the GMO regime is the structure of approval procedure for GM food and feed. This is especially visible in the risk assessment phase, where the relations between the actors and their powers have been modified under the new system. The analysis which follows aims to show that the GMO authorization regime is only centralized in its surface appearance, contrary to the claims of authors such as Pollack and Shaffer (2005*a*).[17]

The GMO authorization procedure under the GMFF Regulation combines elements of centralization and decentralization with heterarchical relations between participants as well as embodying important elements of networked cooperation between EFSA and national authorities based on weekly exchange of information via EFSAnet, technical meetings, and flexible power sharing.

The risk assessment phase under the GMFF Regulation consists of a multilevel procedural labyrinth with EFSA at the apex of interdependent relations with various actors (Chalmers 2005; Dąbrowska 2006; Ostrovsky 2007). Interdependence with national CAs is based on cooperation resulting from delegation of food and environmental risk assessment to national authorities,

and regular information exchange with the latter. Interdependence with CRL/ENGL arises from their powers in the validation of GMO detection and identification methods which must be included in an opinion favouring authorization. Interdependence with applicants providing additional data on request stems from the fact that ERA is primarily conducted by private parties and only later checked and evaluated by public authorities (EFSA 2007). The technological and scientific complexity of the requirements for GM product applications and companies' responsibility for ERA increase the obligations on the latter for *ex ante* accountability by disclosing and explaining their processes (Chalmers 2005). At the same, this complexity also forces authorities to rely on private governance and places companies in an agenda-setting position when they respond to questions, submit additional data, and present studies (Chalmers 2005). Interdependence with the Commission results from the latter's observer status as eventual risk manager (Commission members are allowed to participate in meetings of the Panel, but they 'shall not seek to influence discussions'). These interdependent relations with actors at different governance levels shape the outcome of this phase, that is, conclusions from risk assessment, but cannot be said to 'influence' the content of the EFSA final opinion which must be 'independent'.

Moreover, national CAs in the risk assessment phase of GM food approvals actually gained more substantive powers as compared to the old regime. Thus, they can now perform full ERA (mandatory delegation in the case of seeds and plant propagating material), while previously they could only evaluate applicants' dossiers. This indicates Member States' preference to maintain control over the most politically sensitive questions (approvals of products for cultivation). In addition, when exercising powers under the Regulation, Member States retain the same degree of flexibility as under the DRE Directive (e.g. 'power of assessment'[18]; see Dąbrowska 2006). At the same time, power sharing between EFSA and Member States is designed to be collaborative (with opportunities for exchange of views, opinions, and innovative knowledge), polycentric (consultative links with food authorities and CAs established under the Directive), and to some degree flexible (EFSA's discretion in delegating risk assessment).

As a result, the design of the risk assessment stage under the GM food approval procedure appears to aim at the mainstreaming of various scientific views rather then authoritative centralization of decision making. This stage of risk assessment is thus a *functionally integrated* system of structurally separated bodies which are made interdependent through a complex network of links, fusing single units into a single technical–bureaucratic *continuum*.

In fact, many authors identify similar complex structures of interdependence between Community and national administrations in various EU policies, using slightly different terms such as, 'decentralized integration' (Chiti 2004); 'supervised decentralization' (Holder and Scott 2006); 'functional decentralization'

(Vos 2000*b*). Two authors explicitly characterize the GMO regime itself in terms of 'decentralized cooperation' (Christoforou 2004), or 'adjusted decentralization' (Brosset 2004).

The rationale for this compound legal structure stems from the inability of a single body such as EFSA to assess at EU level all the sophisticated safety requirements and risks of transgenic products, together with the need for channels through which scientific issues can be debated, and innovation and knowledge creation occur. This requires collaboration with laboratories located outside EFSA to validate GMO identification methods; input from national CAs who are especially aware of the regional and local environmental conditions crucial for the evaluation of potential risks and long-term effects; and reliance on the information provided by applicants.

4.3 Experiential discovery: the need for more horizontal cooperation and deliberation

In addition to the forms of experimentalist governance embodied in the new regulatory framework which differ from the classic Community approach based solely on the interaction between the Commission, the Council and the Parliament, and the Community Courts, recent experience with authorization processes has shown that authoritative decision making on GMOs (based on EFSA opinions and qualified majority voting in the Council or Commission decisions) does not necessarily lead to acceptable and legitimate results. Moreover, since it seems to have intensified political bargaining on GMO risks, this demonstrates that more mutual learning and horizontal cooperation between the actors is probably necessary (see also Gastil 2008: 281–8; Rosenberg 2007; and section 8 below).

The previous section argued that the legal structure established for risk assessment under the GMFF Regulation fosters the process of mainstreaming various scientific views on a product dossier before EFSA issues its final opinion. This section will consider the behaviour of the participating actors, examining whether they are indeed prepared for more deliberative problem solving, and highlighting the experience of EFSA in performing GMO risk assessment.

4.3.1 HORIZONTAL COOPERATION (AND LEARNING?) UNDER EFSA'S AUSPICES

Initially and rightly so, EFSA interpreted the provisions regulating GMO approvals under the GMFF Regulation as requiring the coordination and mainstreaming of scientific views. Hence its interpretation of the provision of mandatory consultation with national authorities (Art. 5 and 6 GMFF

Regulation) triggered a networked multi-actor consultation process on each GMO dossier with all national CAs. This went even beyond the literal wording of the Regulation, but was aimed at ensuring that risk assessment is comprehensive and equivalent for all transgenic products.

However, EFSA's behaviour caused confusion among some Member State committee representatives, so it was asked by the Commission to cease this customary practice and stick to the exact content of the regulations. As a result, the consultation process was narrowed down to EFSA consulting solely CAs under the DRE Directive, which excluded national food authorities from expressing their opinion on GMO dossiers.

The behaviour of Member States, who limited their own powers in this way, is rather surprising given their continuous complaints that EFSA does not take their views into account (Council of the European Union 2006*c*). But it does fit with Member States' initial declarations that they wish to centralize the approval procedure for GM food. In this context, some authors had predicted that EFSA's role as network manager and driving force in the decision-making process would continue to cause regulatory problems by stimulating disagreement and resistance on the part of national authorities (Millstone 2000). In fact, some Member States are simply uncertain about how to cooperate with EFSA and turn instead to centralization and limitation of their own powers, which might be easier to exercise without any need for experimental thinking.

At the same time, however, many national authorities present a diametrically opposed view of the development of relations with EFSA when asked for their opinion in questionnaires and reports. For example, the centralized procedure for GM medicines was heavily criticized by the Danish authorities because of the lack of access for national CAs to technical dossiers, the absence of channels for cooperation between Community medical agencies and CAs, submission of comments, and exchange of expertise (COGEM 2003). In another study, some CAs expressed concern that environmental risks (especially concerning regional factors) might not receive adequate attention without extensive consultations of national bodies when carried out by EFSA alone, which may lack the expertise to assess them comprehensively. In relation to specific regional issues and ERA, it was suggested that national CAs should be very closely involved by EFSA (Schenkelaars and Risk and Policy Analyst 2004: 22). This study also concluded that GMOs are still not regarded as an issue to be determined by a centralized body but as national issues to be determined domestically, whatever the EFSA GMO Panel may decide (cf. also Vos, this volume). Moreover, Member States now seem to be really satisfied with the EFSAnet system, which is based on information exchange in network relations. It also appears that informal meetings relating to risk assessment matters with a single CA often lead to fruitful discussions and the establishment of links between EFSA and national bodies (see also Dreyer and Renn 2008; Frade and Leitão Marques 2004).

4.3.2 ARE AUTHORITIES READY FOR MORE DELIBERATION ON GMOS?

To recap, the preceding sections suggest that notwithstanding some misinterpretations there *is* a need for horizontal cooperation between national and Community scientists and regulators in approval procedures as well as deliberation-fostering and consensus-building methods to smooth potential conflicts on GMOs. The necessary means for mediation and step-by-step fence mending on GMO controversies are provided through new elements of decentralization under GM food approval procedures and new methods of dispute resolution. Paradoxically, however, these available means are hardly employed by the actors concerned, who seem to be afraid of any processes of proactive conciliation.

This leads to a vicious circle when regulatory authorities (Member States, EFSA) are generally willing to cooperate horizontally, but do not seem to be ready to proceed with deliberation and reshaping of preferences in order to reach a possible consensus because it requires a lot of effort. Hence, one may logically ask: perhaps these deliberative and discursive strategies are not adequate measures for deciding on GMO risks? In which case, perhaps strengthening of the Community Method based on intergovernmental bargaining and withdrawal of consensus-seeking practices would be more effective for decisions on GMO approvals at the Community level?

Pollack and Shaffer (2006) in particular have argued that GMO sector provides an example where deliberative consensus-based decision making in comitology does not occur because too many politically sensitive interests are at stake, which exclude the possibility of identifying the 'common good' or searching for 'truth' and thereby reshaping preferences. They are right that political sensitivity and polarized views in a controversial sector like the regulation of transgenic products is unavoidable. *But* this is precisely why there is a need at all stages of the procedure for more mediation and conciliatory methods that can lead to mutual learning and understanding. Bargaining among European and national authorities over GMO approvals, instead of seeking a commonly acceptable solution, so far has meant voting in comitology committees, inability for Member States to reach a required majority, followed by the same scenario occurring in the Council, and a subsequent decision by the Commission under the comitology procedure, resulting in great dissatisfaction and disappointment among the Member States (Council of the European Union 2006*c*).

Voting experience on GMOs (5.2 and 8.1 below) suggests that imposing more hierarchical rulings and authoritative decisions of the Commission would only intensify political divergences, deepen the clash of preferences, increase Member States unwillingness to make the effort to arrive at a consensus, and reinforce their inability to reach decisions. With the current political

struggles based on bargaining Members States have not been even able to gather a qualified majority of votes in the committees or the Council, let alone arriving at a legitimate supranational decision. So it is really doubtful that this 'bargaining' route could yield 'good governance'.

Thus, the efficiency of GMO approval decisions by the Commission is high, but there is at same time a growing de-legitimization of this system of governance and policy-making (Ostrovsky 2007: 117, 127). Such outcomes can hardly be claimed to be legitimate not only in terms of the extent of deliberation in the authorization process, but even in light of the Community solidarity principle on which the EU is unquestionably based.

Moreover, the claim that experimentalist governance cannot work effectively in the GMO field because it is difficult to identify deliberative practice in the approval procedures has two important limitations. Firstly, the dichotomy between deliberation and bargaining leads to an oversimplified characterization of the EU GMO governance regime. Secondly, the failure to invoke the available dispute resolution methods can equally serve as a destabilization mechanism triggering more deliberation. Little is known empirically about the employment of mediation mechanisms provided by the GMO regime and about deliberative practices that have taken place or have been facilitated. But information about issues that have been resolved in this way is not easily aired and the formal non-invocation of mediation clauses does not mean that informal attempts to use them in resolving contentious matters have not occurred (see Vos, this volume, on the EFSA scientific conflict clause).

5 The problem of comitology decision making

It is clear from the preceding sections that despite the GMO crisis individual product approvals are still undertaken by the Commission and Member States representatives through the comitology system. This decision-making procedure appears to have been carried over from the old to the new GMO not because it was considered optimal by the parties concerned, but rather because no other or better option existed within the current EU constitutional structure. It is predicted that Commission decisions will thus continue to play a major role in GMO authorizations for the foreseeable future (Hervey 2002: 10).

Unfortunately, the functioning of comitology decision making remains problematic in the GMO sector. Thus, the new GMO approval procedures operate well in terms of procedural efficiency because the Commission proceeds with final decisions and authorizes GM products on the EU market, but, at the same time, it continues to cause frustration and dissatisfaction amongst Member States, who are unable to reach a qualified majority in favour of either positive or negative views in response to the Commission's proposals. Member

States' behaviour is rooted in political bargaining, but it is far from reaching *any* constructive compromise, as well as from the ideals of deliberative decision making. This clearly affects the overall effectiveness and legitimacy of GMO governance.

Moreover, as observed above, final decisions taken by the Commission seem to have intensified Member States' bargaining obduracy. In other words, the Commission's authoritative position seems to have reduced the states' ability to reach decisions. In this case, therefore, the 'shadow of hierarchy' has not produced any shift towards consensus-seeking behaviour or deliberation. Thus, since the current comitology decision-making process for individual GMO products appears to resemble the 'Classic Community Method' (based on QMV, political bargaining, and the Commission's final voice) more than 'deliberative supranationalism' (Joerges and Neyer 1997*b*), the key policy question is *how* to ensure that decision making in these committees may become more consensual in terms of reflecting the will of Member States and more deliberative in terms of modifying preferences to find a shared solution providing for the highest level of protection against GMO risks.

5.1 GMO approvals between science, precaution, and 'other legitimate concerns'

Before proceeding to a closer examination of current comitology practice, it is useful to explain the conditions of decision making by regulatory authorities resulting from the new GMO authorization framework. This stipulates that GMO approvals must be science-based, conducted pursuant to the precautionary principle, and should take account of 'other legitimate concerns', which are typically understood as a vehicle for the introduction of consumers' preferences, public and ethical matters into risk decision making (de Marchi 2003). There is also arguably a place for the consideration of human rights issues in these legitimate concerns. In addition, the new procedures offer channels of public participation and, although hardly employed, ethical consultations (Dąbrowska 2007).

Therefore, public authorities, and above all, the Commission, which proposes GMO decisions, are equipped by the regulatory framework with opportunities to include different views, but in fact only refer to scientific opinions. As a result, GMO approvals are overwhelmingly based on scientific–technical considerations without any attempt to acknowledge non-scientific issues, which could facilitate a more consensus-seeking approach and very probably greater agreement among Member States.

Interestingly, shortly after the new GMO regime came into force there were some signs which suggested that the Commission would try to exploit

these possibilities. Especially, the changeover of the European Commission from the Prodi to the Barroso team has signalled alterations in EU GMO policy. A harbinger of the transformation was the rumour that the power to coordinate biotech cases in the Commission would be exercised by the Group of Policy Advisers[19] (the advisory unit that reports directly to the President and Commissioners) and its group on Science and Technology and Society instead of by the Biotech Steering Committee within the Secretariat-General. It seemed that the Commission would not willingly overrule the majority views of the Member States even if these do not formally reach the QM threshold, and that it would try to work out conciliatory agreements (Poli 2003). Those reforms were not ultimately adopted. In consequence, the Commission and national risk managers face a constitutional and political struggle within the comitology procedure to find a workable solution for GMO authorizations while remaining unsure what route to follow.

5.2 Constitutional and political struggle in comitology

The constitutional reality which frames risk management decisions on GMO approvals at the Community level is characterized by the following elements. First, as explained above, under the New Comitology Decision (1999), a qualified majority of Member States' votes is now required to reject or approve the Commission's proposal in either the committees or the Council. When a QM is reached by the Council, the New Comitology Decision obliges the Commission to re-examine its proposals, and then submit the amended proposal to the Council, or to resubmit the original draft proposal for a second time. Otherwise the Commission maintains the final word in the procedure and the European Parliament is merely to be kept informed.[20]

Apparently, the specific declaration annexed to this Decision, which states that when the Commission proposes measures in particularly sensitive areas (like GMOs) it should find a balanced solution that 'avoids going against any predominant position which might emerge within the Council against the appropriateness of an implementing measure', has not gained any significance due to interpretative doubts regarding the concept of a 'predominant position'. While certain Member States consider this equivalent to a simple majority of Member States against a Commission proposal (e.g. on GMO approval), the Commission Legal Service considers that these rules offer no 'legal flexibility' to take action in the absence of a qualified majority.

This rigid position is rooted in the second important constitutional issue affecting GMO commercialization, the GATT/WTO framework requiring definite risk assessment (scientific evidence) to justify refusal or delays of authorizations. Moreover, the report issued by the WTO Panel confirmed that the European Communities had 'acted inconsistently with its obligations

under the SPS Agreement' by applying a *de facto* moratorium and by delaying procedural approval steps for twenty-one products in the pipeline. The overall conclusions of the report were not excessively negative for the EU, in the sense that the moratorium had already been terminated, but, the international obligations stemming from the GATT laws have nevertheless influenced the Commission's behaviour and spurred the approval of new products.

Austria, Luxembourg, Greece, Italy, and Denmark have traditionally been the states most strongly opposed to the introduction of new GMO products. But opposition is also mounting in the new Member States. There was a great miscalculation in Brussels about the attitude towards biotechnology of east-central European countries. As strong US allies on other issues, they were also expected to be pro-GMO, but the opposite has been the case, with big agricultural states like Poland and Hungary leading the anti-GMO coalition.

During the two years following the end of the *de facto* moratorium (May 2004–March 2006), ten GM products were authorized on the Community market following a final decision issued by the Commission (five under the DRE Directive—maize lines NK603, MON 863, 1507, MON 863 × 810, and rapeseed GT73; and the GMFF Regulation—maize lines Bt-11, NK603, MON 863, GA21, and DAS1507). In none of the twenty votes that took place did Member States manage to reach the required qualified majority of votes against or for the Commission's draft decision (neither in the regulatory committee nor in the Council), and consequently, final decisions were made by the Commission (Council Presidency 2006).

Admittedly, these national votes were much more balanced than before the moratorium, but the situation remains unsettled and still driven by political disagreements. For example, in the first two authorizations, votes were divided equally for and against (e.g. six states in favour, six against and three abstaining on the Bt-11 vote, and nine in favour, nine against, four abstaining and two undecided on the NK603 first vote). Subsequently the weight seems to have shifted towards a greater number of states abstaining (e.g. eight abstaining states with 139 votes on GA21) or a majority of states voting against authorizations (thirteen states with 135 votes on GT73; in some cases a simple majority of opposed votes was reached, e.g. MON863). At the same time, in none of these decisions was there a single reference to the public consultation process, public comments, ethical opinions, or 'other legitimate' concerns. As a result, many Member States at the December 2005 and March 2006 Environment Councils expressed discomfort with the way authorization decisions for GMO are taken (Council of the European Union 2006*c*).

Further reforms which have been proposed include revised voting rules in comitology to a to a simple majority and other procedural shifts, such as Denmark's suggestion that decisions should always be taken at the Council level (SCFCAH 2005*b*: 1). Scholars also suggest a procedural code as a good

remedy for comitology deadlocks and related administrative problems (Joerges and Vos 1999*b*; Toeller and Hofmann 2000: 44–9; Lenaerts and Verhoeven 2000: 662–3). The initial explanatory memorandum attached to the proposal for the second Comitology revision presented in December 2002 announced that the amendments of the regulatory committee procedure are necessary to avoid the risk of an impasse in cases like GMOs where the Council cannot reach a qualified majority, strong opposition to the Commission's proposal emerges, and the European Parliament has no say in the outcome (European Commission 2002*d*). Regrettably, this issue disappeared from the agenda and the comitology reform adopted in 2006 remained partial because there was no agreement on procedural steps and power sharing in individual administrative procedures (see note 20).

The picture thus remains as follows. The GMO regulatory framework and approval procedures offer conditions, mechanisms, and fora for proactive conciliation and mediation before the comitology stage is reached; and even then, a more consensual inclusion of various concerns and preferences is not legally excluded. At the same time, it is improbable that the procedural structure of comitology will change soon. Moreover, Member States struggle politically to make decisions, but are unable to reach a qualified majority of votes either to support or reject the Commission's proposals. The continuation of 'efficient' decision making by the Commission on GMOs thus constantly threatens to trigger a political crisis and seems to have intensified intransigent bargaining positions among the Member States, while remaining exposed to accusations of illegitimate and inadequate governance. The failure of authoritative centralized decision making suggests instead that more horizontal cooperation, deliberation, and learning from differences in values is required to reach consensual decisions in this field.

6 Experimental methods for revisability and mutual accountability

This section analyses further embodiments of experimental governance present in the GMO regime. It demonstrates that there are processes of reporting and revising of policy objectives as well as innovative structures or fora which allow for information exchange and learning to occur. This happens at the level of general policy or rule making and implementation or application of rules where all the actors involved in the regulatory process including public authorities, private applicants, and the public are subject to numerous obligations of information exchange, reporting, and monitoring, and thus to mutual scrutiny. Moreover, there are various elements of recursivity that can be said to offer multi-route accountability in a risk governance process

where there is a need for ongoing revision of rules, objectives, actors' value preferences, and decisions. These important features of the EU GMO regime are often overlooked by scholars who focus exclusively on the approval procedure.

6.1 Reporting, monitoring, and peer review of results

The reporting and monitoring channels established in the GMO regime ensure that experience gained in its implementation is monitored, shared between the national and Community levels, open to participation of stakeholders, and eventually used as an impetus for necessary policy modifications.

(a) Firstly, there are statutory reporting obligations. Each GMO regulatory act lays down obligations for the Commission to report regularly to the Council and/or the European Parliament on the functioning of the system (e.g. Art. 31.7 of the DRE Directive; European Commission 2006*f*). In order to exercise these duties, the Commission usually holds online consultations open to all stakeholders, distributes questionnaires to the interested parties, and employs independent consultants to analyse their results (cf. Dąbrowska 2007).

(b) Secondly, the Community Food and Veterinary Office (FVO) plays an important monitoring role, exercising regulatory control over the functioning of the GMO regime. It belongs to DG SANCO (Directorate F), but its headquarters is in Ireland which may indicate a certain degree of independence. The FVO's main task is to audit the performance of national CAs in the implementation of laws on food safety, animal and plant health, and animal welfare, including the authorization, labelling, and traceability of GMOs. Member State authorities are required to cooperate with the FVO, which has recently been moving away from inspecting individual sites towards a comprehensive evaluation of national control systems. On the basis of these inspection and control activities, FVO prepares recommendations, assesses plans for improvements, and monitors their mandatory implementation by the Member States (European Commission 2006*f*).

(c) Thirdly, the Rapid Alert System for Food and Feed (RASFF) is a dedicated network for monitoring direct and indirect risks to human health deriving from all foods, including GMOs. RASFF involves the Member States, the EFSA, the Commission, the candidate countries, third countries (e.g. Norway), and relevant international organizations. Its purpose RASFF is to equip national and Community control authorities with an effective tool for information exchange and monitoring of measures taken to ensure food safety, including GMOs (see Vos, this volume).

(d) Lastly, market operators are obliged to engage in Post-Market Environmental Monitoring (PMEM) which is a product-specific measure.[21] Under the

new GMO regime, PMEM comprises case specific supervision of all effects foreseen in ERA (thereby linking ERA and PMEM, pre- and post-market control of GMOs) *and* the general surveillance of unanticipated results of GMO marketing.

These final monitoring requirements are specified in GMO authorization decisions, but can be revised by public authorities in light of subsequent experience. Although the planning and execution of monitoring is primarily the applicants' responsibility, they can cooperate horizontally with public institutions in carrying out the agreed work. Applicants can also enter into formal agreements with the Commission and Member States or other third parties to make their PMEM plans more effective (EFSA 2006*b*). Simultaneously, Member States are entitled to take further monitoring measures. Such national plans and strategies that cannot substitute for applicants' own monitoring efforts, but with the consent of relevant parties, may foster mutual learning and exchange of experience which is so critical for the adequacy of implementation in this field.

In summary, the first two monitoring mechanisms (statutory reporting obligations and the FVO) concentrate on general policy-making and implementation, while the other two (the RASFF and PMEM) focus on risks arising from individual products. In addition, the GMO rules impose a systematic duty of cooperation on EU institutions, national CAs, and market actors in carrying out their control obligations at all stages of the risk prevention and monitoring process. Finally, control of GMO risks is based on the concept of 'regulation by information' which involves changing individual, institutional, and political behaviour by improving the quality of (scientific) information and advice made accessible to all actors (Majone 1997; Slaughter 2004).

6.2 Recursive revision of objectives in the light of results

This is the current GMO regulatory framework that directly follows an experimental approach to regulation (Sabel and Zeitlin 2008, this volume). Moreover, beyond the evidence of reporting, monitoring, and peer review of results, analysis of the GMO regime indicates different modes of recursivity where policy objectives are revised in the light of implementation experience.

6.2.1 EASY REVIEWABILITY OF LEGAL ACTS—SCIENTIFIC AND TECHNICAL RECURSIVITY

In order to meet the challenges of new technologies, Community laws on GMO commercialization contain special clauses for 'adaptation to technical progress'. This means that necessary modifications of rules can be achieved through comitology procedures which are simpler and faster than revision of

Community secondary laws.[22] Moreover, it allows for deliberation on specific matters by the Commission and Member State representatives who are closely involved in the implementation of legislation at national level. Thus, these clauses allow relatively quick and expert knowledge-based amendments to those parts of the GMO legislation that require constant revision in response to scientific progress, such as rules for harmonizing the methodology and conclusions of ERA, information required in notifications, guidelines for assessment reports, and the design of monitoring plans.

6.2.2 REVISION OF POLICY ON INDIVIDUAL GMOS—PRODUCT SAFETY RECURSIVITY

In addition to procedures for revising the scientific aspects of the legislation, the GMO regime provides for specific measures which recursively ensure the safety of individual products, through their withdrawal when they are found to impose risks or do not comply with the regulation. The process is based on information from national control points, RASFF, and individual parties.

An example of this procedure in action is the illegal release of GMO Bt-10 maize.[23] Firstly, the Commission was informed by the American authorities about an inadvertent release in the United States of unauthorized GM maize which contained a gene resistant to an important group of antibiotics (European Commission 2005*j*; Council of the European Union 2005). Then, the Commission informed Member States *via* RASFF and asked them to carry out appropriate control measures to stop Bt-10 from entering their territory. It was also established that GM maize Bt-10 entered the EU food chain when it was mistaken for Bt-11 maize (authorized in the EU). Secondly, through the comitology procedure, it was agreed to adopt an emergency measure requiring US importers of corn gluten feed and brewers grain to certify products as free of the unauthorized GMO Bt-10, since those were the imported products most likely to be contaminated by non-approved Bt-10 maize (European Commission 2005*i*: 3). Member States were also made responsible for controlling imports, preventing any contaminated consignments from being marketing, and random sampling and analysis of products already on the market. Finally, the Commission's draft decision was approved by a nearly unanimous favourable vote of Member States, which in such emergency cases usually act very consensually (299 votes in favour, out of 321) (SCFCAH 2005*a*). At the same time, EFSA, working in close collaboration with the Commission and the CRL on scientific issues related to the safety of Bt-10 maize, certified the product detection method proposed by the company responsible (EFSA 2005). Other cases of unauthorized products which have occurred in the EU are regularly reported and handled in a similar way which ensures the involvement of actors at different governance levels and a recursive process of safety assessment (SCFCAH 2007*b*).

6.2.3 REVISION OF STRATEGIES BY INSTITUTIONAL STRUCTURES—RECURSIVITY OF VALUES AND PREFERENCES

Finally, recursivity of values and preferences which underpin the GMO policy occurs within the EU institutional structures, although this type of revision is the most difficult aspect to trace, establish, and verify. Both the Commission and the Member States appear equally aware that the GMO sector is a very sensitive area requiring constant scrutiny and revision of objectives, which cannot remain rigid or permanent. Thus, the Council holds regular orientation debates to discuss GMO issues and seeks to implement modified policy options in view of common experience. The Commission, for its part, often discusses its strategies internally. This probably occurs mainly in the College and through inter-service consultations under the umbrella of the Secretariat General, but these are internal meetings which are usually quite difficult to track down.

Moreover, the Commission declared its intention to pursue meaningful and constructive dialogue with all stakeholders in the biotechnology sector (European Commission 2001*f*, 2007*e*). Thus, it seeks to involve civil society in order to modify the EU's overall GMO strategies. Accordingly, civil society participation has been implemented through three methods: (*a*) the launch of permanent advisory bodies composed of selected civil society organizations to consult on specific issues,[24] (*b*) incorporation of views from written consultation with stakeholders under statutory reporting obligations; and (*c*) organization of *ad hoc* initiatives, for example, open meetings for direct exchange of views. These moves towards greater involvement of non-state actors have a clearly informative, and sometimes, even influential quality. The second method seems to be the most beneficial from the perspective of effective policy making, which requires continuous revisability based on new information about technological, environmental, and local developments as well as about its appropriate implementation, which stakeholders can best provide (Dąbrowska 2007). For example, following the claims expressed by several stakeholders concerning the lack of transparency of the DG Environment web site, the missing documents were published (Schenkelaars and Risk and Policy Analyst 2004).

At the same time, EFSA explicitly states that

> The dialogue between EFSA and stakeholder organisations should be a two-way communication process where all parties feel confident to work more closely together, to understand better the needs of each other and to benefit from each other's experiences. This dialogue should bring an added value to all parties involved. (EFSA 2004*e*)

In order to structure this process, EFSA created a permanent Stakeholder Consultative Platform for advice on general matters linked to its mandate and relations with civil society stakeholders (EFSA 2004*c*: 3; 2004*d*: 3–7). EFSA's current practice suggests that this policy objective has indeed been

implemented and that recursivity of values and preferences occur within the processes where stakeholders participate (cf. Vos, this volume; Dąbrowska 2007; Dreyer and Renn 2008).

Another important example of revision of values and policy preferences is the national experts' network group on coexistence (COEX-net), a body specifically established to exchange information and knowledge on this aspect of agricultural biotechnology; and develop further guidelines and strategies in light of implementation experience.[25] COEX-net aims at exchanging information on best practices and scientific results obtained by Member States, which are then scrutinized by the Commission with a view to their incorporation into EU policy. Indeed, an intense process of reporting and information exchange between the Commission and the Member States seems to have taken place (European Commission 2007*e*). Moreover, not only Member States and EU institutions, but also interested civil society stakeholders are invited to participate in this process of constant reflection on GMO policy and the possible need for its modification and revision (but cf. also Lee 2008).

Taken together, through these different routes for recursivity the EU GMO regulatory regime displays a clear potential for improving its legitimacy, as well as building a more accountable system to all actors involved.

7 Democratizing effects through proceduralization and transparency?

This section examines the procedural rationality underpinning the GMO regime together with its transparency provisions, arguing that they can further enhance accountability within this multilevel system and perhaps even produce democratizing effects (cf. Harlow and Rawlings 2006).

7.1 Procedural rationality of the GMO regime and decision-making reflexivity

There is an interconnection between the procedural rules and their substantive flexibility which is crucial for dealing with uncertainties in the GMO regime. In short, the new GMO approval rules are moderately prescriptive regarding substantive outcomes, but procedurally more sophisticated in terms of establishing participatory rights for different actors, transparency, consultation obligations, and prescribed methods for dispute resolution, etc. Procedural constraints relating to rule implementation were also stimulated by the subsidiarity principle (the outcomes of regulation are not prescribed) and pressure for deregulation in the GMO regime (Scott 2000). Thus, there is also a substantial interrelationship between proceduralization and revisability

in EU GMO policy which also enhances the decision-making reflexivity and provides a tool that can ensure accountability of the actors.

The new GMO approval procedures are centred on two intermingled regulatory concepts, that of proceduralization of rules which is the only way to ensure the 'fairness' of decision making by prescribing the 'steps' to be taken when final outcomes cannot be predicted (to deal with uncertainty); and that of reflexivity, which allows prompt reactions to the volatility of the regulatory environment (to deal with technological innovation). The fact that the Community legislator lacks scientifically established information as to the unforeseen effects of GMOs makes him unable to ensure the 'substantial rationality' of authorization, and leads to a decision-making process based on 'procedural rationality', linked to the possibility of reflecting on choices undertaken in the course of the procedure (Holder and Scott 2006).

The embodiment of these concepts can be found in numerous provisions of the new GM approval procedures, concerning implementation both by Member States and the Community administration (Scott 2004*a*). The most salient example concerns the concept of environmental risk assessment (ERA).[26] EU rules harmonize the principles, methodology, and steps to be followed when ERA is carried out, but the outcome of the process *cannot* be prescribed because it is scientifically uncertain. ERA can only predict the likely effects. Thus, both applicants and authorities (EFSA) need to think through the consequences for GMO marketing while undertaking the steps of the assessment, but the substance of the decision—its final outcome—cannot be normalized (Holder and Scott 2006). At the same time, ERA is construed as a fluid and dynamic process to support reflexive decision making and is closely linked to monitoring because it must be accordingly revised if any new information becomes available.

The second important embodiment of the reflexive procedural rationality underpinning GMO approvals are the provisions on resubmission of products authorized under the old framework, the transformation of applications made under old provisions, and the ten-year validity of marketing consents. The main rationale for this regulatory solution is to adjust the standards of products authorized under the old system to those of the new rules and to upgrade their safety requirements to the new framework (Dąbrowska 2006).

7.2 Procedural functions of the precautionary principle and the role of the judiciary

Although the content of the precautionary principle is not entirely settled in Community legal order (Salmon 2002: 138; da Cruz Vilaça 2004: 369) and there are as many advocates as opponents of its legal application (Bergkamp 2002; Majone 2002) it nevertheless constitutes one of the guiding principles of processes of legal reasoning in risk regulation (Fisher 2004). In addition, in

light of the recent decisions of the European Court of First Instance (CFI), 'precaution' has gained the status of a general principle of Community Law (Lenaerts 2004: 317; Scott and Vos 2001) extending beyond environmental policy. Specifically, in the GMO regime, it is normatively reinforced by explicit references in the DRE Directive, GMFF Regulation, and GFL.

The GMO regime rightly emphasizes the current status of precaution—as a principle rather than a rule. Accordingly, the concept of 'principle' offers the necessary flexibility of application in risk regulation, which can vary depending on its jurisprudential and jurisdictional contexts and/or specific circumstances. In addition, like other principles, '*it states a reason that argues in one direction, but does not necessitate a particular decision*' (Fisher 2002: 26, citing Dworkin 1977). That is why precaution draws attention to the 'process' by which a decision is made, and requires decision-makers to take into account the problems created by scientific uncertainty in the setting of standards whose purpose is to protect human health or the environment (Fisher, Barrett, and Abergel 2002: 47).

In the GMO regime, the precautionary principle has a proceduralizing function in the sense that it influences how problems of scientific uncertainty are addressed in the decision-making process rather than requiring that regulation achieve a certain level of protection or acceptable risk. 'Process' here includes issues like who participates in a decision, what should be taken into account, and how regulatory decision making is structured. Accordingly, the principle has an important impact on the way in which authorization decisions (under conditions of scientific uncertainty) should be taken by regulatory authorities in the new approval procedures. The function of the principle has been developed by the case law of the European Courts, which have emphasized its procedural dimension with regard to, *inter alia*, obligatory scientific opinions, risk assessment, duty to give reasons, and burden of proof. Accordingly, the necessity of consultation with scientific bodies and the integration of scientific risk assessment into decision-making processes are recognized as important procedural guarantees in sectors where the precautionary principle applies (Scott 2004*b*: 51).

The CFI considers that the regulatory authority has two duties when making decisions under conditions of scientific uncertainty and pursuant to the precautionary principle: the duty to examine 'carefully and impartially all the relevant aspects of the individual case', and the duty to provide 'reasons', in case a scientific opinion is disregarded in the final decision on risk, for example, whether or not authorize a product.[27] These procedural requirements stemming from the application of the precautionary principle also provide a yardstick against which review of measures' legality will be carried out.

In this context it should be observed that the Community Courts when deciding in cases where the precautionary principle applies recognize the

importance of procedural warranties, but are reluctant to provide substantive solutions to disputes. Since they are no more equipped with the sophisticated knowledge to resolve cases where science, risk, and uncertainty are unavoidable parameters, they avoid proactive development of substantive judgements, and attempt instead to ensure the correctness, appropriateness, and enforcement of procedural guarantees. For example, the CFI insists that decisions must be science-based, but avoids any explicit specification as to who are scientific experts or the relevant scientific bodies. Likewise, the CFI obliges authorities to rely on the 'most reliable scientific evidence available' and 'the results of international scientific research', but is not eager to identify any scientific institution(s), as having a final say (Dąbrowska and Quillack 2006). Further development of jurisprudence suited to the experimentalist conditions of the regulation would be very welcomed in the GMO risk regime (see Scott and Sturm 2007: 565–93). Widening the availability of opportunities for litigation could outweigh the lack of judicial rulings prescribing substantive outcome in risk regulation disputes, and further reinforce its procedural rationality (cf. Alemanno 2008).

Eventually, a more active engagement of the Community courts in the elaboration of the role of different institutions in assessing and managing risks in decision-making processes; the establishment of standards they must follow to take adequate decisions, together with the recognition of structures or bodies which could exercise legitimate peer review in such complex cases, would be desirable (Chalmers 2005). Courts will need to take a stance on the value of differing scientific opinions and 'newness' of scientific evidence (engage in methodological questions), not to mention the establishment of closer and institutionalized cooperation with national (mostly administrative and civil) courts where there are many cases involving various aspects of GMO regulation and which themselves develop proactive tools to deal with these issues, as well as international courts (see Makowiak 2004; cf. also Sabel and Simon 2004: 1015). In fact, a good occasion for the development of EU jurisprudence on these issues arose in July 2008 when one of the companies filed an action for failure to act against the Commission, which resubmitted questions on a product's safety to EFSA instead of proceeding with EU market approval.[28]

7.3 Democratizing destabilization and accountability through transparency?

The new channels through which information on GMOs can be obtained constitute an important component of the novel EU system of market transparency. This component realizes the most traditional understanding of the transparency principle, that is, the improvement of public access to information on GMOs, and falls under the responsibility of administrative authorities

and companies at all stages of marketing. Through these newly established channels, citizens can obtain information on products published in the GMO registers and request information about decision-making processes, agendas, and minutes of the institutions concerned, draft debated measures, etc. by means of public access rules (Scott 2003: 237).

Those developments have formed a set of *leges speciales* to the general EU principle of transparency that has been recently viewed as one of its most important governing principles (Lenaerts 2004: 318–24; Lodge 2004: 124). The relatively new Regulation on Public Access to documents of EU institutions, and the case law of the European Courts has additionally contributed to the development of the principle.[29] In addition, new channels to obtain information on GMOs give particular expression to recent developments in international law where access to information has been recognized as of crucial importance in securing environmental transparency and empowering citizens in environmental decision making.[30]

This new model, which shifts the burden of proof to authorities when they refuse access to information according to enumerated conditions and abolish the compulsory need to prove the existence of citizens' interest to justify requests to access, was influenced by the culture of Nordic and Scandinavian States joining the EU in 1995, where access to official information was a form of popular accountability (Sabel and Zeitlin 2008). This modern philosophy is strikingly different from the previous approach to administrative/EU institutional secrecy where all the information was in principle confidential except for defined data which could be released.

Moreover, the new transparency regime is tightly proceduralized and makes extensive use of digital tools such as online GMO registers and general mailing lists where citizens can subscribe. In this context, Curtin (2003: 66–8) rightly observes that (digital) access to information is the *sine qua non* condition for creating spaces for 'civil society' in EU governance. The proceduralization and 'digitalization' of transparency rights provide further innovative elements in GMO control and can constitute means of accountability for public authorities. Namely, the increased openness and proceduralized transparency were introduced to make all the institutions and also private companies involved in the commercialization of GMOs more accountable and subject to close public scrutiny (cf. Sabel and Zeitlin 2008). Openness and transparency strengthen the vertical accountability of institutions to citizens in the sense that the public may scrutinize and examine the authorities' actions, and thus exercise 'public control', especially in such a sensitive matter as the marketing of GMOs. These techniques are not entirely 'substitutes' for representative forms of democracy and citizenship, but they constitute fertile complements to 'classic' institutional mechanisms of accountability and can exert fruitful democratizing effects within an innovative and experimentalist structure. In particular, they also increase horizontal accountability between institutions because the public can

seek information about GMOs on the web sites of different EU institutions obliged to publish the relevant documents, as well as through national channels.

But these arguments should not be taken to imply that the system always functions perfectly. Very often the new channels through which information about GMO products can be obtained are still exposed to the shadow of administrative secrecy based on a hierarchical and authoritarian conception of public authorities' role, either at the EU or national level (Onida 2003: 197–9; Poli 2003: 81). And the establishment of instruments ensuring transparency by itself may not be sufficient to encourage citizens to become active in policy-making processes (see broadly Kochler-Koch, De Bievre, and Maloney 2008). Yet, fortunately, the complexity of provisions and some unsatisfactory practices of authorities are not so serious as to hinder the operation of new GMO information channels, even if they cast a shadow on their appropriate realization and impede consumer trust.

These problems still need to be addressed by the responsible institutions (Dąbrowska 2007), but some evidence of positive changes can be found. For example, after criticism by civil society stakeholders in one of the reports, the availability of information on the Commission web sites and registers has significantly improved. This means that the statutory reporting and monitoring practices have proven able to temper the conservative and unsatisfactory behaviour of the Commission, and it should also be useful to influence national CAs.

Finally, since EU/national authorities can ultimately decide on a request for access to information they are also subject to judicial review; either pursuant to national administrative procedures[31] and the preliminary ruling procedure of Article 234 TEC; or through a direct claim to the Court of First Instance under Article 230 TEC. In the case of a Commission decision refusing access to information, standing for any citizen who is an addressee of the decision is beyond doubt. In this sense, public access rules to information about GMOs offer a method for *any citizen* to bring authorities to court and hold them accountable for their behaviour, which supplements the lack of or very limited *locus standi* against the GMO approval decision under the authorization procedure (in limited circumstances action can be brought under national law against an approval decision of Member States' CAs). And the European Courts have quite generously interpreted public access rules and transparency measures (Lenaerts and Corthaut 2004; Scott and Sturm 2007). In fact, some cases against the Commission's decisions refusing access to various documents regarding GMOs have already been lodged;[32] and these will provide an opportunity for the CFI to examine the Commission's behaviour against the yardstick of public access (accountability) rules.

Last but not least, the current GMO regime does not exclude the establishment of further innovative routes which could have democratizing effects. Thus a research agenda has been recently proposed to adopt the open source

software approach to the biotechnology industry in the form of a type of a 'social production' model (open source biotechnology). This would mean releasing so-called confidential information usually protected by Intellectual Property (IP) rights, and sharing knowledge and findings with a broad public. It has been argued that such an experimentalist model could improve public trust in this field and offer further innovative democratizing perspectives for EU policy (Spina 2009).[33]

8 The need for redefinition of objectives and harbingers of change

The preceding sections which analyse the EU regime on GMOs provide evidence of its novel features but, at the same time, of the need for change in the initial definition of objectives towards more experimentalist governance. The remaining sections elaborate on this latter claim, developing the argument for more experimentalism in GMO policy.

8.1 A modification of approach?

The harbingers of a change in approach can already be seen in the Commission's strategic documents some years ago (e.g. European Commission 2002*e*), but a more open recognition of the importance of deliberation and cooperation have only recently begun to appear in the declarations and practices of the institutions concerned (European Commission 2006*g*; EFSA 2006*a*, 2008). Thus a type of 'cooperative approach' which pursues more learning between the actors and more deliberative communication (greater exploitation of experimentalist governance) seems to have been recently introduced by the Commission. Especially, the Commission seems to have realized the importance of facilitating a consensual compromise on GMO risk assessment at all stages of the approval procedure. In particular, a more proactive role is foreseen for EFSA as a moderator of scientific disputes. The Commission invited EFSA to exploit expansively the possibilities of the network; Member States to make full use of the opportunity to submit their scientific views or comments on the risk assessment during the consultation on individual dossiers; and EFSA to ensure that the Member States' concerns are properly reflected and addressed in the final opinion so that it is clear which concerns were raised and why EFSA did not share them. Moreover, the Commission announced that where Member States' observations raise important and substantiated new scientific questions not properly or completely addressed by EFSA's opinion, it may suspend the procedure and refer the question back to the latter for further consideration (European Commission 2006*g*; EFSA 2006*a*; Vos, this volume). The suggestion was also made to organize reciprocal placements between the staff of EFSA and national authorities (EFSA 2006*a*).

This indicates a type of bridging practice aimed at building consensus between Member States. It also implies that the Commission is seeking to impose a deliberative discipline on Member States' behaviour in the decision-making process through opening up discussion of as many contentious issues as possible before comitology voting takes place. As a result, EFSA opinions now include a new annex explaining how each comment provided by the Member States was considered (SCFCAH 2007*a*).

Scrutiny of the comitology committees' minutes indicates that there has been an attempt to launch a process of reflection and inter-institutional discussion (between the Commission, committees, and EFSA and also between the Commission and EMEA—responsible for GM pharmaceuticals) over currently pending applications (SCFCAH 2007*b*). But this change of approach has not yet been reflected in any compromise/consensus in comitology. There is no QM of votes either for or against Commission proposals although lately more states have voted in favour (on GM sugar beet H7-1, 16 states in favour, 8 against and 2 abstaining; on GM maize 1507 × NK603—214 votes in favour, 83 against and 48 abstaining, and on GM maize NK603 × MON810—214 votes in favour, 86 against and 45 abstaining). So the evidence of an effect of this modification of approach remains quite modest, even if decision-making conditions have clearly changed over time.

8.1.1 NEW DECISION-MAKING CONDITIONS

First, it should be remembered that the last two enlargements changed the number of votes necessary for a qualified majority. The threshold moved to 232 out of 321 votes after the enlargement of 2004 and to 255 out of 345 after the enlargement of 2007. It can be thus argued that the change in voting balance has also influenced the stability of conditions under which experts in the committees can socialize and cooperate which in turn affects their capacity to deliberate.

Second, after the recent EU enlargement several (post-communist) countries with strong traditions of hierarchical administration, lack of transparency, fear of flexible cooperative relations, and authoritative decision making entered the EU (cf. Biernat 2004; Sadurski 2004: 371). In the short term, at least, this probably affected the deliberative capacity of comitology and the willingness of states to cooperate or seek consensual approaches to problem solving (cf. also Zielonka 2006).

8.2 Towards more experimentalism?

From these considerations, it follows that the Commission and EFSA need to play a more serious and proactive mediatory role. Thus the Commission should seek to broker possible consensual compromises between Member States (and EFSA) instead of relying on its final, authoritative word in the GMO approval procedures. This would most likely be welcomed by national authorities, who should be aware of the importance of consensus-building strategies and con-

ciliatory methods, and open to slowly modify their administrative cultures. Such a mediatory role would involve the preparation of agendas mapping the differences and conflicts between the deliberating parties, serving as translators or interpreters of the issues at stake in controversies, making the parties aware of the inclusionary and exclusionary effects of problem definition, modes of discourse, discursive hegemony, and the adoption of strategies of dispute resolution, as well as seeking strategies for expert socialization. There is also a need for closer horizontal integration of risk assessment and risk management before final decisions are taken (Vos, this volume). This should be applied at the earliest stage of the approval process, not only when procedures reach comitology because it is often too late. On the other hand, if such methods are employed at earlier stages of procedure, they may well facilitate compromises within comitology where it seems that final decision making by the Commission following unproductive bargaining between Member States does not produce legitimate and satisfying policy outcomes.

Such deliberative mediation methods are more likely to facilitate consensual compromises about uncertain GMO risks because through them more information can be revealed and exchanged at various level of governance; more comprehensive scrutiny of risk becomes possible and more sophisticated scientific questions can be formulated, for example through full exploration of Member State concerns and their evidentiary basis. Taken together, this would contribute to the achievement of the highest level of product quality. Admittedly, such mediation and conciliation would require an intensification of efforts on the side of the Commission and EFSA and all Member States, which would be very demanding in term of time and logistics. But the adoption of a more experimentalist approach would not require modification of the formal procedure and voting rules in comitology (cf. Anker 2006: 454–7). It could be undertaken within the present legal framework by reference to the available dispute-resolution mechanisms and power sharing among European and national authorities. Thus, it is reasonable to argue for more cooperation, deliberation, and horizontal relations among authorities—more experimentalism in short—in EU GMO governance.[34] Certainly, there is little sign that continued reliance on authoritative and hierarchical procedures will succeed in overcoming Member States' opposition to GMOs.

9 Political struggles or experimentalist solutions—which way forward?

To conclude, EU governance of GMOs can be characterized as experimentalist because of the novel regulatory solutions employed and implemented in the regime. Yet, approval processes under comitology are still wracked by political struggles over GMO risk assessment, while EU and national authorities remain

unable to reach any compromise solution, whether through negotiation or deliberation. The authorization process as such is now 'efficient' because the Commission follows the procedures to adopt decisions, but at the same time risks losing legitimacy in view of the unstructured opposition of national authorities and their inability to reach a QM and decide for or against its proposals. In effect, political struggles and unconstructive bargaining do not produce policy outcomes acceptable to, even a qualified majority of Member States.

So far the GMO experience demonstrates that uncritical belief in traditional authoritative centralization has not produced adequate and legitimate results, while fostering political bargaining without any real dialogue and reducing Member States' capacity to negotiate compromise solutions. But is at all possible that actors can engage in learning processes and resolve their conflicts over such contentious issues as risk regulation? If the answer is no, then the future of the whole European project appears to be very bleak because what happens if the parties are never able to work out a common 'good' solution? This especially concerns situations, like GMOs, where deliberation is difficult to trace, but political bargaining does not produce any legitimate outcome either. GMOs are controversial, but there are other debatable issues in EU governance; or issues that suddenly spark a debate because of sudden and inexplicable behaviour by one of the parties in the game or their societies.

But if the answer is yes (no matter how difficult it may be), then the way to enhance the adequacy of the overall governance of the policy field leads through the intensification of efforts to enhance deliberative practices. Since GMO policy already embodies features of experimentalism, its increased use and intentional employment, including the extension of mechanisms triggering deliberative practices, can be expected to improve the adequacy of its governance. In addition, experimentalist tools can also offer greater accountability of institutional actors to the public and one another. At the same time, experimental solutions can produce other democratizing effects through transparency requirements and proceduralization.

Finally, this sector is young, complex, and politically sensitive. Thus, the development of learning and deliberative problem solving will require structural, logistical, and cultural efforts by authorities and experts, as well as time and stability. Yet the transformation of EU governance in this sector towards a more experimentalist architecture is already clearly visible.

Notes

1. Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms OJ 1990 L117/15. Council Directive EEC/90/219 on the contained use of genetically modified organisms was also adopted.
2. Regulation (EC) No 258/97 concerning novel foods and novel food ingredients, OJ 1997 L43/1.

3. Council Decision 87/373 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1987 L197/33 ('Old Comitology Decision') as reformed by the Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission OJ 1999 L184/23 ('New Comitology Decision').
4. Council Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms OJ 2001 L106/1; Regulation (EC) 1829/2003 on genetically modified food and feed OJ 2003 L268/1; see also Regulation 1830/03 on traceability and labelling of GMOs and traceability of food and feed products produced from GMOs OJ 2003 L268/24.
5. Etty, T. (2007). 'Coexistence—The Missing Link in the EU Legislative Framework' (speech transcript). European Parliament, Brussels: 3rd European Conference on GMO Free Regions, Bio-diversity and Rural Development.
6. E.g. Commission Regulation (EC) No 641/2004 on detailed rules for the implementation of Regulation (EC) No 1829/2003 as regards the application for the authorisation of new genetically modified food and feed, the notification of existing products, and adventitious or technically unavoidable presence of genetically modified material which has benefited from a favourable risk evaluation, OJ 2004 L102/14.
7. Commission Recommendation 2004/787/EC on technical guidance for sampling and detection of genetically modified organisms and material produced from genetically modified organisms as or in products in the context of Regulation (EC) No 1830/2003, OJ 2004 L348/18.
8. e.g. *Format to provide information on GM detection methods and related samples* recommended in order to submit information of GM detection methods and related samples under Regulations 1829/2003 and 641/2004, at http://gmo-crl.jrc.it/guidancedocs.htm
9. Commission Recommendation 2003/556/EC on guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming, OJ 2003 L189/36.
10. Point 2.1.10. (Monitoring and evaluation), 2.1.1.1. (Provision and exchange of information at European level), 2.1.12. (Research and sharing of research results.), Annex, ibid.
11. http://biotech.jrc.it; http://gmo-crl.jrc.it
12. www.engl.jrc.it
13. http://ec.europa.eu/food/dyna/gm_register/index_en.cfm and http://bgmo.jrc.ec.europa.eu/home/ict/methodsdatabase.htm
14. http://gmoregis-portal.jrc.it/ visited 2 April 2008.
15. https://sciencenet.efsa.europa.eu/portal/server.pt (access limited to members).
16. Email from an EFSA official, 13 February 2006.
17. Centralization as understood here refers to the relation between the Community and the national levels, not between the Commission and its decentralized agencies.
18. C-6/99, *Association Greenpeace France and Others v Ministere d l'Agriculture et de la Peche and Others,* ECR [2000] I-1651, par. 39–42.
19. GOPA focuses on multidisciplinary issues that tend to involve longer timescales and greater efforts (e.g. application of the precautionary principle in decision-making processes under conditions of uncertainty).
20. There was a further comitology reform in 2006 expanding the European Parliament's competences in legislative rule making but it does not apply to administrative

decisions on individual GMO approvals. See Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 2006 L200/11.

21. Council Decision 2002/811/EC establishing guidance notes supplementing Annex VII to Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms OJ 2002 L280/27.
22. After the 2006 reform of comitology, the change of legislation through committees involves the European Parliament under the regulatory committee procedure with scrutiny (Art. 5a) and resembles its powers under Art. 251 TEC, see note 20.
23. Commission Decision 2005/317/EC on emergency measures regarding the non-authorized genetically modified organism Bt10 on maize products, OJ 2005 L101/14.
24. e.g. Decision concerning the creation of an advisory group on the food chain and animal and plant health, OJ 2004 L275/17.
25. Commission Decision 2005/463/EC establishing a network group for the exchange and coordination of information concerning coexistence of genetically modified, conventional and organic crops, OJ 2005 L164/50.
26. Commission Decision 2002/623/EC establishing guidance notes supplementing Annex II to Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms OJ 2002 L200/22.
27. T-13/99, *Pfizer*, par. 170–2; C-6/99 *Greenpeace*, par. 33; and C-236/01, *Monsanto*, para. 58–61 and 111–12.
28. 'BASF Plant Science takes Amflora case to EU Court', WebWire, 24 July 2008, http://www.webwire.com/ViewPressRel_print.asp?aId=70891, visited 8 August 2008, see T-293/08 pending.
29. Regulation (EC) No 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145/43; see also the judgements T-105/95 *WWF UK v Commission* [1997] ECR II-313, par. 55; and T-84/03 *Maurizio Turco v Council*, [2004] ECR II-4061, par. 53.
30. UN/ECE Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making, and access to justice in environmental matters OJ 2005 L124/1.
31. Cf. C-316/01, *Eva Glawisching v. Bundesminister für Sicherheit and Generationen* (2003) ECRI-5995.
32. For example, T-42/05, *Williams v. Commission*, OJ 2005 C93/34.
33. See also www.cambia.org, a pilot project for open source agricultural biotechnology (cited in Spina 2009).
34. Such a view has been already expressed in the risk regulation scholarship. Thus for example, Klinke and Renn (2001: 170) encourage the intensification of analytic–deliberative strategies for risk decision making. They argue that after the scientific input outlining all the uncertainties and ambiguities, which is the first essential step in procedures, has been gathered by a political body, the evaluation and assessment of this information should take place through discursive and deliberative methods of decision making (cf. also Dreyer and Renn 2008).

9

Stumbling into Experimentalism: The EU Anti-Discrimination Regime*

Gráinne de Búrca

1 Introduction

EU anti-discrimination law originated in a single provision on equal pay between men and women, which was included in the 1957 EEC Treaty largely to allay French fears of wage competition from states without equal pay laws (Barnard 1996). Since then EU anti-discrimination law has broadened and grown considerably, to include a whole range of grounds other than sex, and contexts other than pay and employment. This chapter focuses on the transformation of EU anti-discrimination law over time, but its emphasis is not so much on its transformation in terms of the expansion beyond sex and gender equality, or beyond the employment context. Instead it is on the way in which EU anti-discrimination law has evolved as a distinctive governance regime, which I describe as stumbling into experimentalism. I use the metaphor of stumbling because, as will be explained in more detail later, there was in the shaping of the regime no apparent political commitment to create any form of experimentalist or reflexive governance in this field, nor any apparent awareness then or now on the part of participants in the system of the merits of such a regime. Indeed, it appears from interviews carried out for this chapter[1] that many of the actors who participate in the EU anti-discrimination regime maintain a fairly conventional understanding of their role as the provision and promotion of information about uniform norms to be defined by central authoritative institutions, even as they are beginning to develop and to share problem-solving practices amongst themselves and across some of the newly established networks.

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In analysing EU anti-discrimination law and policy as an experimental regime this chapter draws not only on the introductory chapter and earlier work by Charles Sabel and Jonathan Zeitlin on EU experimentalist governance (Sabel and Zeitlin 2008), but more generally also on Sabel's body of collaborative work on democratic experimentalism (Dorf and Sabel 1998). In this body of work experimentalism is presented as a fresh lens through which to understand modern regulatory change in political systems where the challenge is the effective pursuit of key social and economic goals, and goods within large and diverse polities. Democratic experimentalism is

> a new form of government in which power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems. This information pooling . . . both increases the efficiency of public administration by encouraging mutual learning among its parts and heightens its accountability through participation of citizens in the decisions that affect them. (Dorf and Sabel 1998)

The regulatory strategy aims 'to create a framework for experimentation by defining broad problems, setting provisional standards, pooling measurements of local performance, aiding poor performers to correct their problems, and revising standards and overall goals according to results'. In an experimental system

> it is the local units that do the problem solving. It is they, not the central office, that experiments with cross-cutting solutions. . . . But they do not operate in isolation. They are accountable to the center, and to their local constituents. . . . If the purpose of the center is to frame experimentation, then the purpose of the legislation is, as it were, to frame the frame. (Sabel and O'Donnell 2000)

A first look at the new EU anti-discrimination regime, which is described in further detail later, indicates that there is much that fits the broad description of an experimental system of governance. Yet there may be reasons for resistance to conceiving it in these terms, which might explain the continued adherence of participants within the regime to a more conventional legal understanding. There are a number of features of experimental governance that appear at first glance to make it inherently unsuitable for pursuing a policy goal like gender or racial equality(see de Búrca 2005*b*: 25; 2006). On the one hand, while the language of experimentation, with its scientific connotations, seems to suggest the search for the correct answer or the right solution, the emphasis of democratic experimentalism is rather on the merits of ongoing revisability, corrigibility, flexibility, and change. While the philosophy of experimentalism presupposes uncertainty about the best way of pursuing complex policy goals, anti-discrimination policy is generally thought of as a relatively straightforward normative aim which involves little doubt about the goals to be achieved. Another presupposition of experimentalism is

that policies are best made by an interactive process of bottom-up problem-solving, and horizontal sharing of proposed solutions, with a feedback and monitoring function rather than a hierarchical enforcement role being played by the 'center'. Once again, this approach initially may seem like a poor match for anti-discrimination law and policy, which is generally assumed to be dependent on strong judicial enforcement of fairly unambiguous and uniformly applicable equality norms.

Yet, as has been convincingly argued in the US context, even if some of the more blatant and clearer instances of discrimination can be identified and tackled by law in a relatively straightforward way, the problems of what has been termed 'second-generation discrimination' tend to be considerably more complex, more opaque, and less readily subject to resolution by hierarchically defined and prescribed rules (Sturm 2001). Susan Sturm has made this argument persuasively in her work on employment discrimination in the United States:

> Frequently, sexual harassment and discriminatory exclusion involve issues that depart from the 'first generation' patterns of bias. . . . Second generation claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. . . . The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules. Any rule broad enough to cover the variety of contexts and conduct that might arise will inevitably be quite general and ambiguous, and it will produce considerable uncertainty about the boundaries of lawful conduct. . . . Efforts to reduce the uncertainty of general and ambiguous legal norms by articulating more specific and detailed rules produce a different but equally problematic result. Specific commands will not neatly adapt to variable and fluid contexts. Inevitably, they will be under-inclusive, over-inclusive, or both.

Discussing the alternative regulatory framework which has begun to emerge for dealing with second-generation discrimination problems, Sturm argues that

> This regulatory approach shifts the emphasis away from primary reliance on after-the-fact enforcement of centrally defined, specific commands. Instead, normative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas, including but not limited to the judiciary. . . . This approach expands the field of 'regulatory' participants to include the long-neglected activities of legal actors within workplaces and significant nongovernmental organizations . . . These actors have already begun to play a significant role in pooling information, developing standards of effectiveness, and evaluating the adequacy of local problem-solving efforts.

The upshot of Sturm's argument in relation to the employment context is that the case for an alternative to a conventional command-and-control, hierarchical, rule-based regulatory approach is evident just as much in the field of anti-discrimination as in others.

Sturm's work in the employment law field thus unsettles the assumption that a clear, centrally defined non-discrimination rule is capable of resolving the kind of complex pattern of structural discrimination which prevent equality and anti-discrimination norms from reaching their goal. To her account of the value of a more experimental and structurally focused approach can be added the emergence of what might be called 'third-generation' discrimination problems. Third generation discrimination refers to the deep patterns of systemic inequality which can be seen across the field of access to public and social services such as housing, education, and health (Bossick et al. 2007; also see EU Fundamental Rights Agency 2007, especially sections 4 and 5). The limits of a traditional, hierarchically defined and interpreted, rule-based approach for addressing these entrenched and complex social problems are equally painfully evident here, even as anti-discrimination law has begun to focus on indirect discrimination, and to encompass evidentiary burden-shifting rules and affirmative duties.[2]

Using the lens provided by experimentalism, this chapter argues not that the EU has designed a system of democratic experimentalism to address problems of discrimination in Europe, but rather that if some of its distinctive features and operation are examined, the new regime of EU equality law is slowly—perhaps through a combination of deliberate action and unintended circumstances—stumbling into experimentalism. The argument will be illustrated by tracing briefly the origins and early evolution of EC equality law and policy, and the way in which it has evolved over time from a narrowly focused and conventionally hierarchical legal regime into one which today exhibits several of the features of what might be called a quasi-democratic experimentalism.

2 The origins of EU anti-discrimination law

In the early European Community legislation adopted in the 1970s to deal with sex equality in the workplace, the anti-discrimination provisions were interpreted by the European Court of Justice as an individual right, deriving from the clear requirement of equal pay between men and women, which was to be enforced through judicial review. The original EC Treaty rule in Article 119 was a narrowly focused requirement of equal pay between men and women at work.[3] In other words, it covered only the employment sphere, it was restricted to equal pay, and it covered only discrimination between men and women. Early case law also treated the rule as applying only to cases of

direct discrimination, on the basis that the Treaty rule was not clear enough to be applied in cases of disguised or indirect discrimination.[4] The ECJ gradually changed its approach on this point over time, ruling that indirect discrimination could also be challenged.[5] However, this could only be done with difficulty, since claimants were required to establish that the rule or practice affected a considerably higher proportion of women than men, and even where they succeeded in establishing this, employers could avoid legal liability by putting forward grounds of 'objective justification unrelated to sex' to explain the pay differential. Over the course of the 1970s, legislation was adopted by the EC to extend the sex equality rule from one prohibiting unequal pay to one which also prohibited discriminatory treatment in access to employment, conditions of work, and vocational training.[6] At the same time, legislation was adopted with a view to gradually introducing the principle of sex equality into the area of employment-related social security.[7]

Over time, the ECJ came to read the equal treatment legislation quite expansively. For example, the Court ruled that subsequent victimization of a complainant was covered by the prohibition against sex discrimination in the workplace,[8] and that discrimination on grounds of pregnancy constituted direct sex discrimination.[9] A number of legislative amendments and developments followed in the 1980s and 1990s, updating the legislation in light of the Court's rulings on matters such as pregnancy,[10] occupational social security,[11] and the burden of proof[12] (which would shift to the employer once the claimant put forward facts establishing a presumption of direct or indirect discrimination). Finally, the Court in a series of cases litigated in the 1990s decided, in the absence of any legislative initiative in this field, that the concept of 'sex discrimination' in the equal treatment directive included transgender discrimination,[13] but did not include sexual orientation discrimination.[14]

Thus the pattern, for the first three decades of the European Community's existence, was of a relatively expansive judicial approach to the three pieces of equality legislation adopted in the 1970s (equal pay, equal treatment in the workplace, and equality in employment-related social security), sometimes followed up by legislative amendments which incorporated or bolstered the Court's interpretations. Much of the impetus for these judicially led changes came from an increasingly well-organized trans-European women's movement, which engaged in lobbying the EC legislative institutions—particularly the European Commission and Parliament—and developing litigation strategies to push for judicial expansion of the legislative norms (Barnard 1996*b*; Cichowski 2006: ch. 5; Hoskyns 1996). This pattern of incremental interaction between judicial and legislative reform of EC sex equality law, often mobilized and supported by the activities of the growing transnational women's lobby, was also furthered by a series of softer policy strategies, including in particular a series of supporting 'action programmes' for equal opportunities between men and women.[15]

However, a legal–constitutional turning point in the field of EU equality policy in general, and EC gender equality in particular, was reached with the adoption of the Amsterdam Treaty in 1997. The Amsterdam Treaty introduced several significant formal innovations. The first was to incorporate the requirement of 'mainstreaming' gender equality through all other European Community policies (Beveridge 2007: 193).[16] The second was to introduce Article 13 of the EC Treaty, which subsequently became the legal basis for the new, expanded anti-discrimination regime. Proposals to broaden the scope of EU anti-discrimination law and policy had periodically been made from the mid 1980s onward, partly in response to the perceived rise in xenophobic and racist activity across Europe, and the growth in support for far-right and extremist political parties within many European states.[17] But political agreement on extending the EU's legal powers to act in this field could not be reached, with the United Kingdom in particular opposing any such interference by the EU in state affairs, and viewing any expansion in anti-discrimination policies as a matter for domestic law alone.[18] With the coming into power of the Labour Party in the United Kingdom in 1997, after seventeen years of Conservative Party rule, however, this position changed, and agreement was reached on the inclusion of Article 13 by the Amsterdam Treaty later that year. Article 13 is cautiously worded but provides essentially that the EC legislature, acting within the limits of the EC's overall powers under the Treaty 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' (Bell 2002).

Significant as these changes were in terms of introducing the foundations for the new EU anti-discrimination regime, however, it was not until the turn of the millennium that the contours of what this chapter describes as the 'new regime' began to take shape. The victory won by NGOs and others who had campaigned for the inclusion of a general anti-discrimination clause in the EC Treaty was given further impetus by the unexpected political consensus which developed rapidly behind the enactment of race discrimination legislation, following the 'Haider Affair' involving entry into coalition government in Austria of the far-right Freedom Party in 2000 (Merlingen, Muddle, and Sedelmeier 2001: 59). The newly ratified Article 13 of the EC Treaty was acted upon with unusual speed by the European Commission and by the Council of Ministers, and in the course of that same year, the 'Race Directive' (Chopin 1991; Niessen 2001*a*, 2001*b*: 389)[19] and the 'Framework Equality Directive' were enacted into law (see generally Bell 2002)[20] Together with the subsequent amendment of the 1970 Equal Treatment legislation in 2002, which brought the law on sex equality in the workplace into line with these new broader anti-discrimination measures, the Race Directive and the Framework Equality Directive form the bedrock of the EU's new anti-discrimination regime (Geddes and Guiraudon 2004: 334–53; Ellis 2005).

The main elements of the new anti-discrimination regime have since been extended to other existing parts of EC equality and consolidated by a number of other legislative measures, including a directive on equality between men and women in access to and supply of goods and services,[21] and a codifying Directive adopted in 2006 which brings together much of the existing legislation on sex and gender equality.[22] Finally, the Commission announced in late 2008 that it intends further extending the anti-discrimination laws and will shortly propose measures in the fields of age, disability, religion, and sexual orientation which expand the reach of the equality laws in the direction of those already enacted in the field of discrimination on grounds of racial and ethnic origin.[23]

3 The distinctive features of the new anti-discrimination regime

Below, some of the main distinctive features of the new system are outlined, together with preliminary evidence of the way in which it appears to be operating. Finally, the reasons for describing it as a regime which is stumbling into experimentalism will be explained.

There are five particular features of the emerging anti-discrimination field which merit emphasis in this respect. The *first* is the variety of roles specifically assigned to a range of non-state actors including a new set of actors introduced by the legislation itself; the *second* is the creation, financing and operation of a set of transnational networks of public and private actors; the *third* is the emphasis on alternative remedial or dispute resolution processes in addition to the judicial route; the *fourth* is the broadening of the central norm—which is already a deliberately broad and open-ended norm of non-discrimination—to include a wider conception of indirect discrimination and a range of second-generation equality issues such as harassment and victimization (Sturm 2001) and the fifth is the shift in emphasis from a narrow negative prohibition to a set of positive obligations including the requirement of 'reasonable accommodation' and a general policy of 'mainstreaming'.

(i) *Designating particular roles for non-state actors*

As has already been noted above, a significant body of scholarship has addressed the way in which transnational advocacy groups and networks worked over the years to lobby for the enforcement, expansion and development of EU anti-discrimination law, initially in the area of sex equality, subsequently also on the issues of race discrimination, and transgender and sexual orientation discrimination, and more recently on disability and age discrimination (Bell 2002; Cichowski 2006; Hoskyns 1996; Waddington 2006; Zippel 2004: 57–85). The focus of much of this scholarship has been on how these

social groups, movements and networks pushed from 'outside' for the adoption and strengthening of equality laws at EU level, and for their enforcement at national level through litigation and other strategies. What is distinctive about the new EU anti-discrimination regime, however, is the way in which it has brought these and other social actors formally into the governance regime as part of the law-making and law-application process.

Article 7(2) of the Race Directive provides that 'Member States shall ensure that associations, organizations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. Article 11(2) provides that Member States are to encourage labour and industry to conclude agreements laying down anti-discrimination rules in the fields covered by the Directive, and Article 12 provides that the States are to encourage dialogue with NGOs which have a legitimate interest in combating race discrimination. Most significantly, Article 13 provides that Member States shall designate a body 'for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin', whether within the framework of existing state agencies for human rights protection or otherwise. Finally, Article 16 provides that states can entrust the implementation of the Directive by collective agreement to the social partners. Parallel provisions to these are to be found in Articles 9, 13, 14, and 18 of the Framework Employment Directive in 2000, and in Articles 8a, 8b and 8c of the amended Equal Treatment Directive in 2002 respectively.

Unlike some other examples of EU experimental governance, however, it is notable that the regulated entities—industry actors in particular—are relatively absent from the EU anti-discrimination regime. Virtually all of the major participants so far are NGOs or independent equality bodies established by the state. Part of the reason for this is evident in that, unlike in some other regulatory fields where industry has a clear interest in the kind of regulatory norms adopted and an incentive to get involved in shaping them, employers and service providers often have—or understand themselves to have—little independent interest in developing equality norms. And while the Directive clearly makes provision for the involvement of the social partners, it seems that labour unions and employers' unions alike have at best been marginal actors so far.

(ii) *The creation and financing of transnational networks*

The second significant feature of the new regime is that the European Commission has contributed to establishing and funding of a range of transnational projects and NGOs, first under the 'Action Programme against Racism' and subsequently under the general Action Programme against

Discrimination adopted in 2000,[24] the same year that the two anti-discrimination Directives were adopted.

When introducing the Action Programme, the EU Commission stated that the objectives of the Programme were threefold: (*a*) to help to analyse and evaluate the extent and nature of discrimination in the Community and the effectiveness of measures designed to combat it; (*b*) to help to build up the capacity of those people and organizations which are active in the fight against discrimination; and (*c*) to help to promote and disseminate to practitioners and opinion-formers the values and practices underlying the fight against discrimination (de Búrca 2006). They divided the activities of the programme, accordingly, into three main areas: (*a*) improvement of the understanding of issues related to discrimination, through the development of statistical bases, benchmarks, and indicators to assess the effectiveness of anti-discrimination policies; (*b*) the development of the capacity of the relevant actors to tackle discrimination effectively. This was to include promoting 'civil dialogue' and supporting the transnational exchange of information and good practice. This would also enable the provision of core funding to major European-level networks of organizations working in the field of non-discrimination; and (*c*) the promotion of awareness of the EU dimension of the fight against discrimination. The results of the action programme were to be made public, with the aim of raising the awareness of opinion-formers, and 'with a view to promoting change in society'.

There are several important transnational networks in the field of EU anti-discrimination law. The first and most important, for the purposes of this chapter, is the European Network of Equality bodies, known as EQUINET, which comprises the specialized national equality bodies charged with promoting equal treatment and which were specifically required to be established under the relevant anti-discrimination Directives. The second is coordinated by the Fundamental Rights Agency (FRA), which is the successor to the previously more specific European Union Monitoring Centre on Racism and Xenophobia (EUMC), with its network of national contact points (RAXEN). The RAXEN network and the EUMC were responsible for gathering and publishing sociological data on the phenomena of racism and xenophobia across European Member States, to feed into European policies. And now that the FRA has replaced the EUMC with a wider mandate covering all of the newer grounds of discrimination, it is tasked with data-gathering in these other fields too (EU Fundamental Rights Agency 2007). The third relevant set of networks comprises the four umbrella NGO networks, which are comprised of existing national NGOs active in the various fields of policy covered by the Directives. In the field of racism, the European Network Against Racism (ENAR) is the relevant network of national anti-racism bodies; in the field of disability, the network of national NGOs is known as the European Disability Forum (EDF); in the field of sexual orientation it is the International Lesbian and Gay Association (ILGA-Europe), and

in the field of age discrimination the relevant network is known as AGE—the European Older People's Forum. In the longer-established field of gender equality, a wide range of different networks of women's organizations have been funded including broad umbrella groups such as the European Women's Lobby. A European Gender Institute was also created last year. Fourthly, the Commission established a Network of Legal Experts, composed of independent legal experts across the various fields of antidiscrimination law, and funded under the Action programme. The role of this network of legal experts is to gather information on, analyse, and report on the legal framework for tacking discrimination in the various Member States.

There is a range of other relevant EU NGO groups and networks, including the Network of Independent Experts on Fundamental Rights[25] whose mandate is considerably broader than anti-discrimination policy, but which includes the latter. Further, there are many more specific or smaller discrimination-related networks, such as Solid-EU, which have received funding for particular projects under the Action Programmes. Finally, the EU also established a 'High level group on social inclusion of ethnic minorities' in 2006, whose remit includes the identification of ''good practices'' developed by public policy, by enterprises and by civil society'.[26]

Thus there are four dominant sets of networks which have been assigned or have taken on a specific role within the EU anti-discrimination regime. The most important for present purposes is EQUINET—the network of official equality bodies which is directly charged with promoting equality and thus with shaping policy under the Directives. However, the other three main networks also play distinct and important roles within the regime. The four networks of NGOs active in the various fields have a central role in consciousness-raising, in providing and distributing information, and mobilizing the active enforcement of the legislation through education, litigation etc. The data-gathering networks such as RAXEN on the other hand have undertaken the responsibility of gathering and providing empirical information on the existence of discriminatory practices and patterns, and finally the network of legal experts has the task of analysing and reporting on legal implementation and other legal developments concerning EC anti-discrimination law in the various Member States.

(iii) *Informational approaches, alternative remedies, and alternative dispute-resolution processes*

The third distinctive feature of the new anti-discrimination regime is its emphasis on informational mechanisms and alternative remedial and dispute-resolution processes. While the provisions of the three Directives dealing with remedies are fairly sketchy, there is a clear emphasis –unusual in EU legislation, which normally focuses exclusively on judicial redress—on conciliation, dialogue and informational strategies. The various 'new' actors mentioned in the

legislation—the Equality bodies, NGOs and Social partners in particular—are accorded particular roles in this respect.

(iv) *The broadening of the central anti-discrimination norm*

Building on and going beyond the gradual expansion by the ECJ of the original and narrow equal pay rule, the various anti-discrimination instruments now also clearly prohibit harassment, as well as victimization. Further, the concept of 'indirect discrimination', while it remains very loosely defined in the legislation, has been broadened so that, unlike the judicial definition which had required 'an apparently neutral provision, criterion or practice to disadvantage a substantially higher proportion of the members of one sex', and had been interpreted to require statistical evidence of a pattern of discrimination, the new legislative definition requires only that 'an apparently neutral provision, criterion or practice would put persons [of a racial or ethnic origin/ having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation] at a particular disadvantage compared with other person' unless the provision can be 'objectively justified' and satisfies the criteria of legitimate aim and proportionality (Tyson 2001: 199) Finally, most of the anti-discrimination Directives under the new regime are 'horizontally' as well as vertically effective—in other words, they apply to private as well as to public bodies, thus expanding the immediate scope and applicability of the norm (de Witte 2007).

(v) *From negative to positive obligations*

The fifth distinctive feature of the new regime is the move from a focused negative obligation to broad set of positive requirements including the general requirement of 'mainstreaming' (i.e. the systemic incorporation of equality goals into all public policies), as well as more specific requirements which trigger broader positive obligations such as the requirement to make 'reasonable accommodation' for persons with disabilities (Goldschmidt 2007: 39) While the obligation to mainstream anti-discrimination norms through EU policies does not appear as a legal requirement in the three Directives, the EC Treaty does, as mentioned above, specifically require the goal of equality between men and women to be taken into account in all other EU policies. But even though in legal terms the mainstreaming obligation is articulated only in relation to gender equality, in fact the Commission through the Action Programme has for a number of years been promoting a policy of mainstreaming in the other fields of anti-discrimination too.[27] At present in EU policy there is a hierarchy of mainstreaming initiatives, with gender equality for obvious reasons being the most advanced, then to a lesser extent racial and ethnic discrimination, and also disability discrimination. But few if any moves in this direction have yet been made in the case of sexual orientation discrimination, religious or age discrimination (Bell and Waddington 2001: 587; 2003: 349).

In conclusion, it seems that if we analyse the new EU anti-discrimination regime, taking that to mean the Race Directive and the Framework Equality Directive of 2000, the amended Equal Treatment Directive of 2002, and the two Directives extending and consolidating gender equality law in 2004 and 2006, all of which are underpinned and supported by the Action Programme, something which clearly resembles an experimentalist governance regime in its institutional form and design appears to be emerging. The legislation is clearly designated as 'framework' only, the regulatory norms are broad and open-ended, a range of different social actors are specifically allocated various roles in promoting equality, implementing the norms, raising awareness, providing information, assistance, and reporting back. The 'centre' (in this instance mainly represented by the Commission, although ultimately also the other EU law-making organs and in particular the Council and the Parliament) relies on the various social actors, NGOs, Equality Bodies and specialized experts for input, action and information on a range of different matters. These matters include the problem being tackled (e.g. the sociological data on discrimination in its various forms which is provided by actors such as RAXEN), the strategies being used to address it (which is mainly provided by the four umbrella NGO networks), the legal framework in existence in different states (which is provided by the network of legal experts) and the steps being taken to implement the new EU legislation, as well as difficulties arising with its implementation. EQUINET, the newly established network of independent equality bodies, seeks to spread and share the information and experience of concrete problem-solving within each state. Finally, in the text of the various Directives, the Commission has undertaken to review and revise the legislation in the light of periodic reports on its implementation received from the Member States.

4 The operation of the new regime in practice: a preliminary assessment

So far, the analysis of this chapter has been primarily of the institutional features of the regime, rather than of its functioning in practice. A central premise of experimentalism is that the process of information- and practice-sharing, peer review, monitoring, and feedback should facilitate learning across sites, so that policy evolves not by fiat from above but by information generated and by trial and error triggered from below, shared across sites, and then reflected upon and used to inform the next cycle of 'framing' from the center. Is there is any evidence of this kind of practice within the new EU anti-discrimination system?

A first point to note is that it is still rather early in the life of the new system to be appraising its functioning as an experimentalist regime, even if the two key Directives and the Action Programme were initially adopted eight years ago. This is because they did not require implementation until mid-2003, and

many states in fact delayed transposing the Directives beyond this date until they were brought before the European Court of Justice by the Commission. However, in most states the new, specialized Equality bodies envisaged under the Directives have been functioning for at least a year or more, (EQUINET 2006) and many of the other networks—in particular the four umbrella networks of national NGOs—have been funded to carry out specific transnational tasks under the Action Programme for several years.

The analysis contained in this paper is based on initial interviews carried out with staff of the Commission's Directorate General on Social Affairs, the coordinating office of EQUINET, the ENAR secretariat, the network of legal experts, the Migration Policy Group[28] and Solid-EU.[29] The questions asked in each case were aimed at identifying what role each of the networks understands itself as having, who the target audience of their activities is, whether they consider that cross-national learning of any kind is taking place and if so how that is occurring, and what they understand the role of the EC Commission (the 'center') to be. The questions to the Commission included questions about what role the Commission understood the various networks to have, how it understands its own role within the regime, how best practices are identified and disseminated, to whom they are disseminated, what the role of litigation is perceived to be, and what use it makes of the information and data generated by the networks.

The first and dominant impression gained from the responses to these interviews is that there is little if any conscious experimentalism taking place, and that despite the novel legislation and the new institutions established, most of the actors continue to maintain a conventional understanding of the anti-discrimination system and of their role within it. Many of them are critical of the open-ended nature of the legislation, of the failure to 'clarify' or 'define' many of the key terms such as indirect discrimination, reasonable accommodation, or even to specify more precisely what the new specialized equality bodies are intended to be and do (Bell 2008: 43).[30] They remain very much focused on the Court as the appropriate actor to provide clear and uniform answers on the meaning of the legal provisions, and on the idea of litigation as the route to clarification of norms and thereby strengthening the anti-discrimination regime. They see their role as being to spread information, to raise awareness and to educate, and in the case of several of the networks it is clear that the priority of the component national groups/NGOs is to focus on the problems arising within their own state, and not on sharing experiences across the network or seeking to learn from one another. They have not yet begun to put formal structures in place for exchange of practices, and information-collection remains very much a paper exercise, coordinated at the center by the Commission, but lacking a dynamic learning dimension. They indicate that—apart from the inevitable language difficulties encountered—they lack time, staff and resources within the network bodies to engage in genuine and serious sharing of information of the kind which would lead to a genuine learning process.

These initial observations would seem to suggest that while the institutional framework established by the new EU anti-discrimination laws and policies resembles an experimentalist regime, the experimentalist hypothesis is not borne out in practice, and the 'new clothes' merely cover a legally conventional, centralized and hierarchical anti-discrimination system. However, the picture is somewhat more nuanced than this. The information gained from the interviews indicates that that there are clearly elements of a learning-process going on. Further, the European Commission evidently pays close attention to the activities of several of the networks in particular, and it has changed the goals of the Action Plan in line with its perception, from the information and reports received, of how the previous one had operated. It particularly pays close attention to the reports of the legal experts' network, and requests them regularly to investigate and report on a range of specific issues which it identifies—sometimes from the data provided by other bodies and networks—as being particularly important.

Between the bodies in the networks themselves, there are several elements which point to the growing potential for useful exchanges of practice and some form of dynamic learning process. The Migration Policy Group, which carried out an extensive study of the then twenty-five national equality bodies, expressed the view that EQUINET's self-perception has been evolving from one of a purely legal-based nature to one about the exchange of best practice and policy. The main obstacle to this, in its view, was the combination of a lack of resources and a lack of experience, given that most of the specialized equality bodies are new and that the legislation is also very new. However, it seems that even the exchange of hypothetical information how these different bodies propose to deal with cases which individual members are faced with, and which they then share with other bodies in the network, is facilitating a learning dynamic. Thus EQUINET, apart from its publication of thematic reports based on information from each state, has developed a novel way of sharing information on anti-discrimination practices. This involves one member of the network inviting other members—via a members' website forum (http://www.equineteurope.org/forums/)—to comment on how they would deal with a case that is before that body, and seeking to identify the best response, and how this could be applied in practice. This seems so far to be a relatively informal practice of information-sharing, which does not always involve all or even many of the members. Nonetheless, it is one way in which, in the absence of formal, structural mechanisms for determining best practices, these are being identified and shared.

Outside the formal EQUINET project but in a similar spirit, many members indicated that they are involved in bilateral and plurilateral exchanges with others, in a kind of informal EQUINET 'Erasmus' programme, where staff from one equality body go and spend time learning about the activities and practices of the equivalent body in another state. Furthermore even networks such as ENAR and Solid-EU, which see their main function as being the provision of

top-down information-provision, training and awareness-raising/empowerment, also expressed the view that despite the lack of a formal or structured means of exchanging best practices, synergies had been created by the very existence of their network, and that events such as meetings and conferences had provided fora for a more dynamic exchange of information and a peer-to-peer form of learning. They also appear to be confident that mutual learning is in fact ongoing and will increase through the informal and peripheral contacts that are being built up as part of the network and its activities.

Apart from education/training, awareness-raising and empowerment, the main role which some of the other networks—RAXEN in particular (and now the Fundamental Rights Agency)—saw themselves as having was the systematic collection of data with a view to highlighting the nature of the problems and helping to focus attention on these and on the need for strategies to address them. As far as the primary focus of the networks on their educational role is concerned, it was suggested by the Commission that although the reason usually given for this was the 'complexity and unfamiliarity' of the legislation, another reason may be that little attention was paid to the actual legal content of the Directives when they were being adopted, because of the political hysteria they generated in certain states—apparently including Germany and France. Apart from the more dynamic and interactive methods being developed by EQUINET, there seem to be two main means of sharing information amongst the networks—either by the semi-centralized preparation of reports with the collaboration of members, or the holding of meetings, seminars and conferences. Reports prepared by the umbrella organizations keep all members up to date with what is going on of note in other countries. While the network of legal experts focuses mainly on the various national legal frameworks, and EUMC/FRA have focused so far mainly on providing data on the incidence and phenomena of racism and other forms of discrimination, it is EQUINET, the network of official equality bodies tasked with the promotion of equality throughout the Member States, which is increasingly focusing more on actual practice and policy than on legal norms. Through the informal exchange of advice on how to deal with particular cases, which interviewees indicated they were confident was being used, they have begun to build up a catalogue of different answers to different problems. The Commission itself also suggested that a certain amount of learning is taking place, in particular through the EQUINET, and that—contrary to what many expected—it is not the case that the newer member states of central and Eastern Europe are always the members who are doing the 'learning', but that they have in some instances shared useful instances of practice which then influenced others through the network.[31]

It seems that the Commission views itself as the umbrella for all of the various networks, but that its perception so far of its role and that of the networks remains fairly conventional and top-down in nature. The Commission

sees the role of the networks as being to provide it with information, as well as to spread information and to undertake education and training within each of the states. Recently, for example, the Commission initiated the early stages of legal infringement proceedings against fourteen member states for inadequate or improper implementation of the 2000 Directives, focusing on issues such as excessively narrow definitions of indirect discrimination, harassment or instruction to discriminate, which conflict with those contained in the Directive.[32] Yet the Commission is clearly dependent upon, and is actively using the information provided by, the various groups in order to target its policies, to focus its activities under the various EU action programmes and funds, and to promote further policy developments in these fields. More generally, it seems to be playing a very entrepreneurial—some might say controversial—role in the field of EU antidiscrimination law, proposing new extensions and developments of the law even in areas where there is no particular interest or support from the Member States at the political level, but where it is buttressed by the alliances it has forged with trans-European networks of civil society organizations and other relevant stakeholders.

Finally, as far as the relative absence of the regulated entities—including the employers' unions in their capacity as social partners—from participation in the anti-discrimination regime is concerned, the Commission has taken some steps towards including corporate actors and employers in the system. On the one hand, it has funded several initiatives under the action programmes to help in making the 'business case for diversity',[33] and has undertaken a series of training seminars in 2007, thereby involving business groups and employers at least passively in the process of developing and implementing the anti-discrimination norms. It is also notable than in the Commission's recent announcement of its intention to launch a consultation process with a view to proposing new anti-discrimination legislation in the fields of age, disability and sexual orientation, the Commission indicated that in addition to its general consultation process it intended to conduct a specific consultation targeting business groups.[34] This has also strengthened the Commission's strategy of presenting the expansion of anti-discrimination law not in human rights terms alone, but also as market-making rather than market-correction measures.[35]

One striking feature is that, despite the focus of several of the networks—ENAR and Solid-EU in particular—on strategic litigation and on the judicial role in clarifying and delivering a uniform interpretation, there has been very little litigation thus far. Only one case has come before the ECJ on racial or ethnic discrimination,[36] a small number on age discrimination,[37] two cases on disability discrimination,[38] and one concerning sexual orientation discrimination under the framework employment directive.[39] In general, however, there has as yet been very little EU judicial activity concerning the anti-discrimination directives. One possible explanation offered by the Commission for this was that many cases are settled domestically, or are successful, and

that references are not being made to the ECJ. In states which already have some reasonably developed anti-discrimination law, the Commission suggested, the national courts consider that they are sufficiently familiar with the law, and do not need to refer questions to the ECJ; whereas in states for whom the Directives are very novel and unfamiliar, litigation does not yet appear to be arising. Further, as mentioned already, EQUINET is more focused on developing policies and practices, than on litigation or legal clarification. On the other hand, once the initial implementation phase has finally passed and the legislation begins to embed itself in national legal orders, it is likely that we will see a greater volume of litigation on the anti-discrimination Directives, and there will be an opportunity to evaluate how the overall regime may be shaped and affected by the Court's rulings.

5 Conclusion

EU anti-discrimination law is clearly not a new field of law, nor is it a new area of policy for the EU, but it is undoubtedly one whose character has changed considerably over time. At the key moments of transformation of the regime, with the adoption of Article 13 EC and the 2000 directives in particular, there was a deliberate strategy of changing some of the key features of the earlier and original EC anti-discrimination laws, as well as consolidating and building on some of the changes which had evolved over time. But the new regime is still in many ways at an embryonic stage of its development, with formal transposition of the directives only recently having been completed, recent directives still in the process of being transposed and new proposed laws in the pipeline. Many of the actors within the anti-discrimination system—in particular the important new equality bodies established under the terms of the 2000 Directives—are only beginning to gain experience in their roles, and the process of effective institutional embedding and development within existing national regimes is clearly a long-term project. Nonetheless, despite the apparent lack of consciousness of a shift towards a more decentralized and experimentalist form of regime, it appears from the preliminary analysis carried out that some of the key actors are in fact engaging in experimental practices, giving shape to open-ended norms through concrete problems arising before them, and testing out and sharing their proposed solutions on an informal basis. Litigation is only now beginning to trickle upwards towards the European Court of Justice, but as yet there is little indication of the way in which that litigation is likely to shape or influence the regime, and it remains to be seen whether the Court will pursue an approach which complements rather than thwarts the experimental potential of the system (Scott and Sturm 2007: 565).

For now, it can be said that the basic institutional features of an experimental architecture are clearly evident, and that although the 'new' EU

anti-discrimination system is at an early stage of its development, in term of its actual functioning it can best be described as stumbling into experimentalism. This is in part because of the self-conscious priorities and strategies of the key (central as well as local) actors concerned, many of whom are operating on the premise that there is or should be a clear and uniform set of rules to combat discrimination, and that it is their task to teach and to help enforce this set of rules, rather than that they are centrally involved in shaping and developing standards within a fairly open-ended and fluid regime. At the same time, however, it is clear that some of the actors are beginning to develop practices which look comparatively at the way problems are addressed in other jurisdictions, and which seek to learn from one another through the dynamic sharing and pooling of information. Similarly, the Commission, even though it appears to view the design of the new anti-discrimination regime mainly as a way of gaining more accurate information on what is happening regionally and locally with a view to more effective enforcement of the centrally agreed rules, clearly recognizes its reliance on the local actors not only to shape the application and operation in practice of the norms in specific contexts, but also to learn from them and to feed their experience into its proposals for new and expanded norms in the equality field, as well as its revision of the existing framework norms and policies over time.

Notes

1. Interviews were carried out with staff from the EC Commission Directorate General on Social Affairs, with staff from the coordinating office of the European Network of Equality Bodies (EQUINET), with the secretariat of the European Network Against Racism (ENAR), with a member of the EU network of legal experts on discrimination, with staff from the Migration Policy Group (which is a prominent European NGO funded by the EC Commission to coordinate, amongst other things, a research project on the role of the new specialized equality bodies) and finally with Solid-EU, which is one of the smaller transnational networks funded by the Commission primarily to focus on strategic litigation in the field of anti-discrimination.
2. For a recent high-profile judgment of the European Court of Human Rights, which began to broaden the concept of discrimination under the ECHR to cover this kind of third-generation discrimination in the context of the provision of a *de facto* segregated system of education for Roma children, see *DH v Czech Republic,* Appl. no. 57325/00, judgment of the Grand Chamber of 13 November 2007. The judgment condemns the system of segregated education as being in violation of the non-discrimination provisions of the ECHR, but does not embark on the ambitious task of prescribing how to remedy the problem. For earlier moves in the direction of broadening the anti-discrimination provisions of the ECHR, see *Thlimmenos v Greece*, Appl no. 34369/97judgment of the ECtHR of 6 April 2000.

3. Article 119 of the EEC Treaty stipulated that EC Member States should ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'.
4. Cases 149/77 *Defrenne v Sabena* [1978] ECR 1365 and 129/79 *Macarthys Ltd* v. *Smith* [1980] ECR 1275.
5. See Cases 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.
6. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.
7. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.
8. Case C–185/97 *Coote v Granada Hospitality Ltd*. [1998] ECR I–5199.
9. Case C–177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.
10. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1.
11. Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40.
12. Council Directive 97/80 on the Burden of Proof [1997] OJ L14/6.
13. C–13/94 *P v S and Cornwall County Council* [1996] ECR I–2143 and C-117/01 *K.B. v NHS* [2004] ECR I-541. For one of the very active organizations working to promote the equality rights of transgendered persons through EU law and policy, see Press For Change: http://www.pfc.org.uk. See also the European Transgender Network http://tgeu.net/.
14. C–249/96 *Grant v South–West Trains* [1998] ECR I–621 and C–125/99P *D v Council* [2001] ECR I–4319. More recently, the ECJ has decided its first case involving sexual orientation discrimination under Directive 2000/78, see C-267/06, *Tadao Maruko,* judgment of the ECJ of 1 April 2008.
15. There have been five sequential EU 'equal opportunities' action programmes, replaced most recently by a European Commission 'Roadmap' on Gender Equality adopted in 2006, COM(2006) 92.
16. Art. 3 of the EC Treaty was amended to state that in all of the EC's activities 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'. See also more recently the Commission's Roadmap on gender equality which discusses the state of mainstreaming policy, and its recent communication on mainstreaming in the field of development policy, COM(2007)100.
17. In 1984 the European parliament set up a Committee of Inquiry into the rise of racism and xenophobia, which led to the adoption of the Evrigenis Report in 1985. A second committee of inquiry was created in 1989, leading to 1990 Ford Report. These and a whole range of later European Parliament and other institutional reports fed into the growing movement to bring issues of racism onto the EU agenda,

resulting initially in the setting up of a Monitoring Centre against Racism and Xenophobia in 1997, even before the Amsterdam Treaty was adopted, and later contribution towards the impetus to adopt Article 13 of the EC Treaty and the later anti-discrimination Directives.

18. The EU report on the 1996 Intergovernmental Conference which prepared the text of the Amsterdam Treaty stated as follows: 'The ''British conception'' of the IGC is set out in the ''United Kingdom White Paper of 12 March 1996 on the IGC: an association of nations''. On European citizenship, human rights and non-discrimination on grounds of race, the UK government *considers that the EU is not an appropriate context for the protection of fundamental human rights or, despite the views of some other Member States, for a general clause outlawing discrimination on such grounds as sex (. . .), race, religion (etc . . .)*. Paragraph 5 of the same document deals more specifically with racial discrimination, stating that the government is proud of its national tradition and considers that the existing legal framework is the right one; it believes that problems of discrimination (especially those relating to sensitive areas such as race [. . .]) are best dealt with by applying the national legislation.'
19. The influence on the adoption and content of the Race Discrimination legislation of one NGO in particular, the Starting Line Group, has been well documented.
20. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.
21. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.
22. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
23. Com (2008) 426. See also Commission press report IP/07/1006, 4 July 2007 and the Commission's Legislative Work Programme for 2008 COM(2007)640.
24. The Action Programme ran from 2001–6 and has now been replaced by the PROGRESS initiative, an integrated Social Solidarity and Employment programme to run from 2007-2013. Many other anti-discrimination projects and initiatives are financed through the 'Equal' Initiative of the European Social Fund.
25. See http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.
26. EU Press Release IP/06/149, 13 February 2006.
27. See, e.g. the study recently commissioned and published by the European Commission on 'Non-Discrimination Mainstreaming: Instruments, Case Studies and the Way Forward' (2007).
    http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mainstr07_en.pdf.
28. This is a prominent European NGO which was funded under the Action Programme, amongst other things to coordinate a research project on the role of the new

specialized equality bodies, and to undertake a project examining the implementation of the new directives in all member states. See www.migpolgroup.com/.

29. This is one of the smaller transnational networks established and funded by the Action Programme primarily to focus on strategic litigation. www.solid-eu.org.
30. Mark Bell (2008: 43) has argued that leaving room for institutional experimentation under the EU anti-discrimination directives was a deliberate one, but that leaving the definition of so many key terms in the legislation open was more likely a choice to defer a tricky question for future judicial resolution.
31. While the Commission employee interviewed did not give specific examples within EQUINET, it may be relevant that, for example, the proportion of female managers and the proportion of workers whose boss was a woman was higher in the ten new member states than in the fifteen other member states in 2004: see European Foundation for the Improvement of Living and Working Conditions 2005. On the greater degree of gender equality in the 'new' member states in other respects, see European Foundation for the Improvement of Living and Working Conditions (2007).
32. Commission Press Release IP/07/928, 27 June 2007. See also its commencement of infringement proceedings against a range of Member States for inadequate implementation of the framework equality Directive, Commission Press Release IP/08/155 of 31 January 2008.
33. See European Commission (2005*p*), a report resulting from a study which interviewed around 3,000 companies and sought to identify a range of 'best practices' from amongst those surveyed. The study was undertaken and the report co-authored by the Conference Board organization which is a non-profit 'business membership and research organization' which amongst other things aims to provide 'forward-looking best practices' for corporations.
34. Commission Press Release IP/07/1006 of 4 July 2007.
35. Thanks to Olivier De Schutter for this point.
36. C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*, opinion of AG Maduro of 12 March 2008. See also staff case F-120/06, *Dálnoky v Commission*, concerning discrimination on the basis of belonging to a linguistic minority, which was dismissed by the EU Civil Service Tribunal on 27 September, 2007.
37. C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, judgment of 16 October 2007, C-144/04, *Mangold*, judgment of 4 July 2006. Other cases on age discrimination are pending, such as C-555/07, *Kücükdeveci,* C-87/06*, Pascual Garcia*, and C-388/07, *Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform*.
38. C-13/05, *Chacon Navas v Eurest Colectividades*, judgment of 11 July 2006 and C-303/06, *Coleman v Attridge Law*, opinion of AG Maduro of 31 January, 2008.
39. C-267/06, *Tadao Maruko*, judgment of 1 April 2008.

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Experimentalist Governance in Justice and Home Affairs

Jörg Monar

1 Introduction[1]

Justice and Home Affairs (JHA)[2] can be regarded with some justification as the most recent of the large policy-making domains of the European Union (EU). Formally introduced only by the Treaty of Maastricht in 1993, it has expanded rapidly, especially after the Treaty of Amsterdam reforms of 1999, to become one of the fastest growing areas of the Union's activity, with the Council of the EU adopting an average of 10 new texts per month since 1999, the creation of a whole range of new institutional structures, and an ambitious political agenda sustained by important impulses from the European Council. Under the ringing terms of the EU's 'Area of Freedom, Security, and Justice' (AFSJ), action in the JHA domain has also been elevated to a fundamental treaty objective in Article 2 TEU, which has put it formally on par with other strategic objectives of the EU such as Economic and Monetary Union and the Common Foreign and Security Policy.

The JHA domain constitutes an interesting field for exploration of experimentalist governance in the EU as it has not grown out of one of the traditional fields of the Community Method with its well-established legal instruments and more hierarchical governance orientation, but instead out of the rather weak intergovernmental and non-legislative TREVI cooperation framework which started in 1975 and involved only information exchange and loose coordination of certain national activities against cross-border crime. Another major tributary to the development of the JHA domain has been the Schengen system which, by contrast with TREVI, has made extensive use of regulatory instruments, but until its incorporation into the EU legal framework in 1999 did so entirely outside of the Community framework (de Lobkowicz 2002: 17–43). The JHA domain in its current form has therefore developed out of a variety of mainly 'non-Community' governance

systems, which not only continue to influence its development but also constitute a fertile ground for the emergence of more flexible forms of EU governance, although these have also emerged in the JHA fields which have been 'communitarized' since 1999.

Some of these new forms of governance can be categorized as functionally 'experimentalist' insofar as they provide for a higher degree of flexibility, a less hierarchical approach, and—above all—adaptability of targets and instruments. Following the arguments set out by Sabel and Zeitlin (this volume) the following can be regarded as the key elements of experimentalist governance:

- the establishment of framework objectives;
- strong input of 'lower-level' units (national or sub-national) into the way objectives are pursued;
- reporting, monitoring, and peer review of results; and
- recursive revision of objectives in the light of these results.

In the rest of this chapter, we will first look at the conditions which have made possible the emergence of experimentalist forms of governance in the JHA domain. This will be followed by an analytical survey of currently existing JHA governance features which fit in with the above named four key elements. Section 4 will provide an assessment of the overall relevance of experimentalist governance features in the JHA domain and some of their problems of accountability and effectiveness.

2 The conditions for the emergence of experimentalist forms of governance in the JHA domain

When the European Commission first proposed substantial common action on JHA issues in the context of its White Paper on completing the Internal Market [COM(1985) 310 of 14/06/1985]—especially as regards border controls, asylum, immigration, and visa policy—it envisaged the use of the procedures and legal instruments of the EC for these fields largely according to the traditional hierarchical and rigid 'common policy' model without any hint of 'experimentalist' features. If two decades later such features, as will be shown below, have clearly become part of EU governance in the JHA domain it seems useful to examine the reasons which can explain this 'deviation' from the originally aimed at method and the emergence of experimentalist elements.

2.1 The particular sensitivity of JHA policy fields from a sovereignty, territoriality, and domestic politics perspective

One major reason why EU Member States have right from the start been reluctant to go down the road of the classic Community Method is that action

in the JHA domain touches upon core functions of the state: providing security and justice to citizens and sovereign control over the national territory (including admission to it) are not only central prerogatives of the modern nation state but also essential elements of its *raison d'être* and legitimacy (on the sovereignty issue see Barbe 2002: 23). The principle that the exercise of law enforcement is strictly limited to national authorities within their territory, a traditional expression of state sovereignty, continues to be a major problem for JHA cooperation. In addition some key aspects of the JHA domain, especially internal security and the control of migration, are highly sensitive issues at the domestic level, which can make national governments win or lose elections.

Unsurprisingly EU governments—or at least most of them—have been reluctant to relinquish control over national governance instruments in the JHA domain and have so far only vested the EU with rather limited powers in the JHA domain, which come nowhere near the competences in 'classic EC' 'common policies'. There is so far not a single 'common policy' within this domain, and even in the case of the 'common visa policy' or the 'common asylum system'—which may be regarded as coming closest—the Treaty does not provide a comprehensive transfer of competences. The Vienna Action Plan of December 1998, which launched the construction of the AFSJ, explicitly stated that the objective was 'not to create a European security area in the sense of a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe' and that the Treaty provisions would 'not affect the exercise of the responsibilities incumbent on Member States to maintain law and order and safeguard internal security' (OJ C 19/3 of 23.01.1999). If this can already be taken as a clear indication of the Member States' reluctance to proceed with real 'integration' in this domain, a further indicator is the fact that they have shown a strong preference for mutual recognition and minimal(ist) harmonization so far as legislative action is concerned rather than pursuing any major harmonization project such as the gradual introduction of a European criminal or civil law code. It is also noteworthy that the Member States have so far not conferred operational powers on any of the special agencies established in this domain (Europol, Eurojust, Frontex), all law enforcement powers remaining in the hands of national authorities.

What emerges from these indicators is that there has so far been a strong political preference for focusing EU action on reinforcing coordination of and cooperation between the national systems rather than forcing major change on them through any real attempt at integration into a single system with a strong set of common rules and institutions with cross-border operational capabilities. This political preference has resulted in a focalization of governance instruments on coordination and cooperation. This means not only a preference for instruments which are 'lighter' in the sense of being less intrusive on the national systems but also for the development of specific more

'flexible' mechanisms and structures which allow intensified cooperation and coordination while leaving the national systems largely unchanged. In this context, experimentalist features of governance can be attractive because they do not impose a tight regulatory framework, replace rigid enforcement procedures by reporting and peer review procedures, and allow for recursive adaptation of goals and procedures with a strong input from national 'stakeholders'.

2.2 The diversity of JHA policy fields

One specificity of the JHA domain is that it comprises a set of rather diverse policy fields: asylum, immigration, border controls, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation. Both the objectives pursued and the instruments used to achieve them are necessarily rather different if one compares, for instance, the fields of asylum policy, judicial cooperation in civil matters, and police cooperation. In the first, the main focus is on the common definition of minimum guarantees and procedures regarding asylum seekers; in the second, it is essentially the facilitation of the cross-border administration of civil justice; while in the third, it is enhanced information exchange and operational interaction between national law enforcement authorities. In each case different regulatory and non-regulatory instruments are needed, which makes it impossible to apply a 'one-size-fit-all' mode of governance. Thus as a result of the diversity of policy fields EU governance in the JHA domain is necessarily more diverse than more homogenous policy domains such as agricultural or environmental policy, necessitating a wider range of different instruments. This diversity has increased with the expansion of the policy-making objectives in the individual areas since the 1990s (Müller 2003: 278–327). This diversity also provides some fertile ground for experimentalist governance since it leaves a greater margin for using and adapting different governance instrument and mechanisms across different JHA fields to achieve the same overarching goals, such as enhanced internal security or a more effective management of migration problems, with the recursive element allowing for the revision of objectives and instruments in the light of implementation results in the different fields.

2.3 The strong operational dimension of the JHA domain

The traditional Community Method has heavily relied on the use of legal instruments. While there are some areas in the JHA domain, such as asylum and migration, where legislative acts are also of primary importance, there are others, especially police cooperation and external border controls, where operational information exchange and coordination as well as the conduct of joint operations are often enough of equal or even greater importance. Legislative measures on the one hand and operational measures on the other

obviously have substantially different rationales and requirements—as regards flexibility and speed, for instance. As a result rather different elements of governance are needed, and this often enough in one and the same field. Judicial cooperation in the fight against cross-border crime, for example, needs both legislative action for minimum harmonization of certain procedural and substantive provisions of criminal law and operational coordination and cooperation of prosecution services. This obviously adds to the diversity of governance requirements in the JHA domain. Experimentalist governance features are again attractive in an operational context because they allow for a more flexible pursuit of common objectives through non-legislative mechanisms and instruments, as well as because reporting, monitoring, and peer reviews are often more adapted to ensure compliance with common objectives by operational units (e.g. police and border guard forces) than cumbersome legal enforcement measures. The recursive element is useful as well since the input of units involved in or—as in the case of agencies such as Europol and Eurojust—supporting operational activities can allow for a 'practical' revision of objectives and instruments.

2.4 Differentiation as a characteristic of the JHA domain

Although the AFSJ is formally designed as a single 'area', it is the most differentiated of all the constructions which the EU integration process has so far produced. Currently only 12 of the Member States[3] fully participate in all the governance instruments and structures which have been developed within the AFSJ. The UK, Ireland, and Denmark have all to various degrees 'opt-out' arrangements from the Schengen system and the Communitarized JHA fields (asylum, immigration, border controls, judicial cooperation in civil matters). The 12 new Member States have all had to accept the entire JHA *acquis*, but their full integration into the Schengen system depends on the old members being first satisfied about their capacity—often referred to as 'Schengen maturity'—to fully assume all the obligations the Schengen border control system. In 2008, nine of the 12 new Member States were fully integrated, but Bulgaria and Romania (because of capacity deficits) and Cyprus (because of problems relating to the partition of the island) currently remain outside of the integrated border control system. Further differentiation is generated by the 'association' of Iceland, Norway, and (very recently) Switzerland as non-EU Member States with the Schengen system. This characteristic of major differentiation in the JHA domain has substantial implications for EU governance in the sense that some objectives are defined by and for only some Member States (i.e. the Schengen countries) and that the form and the use (in a more or less binding way) of instruments can vary depending on whether all Member Sates participate or not. Such strong differentiation can also encourage the use of experimentalist features of governance since all Member States share certain framework objectives,

especially as regards enhanced internal security and more effective migration management, but because of their different degree of participation no 'one-size-fits-all' approach is sustainable for the EU as a whole, with the recursive element again allowing for revisions of objectives, mechanisms, and instruments which might allow a more effective participation of the 'opt-outs'.

2.5 The divide between the 'first' and the 'third' pillar fields

This is the last, but certainly not the least of the factors determining EU governance in the JHA domain. Although linked together by the common objective of the AFSJ and the common institutional framework (in particular the JHA Council), the 'first pillar' fields (asylum, immigration, border controls, judicial cooperation in civil matters) are separated from the 'third pillar' fields (police and judicial cooperation in criminal matters) not only by a different legal basis[4] but also by different decision-making procedures,[5] separate decision-making structures in the Council below the level of the COREPER, and different legal instruments. This divide, which cuts through the entire domain, means the current Treaty framework imposes a distinct cleavage on EU governance in the JHA domain which cannot be found in this form in any other policy field. The artificiality of this divide becomes particularly clear in cases in which different procedures and instruments have to be used separately in parallel for the same objective, which is the case, for instance, with 'first' and 'third' pillar legislative measures against illegal immigration. Yet artificial or not, this legal divide is currently a fundamental aspect of EU governance in the JHA domain, and makes it impossible to pursue cross-cutting objectives with the same instruments and mechanisms under the two 'pillars'. This makes 'cross-pillar' framework objectives and their possible recursive revision in the light of implementation problems, as 'offered' in an experimentalist governance context, all the more attractive.

2.6 The broad historical and political context

Although this is much less JHA-specific, the broad historical and political context of European integration can also be regarding as a factor favouring the use of experimentalist forms of governance. As indicated above, most of the rapid growth of the JHA domain has taken place since the 1990s, meaning in a phase of the integration process where greater strategic priority has been given to 'widening' rather than 'deepening', where Member States have made use of ample 'opt-outs' from major integration commitments (Schengen, single currency), and where an erosion of the permissive consensus in favour of European integration have all made governments more wary of subscribing to 'hard' integrationist objectives. This has produced a distinct preference for using the EU level primarily for seeking more effective common solutions to cross-border

problems affecting the national systems, with overall progress of European integration being of much less concern to even traditionally 'pro-integrationist' countries (such as France and the Netherlands). Such a more 'pragmatic', non-ideological problem-solving approach favours the use of experimentalist governance methods, since their limitation to framework objectives and their flexible adaptation elements allow for a more concrete result orientation on specific sectoral issues through whatever means seem most suitable, regardless of any potential net benefit (or loss) in terms of deeper political integration more generally. In the JHA domain the most notable indicators of the predominance of this new pragmatism are the already mentioned facts that the Member States are currently not pursuing any major harmonization project and have neither transferred exclusive competences to the EU level nor operational powers to key agencies which would have been in line with traditional 'hard' political integration objectives. It seems hardly exaggerated to say that this pragmatic 'Zeitgeist' of the current phase of European integration, to which the rejection of the Constitutional Treaty in 2005 has contributed, creates a favourable context for experimentalist governance.

3 Elements of experimentalist governance

3.1 Establishment of framework objectives

In the JHA domain both the European Council and the Council, the latter increasingly on the basis of proposals from the European Commission, make extensive use of legally non-binding texts defining framework objectives and guidelines for achieving them. As instruments of governance these texts serve essentially a non-legislative 'targeting' purpose. One can broadly distinguish between two categories of these texts.

The first can be described as *functional targeting* texts. This group includes Council Resolutions, Recommendations, and Conclusions as well as 'Guidelines' and Best Practice Manuals'. It focuses on the setting of targets for improving the functioning of often fairly specific aspects of cross-border cooperation between the Member States. Examples are the Council Recommendation of 30 March 2004 regarding guidelines for taking samples of seized drugs (OJ C 86 of 06.04.2004) and the Council Resolution of 4 December 2006 on 'handbook' recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension (OJ C 322 of 29.12.2006). Targets or guidelines in this category are often quite detailed and can sometimes resemble legislative texts in the density of coverage of certain issues.

The second category of 'target-setting' texts can be described as *programme targeting*, and comprises Action Plans, Programmes, and Strategies which

define in a multi-annual perspective common measures—whether legislative or operational—which the Member States are planning to adopt, often in combination with specific deadlines. The extensive use of such programming documents is one of the most characteristic features of EU governance in the JHA domain. The further development of the AFSJ as whole has since 1999 been governed by overall programming texts defining broad objectives as well some of the implementation steps considered necessary for achieving them including deadlines for the most important ones. From 1999 to 2004 this programming function was fulfilled by the so– called 'Tampere Programme' which took the form of the 'Presidency Conclusions' adopted by the Tampere European on 15/16 October 1999 (Bulletin of the EU 10–1999, paragraph I.2–I.16). The Tampere Programme decisively shaped the first phase of the construction of the AFSJ, both by establishing strategic objectives—such as the introduction of a common asylum system—and by providing an impetus for concrete steps to be taken—such as the establishment of the cross-border prosecution unit Eurojust in 2002. In November 2004, the Council adopted a successor programme, the so-called Hague Programme on the 'strengthening of freedom, security, and justice in the EU' (OJ C 53 of 03.03.2005), which runs until 2010. Yet the Council has also adopted a whole range of similar documents for major fields of the AFSJ—often with a cross-pillar dimension—containing broad descriptions of objectives to be achieved and individual measures to be adopted in view of those. The most detailed of those is the repeatedly amended EU Action Plan on Combating Terrorism (latest version: Council document 7233/1/07 of 29.03.2007), which comprises over 200 measures across all three 'pillars'. Other examples are the 2000 EU Strategy for the prevention and control of organized crime (OJ C 124 of 03.05.2000), the 2002 Council Plan for the management of the external borders (Council document 10019/02 of 14.06.2002), the 2005–8 EU Action Plan on Drugs (OJ C 168 of 08.07.2005,[6] and the 2005 EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311 of 09.12.2005).

What is common to all of these target-setting texts in the JHA domain—both functional and programming—is that they do not take the form of legislative acts and that most are subject to various forms of reporting, monitoring, and peer review as well recursive revision mechanisms (see below). Such target-setting occupies a major place in EU policy-making in the JHA domain. A statistical analysis of the texts adopted by the JHA Council from 1 May 1999 to 31 December 2006 shows that target-setting accounts for 215 out of total of 868 texts (i.e. 24.8%), a major share of the Council's policy output.[7] The extensive use of functional targeting texts can be explained by the political preference for 'lighter' forms of governance and coordinating and cooperative instruments. However, the strong operational dimension of the JHA domain is also a contributory factor as tight or even framework regulation

of the operational rules under which Member State law enforcement authorities have to operate would be regarded as highly intrusive on national systems and likely to encounter much opposition. National governments therefore prefer to issue 'recommendations' or 'guidelines' in areas such as police cooperation or horizontal operational coordination. The extensive use of multi-annual programming instruments merits special consideration. It can be explained by the need for Member States to agree on a longer-term path of common action in fields which are affected by the aforementioned diversity of the JHA policy areas, the high degree of differentiation, and the artificial divide between the 'pillars'. These specific problems or at least challenges of the JHA domain account for a particular need for cross-cutting common objectives, scheduling, and prioritization of action to be taken.

While clearly fitting in with the setting of framework objectives as one of the key elements of experimentalist governance, it must be emphasized that the widespread use of legally non-binding targeting on its own is a necessary but not sufficient condition for experimentalist governance. As emphasized also by Sabel and Zeitlin (2008, this volume), experimentalist governance depends also on the presence of the other key elements, most notably the recursive revision of objectives in the light of results.

3.2 The role of 'lower-level' units in the way objectives are pursued

In experimentalist governance as defined by Sabel and Zeitlin, lower-level units play an important part in pursuing common framework objectives and are given significant margins of autonomy in the way they do so. In the JHA domain such lower-level units appear in the form of the national ministries of interior and justice, operational authorities at the national level, such as police forces and prosecution agencies, and—last but not least—special agencies which have been set up in the JHA domain, in particular the European police agency, Europol, the cross-border prosecution agency, Eurojust, and the external border management agency, Frontex. The role of each of these categories of lower-level units needs be examined and assessed separately.

In the JHA domain, national ministries are not only crucial to implementation since the Commission is given few direct implementation powers but they also enjoy in many cases a relatively wide margin of autonomy as regards the attaining of defined framework objectives. This flows naturally from the tendency of ministers to limit as far as possible the imposition of uniform changes to their still widely different and politically and from the national sovereignty point of view highly sensitive national JHA systems. In practice this means that many texts adopted for implementation by national ministries make extensive reference to existing national legislation and practices and leave wide margins of discretion not only on what 'appropriate' action should be taken at the national level but often enough even as to the question whether such action

is actually necessary. Such texts are particularly numerous in the sensitive 'third pillar' fields of police and judicial cooperation in criminal matters which are also subject to the unanimity rule. A telling—but far from unique example—are the following provisions of paragraph 3 of the Council's 2005 'EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings' in which we have highlighted in italics all terminology providing discretion to the implementing ministries.

> Member States should ensure that *appropriate* referral mechanisms are in place, *as necessary* and *in line with national practice and law*, to enable the early identification and referral of trafficked persons. Member States should work to develop, *in line with national traditions, circumstances and practice*, an *appropriate* governmental coordination structure to coordinate and evaluate national policies and ensure *appropriate* handling of individuals. [. . .] Member States and the Commission should actively pursue policies reinforcing the criminalization of human trafficking [. . . .] This should include, *as appropriate* and *where relevant*, prevention strategies specific to vulnerable groups such as women and children. (OJ C 311 of 09.12.2005)

Even in those cases where the need for approximation of legislation is agreed upon, the national level is normally left with a considerable margin of discretion as shown in particular by the use of only minimum/maximum penalty levels in the Council's Framework Decisions on a range of serious forms of cross-border crime.[8]

Yet margins of autonomy of national ministries vary depending on the policy fields and issues concerned. Generally margins of autonomy in implementation tend to be more restricted in JHA fields where qualified majority voting applies instead of unanimity—reducing the risk of 'thin' least common denominator agreements—and on issues where large margins of discretion are likely seriously to undermine a common purpose considered vital by the Member States. A good example in this context is the new Regulation (EC) 562/2006 establishing the 'Schengen Borders Code', which entered into force in October 2006 and provides for a tight regulation of the rules applying to the control and patrolling of both internal and external borders, leaving the participating governments with very little discretion on key aspects of the control system (OJ L 105, 13.04.2006). In this case qualified majority did apply and the Schengen members had a strong common interest in not increasing potential internal security risks in the Schengen zone by allowing considerable variations in border control procedures. Even in the 'third pillar' certain instruments can impose quite precise and 'invasive' obligations on national ministries if there is sufficient political consensus on the need for a high degree of harmonized application. The June 2002 Framework Decision on the European Arrest Warrant (OJ L 190 of 18.07.2002), whose implementation got national governments in Germany, Poland, Cyprus, and Finland into trouble with their constitutional courts (on these constitutional issues

see Guild 2006), is a major example. It is noteworthy in this context that 25.2% (219 out of 868) of the texts adopted by the JHA Council in the post-Amsterdam period provide for tight regulation in various forms, exceeding thereby slightly the aforementioned total number of non-binding target-setting texts (Monar 2006).

The strong operational dimension of the JHA domain makes operational authorities important elements in pursuing common framework objectives. This applies, in particular, to cross-border law enforcement and judicial cooperation, where national authorities increasingly interact directly across borders and with EU agencies (see the following text) without going through their ministries. Their activities continue to be determined largely by national regulatory frameworks, but there is a growing *acquis* dealing with specific aspects of their cross-border cooperation, such as on information exchange between police authorities, mutual legal assistance, and mutual recognition of judgements. As regards margins of autonomy one can say that these continue to be quite large in the case of police cooperation where Member States tend to be very protective of established national structures and practices. Although common crime threat assessments through Europol are an important objective of the Hague Programme, for instance, national police authorities currently have no legal obligation to provide Europol with all information the police agency might request, which means that some continue to provide more and different types of data than others.[9] In the case of joint operations on EU external borders, which fall within the external border 'solidarity' objective of the Hague Programme, participation by national land or sea border forces is even entirely voluntary both as regards such and the support in personnel and equipment provided.[10] The situation is slightly different in judicial cooperation in criminal matters where the need for legal clarity and certainty has led to several instances of relatively tight regulatory measures leaving little autonomy to judicial authorities in the context of the strategic objective of enhancing mutual recognition of court decisions. If the required formal conditions of a request from a court in another Member State are met, courts have, for instance, hardly any autonomy in deciding whether or not to implement a European Arrest Warrant or a confiscation order regarding proceeds from crime under the October 2006 Framework Decision on the application of the principle of mutual recognition to confiscation orders (OJ L 328, of 24.11.2006).

The EU agencies in the JHA domain have no regulatory powers and therefore cannot be compared to EU agencies with regulatory functions such as the European Medicines Agency. They contribute to the framework objectives by facilitating cross-border cooperation between the national authorities primarily through their information exchange and analysis functions and to a lesser extent by helping to identify and spread best practices through advice and the organization of seminars. In this respect they may best be regarded as

networked information agencies, and contribute to a common assessment of policy challenges—such as the threats posed by serious cross-border crime[11]—and a certain harmonization of cooperation practices. Yet although not vested with operational powers themselves, they have certain operational functions which differentiate them from other networked information agencies in the EU, such as, for instance, the European Environment Agency. Frontex, for example, can initiate and be asked to coordinate joint operations of national units on EU external borders, and Eurojust can ask national authorities to initiate investigations and prosecution and regularly holds 'coordination meetings' to render cooperation between national prosecution services on specific cases more effective (overview and concrete examples: Eurojust 2007). Although they do not have a 'command-and-control' power over national authorities, the agencies therefore play an important role in encouraging, developing, and supporting cooperation between them. The agencies also play an increasingly important role in the fields of reporting and monitoring (see next section).

3.3 Reporting, monitoring, and peer review of results

The JHA domain is rich in different forms of reporting, monitoring, and peer review. One can broadly distinguish between three different major forms, reporting and monitoring by the Commission, reporting and monitoring by specialized structures, and peer review-based evaluation procedures.

Reporting and monitoring by the European Commission. The proliferation of objectives after the launch of the Tampere Programme, the extensive use of non-binding texts by the Council, and the lack of an infringement procedure in the 'third pillar' led the Commission already at an early stage to consider a monitoring mechanism to put some pressure on Member States in the Council as regards the timely implementation of agreed objectives during the Tampere Programme period. The result was the introduction in 2000 of semi-annual 'Scoreboard' reports which listed progress made and further steps needed against all agreed objectives.[12] The effects of this instrument were limited, though, not only because the Council felt not obliged to act on each of the 'Scoreboard' reports but also because the Commission abstained from any 'naming and shaming' of Member States bearing responsibility for veto positions and delays in implementation. After June 2004 this first 'Scoreboard' mechanism was discontinued. The growing implementation problems in the JHA domain and an explicit mandate from the European Council then led the Commission to introduce a revised system, the so-called 'Scoreboard Plus', for the implementation of the Hague Programme with a first report presented in June 2006 and a second in July 2007 [COM(2006) 333 of 28.06.2006 and COM (2007) 373 of 03.07.2007]. The 'Scoreboard Plus' has a stronger focus on implementation problems than its predecessor and also provides aggregate

data on implementation failures by each of the Member States as regards lack of communication of national measures to the Commission and cases of non-compliance or invalid application, a 'naming and shaming', which, inter alia, made Greece, Italy, and Malta appear as the biggest 'sinners' in the JHA domain (COM(2007) 373 of 03.07.2007; 18).

Together with the submission of the first 'Scoreboard Plus' the Commission also proposed an ambitious mechanism for evaluating the actual results achieved by EU JHA policies on the basis of three steps and resulting 'deliverables':

(1) the setting up of a system of information gathering and sharing on results achieved by JHA instruments (legislative acts, funding programmes, and so on) in the different policy-fields, which will result in 'fact sheets' based on policy objective-linked indicators to be filled in by the Member States;

(2) under a new 'reporting mechanism' the Commission will collect the fact-sheets, validate the facts provided, consult stakeholders (e.g. NGOs) and, on the basis of this, produce 'evaluation reports' for each of the policy fields; and

(3) once all 'evaluation reports' have been drawn up and after further consultations, 'in-depth strategic policy evaluations' are to be produced for selected areas aimed at 'producing useful and timely information as inputs for political decisions in each policy area' (COM(2006) 332 of 28.06.2006; 6–10).

Especially the last step of the proposed evaluation process clearly constitutes a recursive element as potential policy changes are envisaged as a follow-up to the evaluation carried out (see also following section). Yet the proposed heavy procedures and complex reporting duties imposed on the Member States as well as remaining questions about the evaluation methodology led to an unenthusiastic reception of the proposals by the Member States. It remains to be seen to what extent the Commission will get all the necessary data from the Member States. Quick results are also unlikely as the Commission intends to carry the process out only twice in every five years.

Apart from these comprehensive reporting and monitoring mechanisms the Commission is routinely monitoring and reporting on the application of individual legislative acts and the implementation of JHA funding instruments. In most case monitoring obligations are provided for by the respective instruments, but in at least some cases the Commission also does so if—as frequently in the 'third pillar' domain—the Council does not provide for mandatory monitoring.[13]

Monitoring and reporting by specialized structures. The most prominent example of this type of reporting are the half-yearly reports of the EU's Counter-Terrorism

Coordinator on the implementation of the non-binding Strategy and Action Plan to Combat Terrorism (latest version: Council document 15411/1/07 REV 1 of 28.11.2007). These reports identify both elements of progress and persisting deficits of implementation of the common objectives agreed in the Strategy and Action Plan. They highlight issues of major concern and include tables listing Member States' only partial or non-implementation of adopted legislative acts. The Counter-Terrorism Coordinator has no powers to sanction Member States, but the Reports are made public and are put on the agenda of the JHA Council, their function being to both help the Council to identify collective weaknesses and to exercise peer pressure on individual laggards. Although less directly performance-oriented, the reports of the special agencies also play an increasingly important role in identifying needs for further action and implementation deficits. Europol's annual Organised Crime Threat Assessment (OCTA), for instance, contains a number of recommendations for EU priorities in the fight against organized crime (Europol 2006: 23–6; 2007*a*: 28) the annual reports of Eurojust contain critical comments on national authorities' failures to effectively use or cooperate with Eurojust as well as legislative implementation deficits (Eurojust 2006: 109–13; 2007: 29–39), and the external border security risk assessments of Frontex provide recommendations on action to be taken and form the basis of subsequent operational decisions (Donoghue et al. 2006).

Besides the agencies the JHA domain also has other institutional structures with specialized monitoring functions. The oldest of these is the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) in Lisbon, which produces statistics and reports on the drug situation in the EU, including risk assessments and the monitoring of national drug policies. The Commission tends to rely heavily on information provided by the EMCDDA which also helped it—together with Europol—to produce the final evaluation of the 2000–4 EU Drugs Strategy and Action Plan (COM(2004) 707 of 22.10.2004) which then served to introduce some changes in the 2005–8 Action Plan (see also Section 3.4). The Vienna-based European Monitoring Centre for Racism and Xenophobia, which on 1 March 2007 has been transformed into the new EU Agency of Fundamental Rights, has since 1998 provided an annual survey and studies on phenomena of racism and xenophobia in the EU aimed at helping Council and Commission to design more effective policy responses.

Peer review- based evaluation procedures. Such procedures were developed for the first time in the context of the Schengen system in the 1990s and maintained after the incorporation of the system in 1999. The Schengen members not only needed to evaluate whether new members were ready to be fully integrated into the operational parts of the integrated border system—with the resulting abolition of controls at internal borders—but there was also the problem that in the purely intergovernmental context of the original system the was no effective way to sanction members not complying with common rules. The so-called Schengen

evaluation[14] serves as a means to assess and control the correct application of the Schengen rules, especially as regards external border controls, by regularly submitting each of its members in turn to an evaluation by experts from all the other members on the basis of questionnaires and inspection visits. The reports, which are submitted to the Council but remain classified, provide an overall assessment, give details on identified deficits and weaknesses, and make recommendations on how these should be addressed. The reports are discussed in detail at Council working party level and ministers are expected to take action at the national level to address identified weaknesses. While primarily an instrument to ensure compliance through peer pressure, the evaluation reports also serve to identify more general problems of the operation of the Schengen system which can have an influence on the revision of legal and operational instruments, such as the already mentioned 2006 Schengen Borders Code or the second generation Schengen Information System (SIS II). The evaluation of the 'Schengen maturity' of new Member States constitutes a special and politically more sensitive form of this evaluation since negative reports can lead to a postponement of the lifting of internal border controls.

Over time peer-reviewed evaluation procedures have spread well beyond the Schengen system. Already in December 1997 the Council established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (Joint Action 97/827/JHA, OJ L 344 of 15.12.1997). So far four rounds of evaluation have taken place, focussing successively on mutual legal assistance in criminal matters, legal instruments dealing with law enforcement and drug-trafficking, exchanges of information and intelligence, and the application of the European Arrest Warrant. Similarly to the Schengen evaluation the organized crime evaluation mechanism is based on expert teams which carry out an in-depth evaluation (including visits in the Member States) and produce reports with the identification of weaknesses and recommendations on how to address the latter. However, while again specific (confidential) recommendations are made to each of the Member States regarding their own weaknesses, this evaluation exercise has also a strong focus on improving the overall functioning of the different fields and instruments of cooperation in the fight against organized crime. As a result this evaluation mechanism can result in general recommendations to change practices and adapt instruments and policies.[15] A similar mechanism, again based on mutual evaluation by teams of national experts, has been put into place in September 2001 for peer review of national anti-terrorism measures. The (confidential) reports coming out of this exercise have not only resulted in recommendations to Member States—with an obligation for them to report back on action taken (see Council document 14469/4/05 of 30.11.2005)—but are also used for the overall assessments of progress and deficits of the EU and national action by the EU's Counter-Terrorism Coordinator in his already mentioned reports.

3.4 Recursive revision of objectives in the light of results

Recursive elements can be observed in JHA governance in various forms. It is best to distinguish between recursive revision of programming, of legal instruments, and of practices:

Recursive revision of programming. It has become an established pattern in the JHA domain for the European Council to ask the Commission to submit reviews or reports on the implementation of programmes, action plans, and strategies in order to identify strengths and weaknesses and revise priorities or take supplementary action where needed. At the most strategic level this recursive element has been applied to the multi-annual Tampere and Hague Programmes. The Tampere Programme was subject, on the basis of a mandate by the European Council, to an overall evaluation by the Commission for the purpose of redefining priorities in the light of progress and deficits for the succeeding Hague Programme (COM(2004) 4002 of 02.06.2004). Many of the suggestions emerging from this evaluation, for instance, as regards enhanced border protection measures and more external action, found their way into the Hague Programme. The Hague Programme itself provided for a midterm review which was carried out under the Finnish Presidency of the second half of 2006, partly on the basis of the Commission's aforementioned 'Scoreboard Plus'. This review resulted in the adoption by the Council on 5 December 2006 of Conclusions on the updating of the Action Plan implementing the Hague Programme and a revised set of priorities for EU migration policy in the context of the Hague Programme by the European Council on 15/16 December 2006 (Council documents 15801/06 of 05.12.06, 8–9, and 16879/1/06 of 12.07.2007, part II).

Recursive revision of political programming can also be found in the 'sectoral programmes' for specific broad JHA area. One example here is the already mentioned Action Plan on Combating Terrorism which has been regularly updated and expanded since its original adoption shortly after the September 11 terrorist attacks in 2001. The reports of the Counter-Terrorism Coordinator since 2004, the peer review exercise in the anti-terrorism domain (see the preceding text), and additional reports and proposals by the European Commission have contributed to an almost constant revision of this Action Plan in the light of overall anti-terrorism objectives and priorities. Another example of recursive revision is the multi-annual Drug Strategies and Action Plans. The 2005–8 Action Plan explicitly incorporates priorities responding to weaknesses identified by the evaluation carried out by the Commission (with an input also by the EMCDDA and Europol) of the previous 2000–4 Action Plan as regards, for instance, preventive measures, more effective coordination, implementation monitoring, and the involvement of Europol (OJ C 168 of 08.07.2005).

Recursive revision of legislation. Although this is not systematically applied, there has been a tendency in the JHA domain to provide for review and revision clauses in parts of the legislation as part of the overall effort to

achieve overall framework objectives such as enhanced effectiveness in the fight against serious forms of cross-border crime. A good example is the 2002 Framework Decision on the European Arrest Warrant which in Article 34(3) provides for a report by the Commission on the operation of the instrument with potential legislative proposals (OJ L 190 of 18.07.2002). The Commission submitted this report in January 2006 and made no legislative proposals, but explicitly reserved its right to make such proposals for legislative revision at a later stage after the picture on the implementation side would be more complete (COM(2006) 8 of 24.01.2006). A similar provision for review-based potential revision, another example, has been included in the 2006 Framework Decision on the application of the principle of mutual recognition to confiscation orders, although in that case the deadline for the review has been set for as late as 2013.[16]

An interesting case of review-based substantial legislative change is that of the 2000 Council Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children, the so-called Brussels II Regulation. Article 43 of the original version of the Brussels II Regulation (Council Regulation (EC) 1347/2000) provided for a review and potential legislative revision of the Regulation (OJ L 160 of 30.06.2000). As the Regulation was severely criticized because of a range of gaps and several controversial provisions regarding issues of parental responsibility the Commission proceeded with a review already in 2001 and proposed a first—later amended—set of legislative revision proposals in September 2001 (COM(2001) 505 of 06.09.2001). This led eventually in November 2003 to a repeal of the 2000 Regulation and its replacement by a new 'IIbis' Brussels II Regulation (Council Regulation (EC) 2201/2003) with an extended scope of application and substantial changes in matters of parental responsibility (OJ L 338 of 23.12.2003).

In the area of asylum policy an 'en bloc' review of existing 'first phase' legislation[17] is provided for by the Hague Programme as a mandatory intermediate step before the Commission is to present proposals for the 'second phase' legislative instruments (Council document 9778/2/05 of 10.06.2005; 6). These are aimed at achieving the strategic objectives of establishing a common asylum procedure and a uniform asylum status by 2010, and can—and are indeed most likely—to involve changes to the 'first phase' instruments. The late adoption of some of the 'first phase' instruments has delayed the review phase, but the Commission is expected to base its proposals for the 'second phase' on a comprehensive and thorough evaluation of the transposition and implementation of the 'first phase' instruments.

Recursive revision of practices. As indicated earlier the JHA domain is marked by a strong operational dimension as much of the progress depends on effective interaction between national authorities, especially in the law enforcement domain. The identification and transfer—through training and common

guidelines—of 'best practices' of cooperation is therefore of considerable practical importance. In this field recursive revision elements can be observed as well as commonly agreed on 'best practices' are frequently revised to take into account identified weaknesses and to introduce improvements. One method used is that of formally revising existing texts which provide guidelines. An example for that is the already mentioned Council Resolution of 4 December 2006 regarding international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension (OJ C 322 of 29.12.2006). These detailed recommendations on a 'handbook' of practices for facilitating such cooperation go back to a first set of such recommendations in 1999 (OJ C 196 of 13.07.1999) which had been reviewed and revised in 2002 (OJ C 22 of 24.01.2002) only to be reviewed and revised again for the 2006 Resolution. Another method of recursive revision of practices consists of passing on improved practices via training measures and special meetings. For this JHA funding instruments as well as special structures such as the European Police College (CEPOL) are used, but the above-mentioned special agencies also play a role, with Eurojust, for instance, organizing every year several 'strategic meetings' to discuss best practices and problems of cross-border judicial cooperation in criminal matters in different fields.[18]

4 Relevance, accountability, and effectiveness of experimentalist governance in the JHA domain

4.1 Relevance

In the light of previous section there can be no doubt that experimentalist governance is strongly present in the JHA, and this from the macro political level of multi-annual political programme 'targeting' right down to the micro level of individual legal instruments and sets of practices. EU actors are also involved in on large scale, from the European Council over Council and Commission down to national ministries and special agencies as 'lower level' units. With its greater openness, flexibility, and the possibility to revise objectives in the light of problems encountered the identified elements of experimentalist governance respond to the unwillingness of many Member States to subject themselves to more hierarchical and rigid forms of governance in a domain of considerable sensitivity from a sovereignty and domestic politics point of view and allows to 'test' and if necessary revise programming and instruments in the light of results obtained and problems encountered. There can therefore be no doubt about its relevance for the JHA domain.

It also emerges from our analysis that experimentalist governance in the JHA domain cannot be regarded as an alternative to the 'Community Method' to be

found exclusively in the non-Communitarized 'third pillar' fields (police and judicial cooperation criminal matters). Some elements of experimentalist governance—such as monitoring and reporting by specialized structures—tend to be used more widely in the 'third pillar' as they are partially aimed at reinforcing implementation discipline in the absence of more effective infringement procedures as existing within the 'first pillar'. Yet, as indicated above, non-binding targeting texts are also extensively used in the Communitarized 'first pillar' JHA fields (asylum, immigration, border controls, judicial cooperation in civil matters) where one also finds a lot of recursive elements, both as regards programming and legislation. In the JHA domain, experimentalist governance is therefore clearly a 'cross-pillar' phenomenon by no means incompatible with the application of the Community method—which adds to its overall relevance.

Yet the identified elements of experimentalist governance are not to be found uniformly across the board in the JHA domain. They tend not to be applied in fields where there is a high political consensus on the need for tight regulation to ensure implementation effectiveness and legal certainty, such as the issues regulated by the Schengen Borders Code and the European Arrest Warrant. Hierarchical, relatively inflexible, and non-recursive governance elements therefore continue to coexist in the JHA domain with experimentalist ones. This can be regarded as an expression of the pragmatic 'Zeitgeist' of the current stage of the European integration process under which different governance approaches and instruments are simply used as instruments to achieve certain 'sectoral' objectives regardless of their overall (ideological) significance for the progress of European integration. In this sense experimentalist governance in the JHA domain remains selective in its usage rather constituting a comprehensive 'architecture'.

The relevance of experimentalist governance in the JHA domain obviously depends also on its accountability and effectiveness as major contributory factors to its legitimacy. Accountability can be regarded as a major dimension of 'input legitimacy' and effectiveness a major dimension of 'output legitimacy' (for these concepts, see Scharpf 1999*a*: 16–17). The diversity of experimentalist governance elements in the JHA domain, the lack of clear assessment criteria, and the absence of comprehensive evidence in either academic research or EU evaluations mean that only some tentative conclusions based on fragmentary evidence can be offered here.

4.2 Accountability

If one approaches the question of accountability from the perspective of formal control of the JHA domain by the European Parliament (EP), the experimentalist elements of governance clearly appear as a factor of the domain's democracy deficit: The EP has no formal say over any of the framework objectives set by the European Council or the Council for the

JHA domain. This also applies to the strategic framework programmes which largely determine priorities and the sequence of action to be taken: The Hague Programme was adopted without any formal consultation of the EP, and the recommendations adopted by the Parliament in October 2004 (OJ C 166E/58 of 05.05.2005) were 'welcomed' by the Council but did not leave any visible trace in the text. As regards the recursive revision of the programming texts, the Commission addresses all relevant reviews and reports to both the Council and the Parliament, but the latter can influence the negotiations in the Council on any revisions at best only via the Commission. The situation is only different in the case of recursive revision of legislation, in which case the EP participates on the basis of the applicable legislative procedures (Peers 2006: 51), but even in those cases the Parliament does often not get all the necessary preparatory documents to participate in the decision-making process from the outset as this was explicitly criticized by the EP in the Resolution on the Area of Freedom, Security and Justice of 8 June 2006 (OJ C 124E/398 of 25.05.2006).

The situation of national parliaments varies according to national constitutional arrangements and governmental practices. Yet in most cases national parliaments get at best a chance to scrutinize agreed (or revised) framework texts after they have already been agreed upon. The experience of the British House of Lords Select Committee on the EU—well-known for the thoroughness of its scrutiny of EU business—regarding The Hague Programme can safely be regarded as characteristic. After having gone through the Commission's proposals for a follow-up to the Tampere Programme the Committee, well aware that negotiations on the new programme were advancing, asked in September 2004 for a clarification of the British Government's position on a number of issues. The Government replied on 4 November 2004, the very day of the meeting of the European Council, which approved the content of the Programme. Even after that the Government still declined to deposit the officially still unpublished draft for scrutiny. Only on 21 December, more than six weeks after the adoption of The Hague Programme, did the Government write to the Committee providing a copy of the Programme and outlining its views, leaving the latter at that stage only with the option to undertake an *ex post facto* inquiry into it (House of Lords Select Committee on the European Union 2005: par. 2–4).

As regards civil society participation, the Commission tends to engage in consultations of relevant non-state actors in many of its evaluative reports and reviews, especially in the fields of asylum and immigration, where it has even established a 'Committee on Immigration and Asylum' (CIA) consisting of experts and civil society representatives (COM(2006) 332 of 28.06.2006, p. 93). Yet while civil society actors may in this way have an influence on recommendations for revisions of current approaches and legal instruments, they obviously have no direct impact on the negotiations in the Council. In 'third

pillar' fields the classification of a large number of documents as 'restricted' because of their law enforcement and internal security sensitivity not only makes civil society participation virtually impossible but also drastically reduces scrutiny possibilities by the media.

4.3 Effectiveness

A very basic way of measuring effectiveness of governance mechanisms is simply to ask whether objectives set are formally met as originally defined and within the time limits set. The Commission has been carrying out such a simple check on objectives met in the JHA domain with its series of 'Scoreboard' reports. As regards the experimentalist elements the balance sheet is in this respect a rather mixed one. The framework objectives defined in the JHA programming documents are broadly adhered to and define to a considerable extent the Commission's and the Council's agenda. Yet objectives are often defined only vaguely, deadlines for adopting certain measures are often missed and there are serious deficits in implementation. The last of the 'first phase' asylum policy instruments, for instance, the 2005 Directive on asylum procedures, was only adopted in December 2005 instead of end of April 2004 as provided for by the Tampere Programme, which has thrown into disarray the planning for the review to precede the 'second phase' instruments. Especially in the 'third pillar' context, where effective infringement procedures are missing, many instruments are implemented with huge delays and little respect for framework objectives. In its July 2007 report on the implementation of the Hague Programme the Commission stated that at the end of 2006 only 53% of the measures programmed had been adopted according to the deadlines (COM(2007) 373 of 03.07.2007, 2–3).

The recursive element as a crucial characteristic of experimentalist governance merits a special look from an effectiveness perspective. There are examples of clearly identifiable recursive revision in the JHA domain at the strategic level—such as The Hague Programme building on the Tampere results; the level of instruments, for example, the 'Brussels IIbis Regulation'; and as regards practices, for example, the 'handbook' recommendations on international police cooperation regarding football matches (see the preceding text). Yet in spite of all monitoring, reviewing, and reporting, changes clearly identified as necessary for achieving the common objectives are often not made. The anti-terrorism domain is a key example in this respect: In his semi-annual monitoring reports the EU Counter-Terrorism Coordinator has been tirelessly identifying deficits such as legislative implementation delays, gaps in common action against terrorist financing, and information exchange and coordination problems (for instance: Council document 15266/1/06 of 24.11.2006). The effect has in most cases been at best an often hardly discernible acceleration of decision making and implementation—and a

reaffirmation—sometimes with stronger language—of objectives in the next revision of the non-binding Action Plan. It is obviously much easier for the Council to agree on revised or additional objectives in a recursive process than to ensure that these objectives are also at some stage effectively met.

Yet a mere formal check on objectives met as an effectiveness 'test' in the JHA governance domain obviously has its limits. It allows neither for a real impact assessment—this is what the Commission is aiming at with its new complex evaluation mechanism (see Section 3.3)—nor for a response to the question whether a particular approach is more or less effective than potential alternatives. Having regard to the problems mentioned above it may appear as if the experimentalist governance elements in the JHA domain have not proven their overall effectiveness. To at least some extent this seems to be the view of the Commission as it proposed in June 2006 to use the 'passerelle' provision of Article 42 TEU for transferring the 'third pillar' JHA fields to the EC Treaty, emphasising the merits of the EC decision-making and enforcement procedures and legal instruments (COM(2006) 331 of 28.06.2006). It is difficult not to see there a certain Commission preference for a more hierarchical governance approach based on the 'hard' Community legal instruments and tighter enforcement procedures. Yet it is far from certain that a more hierarchical and rigid approach would have led—and would lead in the future—to significantly better results. Subject to tighter hierarchical discipline and more inflexible programming and instruments the Member States might not only downgrade their objectives—which have proliferated in the last few years—but also become even more reluctant to agree on any substantial measures.

5 Outlook

With the 2007 IGC and the signing of the new Reform Treaty ('Treaty of Lisbon') in December 2007 the Commission's 'passerelle' initiative has became obsolete. Yet the Reform Treaty follows to a considerable extent the logic of the Commission's 2006 'Communitarization' proposals, extending, in particular, qualified majority voting to a range of matters of police and judicial cooperation in criminal matters, and making the current 'third pillar' fields subject to 'hard' judicial EC infringement procedures. The new Treaty therefore provides some scope for a more hierarchical and rigid governance approach in the JHA domain. Yet, on the other hand, the Reform Treaty establishes for the first time a specific legal base for the application of peer review procedures and codifies the European Council's right to set framework objectives in the JHA domain,[19] both of which have been important elements of 'experimentalist' governance in this domain so far. It is to be hoped that the new treaty provisions will be used in a balanced way allowing the Union to continue to profit from the advantages of experimentalist governance

instruments—with their higher degree of openness and flexibility and recursive revision possibilities—especially in the JHA fields which are most sensitive for the Member States.

Notes

1. In this chapter frequent references are made to official documents of the EU. In order to enable the reader to consult those either the Official Journal of the EU (OJ) references are given in brackets in the text or the document numbers used by the institutions (COM for Commission Communications, Council registry numbers, and dates in the case of the EU Council). The Official Journal can be accessed at: http://eur-lex.europa.eu/JOIndex.do?ihmlang=en and the EU Council Registry at http://register.consilium.europa.eu/servlet/driver?typ=&page=Simple&lang=EN&cmsid=638.
2. The term 'Justice and Home Affairs' has become a firm part of EU jargon and denotes the policy-making fields falling within the remit of the 'JHA Council' which include asylum, immigration, border controls, judicial cooperation in civil and in criminal matters, and police cooperation.
3. The 'old' 13 Schengen Member States except Denmark which—as a result of its Amsterdam 'opt-out' Protocol—enjoys a special status.
4. Title IV TEC and Title VI TEU.
5. Mainly qualified majority under Title IV TEC and unanimity under Title VI TEU.
6. Which in turn is based on the EU 2005 to 2012 'Drugs Strategy'.
7. Analysis based on the annual list of texts adopted by the JHA Council provided by the Council's General-Secretariat. These lists comprise also the texts not published in the Official Journal of the EU and not available on the EUR-Lex legislative database. The author thanks Mr. Hans Nilsson from the General-Secretariat for making the latest annual lists (not published on the Council's web site) available to him. For our methodology of classifying Council texts, see Monar 2006.
8. An example is the June 2002 Framework Decision on Combating Terrorism which defines a minimum maximum penalty level of fifteen years for directing a terrorist organization and of eight years for participating in a terrorist organization (OJ L 164 of 22 June 2002).
9. This was one of the not so positive conclusions of a High Level Conference on the future of Europol convened in 2006 (Council document 7868/06 of 29.03.2006).
10. See details of recent joint operations, such as HERA I and II, provided on the web site of the Frontex agency (http://www.frontex.europa.eu/).
11. The key examples here being the annual Organised Crime Threat Assessment (OCTA) and Terrorism Situation Report (TE-SAT) provided by Europol (non-classified versions: Europol 2007*a*, 2007*b*).
12. The complete texts of the 'Scoreboard' Reports are available from the Commission's web site under http://ec.europa.eu/justice_home/doc_centre/scoreboard_en.htm.
13. Such as in the case of the Council Decision establishing Eurojust. See on this point COM(2006) 332 of 28.06.2006, 91–92.
14. As finally defined in Decision 26 DEF 1998 of the Schengen Executive Committee which is now part of the EU *acquis*.

15. A good example is the final report on the first evaluation exercise on mutual legal assistance in criminal matters, OJ C 216 of 01.08.2001.
16. Article 22(5) of the Framework Decision 2006/783/JHA, OJ L 328 of 24.11.2006.
17. This is one of the most substantial 'blocks' of JHA legislation so far, comprising essentially Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application, Council Directive 2003/9/EC of 27 January 2003 on minimum standards for the reception of asylum seekers, and Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons.
18. In 2005, for instance, regarding practices of cooperation in the fight against trafficking in human beings, drug-trafficking, and the counterfeiting of the Euro (Eurojust 2006: 41–6).
19. New Article 70 TFEU (Treaty on the Functioning of the EU) provides for 'the objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities', and new Article 68 TFEU provides for the European Council 'to define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice'.

11

The Role of Evaluation in Experimentalist Governance: Learning by Monitoring in the Establishment of the Area of Freedom, Security, and Justice*

Olivier De Schutter

1 Introduction

The decentralized approach adopted in democratic experimentalism encourages the subunits of a federal system to devise their own solutions to the regulatory problems they face. But local experiments will benefit the other subunits only if they are evaluated, according to scales which are at once flexible enough to accommodate the novelty of experiments that work, and sufficiently robust in order to provide the adequate incentives to the subunits. Through evaluation, the subunits should be encouraged to take part in a collective search for solutions which can be replicated elsewhere; and they should be discouraged from experimenting in ways which create negative externalities, which could lead to calls for the imposition of standards from above.

This chapter seeks to contribute to our understanding of the role of evaluation mechanisms in the architecture of democratic experimentalism, by focusing on the rise of evaluation in the establishment of the Area of Freedom, Security, and Justice (AFSJ). The establishment of an AFSJ between the Member States of the European Union is based on the idea that national courts and administrations, as well as law enforcement authorities, should cooperate with one another, in particular by exchanging information and by mutually recognizing judicial decisions in civil and criminal matters. Such cooperation presupposes that the Member States share a set of common values, which

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include the fundamental rights recognized in EU law.[1] It may also demand, in certain cases, the approximation of the national legislations of the EU Member States, as may be required for such cooperation.[2]

The standard explanatory framework for the progressive establishment of an AFSJ between the EU Member States is thus based on two complementary propositions. First, mutual recognition, the 'cornerstone' of establishment of the European criminal area, or other forms of cooperation between States in the field of law enforcement, presuppose a high degree of compliance with fundamental rights. The national authorities of the Member States should therefore refuse to cooperate where this would risk violation of these values: this is not only prescribed by the EU Treaty; it is also reiterated in the instruments implementing the principle of mutual recognition in a variety of domains since the concept was introduced at the Tampere European Council of 1999.[3] Second, where there remain obstacles to mutual recognition or other forms of inter-state cooperation, due to diverging standards of protection of fundamental rights and to the resulting lack of 'mutual trust' between national authorities, harmonization may be required. Such approximation of national legislation might serve, in particular, to raise the overall level of protection of fundamental rights, and create the 'mutual trust' between the Member States which cannot merely be presupposed. We thus seem to witness in this area what neo-functionalists would see as confirming their view of the logic of European integration: 'positive integration', in the form of harmonization of national legislation, accompanies 'negative integration', especially where the latter takes the form of mutual recognition of national rules or decisions; harmonization is the result of spillover from the abolition of barriers to cooperation between the Member States.

This chapter challenges that classic narrative. It does not question the appeal of the standard view to the institutional actors. Nor does it underestimate the weight of the analogy to the establishment of the internal market in the mental representations of these actors—and, to that extent at least, the validity of the neo-functionalist logic of a complementarity at work between negative and positive integration. Rather, the aim of this chapter is to draw attention to a competing logic, which may help us move beyond the debate between mutual recognition and harmonization. This competing logic is a combination of evaluation and collective learning: by setting up evaluation mechanisms and by mutually observing one another the EU Member States not only can create the mutual trust on which their cooperation depends, but they also can make progress together towards identifying the precise content of this new field of European integration.

This chapter documents the emergence in the EU of a logic of evaluation and learning. This logic is an alternative to the balancing between positive integration and negative integration, since it is reducible to neither and opens up a third avenue through which to achieve coordination. It is also a complement to those

classic tools of integration, since we will use the latter better once we equip ourselves with the search devices which evaluation mechanisms can constitute. The approach is procedural, rather than substantive. It acknowledges that we cannot know, in advance of developing cooperation between EU Member States, which obstacles such cooperation may face, and which measures should be adopted in order to remove these obstacles. But the alternative is not necessarily to rely on a purely *ad hoc* construction of the AFSJ, guided by the priorities of national political agendas and the rhythm of crises occasionally drawing the attention of policymakers to certain, previously unidentified or underestimated, problems. Rather, evaluation mechanisms described here should be conceived as search mechanisms, which should allow us to identify, on a systematic basis, what steps are required to achieve progress towards the establishment of the AFSJ. Through the tool of evaluation, the ends of the AFSJ are constantly redefined as a result of developing the means to achieve it, and its shape is being discovered at the same time as the area itself is being invented.

The chapter proceeds as follows. Section 2 briefly describes the standard view of how progress should be made towards the establishment of an AFSJ, by analogy with the establishment of the internal market. That standard view opposes mutual recognition (or some other form of cooperation built on mutual trust) to harmonization, understood as the adoption of common standards. A trade-off between diversity and unity is implicit in this standard view: the risks of divergent approaches by the Member States, insofar as they could threaten mutual recognition, are to be countered by the imposition of uniformity—harmonization from above. In part, the logic of evaluation presented here is useful because it may allow us to escape such a trade-off. In order to describe how this alternative logic has emerged, Section 3 describes how the Member States have gradually come to realize that they needed to mutually evaluate themselves in a variety of fields, such as external border control, combating terrorism, or the administration of justice. The review of evaluation mechanisms in these areas illustrates that they fulfil at least five distinct objectives. They may serve to monitor the implementation of EU laws and policies by the Member States; ensure a feedback on those laws and policies themselves; contribute to collective learning, on the basis of local experiments; enhance mutual trust between the Member States; and finally, stimulate democratic deliberation both at national and at European level. Section 4 examines these different functions of evaluation, and asks whether they can be reconciled in a single model. Section 5 concludes.

The logic of evaluation presented here may be seen as subverting the neo-functionalist logic of which it is a potential competitor. But it may also be seen as a necessary complement to that neo-functionalist logic itself. Indeed, the establishment of an AFSJ between the EU Member States cannot avoid constantly questioning the content of such an area itself, and in particular, the relationship between mutual recognition and harmonization

(or, more broadly, between mutual cooperation and the definition of common standards) in its progressive establishment between EU Member States. By establishing such an area, the Union seeks to achieve a balance between conflicting goals—free movement of persons on the hand, a high level of security on the other hand—and it does so by means which are as much competitive as they are complementary: mutual recognition and cooperation to the fullest extent possible, accompanied by approximation of national legislation or the development of common standards where necessary. Where the balance is to be struck, which degree of legal approximation should accompany mutual recognition and according to which sequence this should happen are left for us to discover as we move towards the fulfilment of the objective set by the Treaty. Evaluation mechanisms therefore may be conceived as search devices which will enable us to better understand this objective, in the very process of implementing it. This chapter explores the potential of this logic of evaluation, including both monitoring and learning.

2 The standard view

The standard view sees the establishment of an AFSJ in the European Union as the search for an adequate equilibrium point between negative and positive integration. This view identifies a deep structure in the process of European integration, analogizing the establishment of the AFSJ in the 2000s, to the establishment of the internal market in the 1980s. Mutual recognition is the rule, based on the premise that the national authorities of all Member States can be trusted to comply with the same set of publicly agreed upon values. Harmonization is the exception, but it constitutes the preferred remedy where mutual confidence breaks down, whether or not for objectively justifiable reasons: it constitutes the other horn of the dilemma. In this view, fundamental rights fulfil, in the establishment of the AFSJ, the same function as the 'mandatory requirements' famously put forward by the European Court of Justice in the *Cassis de Dijon* judgment of 1979 where, for the first time, the concept of mutual recognition was introduced in the law of the internal market.[4] In *Cassis de Dijon*, the Court took the view that products should be allowed to be sold into any other Member State provided that they have been lawfully produced and marketed in one of the Member States, but it acknowledged that 'obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer' (par. 8). One generation later, the European Court of Justice was asked

in the landmark case of *Gözutok* and *Brügge*[5] whether the national courts of the Member States should be obliged, under the *non bis in idem* (double jeopardy) principle enshrined in the Schengen Agreement,[6] to recognize that further prosecution is barred after the accused has arrived at a settlement with the prosecuting authorities of another Member State than the one where he or she is facing criminal charges. The Court explicitly noted that mutual recognition was not conditional upon the harmonization of criminal procedures across the Member States. Instead, said the Court, the 'necessary implication' of the *non bis in idem* principle is that 'the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States *even when the outcome would be different if its own national law were applied*' (par. 33).[7] The analogy between the concept of mutual recognition in the internal market and its function in AFSJ is clear: the latter thus emerges as a 'market of fundamental rights', in the words of Advocate General Ruiz-Jarabo Colomer.

Just as the AFSJ inherited the concept of mutual recognition from the law of the internal market, it has remained hostage to a strangely binary form of thinking characteristic of the 'new approach' to market integration. This standard view builds on the idea of a grand alternative between mutual recognition (in its many incarnations) and harmonization (see also Peers 2004). Only a few years ago, the approach of the Commission still offered a clear illustration of this. 'Mutual recognition', according to the Commission, 'is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state' (European Commission 2000*a*: par. 3.1). However, mutual recognition thus understood 'rests on mutual trust and confidence between the Member States' legal systems', which may have to be 'enhanced' by certain harmonization measures: 'Differences in the way human rights are translated into practice in national procedural rules [. . .] run the risk of hindering mutual trust and confidence which is the basis of mutual recognition' (European Commission 2003*d*: title I.7). The Commission stated thus, in 2005, that '[t]he first endeavours to apply the [mutual recognition] principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation [aimed at] ensuring that mutually recognised judgments meet high standards in terms of securing personal rights' (European Commission 2005*d*: par. 3.1).[8]

Nor is this view applicable only to mutual recognition in the criminal justice field. A similar dialectic is for instance currently at play as regards the protection of personal data processed by law enforcement authorities, in the establishment of the area of freedom, security, and justice. Just as the harmonization of the protection of personal data in the internal market was seen as a condition of mutual recognition of the relevant national legislations,[9] the development

of common rules on the protection of personal data is considered a condition for the exchange of information between the law enforcement agencies of the Member States under what came to be called the principle of availability. This principle means that, 'throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that state' (European Council 2004: par. 2.1). In other terms, information available in one Member State should be made available to the authorities of any other Member State, just as if these were authorities of the same State: 'The mere fact that information crosses borders should no longer be relevant' (European Commission 2005*e*: par. 2.2). This 'principle of availability' is currently codified in the proposal for a Framework Decision on the exchange of information (European Commission 2005*f*).

The principle of availability plays in this field the role which the principle of mutual recognition plays in the field of judicial cooperation in criminal matters. It presupposes the mutual trust which should exist between the Member States' national authorities. But it is also a technique through which leverage may be exercised in favour of the adoption of common standards in order to strengthen mutual trust (de Biolley 2006: 194). Indeed, its implementation requires that all Member States ensure a high level of protection of personal data, thus justifying the high level of trust which this principle presupposes between the national authorities of the different Member States (European Council 2004: par. 2.1). However, the 1995 Data Protection Directive does not apply to the processing of personal data effectuated in the course of state activities in areas of criminal law or matters falling under Title VI EU.[10] Moreover, while all the EU Member States are parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981, the principles set forth in this instrument are expressed at a relatively high level of generality, and certainly does not ensure the same level of protection as, for instance, the 1995 Data Protection Directive. Therefore, almost simultaneously to proposing an instrument implementing the principle of availability, the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (European Commission 2005*g*). This was encouraged by the European Parliament (2005) and welcomed by the European Data Protection Supervisor (2006). It illustrates perfectly the standard narrative, in which the need to adopt 'flanking measures', aimed at improving the level of protection of fundamental rights in the EU Member States, appears as a logical—and unavoidable—counterpart to the lowering the barriers to mutual recognition or exchange of information.

There is, of course, an inherent tension underlying the dialectic described in the standard view. Insofar as it justifies mutual recognition, mutual trust is *presupposed* by the very fact that each Member State has agreed to consider decisions adopted by the authorities of any other Member State as equivalent to decisions adopted by its own authorities: such a presupposition was, for instance, central to the reasoning of the *Gözütok* and *Brügge* judgment of the European Court of Justice. But insofar as it justifies, instead, the approximation of national legislations, the concept of mutual trust appears rather as a *precondition* for establishing the area of freedom, security and justice on the principle of mutual recognition (De Schutter 2005: Weyembergh 2004: 339). In this second perspective, mutual trust is not to be taken for granted: it has to be created. The desire to strengthen mutual trust may therefore justify the approximation or the harmonization of legislations as a measure accompanying mutual recognition.

Whether this latter function of the notion of mutual trust corresponds to the original understanding of mutual recognition may be doubted. The EU Treaty provides in Article 31c, that common action on judicial cooperation in criminal matters shall include, *inter alia*, 'ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation'. But this remains a particularly vague formulation. And when the concept of mutual recognition was originally put forward, with the evident purpose of achieving in the establishment of the criminal area what had be achieved in the internal market during the late 1980s, this was presented not as a lever to promote the further approximation of national legislations in this area, but quite to the contrary as a *substitute* for harmonization. The United Kingdom Presidency document of 1998 which initially presented the idea of mutual recognition stated: '. . . a possible approach, comparable to that used to unblock the single market, would be to *move away from attempts to achieve detailed harmonization* to a regime where each Member State recognized as valid the decision of another Member State's Courts in the criminal area with the minimum of formality' (Council of the European Union 1998 (emphasis added); Nilsson 2005). In this original view of mutual recognition, the fact that all the EU Member States are bound by the same international human rights instruments should suffice to justify establishing between them the mechanism of mutual recognition of judicial decisions adopted in criminal matters. And indeed, such has been hitherto the approach adopted by the Council of Europe instruments which promote mutual recognition on the criminal field: although these instruments, such as the 1970 European Convention on the International Validity of Criminal Judgments[11] or the 1972 European Convention on the Transfer of Proceedings in Criminal Matters,[12] contain certain safeguard clauses ensuring that criminal sanctions adopted by one state will not be enforced in another in violation of the latter's international obligations or of the 'fundamental principles of its legal system',[13] they do not presuppose

that both states will have implemented principles such as respect for the rights of defence or the presumption of innocence, through similar or comparable national legislation.

Whatever the original intent behind the introduction of the concept of mutual recognition in the establishment of the AFSJ, it soon became clear that, far from rendering unnecessary the adoption of common standards, the mutual recognition of judicial decisions in criminal matters could in fact constitute an incentive for further harmonization, especially where the level of protection of certain fundamental rights in criminal proceedings varies among EU Member States. The idea of such complementarity between approximation of national laws and mutual recognition was recognized already by the Tampere European Council of 15–16 October 1999, which launched the idea of an AFSJ, and asked the Council of the EU and the Commission 'to adopt [...] a programme of measures to implement the principle of mutual recognition [including on] those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States' (European Council 1999: par. 37).

Of course, whether mutual trust between EU Member States should be enhanced through harmonization measures—or whether, instead, mutual trust can be *presupposed*—cannot be dissociated from the fact that these states share a common *acquis* in the area of fundamental rights, in particular since they all are parties to the most important instruments of the Council of Europe. But this argument is not a decisive one. Council of Europe instruments do not cover all areas in which harmonization may be required in the EU in the field of criminal law. They often impose only *minimum* standards, particularly in the area of fundamental rights, and they therefore are an insufficient response to the risk of *divergences* between the Member States beyond those minimum standards, in the absence of any attempt at approximation under EU law.

In the establishment of the AFSJ, it is perhaps in the field of fundamental rights that the choice between harmonization on the one hand, and mutual recognition presupposing mutual trust on the other hand, presents itself in the purest form. And it is here, too, that the substitution of a logic of monitoring for the alternative between harmonization and mutual trust has been most heavily discussed: indeed, the scenario of human rights monitoring performed by the European Union on its Member States, in order to provide each Member State with the assurance that, if a serious threat to fundamental rights exists in another, this will be identified and reacted to as appropriate, has been explored in the period 2000–5 (De Schutter, 2008, 2009). This scenario was finally implemented in part only, essentially because of the fear that tasking the EU institutions with such a role would be competing with the kind of monitoring

performed by the Council of Europe bodies. However, the main weakness of fundamental rights monitoring within the European Union is neither that it is overambitious, nor that the Union would somehow exceed its mandate by developing into a 'human rights organisation' (Von Bogdandy 2000): it is rather that such monitoring is misdirected, because it is conceived as a top-down mechanism, aimed at verifying compliance with a predefined set of norms. The next part argues that monitoring the Member States is chiefly useful as a search device. Evaluation allows comparisons to be made. It allows each state to learn from the others. It therefore not only cements mutual trust, although this may be a desirable by-product, but first and foremost provides hope that, in the future, the choice between mutual recognition and harmonization will be better informed, and that, beyond those two branches of the classic alternative, mutual evaluation will emerge as a coordinating tool in its own right.

3 Evaluation mechanisms in the area of freedom, security, and justice: a typology

In order to understand the potential of such evaluation mechanisms in experimentalist governance architecture, we should first acknowledge the ambiguity of the position of the EU institutions concerning the criteria which they should follow when choosing, in the terms of the classic view, between mutual recognition and harmonization. For instance, the European Commission states in its July 2000 Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters: 'Not always, but often, the concept of mutual recognition goes hand in hand with a certain degree of standardisation of the way states do things. Such standardisation indeed often makes it easier to accept results reached in another state. On the other hand, mutual recognition can to some degree make standardisation unnecessary' (European Commission 2000*a*: par. 3.1). The Hague Programme, too, remains vague on this crucial question. While this programme is intended to define the Union's agenda in the field of justice and home affairs for the years 2005–10, it simply mentions that the mutual trust on which mutual recognition of judicial decisions is based could be enhanced by a number of means, consisting of both legal measures and operational initiatives, and including in particular the 'progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law'; 'a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice', providing 'the certainty that all European citizens have access to a judicial system meeting high standards of quality'; the 'development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member

States and with due respect for their legal traditions'; 'the establishment of minimum rules concerning aspects of procedural law (. . .) in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'; and finally, the approximation of substantive criminal law as regards 'serious crime with cross border dimensions', as provided by the EU Treaty (European Council 2004: par. 3.2 and 3.3).

This leaves to the European legislator an almost unlimited margin of appreciation. When it commented on The Hague Programme adopted by the European Council of 4–5 November 2004, the House of Lords urged caution on the question of approximation of the criminal laws of Member States in order to facilitate mutual recognition, emphasizing that 'this is an area where the principle of subsidiarity will come prominently into play and due observance of it will be necessary' (House of Lords Select Committee on the European Union 2005: par. 40). But what precisely the principle of subsidiarity might entail in this area remains unaddressed. The Protocol on the application of the principles of subsidiarity and proportionality, appended to the 1997 Treaty of Amsterdam, emphasized that subsidiarity is 'a dynamic concept', whose meaning will depend on the evolution of the circumstances: the principle of subsidiarity, it stated, 'allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified' (par. 3). It also imposed a requirement that any action of the Union subject to the principles of subsidiarity and proportionality be justified by reference to these principles (par. 4). Most importantly, it shed further light on the content of these requirements. The principle of subsidiarity requires that it be demonstrated that 'the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional systems and can therefore be better achieved by action on the part of the Community'. The verification of this condition may be influenced by considerations relating to the question whether 'the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States'; whether 'actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests'; or whether 'action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States' (par. 5). Of these, the second justification for an intervention by the Union is clearly the most relevant in the establishment of the area of freedom, security, and justice: where the divergence between the Member States' approaches to a certain issue result in an obstacle to their mutual cooperation and, thus, threaten the aim of an area of freedom, security, and justice, this may call for

the approximation of national legislation, administrative regulations, or practices; in addition, according to the principle of proportionality, the intervention of the Union should be limited to what is necessary.

There are a number of signs indicating that mutual evaluation is emerging as a policy mode in its own right, either as a substitute for the mutual recognition/harmonization alternative or as a means to identify any divergences between the member States which may call for harmonization, consistent with the principle of subsidiarity which has just been recalled. A general monitoring, performed by mechanisms established within the European Union, of EU Member States' compliance with the values on which the Union is founded may never be established. But other, lower-profile forms of monitoring have recently been developing, in recognition of the need to ground mutual cooperation on a firm basis (Weyembergh and de Biolley 2006). Under one model, the European Commission is assigned a leading role, corresponding to its function under the EC Treaty as guardian of the Member States' obligations: it monitors the implementation of specific instruments adopted under title VI of the EU Treaty, on the basis of information collected from the national authorities. Under a second model, the Member States organize among themselves a form of peer evaluation, in order to improve the mutual understanding of one another's approaches to certain issues of common interest (such as the policing of external borders or the fight against terrorism), and to exercise political pressure on the Member States where certain deficiencies are identified. More recently, a third and more ambitious model, which may be seen as a synthesis an extension of these two existing models, has been proposed.

3.1 The evaluation of the implementation of third pillar instruments

A first category of 'evaluations' in fact aim, at a rather modest level, to compensate for the absence of infringement proceedings filed by the Commission against the Member States under Title VI of the Treaty on the European Union, in situations where they would fail to comply with their obligations under EU law, especially in the implementation of framework decisions. It has become typical for these instruments to require the Member States to report to the Commission, within a prescribed deadline after the period left for implementation has expired, about the implementation measures adopted; the Council is then expected to assess implementation with the framework decision on the basis of a report prepared by the Commission following the receipt of this information.[14] Indeed, even in the absence of an explicit legislative mandate to that effect, the European Commission has occasionally considered that it should present such an evaluation of the implementation measures adopted by the Member States, putting forward the importance of the instruments concerned (European Commission 2004*d*: 3).

The impact of such evaluations is limited (de Biolley and Weyembergh 2006: 75–98). The information sent to the European Commission by the EU Member States relates to the implementation of a particular legislative instrument, rather than to the full set of measures adopted in a certain policy area (for more details, see European Commission 2001*a*: par. 1.2.2). These evaluations moreover are concerned only with the question whether the Member States have adopted the measures required under these instruments: they do not examine whether these implementation measures comply with the requirements of fundamental rights nor do they address whether, in the light of the difficulties encountered in the implementation phase, the legislative instruments adopted by the Union may have to be amended, or even completely redesigned. They concentrate on the adoption of legal measures by the Member States: they are silent about the practical impact of such measures, and about the question whether these measures effectively contribute to the establishment of the AFSJ. Although there have been attempts to move beyond the practice of evaluations based exclusively on the legal measures adopted, in particular, as regards the implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[15] the uneven quality of the information on which this was based has been recognized as a serious deficiency of the process (European Commission 2006*c*). The Commission did suggest farther-reaching evaluation mechanisms, such as involving independent experts in monitoring the effective compliance by all the EU Member States with the fair trial requirements imposed under the proposed Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, or imposing on the national authorities an obligation to collect statistics about the impact of this instrument (European Commission 2004*d*). But these proposals for strengthening the monitoring of implementation of EU law apparently met with strong resistance.

In sum, the evaluations which have been set up under specific instruments adopted under the third pillar hitherto have served to monitor the compliance of the Member States with their obligations, in a classical top-down fashion; but they are not seen as a potential source of reflexivity for the EU institutions or as providing an opportunity for collective learning between the Member States. It is as if the European legislator could do no wrong. And it is as if the adoption of legal measures, by itself, would be sufficient to create the conditions which will ensure that they will achieve their objective, however diverse and evolving the settings in which these measures are to be implemented.

3.2 Peer evaluation

In the kind of evaluation discussed above, the European Commission plays the central role as the guardian of the Member States' obligations. In contrast, peer evaluations have developed in certain areas. One of the oldest and most

interesting forms of peer review organized in the justice and home affairs field results from the establishment of a Standing Committee on the evaluation and implementation of Schengen, entrusted with evaluating both the degree of preparedness of the states who are candidates for participation in the Schengen Convention, and the level of compliance of existing signatory states.[16] This committee is composed of one high-ranking representative from each signatory state. Its delegations, composed of inspectors representing the Member States willing to contribute (each state funding its own representative within the group), visit the countries subject to the evaluation procedure, according to a work programme defined initially by the Executive Committee, and now by the Council of the EU. The mutual evaluation is organized on the basis of the information collected through these visits as well as information provided by the host state. The purpose of this monitoring is not only to evaluate whether all the preconditions for applying the Convention Implementing the Schengen Agreement in a candidate state have been fulfilled but also to 'seek solutions to the problems detected and [to] make proposals for the satisfactory and optimal implementation of the Convention' in the existing signatory states.

The peer review mechanism is based on inspections in the states concerned as well as on a written questionnaire-based procedure.[17] This procedure, which remains fully confidential, leads to the adoption of political conclusions by the Council of the EU, which may approve recommendations adopted by the Working Group. After a state has been subjected to an evaluation, it must present a follow-up report stating how it met the recommendations made by the experts. The follow-up may identify the measures which were adopted in response to those recommendations; or it may explain why certain reforms could not be implemented immediately, for example, because they require the reinforcement of the existing capacities, for which the necessary budgets may be lacking; in certain cases, the states concerned have contested the recommendations addressed to them.

The evaluation mechanism is thus conceived to allow the detection of any problems encountered in the implementation of the Schengen Convention, and to identify solutions proposed for applying the Convention in the most satisfactory and effective manner. The participating states are thus placed under a close supervision, focused not only on the legal transposition of the Schengen acquis but also—and primarily—on its practical implementation, in areas such as border controls, visas, protection of personal data, or the expulsion or readmission of foreign nationals. In the development of the Schengen evaluation mechanism, a number of remarkable evolutions have taken place.[18] In particular, the catalogues prepared in order to facilitate the implementation of the Schengen acquis—compendia of best practices in areas such as, for instance, the crossing of external borders and the delivery of visas[19]—have taken into account in the practice of evaluations, even though these

catalogues have no binding legal effect. The reports of the inspection visits have also been structured in a more harmonized way, thus ensuring the possibility of comparison between evaluations.

Peer assessments broadly similar to the Schengen evaluation mechanism have developed in the fields of terrorism and of organized crime. The Joint Action of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime[20] provides perhaps the best illustration. This peer evaluation, intended to cover at least five states per year, is supervised by the members of the Multidisciplinary Working Party on Organized Crime (MDW). Acting on the proposal of the presidency of the Council, the MDW defines the specific subject of the evaluation[21] as well as the order in which Member States are to be evaluated. The evaluation teams comprise three experts for each Member State subject to the evaluation drawn from a list of experts presented by the other Member States, and include in addition one or two members of the General Secretariat of the Council, one representative of the Commission, and occasionally a member of a body such as (depending on the subject of the evaluation) Europol or Eurojust. On the basis of the answers of the Member State concerned to a questionnaire and of a visit in that Member State allowing the evaluation team to meet the officials involved, a draft report is prepared, which is transmitted to the MDW along with the comments of the state which were not accepted by the evaluation team. The MDW adopts conclusions by consensus, following a presentation of their report by the evaluation team, and the explanations received from the State subject to the evaluation. Those conclusions are transmitted to the Council, which may address recommendations to the Member State concerned and invite it to report back to the Council on the progress it has made by a specific deadline. The follow-up of the recommendations is generally weak: although most states do respond to the recommendations addressed to them, the information they send to the Council does not lead to any further discussions. Interestingly however, the MDW has occasionally included recommendations addressed to the Council itself, or to Europol: this suggests that, although conceived initially for the monitoring of the Member States' application and implementation of international undertakings in the field of organized crime, this mechanism has the potential to bring about improvements also in the approach developed at European level in this field. On the other hand, the mechanism does not contribute to the accountability of the executives towards either the national parliaments or to civil society organizations, since the whole process is in principle confidential, although the Member States evaluated may if they wish make public the reports under their own responsibility.

This system was further built upon in order to ensure a form of peer evaluation of the action of the Member States against the threat of terrorism.[22]

The mechanism is placed under the supervision of the 'Article 36 Committee', a Committee of high-level national public servants established under Article 36 EU in order to prepare the discussions within COREPER and the Council in the fields of police cooperation and judicial criminal cooperation. For each cycle of evaluation in this area, this Committee chooses one theme.[23] Within six weeks after receiving the reply of the Member States to the questionnaire prepared on that theme by the Presidency of the Council, an evaluation team composed of two national experts from other Member States and assisted by the General Secretariat of the Council and the Commission may if appropriate travel to that Member State, in order to clarify the replies to the questionnaire: a programme of visits is arranged to that effect by the Member State visited on the basis of the evaluation team's proposal, for interviews with the political, administrative, police, customs and judicial authorities, and any other relevant body. The members of the Article 36 Committee receive the draft report of the evaluation team, along with any comments of the state concerned which the evaluation team did not wish to include. On the basis of a discussion introduced by the presentation of their report by the members of the evaluation team, the Article 36 Committee adopts conclusions by consensus. At the end of a complete evaluation exercise, the Council is informed of the results of the evaluation, and it may address recommendations to the Member State concerned and invite it to report back to the Council on the progress it has made by a certain deadline.[24] The information collected by the evaluation teams in this process, as well as the country-specific recommendations, are confidential. Only the synthesis reports adopted by the Council at the close of an evaluation cycle are public, and are transmitted to the European Parliament; however they contain no references to specific states.

3.3 Strategic evaluations

Each of the evaluation processes described above presents a number of deficiencies. The evaluations by the Commission of the implementation of certain specific instruments adopted under Title VI of the EU Treaty essentially focus on the adoption of legal measures by the Member States, rather than on the practical effectiveness of the policies to which those instruments seek to contribute. If they add to our understanding of the adequacy of those instruments themselves, this results from chance rather than from design. As a tool to improve the reflexivity of European policies, which should allow for those policies to be revised in the light of their impact in different settings, they are poor. And even as a tool to exert pressure on Member States in order to ensure that they adopt all the implementation measures required, these meet with only partial success, since the Commission cannot file infringement proceedings for failure to comply with the obligations imposed by instruments adopted under the third pillar of the EU Treaty.

In contrast, the peer evaluations conducted in order to contribute to the implementation of the Schengen *acquis*, or in the fields of organized crime or terrorism, have a potential to bring about policy changes in certain Member States, and may contribute to mutual learning in certain fields where the Member States have adopted significantly different approaches. But their contribution to improving the accountability of the governmental departments concerned is limited: with few exceptions, their results are not public, and any pressure exercised on a state by the other Member States within the Council of the EU cannot be relayed by national parliaments or by civil society organizations. In addition, as clearly illustrated by the preparation of compendia of best practices such as the Schengen catalogues in the Schengen evaluation mechanism, these evaluations presuppose that, for any question of common interest, there exists one 'adequate' or 'best' way to implement certain predefined objectives: while the same processes may also occasionally lead to 'discover' new approaches to old problems, on the basis of certain experiments conducted by one Member State, this is not the explicit aim of the peer evaluations—and even where it happens, the end goal still appears to be greater uniformity, even if this may take the form of the adoption by all the states of certain best practices identified in one of their number. Finally, these evaluations, even considered together rather than individually, remain fragmentary and *ad hoc*, rather than guided by any overarching vision about how evaluation may contribute to the rationality and reflexivity of EU policies.

This may be changing. The Lisbon Treaty provides that the Council may adopt measures 'laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in [Title IV: Area of Freedom, Security and Justice] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation'.[25] Clearly, the intention is not solely to supervise the faithful implementation by the Member States of instruments adopted in this field (something which, under the new framework established by the Treaty of Lisbon, should in any event be facilitated by recourse to the more classical means currently used in Community law). Rather, that evaluation should serve other goals, primarily to establish mutual trust between the Member States' national authorities, and to ensure that the development of EU policies are fully informed by the difficulties encountered in practice by the Member States in the course of the implementation of these policies, in order to allow for them to be revised in the light of such obstacles. In addition, not only the European Parliament but also national parliaments are to be involved in the evaluation. This should increase the pressure on the Member States, and it should improve the accountability of the Executives who fail to comply with their obligations under EU Law. But it should also contribute to each national

parliament gaining a better understanding of the stakes of European integration, and of the nature of the obstacles faced in other Member States in the implementation of European policies developed in the field of freedom, security, and justice.

Following upon The Hague Programme adopted by the European Council on 4 November 2004 (European Council 2004: par. 3.2), the Council and the Commission adopted on 2–3 June 2005 an Action Plan listing the setting up of a system for objective and impartial evaluation of the implementation of EU measures in the field of Freedom, Security, and Justice as the first priority.[26] The result was the presentation by the Commission, on 28 June 2006, of a communication on the evaluation of EU policies on Freedom, Security, and Justice (European Commission 2006*d*). This communication goes much further, however, than what the Member States had anticipated. It proposes a form of systematic evaluation of the implementation of the EU policies in these fields,[27] aimed not only at ensuring compliance with the Member States' obligations under EU law but also at evaluating *EU policies* as such. The Hague Programme had stated that '[e]valuation of the implementation *as well as of the effects of all measures* is (. . .) essential to the effectiveness of Union action' (emphasis added). In line with this mandate, the communication on strategic evaluations deliberately seeks to ensure that the evaluation of developments at Member State level will serve to improve the design of EU policies. These policies are therefore being 'tested' at the same time that the Member States' implementation is being 'monitored': the evaluation of the implementation of the EU policies ensures a feedback on the latter themselves, which may have to be revised in the light of the problems encountered in their implementation or the—perhaps unintended—impacts they produce; and, beyond the aim of monitoring as a means to ensure compliance, evaluation serves the aim of promoting learning, by the comparisons it should allow of the experiences of the different Member States in the implementation process.

The mechanism proposed in the communication consists in the Member States providing the Commission with information about the implementation of EU policies in the fields of freedom, security, and justice, by the regular delivery of 'factsheets' (one for each policy area), describing the achievements of each Member States on the basis of a relevant set of indicators. Such factsheets should be communicated twice every five years, since they will focus on 'slow-moving outputs and results and on medium-term data' (European Commission 2006*d*: par. 35). The information contained in these factsheets would be commented upon by the relevant stakeholders. The Commission would then prepare an 'evaluation report', including certain political recommendations. Finally, where justified, an 'in-depth evaluation report' would be prepared by the Commission in specific areas. 'Strategic' evaluations thus conceived should add value to the current practices as described above, according to the Commission, notably by (European Commission 2006*d*: par. 33).

(*a*) focusing on *policies* (or coherent subsets), rather than individual instruments (for instance, evaluation of the common immigration policy);

(*b*) analysing the *coherence* of different instruments within a given policy (e.g. how financial programmes support and facilitate implementation of the EU legislation in a given field);

(*c*) investigating how a certain policy contributes to the *overall objective* of establishing an Area of Freedom, Security, and Justice;

(*d*) determining the overall *rate of achievement* of that general objective; and

(*e*) assessing achievement of an overarching objective in the field of freedom, security, and justice (for instance, safeguarding of fundamental rights).

This goes far beyond a banal practice of monitoring Member States' compliance with their legal obligations under the EU Treaty, in particular, to compensate for the absence of infringement proceedings filed by the Commission under Title VI EU. Rather, the strategic evaluation of the EU policies adopted in the field of freedom, justice, and security constitutes a means to ensure that (*a*) beyond the compliance achieved by the adoption of legal instruments, the effectiveness of the measures adopted (their ability to achieve the objectives of the policies pursued) is measured (*b*) the political objectives are regularly redefined in the light of the lessons which may be drawn from implementation by the Member States; and (*c*) our common understanding of the requirements of an 'area of freedom, security and justice' is progressively transformed by this iterative process. In sum, this 'strategic evaluation' should serve to transform what currently may be seen as a liability (the absence between the Member States of a common understanding of the end-goal of an AFSJ, combined with the inability of the Commission to effectively impose on them such an understanding) into a virtue: the very ambiguities about the meaning of this project are productive, in that they allow a collective learning to take place in which the 'principals' learn from the 'agents' and, in the light of the information provided by the agents, may be led to revise their understanding of what political initiatives may be required.

As confirmed by the mostly sceptical reactions it triggered from the Member States,[28] the communication on strategic evaluations goes beyond what is envisaged in the Lisbon Treaty. It envisages the evaluation process leading to an improved accountability of policymakers, both at European and at national level, through the dissemination of the results of the evaluation and the involvement of a variety of actors in the process: in particular, the 'evaluation report' prepared by the Commission on the basis of the factsheets communicated by the Member States will be transmitted not only to the Council and European Parliament but also to the European Economic and Social Committee and the Committee of the Regions; it will be 'disseminated as appropriate

to wider audiences, including via ad-hoc public events' (European Commission 2006*d*: par. 21); more generally, the Commission will 'ensure that the views of the civil society will be taken into account and will establish appropriate mechanisms to ensure its participation in the evaluation of all policies in the area of freedom, security and justice' (European Commission 2006*d*: par. 16).

The form of 'strategic evaluation' proposed should not be seen as a form of Open Method of Coordination in the canonical definition given the latter by the Lisbon European Council of March 2000. The Member States are not requested here to prepare action plans which will subjected to peer review, and lead to the adoption of guidelines by the Council: they are, rather, to provide factual information to the Commission about the effectiveness of the policies they are pursuing, for the latter to draw political conclusions and stimulate debate about the need to revise EU policies adopted in the field.[29] Nevertheless, the dimensions of mutual learning and of peer review are not absent from the strategic evaluations. Even more importantly, these strategic evaluations are devised as a response to the uncertainty we face in the fields they will cover: the reason why there is a need to evaluate the effectiveness of the EU policies developed in these fields is that 'good' answers to the questions of how to create the mutual trust required for the mutual recognition of judicial decisions in civil and criminal matters, how to effectively prevent organized crime, or how to combat illegal immigration—to mention only those examples—are not readily available, and that the initiatives adopted so far may appear to be based on misguided information, not to have anticipated certain secondary effects, or to have underestimated certain obstacles to implementation by the national authorities. Indeed, not only are the means to be permanently 'tested' in the light of the national authorities' experience with the implementation of EU policies, the ends themselves—*what we mean* by the establishment of an area of freedom, security and justice—need to be redefined, or reinvented, as we unpack the implications of seeking to implement them.

4 The potential of evaluation

On their surface, the strategic evaluations the European Commission proposes to introduce in the field of freedom, security, and justice, should provide it and the Member States the information they require to improve EU policies in the six areas they will cover. The practice of such evaluations fits into the broader framework of improving governance in the European Union: in the July 2001 White Paper on Governance, the Commission had already emphasized the need for 'a stronger culture of evaluation and feedback (. . .) in order to learn from the successes and mistakes of the past' (European Commission 2001*b*: 22). And it constitutes a clear recognition that, such an evaluation is not

satisfactorily organized in the standard inter-institutional division of tasks in EU law and policy-making. Neither the European Commission nor the European Parliament has all the information required from the Member States to perform such evaluations; indeed, to make this information available in a transparent and non-selective manner is precisely what the June 2006 communication seeks to achieve. The Council of the European Union has been developing a practice of peer assessment for almost ten years in certain well-defined areas, but it is seriously handicapped by Member States' natural tendency not to put excessive pressure on one other, especially in fields such as law enforcement, which are traditionally associated with the core of national sovereignty. In addition, it is difficult for the Council to question its general orientations in the light of possible resistance in certain Member States, since this would risk undermining its credibility and encouraging non-compliance. Indeed, it is perhaps at this last level that the novelty of the 'strategic evaluations' proposed by the European Commission is most striking: rather than offering to monitor Member States' compliance through certain instruments or predefined policy options, the strategic evaluations explicitly consider that difficulties in the implementation phase may indicate not that the Member States concerned are acting in bad faith, or are unwilling to contribute to the common objective—but that these predefined instruments or options may be misconceived, or may have underestimated the obstacles resulting from the need to apply them in particular settings whose dynamics could not be anticipated.

Yet, as conceived in the 2006 communication, the reflexive potential of evaluation may be lost, if a number of conditions are not fulfilled. By reviewing the aims of evaluation in the fields covered by the communication, we may hope to shed some light on the conditions which should be created for such evaluations to effectively contribute to the legitimacy and efficiency of these policies. However, as we will discover, the relationship between the different objectives of the system of strategic evaluation proposed remains ambiguous and, if not considered in its own right, could become a source of tension. Five objectives at least may be distinguished. The two first objectives, which only a thin line separates from one another, are considered together.

4.1 Monitoring the quality of implementation of EU policies and ensuring feedback on them

Article 61C of the Treaty on the Functioning of the European Union mentions the need to establish 'an objective and impartial evaluation of the implementation of the Union policies [in the area of freedom, security and justice] by Member States' authorities'. This refers to the aim of monitoring whether or not the EU Member States loyally cooperate in the implementation of these policies, not only by transposing the instruments which are adopted but also,

for instance, by ensuring that their authorities cooperate with those of other Member States, or that the operational measures required for the implementation of EU instruments are taken. But the 2006 communication mentions a quite different aim, which is to 'improve policy-making, by promoting systematic feedback of evaluation results into the decision-making process' (European Commission 2006*d*: par. 7). Here, EU policies themselves, rather than their implementation by the Member States, come into question: from an evaluation of the implementation measures by the Member States, the communication shifts to an evaluation of the *effects* of such implementation, *in order to improve the policies adopted at EU level*. The notion of evaluation on which this shift relies is the one defined initially in the context of the reform of EU governance, at a time when both the legitimacy and the efficiency of the Union's policies were under heavy criticism. Among the many initiatives which this reform has led to since 1999–2000 is the adoption of an internal communication on evaluation which states that

Evaluation is '*judgement of interventions according to their results, impacts and the needs they aim to satisfy*'. It is a process in which DGs and Services engage in order to identify what can be learned for policy and planning. Furthermore, evaluation findings should contribute to Commission level decision-making on priorities and resource allocation.[30]

The 2006 communication alludes to this where it writes that the evaluation mechanism proposed 'is based on this comprehensive definition which, in the Commission's view, should allow a full understanding of the quantity and quality of results achieved on freedom, security and justice' (European Commission 2006*d*: par. 7). It will be noted, however, that a distinction may be made between policy feedback and policy learning. As explained by Anton Hemerijck and Jelle Visser: 'Policy learning is analytically distinct from policy feedback in that it essentially gives pride of place to the reflexive and evaluative, both cognitive and normative, activities of policy actors' (Hemerijck and Visser 2006: 37). In Kuhnian terms, one might say that policy learning seeks to question the policy paradigm itself, and not only the adequacy of the implementation measures adopted under the paradigm guiding the policy-makers in a particular policy area. If we use this distinction in that sense, although the 'strategic evaluations' proposed by the Commission might lead to policy learning within the Member States themselves (a question which is further examined below), it is more doubtful whether it will ensure genuine learning in the design of the policies at EU level, whereas the evaluation is designed to judge interventions according to their results and impacts, in the light of the needs they aim to satisfy, these needs themselves—the general objectives, typically set by the European Council—will presumably not be questioned in this process.

The definition of evaluation quoted above is too narrow in another respect. If we take this formulation literally, this evaluation should consist in judging

the impact of interventions. However, one of the main aims of strategic evaluations should also be to judge the impact of the *absence* of interventions, that is, of the *failure* of the European Union to harmonize national laws, regulations, and practices, or to improve the coordination, through any alternative means, between national authorities. These evaluations are explicitly stated to focus on *policies* (such as, for instance, the common immigration policy) rather than on specific *instruments*. This creates the possibility that the information collected from the national authorities will highlight the need for more EU intervention, for instance, in order to encourage the diffusion of the best practices identified in one Member State or in order to ensure that certain measures adopted in one Member State (say, massive regularization of foreigners illegally staying on the territory) are not undercutting the efforts of another Member State in the same area (such as to discourage candidates to illegal immigration in the EU). The information collected from the national authorities are conceived as relating not only to the existing EU instruments, but more broadly to policy objectives identified at the European level.

Because the evaluations will cover measures adopted in areas where the European Union has not acted (or has not acted yet), they have the potential of both depoliticizing and repoliticizing the interpretation of the principles of subsidiarity and proportionality, which should guide the exercise of EU competences in the fields which it shares with the Member States. Indeed, by ensuring that the Commission and the Council will be informed of the full set of measures adopted by each Member State in a particular area, the answer to the question of whether the intervention of the EU would have a truly added value—insofar as the objectives cannot be sufficiently achieved by Member States' individual actions and can therefore be better achieved by action on the part of the Union, to paraphrase the treaties—will be based on evidence, and on the comparison of data from all the EU member States, rather than on the basis of mere intuition or on considerations relating to the political feasibility of any particular initiative. In that sense, a system of objective and reliable evaluation of the Member States' policies in the fields of freedom, security, and justice, should better insulate decisions about the desirability of EU intervention from political pressure: hence, the depoliticization of subsidiarity and proportionality this might entail. But at the same time, these principles would be repoliticized, insofar as the evaluations may be a tool for ensuring the participation of the European Parliament, the national parliaments and a wide range of other stakeholders in the discussion about which lessons should be drawn from the information pooled (European Commission 2006*d*: par. 11–16). These are not conflicting tendencies. They both point towards ensuring that agenda setting in the European Union and the sequencing of EU interventions are made more transparent and the subject of explicit deliberation, based on sound and comparable evidence concerning the evolution of policies developed at Member State level.

4.2 Promoting mutual learning

A third, and again distinct, aim of evaluation is to promote mutual learning between the Member States. Under an evaluation emphasizing the first aim identified above (that of ensuring compliance with certain predefined instruments or policies), uniformity (or at least convergence) between the Member States is seen as positive and desirable; and diversity, instead, is considered with suspicion. In contrast, where the focus is on mutual learning, diversity is cherished as a potential source of progress. The Member States are not encouraged to demonstrate that they act according to a script prepared for them; they are asked what original approaches they have to offer which might lead others to revise their own presuppositions about the most efficient approach. It is in the fulfilment of this aim that peer evaluations have an unparalleled potential, especially when it is conducted—as in the Schengen evaluation mechanism or in the mechanisms established in the areas of organized crime or counter-terrorism—by the counterparts, in the other Member States, of the very officials who are in charge of implementing a particular policy and who may be visited by an evaluation team. This kind of interaction between national civil servants may lead to blurring the differences between the respective positions of the 'evaluators' and the 'evaluated'; instead of the former controlling whether the latter effectively comply with what is expected by their European partners, the national agencies who are subjected to the evaluation may be developing original approaches towards certain problems faced also in other States, from which the evaluators might seek inspiration and may even wish to promote. The claim is not that such an identification and diffusion of best practices takes place effectively under the peer evaluations which are currently practiced in the fields of freedom, security, and justice—although it is more likely than not that examples of this could be found. Rather, the claim is that if mutual learning is one of the objectives of evaluation processes, peer evaluations may be the most adequate tool through which this can be achieved.

The enumeration of mutual learning among the aims of evaluation assumes that policy changes may develop not only incrementally, as a result of small-scale corrections to the dominant approaches in place through feedback mechanisms and as a result of trial-and-error processes, but also through cognitive or normative shifts in the policy-makers' understanding of causality chains or in the values guiding policy, that is, in the definition of the ends they seek to pursue. It assumes, further, that such shifts may result from the confrontation of policy-makers with other perspectives, or approaches, adopted in other Member States, towards the same problem. Certain conditions must be created, however, before such mutual learning effectively occurs, and in order that it may be successful. One set of conditions concerns the circumstances surrounding the learning process. For instance, a sense of crisis—policy-makers' conviction of that things cannot continue as they have previously and that the

perpetuation of routines is not a viable option—may enhance their willingness to learn, and thus create the necessary motivation to borrow from solutions developed elsewhere. In that sense, although not necessarily a condition for mutual learning, crises provoked by the failure of previous policies may facilitate policy changes.

Although some conditions favourable to learning cannot necessarily be created, others can. Thus, it may be presumed that if a particular experiment conducted in another jurisdiction is shared with a wide variety of actors in the 'receiving' jurisdiction, this will have greater chances of influencing policy debate and, perhaps, of bringing about changes. Similarly, if there exists, within the 'receiving' jurisdiction, an agency specifically dedicated to the understanding of such foreign experiments and to assessing whether the transposition of such experiments would be desirable, this could greatly contribute to overcoming bureaucratic inertia and the resistance of policy-makers who, in the face of uncertainty about whether change will be rewarding, might otherwise prefer to opt for the perpetuation of routines—for choice without search. In that sense, the reception structures may be more or less favourable to mutual learning: the wide diffusion of foreign policy experiments to a broad range of actors, as well as the establishment of expert bodies or think tanks whose mission it is to draw the attention of policy-makers to the need to explore those solutions, could greatly contribute to the success of mutual learning as one possible result of evaluation.

Another set of conditions relate to the channels of mutual learning—the process through which learning occurs or not. In particular, a contextualization both of the solutions developed in other settings and of the problems encountered in the 'receiving' jurisdiction seems necessary for learning to be successful. Solutions developed elsewhere cannot simply be presumed to be transposable to any other context: instead, what makes one approach successful in any particular situation will depend on a full range of factors which may or may not be present in the context in which that solution is being replicated. In what may be seen as one version of the 'garbage can' logic of decision making (Cohen et al. 1972), the available solutions risk predetermining the understanding of the problem to be addressed, rather than the problem being diagnosed independently of which solutions offer themselves. Therefore, any attempt by a 'receiving' jurisdiction to borrow from solutions developed elsewhere to similar policy problems should be preceded by an attempt to identify the conditions which allowed those particular solutions to be effective where they were first introduced, and by a diagnosis of the reasons why the approaches currently in place in the receiving jurisdiction have failed, which should be conducted independently of the existing catalogue of alternative policies. While foreign experiences may shed light on certain problems in the 'receiving' jurisdiction which might otherwise have been underestimated or ignored, they should not be seen as a substitute for

the analysis of those problems under the specific circumstances in which they have arisen. The risk of such 'decontextualized learning', in which solutions are prescribed irrespective of local conditions (Hemerijck and Visser 2006: 42), is especially high where the analysis of policy options is sectorialized, that is, where this analysis focuses on discrete areas of public policy, defined relatively narrowly, and thus detached from the analysis of the background conditions which may play a role in the success or failure of the policy options which are experimented. It seems contestable, for instance, to evaluate the policy of the Member States in the area of trafficking of human beings without considering different approaches to prostitution; or to evaluate their respective counter-terrorism strategies in isolation from the tools they develop to integrate third-country migrants residing on their territory and ethnic or religious minorities which may be tempted by violent radicalization.

4.3 Enhancing mutual trust

The Hague Programme adopted by the European Council mentioned that the mutual trust on which mutual recognition of judicial decisions was based could be enhanced by 'a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice' (European Council 2004: par. 3.2. and 3.3.). Indeed, a practice of evaluation may limit the risk of misunderstandings occurring between national authorities of different states, which may result simply from the differences between the legal systems in which they operate: evaluation thus conceived may be a means of ensuring that, however important those differences may seem, all the States at least comply with certain standards; and it may encourage a better knowledge of one another's system, facilitating in turn cooperation between the authorities concerned. But in an evaluation conducted for the purpose of creating mutual trust conformity will be rewarded: if there are differences, these will be minimized; rather than being an asset, original solutions to common problems are a threat, since they risk undermining mutual confidence.

4.4 Stimulating democratic deliberation

The 2001 White Paper on European Governance lists both participation and accountability—along with openness, effectiveness, and coherence—among the five principles of good governance (European Commission 2001*b*: 10). Evaluation of course, contributes to the effectiveness of EU policies. But it may also stimulate democratic debate and promote accountability. Provided with the results of an evaluation of the achievements of the Member State concerned in a particular policy area, opposition political parties, civil society

organizations, the media, and the public at large, not only will be better equipped to request explanations from decision-makers, and to critically gauge the justifications offered for pursuing particular policy options, they will also be more motivated to invest in any participatory mechanisms proposed to them. The broad discussion of alternatives to the dominant solution may provide public officials with an incentive to revise their routines. This may compensate at least partly for their fear that, by exploring those alternatives, they will betray established expectations and threaten acquired positions, which may be costly in electoral terms—especially since, as noted by March and Olsen, voters tend to sanction mistakes, more than the failure to explore untested opportunities, leading policy-makers to be generally risk-averse.[31]

Indeed, this may be one possible result of the strategic evaluations as conceived by the Commission (European Commission 2006*d*). In its 2006 communication, the Commission proposes that the 'factsheets' to be filled in by the Member States should be 'put out to consultation with relevant stakeholders and civil society' (European Commission 2006*d*: par. 24). It is indeed essential that the information provided by the Member States be completed from other sources. Although the strategic evaluation mechanism is ostensibly designed to improve EU policies rather than to monitor the contribution of each Member State to their implementation, the quality of the latter will also necessarily figure in these evaluations. National authorities therefore may be reluctant to provide the European Commission—and, thus, the other Member States and the broader public—with information which casts them in an unfavourable light. The 'factsheets' as completed by the national authorities therefore should be verified against any other information available, especially that collected by independent experts or civil society organizations. An interesting precedent in this regard is the establishment, by DG Employment, Social Affairs and Equal Opportunities of the European Commission, of networks of independent experts in order to monitor the implementation of the directives adopted in the equality field:[32] these experts provide the Commission with crucial information not only on the legal measures adopted in each Member State, in a format which is generally more complete and systematic than what could be expected from national administrations, but also on any gaps which those measures present, or the problems met in their practical implementation. Such a mechanism could equally be conceived in other areas, in order to ensure that the evaluation is based on reliable and balanced reports.[33] But even in the absence of such independent assessment, the publicity given to the factsheets filed by the Member States, combined with the possibility for other interested parties, including non-governmental organisations, to complement or contradict this information—and with the possibility for opposition political parties in national parliaments to hold the government accountable for the information it provides—should ensure its trustworthiness.

4.5 Combining the diverse aims of evaluation

While all these aims potentially served by an evaluation mechanism are clearly desirable, it is a distinct question whether they all can be pursued at the same time, through similarly conceived processes. Two views of this are possible. In one view, we would have to choose between two models, neither of which is capable of fulfilling all the aims listed above. The first model is of relatively closed, peer-review mechanisms, through which Member States may have frank exchanges on the basis of information which—because it is not public—can be presumed to be more reliable than if it were to be shared and therefore potentially used against them. This model, directly involving civil servants from the Member States in the evaluations, would also be more conducive to mutual learning, since the evaluations are conducted by the very individuals who could benefit most from it. The second, alternative model is put forward by the 2006 communication on the evaluation of EU policies in freedom, justice, and security. The communication intends the strategic evaluation mechanisms it proposes to be broadly participatory, with an involvement of a wide range of actors including civil society organizations; and it envisages that the factsheets prepared by the Member States will be made public. As already noted, this approach—in line with the White Paper on European Governance of 2001 (European Commission 2001*b*)—has the potential to enrich democratic deliberation and to improve the accountability of policy-makers, by obliging them to provide justifications for not exploring certain alternatives to the prevailing routines. But such openness, it could be argued, may also constitute a disincentive for the disclosure of certain failures or resistance encountered in the implementation of policies: it may be difficult to convince national authorities to be fully transparent about such failures or the nature of the obstacles they are facing, since this not only may be held against them in internal electoral debates but could also provide a pretext for proposing further interventions by the EU in areas where the national authorities appear particularly jealous to preserve their national sovereignty.

But this is not a true dilemma. In fact, the virtues attributed to peer-review evaluation mechanisms can also result from more openness and transparency, rather than less. As we have seen, the best way to ensure that policy learning takes place may be to provide a broad range of actors with an incentive to challenge dominant policy paradigms in the light of the available alternatives, and a wide discussion about such alternatives might make them more attractive to decision-makers. Hence although peer-review mechanisms, left entirely in the hands of the States, may be conducive to mutual learning thanks to the direct exchanges they permit, the resulting advantages may be more than offset by the lack of involvement of other actors, especially at the national level, whose support may be decisive for any policy learning which occurs to lead to actual improvements in the design and implementation of policies.

As to the reliability of the information provided by the Member States, although it may to a certain extent be achieved by this information not being made public, this also may result from any information provided by the national authorities being widely discussed and cross-examined, by national parliaments and civil society organizations. In sum, while the secrecy of peer-review mechanisms may seem to present certain advantages, these can be obtained through an entirely different strategy, which emphasizes openness over closure and publicity over confidentiality.

A more serious dilemma may be between the prescriptive and the non-prescriptive dimensions of evaluation—in other words, between monitoring and learning in evaluation. Where monitoring compliance with predefined instruments or policies is emphasized, the Member States will have a natural tendency to present their practices and results in the best possible light; where the focus is, instead, on collectively deciding what approaches should be privileged, or on evaluating whether the EU policies work, they may become more open about their failure to achieve results and the obstacles they face. In a form of evaluation promoting mutual learning, Member States will explain how they have developed different approaches; in one which seeks to monitor compliance with agreed upon instruments or objectives, or which is seen as a contribution to creating mutual trust, they will dismiss these differences as merely superficial, and seek to convince their interlocutors, instead, that what they are doing is really the same as what others are doing—or that it better follows the agreed script.

In the face of this second dilemma, it is again tempting to contrast, in a binary mode, two forms of 'evaluation': one geared towards verification of compliance with commonly agreed objectives, and which could lead to addressing recommendations to the states concerned when they deviate from those prescribed objectives, and the other aimed at 'exchange of experiences', without any monitoring dimension. But the practice of the institutions illustrates the fragility of this distinction. Both in the fields of asylum and immigration[34] and in the broader area of freedom, security, and justice, the exchange and pooling of information between the Member States, coordinated by the Commission, has been preferred to the adoption of guidelines by the Council and the preparation of national plans to implement them. But this shift has been tactical rather than strategic, and its consequences should not be overemphasized: once it agrees to report on its policies in a particular area, and to have this information made public, each Member State accepts to be held accountable in principle, both to one another (for any externalities of its unilateral actions) and to public opinion at home and abroad (for any gap between its own achievements in reaching a goal collectively recognized as desirable and the achievements of its neighbours confronted with a similar set of circumstances). Whether evaluation takes the form of OMC-like processes or of less demanding exchanges and information pooling, some form of

diagnostic monitoring takes place, in which the achievements of each Member State are related both to the conditions it faces and to the policies in place, in order to assess whether the policies should be changed or, instead, inspire others, thus breaking down the distinction between learning and monitoring. The difference however, is in the mode of identification of the best means to achieve the common objectives: whereas, in an OMC-like process, what the best practices are is the subject of a deliberation between the Member States within the Council, in procedures limited to mutual information, these best practices are, at best, progressively defined by the Commission in the reports it prepares on the basis of the information coming from the Member States; at worst, this identification remains implicit, it is never openly discussed for its own sake, and as a result, what is most desirable may be understood quite differently by each actor. In defence of this approach, it may be said that such an ambiguity may be productive: it may encourage Member States to explore a diversity of approaches, experimenting in ways from which the others may then seek inspiration, and replicate, partially or wholly, taking into account their local circumstances. But it could also be argued, conversely, that the lack of any attempt even to make explicit what are considered to be the best practices artificially separates the definition of the European public interest by the Council from the identification of the means through which it may be realized—the very opposite of what a public policy based on the iterative redefinition of the objectives in the light of implementation should resemble. It is therefore crucial that the pooling of information through mutual information processes feeds into a debate concerning the further steps to be taken in the Union's legislative and policy agenda. Indeed, it is in the light of their contribution to the objectives pursued by the Union—rather than in the light of purely national preoccupations—that the measures adopted at Member State level should be evaluated: only if the information delivered by each Member State is examined in this light will such a process shape, in time, the attitudes of national actors, who instead of vetoing changes which would disrupt their expectations or acquired positions, could then become active participants in mutual learning aimed at the realization of the European public interest.

5 Conclusion

The lack of a clear, unambiguous understanding of the final shape of the AFSJ would constitute a disability under a classical, formalistic conception of policy-making: it would create an obstacle to the choice and sequencing of the measures to be adopted; and it would leave us ill-equipped when asked to define where mutual recognition can proceed, and where harmonization is instead required as a precondition. But the vague definition of the aims of the

AFSJ, and especially of their prioritization, can also be seen as an opportunity: perhaps counter-intuitively, it could encourage a mode of agenda setting more responsive to the actual needs of mutual cooperation between national authorities than to sudden events which, perceived as crises calling for urgent answers, may lead to an *ad hoc* and disorderly construction of the AFSJ. For this to happen, however, adequate mechanisms should be put in place. Monitoring of the situation of fundamental rights in the EU Member States is probably not a priority in this respect. Although such monitoring clearly would enhance mutual trust between the Member States, this is also an area where the standards are most uniform, and where the need for harmonization, therefore, may be weakest. If problems do occur—if, in other terms, diverging approaches to fundamental rights risk threatening mutual cooperation in AFSJ—courts generally may be counted upon to identify the: indeed, whether or not such problems exist depends largely on the attitude of courts, when they are confronted with allegations that mutual cooperation will result in a violation of fundamental rights.

But more is required, rather than less. First, the kind of monitoring which is required should go beyond fundamental rights strictly conceived; instead, it should ensure a screening of the developments within the Member States in all areas in which the European Union has launched policies, whether or not those developments relate to the implementation of a specific EU instrument, in order to identify the lacunae of existing policies and the need, therefore, to move further or even to change directions. Second, evaluation therefore should not be conceived primarily as a mode of supervision, or of monitoring compliance with pre-established commitments. To the extent that it includes a monitoring element, this should be limited to identifying instances where measures adopted in one Member State produce externalities, which may lead to the conclusion that some form of coordination, or possibly harmonization, is required. But the main purposes of such evaluation should be to promote *mutual learning* between the Member States and to ensure the *pooling of information on developments within the Member States needed to define the Union's agenda*. Any monitoring there is should be of a diagnostic nature: it should climb up the causality chain and identify which remedial measures might be suggested, and whether such measures should be adopted at the national or Union level.

The fulfilment of these objectives calls for as open and transparent a procedure as possible, as well as for the development of participatory mechanisms. Such procedures should ensure that the improved understanding gained from experiences conducted in other jurisdictions will not remain the privilege of certain high-level public servants involved in intergovernmental working groups, but instead will be diffused as widely as possible, in particular through umbrella non-governmental organizations or social actors established at European level. While it is often asserted that publicity can only operate at the expense of truthworthiness—since the national authorities may be tempted to

report only partially, highlighting their successes rather than their failures, if they know that the information they provide will be made public—any such tendency to misrepresent local conditions should be responded to by more transparency, rather than by more confidentiality: indeed, the preparation of shadow reports by non-governmental organizations may constitute a powerful incentive for states to provide as impartial and balanced a picture as possible of the problems they are facing, in order not to be accused of manipulating the facts. It is clear that in certain areas, confidentiality is required: where reports are presented about the control of the external borders, about counter-terrorism strategies or about the fight against organized crime, it is understandable that such reports should remain secret, since they may contain sensitive information that traffickers or terrorists, for example, might be able to use. But this will be true only in very exceptional situations, and in very limited fields. The fact that it is precisely in those areas that peer evaluations have been developed since a decade in the EU should therefore not be misconstrued: although, as we have seen, these evaluations are secret,[35] they are in this respect the exception, and should not constitute the norm for the future. In addition, while confidentiality may be a condition for a fully effective evaluation mechanism whose main objective is to ensure that Member States comply with certain requirements (such as, for instance, to control external borders, or to apply and implement at national level international undertakings in the fight against organized crime), since states in such a mechanism may have an interest in avoiding criticism, this justification is absent where the evaluation aims to promote mutual learning or to improve the relevance of EU policies and their ability to address the problems they seek to respond to.

While mutual learning and guidance of Union policies should be the primary objectives of evaluation mechanisms set up in the EU, such mechanisms at the same time should improve the accountability of national policy-makers and the quality of democratic deliberation. Openness and participation are conditions for mutual learning: the more different actors are involved, the less the national policy-makers directly in charge of any particular area will be able to afford to ignore the lessons from other jurisdictions and the easiest it will be for them to effectuate policy changes on the basis of those lessons, since the actors who could otherwise have vetoed or opposed such changes will themselves have been involved in this redefinition. Evaluation mechanisms thus conceived—based on the twin principles of publicity and participation—also have a deeply democratizing potential: they heighten the scrutiny to which national policy-makers are subjected, since the latter will have to explain both why their policies are failing where those developed elsewhere seem to work better, and why they are implementing certain policies despite their impact on other Member States. Such evaluation mechanisms also provide opposition political parties, civil society organizations, and the public at large with a broader range of options from which to choose and against which the policies

in force might be gauged. A virtuous circle may thus emerge, in which an improved evaluation of EU policies will have a democratizing effect at national level and, as a result, lead to improved national policies whether or not guided by a direct intervention from the EU.

For this to happen, constructing an evaluation mechanism at EU level along the lines of the proposals of the European Commission will not be sufficient. For the establishment of such a mechanism to produce the far-reaching impact we can hope for, certain background conditions should also be created, both at the European and at the national level. Member States must be convinced that it is in their interest to contribute to this evaluation process: that they can improve their policies by agreeing to discuss them with the other Member States, by asking how these policies contribute to the gradual shaping of the AFSJ, and by learning from the experiences of others. National parliaments should use this evaluation process as an opportunity to better monitor governments, who, as a result of this process, will have to provide justifications which they may not have had to provide previously; at the same time, the former will be led to redefine their understanding of what constitutes a valid justification, in the light of the impact on other Member States any particular choice made at national level may have. Civil society organizations should be active in this process, whose success will depend, to a large extent, on their vigilance and on their ability to feed into the evaluation the kind of grassroots knowledge they alone, in certain cases, may possess or may be willing to provide. Finally, specialized bodies, possessing a degree of expertise and independence ensuring that their opinions cannot be ignored or dismissed without justification by the government, could make an important contribution to such EU-wide evaluation processes conceived as tools for mutual learning.

Building an area of freedom, security, and justice is not to be conceived simply as the superimposition above national systems of governance, of another—European—layer, only marginally affecting the practices and ethos of the national authorities. On the contrary, because of the direct cooperation it requires between national authorities—law enforcement officers, national administrations, national judges—it could deeply transform those practices and ethos, and create among those concerned a sense of belonging to a new, broader, and more diverse community. It is our responsibility to ensure that this Europeanization of national practices in fields which, hitherto, were traditionally conceived of as belonging to the core of the sovereign powers of the state, results in greater accountability and in a richer democratic debate at both national and at European levels, rather than in the *déjà vu* impression of powerlessness of the masses in the face of European elites. Although, realistically, this darker scenario has greater chances of materializing in the next few years, this is by no means a necessity or the inevitable result of further powers being exercised at a level to which no *demos* corresponds. But we bear the burden of proving that there is an alternative.

Notes

1. Art. 6 (1) and (2) EU.
2. Art. 31 (1) (c) and (e) EU.
3. See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18.7.2002, p. 1), 12th recital of the Preamble and Article 1, §3; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196 of 2.8.2003, p. 45), Article 1, as well as, with regard to the *ne bis in idem* principle, the observance of which may constitute a ground for non-recognition or non-execution, Article 7 §1, c); Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16), 5th and 6th recitals of the Preamble as well as Articles 3 and 20 §3; the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59), 3rd recital of the Preamble and Article 1, § 2.
4. Case 120/78, *Rewe-Zentral AG v. Budesmonopolverwaltung für Branntwein ('Cassis de Dijon')*, [1979] ECR 649.
5. Joined Cases C-197/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345.
6. Article 54 of the Convention implementing the Schengen Agreement (CISA) of 14 June 1985 on the gradual abolition of checks at the common borders, of 19 June 1990 (Schengen Convention), OJ L 239, 22.9.2000, p. 19.
7. The Court accepted that such mutual recognition would not be obligatory where it would jeopardize fundamental rights, such as the rights of victims of criminal offences; but it noted that, in the case at hand, the issue did not arise, since the *non bis in idem* principle 'does not preclude the victim or any other person harmed by the accused's conduct from bringing a civil action to seek compensation for the damage suffered' (par. 47).
8. For another example of this dialectic, see Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities, and property, OJ L 68 of 15.3.2005, p. 49, where the Preamble (10th recital) says that it is 'linked to a Danish draft Framework Decision on the mutual recognition within the European Union of decisions concerning the confiscation of proceeds from crime and asset-sharing, which is being submitted at the same time' (see now Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59, referring in turn to the Council Framework Decision on confiscation of crime-related proceeds, instrumentalities, and property).
9. The 1995 Data Protection Directive defines minimum safeguards for the protection of private life in the processing of personal data throughout the Union. Article 1(2) of the directive provides that 'Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with' the protection of the right to privacy with respect to the processing of personal data.
10. See Art. 3(2) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, at 31.

11. C.E.T.S. n°. 70; signed in The Hague on 28 May 1970 and in force since 26 July 1974. This instrument provides that each Contracting State shall be competent under certain conditions to enforce a sanction imposed in another Contracting State, which is enforceable in the latter State, upon the request of this State.
12. C.E.T.S. n°. 73; signed in Strasbourg on 15 May 1972 and in force since 30 March 1978. Under the mechanism established by this Convention, any Contracting State may prosecute under its own criminal law any offence to which the law of another Contracting State is applicable, upon the request of the latter State.
13. See Article 6 of the European Convention on the International Validity of Criminal Judgments; and Article 11 of the European Convention on the Transfer of Proceedings in Criminal Matters.
14. See, for example, Article 11(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18.7.2002, p. 1); Article 14(2) of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196 of 2.8.2003, p. 45); Article 16(2) of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16); Article 19(2) of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59).
15. Although principally based on the national provisions giving effect to the arrest warrant, as communicated to it by the Member States (as required under Article 34 (2) of the Framework Decision), the evaluation reports of the Commission (European Commission 2006*c*) also rely on the replies given to the European Judicial Network's questionnaire, which concerned the practical aspects of the arrest warrant prior to 1 September 2004, and by maintaining a bilateral dialogue with the designated national contact points.
16. Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex (98) 26 def.), OJ L 239, 22.9.2000, p. 138. See Genson and van de Rijt (2006).
17. See Council of the EU, doc. 8286/1/03, of 6 May 2003 (Maintaining and increasing the efficiency of the Schengen Evaluation mechanism); and Council of the EU, doc. 15275/04, of 29 November 2004.
18. There are currently plans to further improve the evaluation mechanism (see the conclusions on the EU border management strategy adopted at the Justice and Home Affairs Council of 4–5 December 2006).
19. Common Manual (OJ C 313 16.12.2002, p.97) and the Common Consular Instructions on visas for the diplomatic missions and consular posts (OJ C 313 16.12.2002, p.1)
20. See Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, OJ L 344, 15.12.1997, p. 7.
21. These have been mutual judicial assistance in criminal matters; the action of law enforcement authorities in the area of drug trafficking; the exchange of information between law enforcement authorities of the Member States and between the Member States and Europol; and the application of the European arrest warrant.

22. Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism (2002/996/JHA), OJ L 349, 24.12.2002, p. 1.
23. The theme of the first evaluation cycle was the exchange of information on terrorist activities.
24. Article 8(3) of Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, cited above n. 22.
25. Article 61C of the Treaty on the Functioning of the European Union (as the EC Treaty will be renamed by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17.12.2007, p. 1)). Article III-260 of the Treaty establishing a Constitution for Europe (OJ C 310 of 16.12.2004, p. 1) had anticipated the introduction of such an evaluation mechanism.
26. Council of the EU, doc. 9778/2/05 REV 2, 10 June 2005 ; OJ C 198, 12.8.2005, p. 1.
27. This comprises six areas: external borders, visa policies and free movement of persons; citizenship and fundamental rights; coordination in the field of drugs; immigration and asylum ; the establishment of an area of justice in civil and criminal matters ; law enforcement cooperation and prevention of and fight against organized crime.
28. The Member States expressed their concern at what they consider the overambitious nature of the proposals of the Commission. In general, favour less frequent cycles of evaluation (every five years instead of twice every five years) ; and they advocated a focus, initially, on limited sectors, in order to 'test' the evaluation mechanism before extending it to all the policies covered by the communication. In addition, noting that the data-gathering techniques across the Union are not uniform, they questioned whether it was worth the effort reaching beyond the information already available in each Member State. See Council of the EU, 'Evaluation of Policies on Freedom, Security and Justice—Discussion Paper,' 8752/07 LIMITE, 23 April 2007; Finland's answers, 8752/07 ADD7 LIMITE, 29 May 2007; Sweden's answers, 8752/07 ADD9 LIMITE, 29 May 2007; Czech Republic's answers, 8752/07 ADD6 LIMITE, 29 May 2007; Answers from Republic of Slovenia, 8752/07 ADD1 LIMITE, 29 May 2007; Romania's answers, 8752/07 ADD3 LIMITE, 29 May 2007; Ireland's answers, 8752/07 ADD4, 29 May 2007; Poland's answers, 8752/07 ADD5 LIMITE, 29 May 2007; Austrian answers, 8752/07 ADD2 LIMITE, 29 May 2007; Denmark's answers, 8752/07 ADD8 LIMITE, 29 May 2007; Slovakia's answers, 8752/07 ADD10 LIMITE, 30 May 2007; Hungary's answers, 8752/07 ADD12 LIMITE, 31 May 2007; Belgium's answers, 8752/07 ADD11 LIMITE, 30 May 2007; Latvia's answers, 8752/07 ADD13 LIMITE, 31 May 2007; United Kingdom response, 8752/07 ADD14 LIMITE, 6 June 2007; Estonian answers, 8752/07 ADD16 LIMITE, 7 June 2007; Replies by the French delegation, 8752/07 ADD15 LIMITE, 6 June 2007; Greece's answers, 8752/07 ADD17 LIMITE, 8 June 2007; Portugal's answers, 8752/07 ADD18 LIMITE, 11 June 2007; Answers from Cyprus, 8752/07 ADD19 LIMITE, 11 June 2007; Bulgaria's reply, 8752/07 ADD21 LIMITE, 12 June 2007; Malta's reply, 8752/07 ADD20 LIMITE, 11 June 2007. I am grateful to Violeta Moreno Lax for collecting these answers.

29. The option of proposing the launch of an Open Method of Coordination was apparently considered in the course of the preparation of the communication on the evaluation of EU policies in the fields of freedom, justice, and security. This option was considered not to be politically feasible, however, since it was anticipated that the Member States would resist subjecting policies so closely linked to their national sovereignty to some form of peer review. In addition, the view was expressed that OMCs fit areas which are primarily inter-governmental in the absence of competences of the Union, whereas in the freedom, justice, and security fields covered by the evaluation proposed by the Commission, there exist EU policies and, increasingly, instruments implementing these policies (European Commission 2006*e*: 12).
30. European Commission 2000*b*: 2. The definition of evaluation is borrowed from the Glossary appended to the White Paper on Reform.
31. March and Olsen 1995: 227. In that sense, 'Democratic institutions (. . .) are both arranged to speed up and slow down learning from experience and adaptation' (March and Olsen 2001: 13).
32. One network currently monitors the implementation of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000, p. 22) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16); it is funded under the Community Action Programme to combat discrimination (2001 to 2006) (see Council Decision of 27 November 2000, OJ L 303 of 2.12.2000, p. 23). See: ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm. Another network of legal experts has been set up, since 1984, on the application of Community law on equal treatment between men and women. According to its web site, its tasks are to 'facilitate the Commission to monitor the implementation of the acquis communautaire in the Member states with regard to legislation and case law on equal treatment between women and men'; 'assist the Commission in the preparation of European Court of Justice cases, in particular infringement procedures'; and assist the Commission in developing 'new strategies and ideas' in this field: see www.ec.europa.eu/employment_social/equ_opp/rights/experts_en.html.
33. Existing academic networks, such as the European Criminal Law Academic Network (see eclan-eu.org/) in the criminal law area or the Odysseus Network on asylum and immigration (see www.ulb.ac.be/assoc/odysseus/index2.html), could be used to that effect.
34. The European Commission initially had proposed the introduction in these areas of an Open Method of Coordination as an adjunct to the adoption of legislative measures under Articles 61–69 EC (see European Commission 2001*c*, 2001*d*). Since this met with scepticism, it then subsequently reverted to a more modest suggestion to enhance mutual information of national immigration and asylum policies between Member State policymakers through the creation of a mutual information procedure on planned national asylum and immigration measures, thus retreating from an OMC to information collecting and pooling (European Commission 2005*e*).
35. See above, Section 3.2.

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Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy

Elsa Tulmets

1 Introduction

The external relations of the European Union (EU) are characterized by a patchwork of policies that are not always easy to coordinate. Some fields are communitarized, like the Common Trade Policy and the negotiation of association agreements, where the EU Member States have agreed to transfer part of their sovereignty to the European level. Others still work intergovernmentally, for example, the Common Foreign and Security Policy (CFSP). Furthermore, as in the field of development, there is a single EU assistance policy, as well as (in theory) one policy for each Member State. The difficult tasks of how to coordinate such policies and thus to add coherence to European external relations are increasingly entrusted to the European Council (coordination between the Member States) and the European Commission (coordination between the Community level and the Member States). However, the literature on EU external relations overlooks the fact that these two institutions, especially the Commission, have recently helped to shape and implement a new method in European foreign policy. This method displays many similarities to the experimentalist forms of governance, developed during the 1990s in European internal policies like employment and social protection. I argue in this chapter that this link between internal and external policies was made possible through the process of EU enlargement, which extended internal policies to future Member States. This process of externalization of EU policies not only contributes to the Europeanization[1] of third countries interested in adopting EU norms and standards, but also gives opportunities for participation in European governance[2] through policy adaptation[3] and the extension of internal (policy) networks abroad.[4] This chapter focuses primarily

on the example of enlargement and explains how this method was subsequently adapted to the context of the European Neighbourhood Policy (ENP) launched in 2003, although the latter offers no perspective of EU accession. It will also show that this experience opened the way towards new opportunities in the field of external relations more generally.

In order to determine if there are any similarities between the findings of research on EU's foreign relations (e.g. Tulmets 2005*b*; 2006) and the experimentalist governance architecture proposed by Sabel and Zeitlin (2008, this volume), this chapter first focuses on the characteristics of the newly identified method. It then uses enlargement and the European Neighbourhood Policy as examples to consider whether this method can be considered as part of EU experimentalist governance and whether it contributes to creating a new governance architecture with extensions, not only within the EU but also beyond its borders. The final section reviews the use of a similar approach in other EU external policies.

2 A new method in European external relations

2.1 Why a new method?

The last round of Eastern enlargement is important for understanding the link between the methods used in the EU's internal and external policies. It has been particularly challenging for the EU and its members. First, the Member States had to agree on what policy to adopt: some states were against and others were for enlargement, and if in 1993 all accepted the proposal to enlarge the EU, the question of at what speed remained open until the end of the decade. Second, the EU had to make sure that its accumulated legislation, which had particularly grown in the beginning of the 1990s with the creation of the Internal Market, the CFSP, and Justice and Home Affairs policies, would be taken over by the candidate countries. The debates on Member States' administrative capacity to implement this enlarged *acquis* and on the need to construct a 'Social Europe' to prevent accession countries from lowering social standards also reflected fears that policy implementation would become even more difficult in an enlarged EU. Thus some debates on EU internal policies and governance had a direct link with the process of enlargement, especially in fields where there was no formal *acquis*. The Commission received the heavy responsibility not only to suggest a solution to the Council on how to coordinate the different policy preferences of the Member States, but also how to ensure the implementation of the whole process in the candidate countries. The Commission first adopted a traditional approach inspired by the Community Method and used in previous enlargements, which consisted in checking that candidate countries transposed Community law. Contrary to previous enlargements, this control

was performed *ex ante* (before enlargement) and not *ex post*. For this purpose, the Commission issued in 1994–5 a White Paper on the Internal Market to ensure that this crucial body of law, on which all Member States had agreed in Maastricht (1992), would be adopted by the candidate countries. But in the mid-1990s, the Commission realized the shortcomings of this traditional approach (inspired by the original Monnet method of integration): the candidate countries were transposing Community laws, but were rarely implementing them either because the Commission had no effective means to put pressure on them,[5] or because the countries lacked the institutional capacities to do so (Preston 1995; Tulmets 2003). The latter became particularly true after 1996–7, when all the candidate countries from Eastern Europe experienced an economic crisis, which showed their inability to follow the recipes of the Washington Consensus (privatization, deregulation, etc.) recommended by the World Bank and the International Monetary Fund (IMF) (Commaille and Jobert 1998; Dobry 2000; Andreff 2007). Thus, the Commission issued its 'Agenda 2000' (European Commission 1997), a strategy taking into account the conclusions of the Madrid Summit of 1995, which insisted on the necessity for the candidates to demonstrate the judicial and administrative capacity to implement the *acquis*. However, institution-building is a field where the EU has no *acquis communautaire*, that is, no European law or harmonized 'model' to rely on. Therefore, the Commission proposed to introduce an innovative and flexible method which could not only help to coordinate the policy models Member States wanted to export abroad (internal coherence), but also to support institution-building processes in the candidate countries (external coherence).[6] This reform was proposed at a time when the growing (and non-transparent) role of the Commission in the field of foreign policies was being criticized by institutions like the European Parliament (1997) and the European Court of Auditors (1997). Furthermore, the candidate countries complained at the time that accession was an asymmetrical process, since the EU was imposing conditions that were constantly evolving in their details due to the ongoing process of internal integration. The 'moving target' of accession was undermining the legitimacy of the pre-accession strategy. The 1997 reform thus represented not only a way to increase the internal and external coherence of enlargement policy, but also to enhance its legitimacy.[7]

Interestingly, the method used during enlargement could cope with possible conflicts and has been conceived since then as an instrument of conflict prevention, able to add coherence and effectiveness to EU external action: 'Conflict prevention is at the heart of the European Union which is in itself a strikingly successful example of how reconciliation, stability and prosperity can be promoted through closer cooperation and understanding. The process of enlargement aims to extend these benefits to a wider circle of European states' (SG/HR and the European Commission 2000: 3). It is thus not surprising

that enlargement built a strong basis for the launch of the European Neighbourhood Policy, which is addressed to both European and non-European states, and also inspired innovations in other EU external policies.

2.2 What is the new method?

On the basis of empirical evidence collected between 2000 and 2005, which cannot be detailed here (cf. Tulmets 2005*b*), I argue that the new method introduced in the 'Agenda 2000' and presented at the Luxembourg Council of December 1997 involves many similarities with the Open Method of Coordination (OMC) and its predecessor, the European Employment Strategy (EES). The characteristics of the OMC were first defined with the launch of the EES at the European Council on Employment in November 1997, after being tested with the Euro on an experimental basis and before being officially adopted as an innovative method of EU governance at the Lisbon Summit in March 2000. This method was partly inspired by new public management and the governance practices of international institutions like the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD), where coordination is ensured through the definition of benchmarks, monitoring procedures, peer review processes, and reports (Schäfer 2004). In the EU, the method was defined in order to coordinate the Member States' policies in fields where there is a weak or non-existent European *acquis* and where intergovernmental procedures are the rule (Trubek and Trubek 2005*b*; Dehousse 2004). It is thus not surprising that it could be adapted to foreign policy issues (Tulmets 2005*a*, 2005*c*). As I will explain later, although these innovative working documents and procedures have the same function, they have been given different names in order to differentiate the context of their usage.

As defined in 1997 in relation to the EES, the OMC presents the following characteristics: on a proposition by the Commission, Member States agree to follow a set of common objectives, which are agreed upon by the European Council. In order to monitor the policy, the Member States define action plans. Specialized committees discuss the various technical issues and the Commission ensures the coordination of the whole process. Member States are free to adopt the necessary measures to implement the reforms while favouring the exchange of best practices. Social partners and other stakeholders might be consulted during the phase of definition of the objectives and the action plan and/or the phase of implementation at the level of the Member States and/or of the Commission. In terms of evaluation, peer reviews are conducted by experts from the Member States. The Commission publishes an annual evaluation of the reforms conducted. The very fact that the evaluation is published places pressure on the laggards, according to the logic of 'naming and shaming', pushing them to fulfil their commitments in the future. According to these

results, the objectives are again discussed, and possibly amended by a proposition of the Commission and agreed by the Council. As in other very partially communitarized or intergovernmental fields, the European Parliament plays a marginal role and is only informed during the whole procedure.[8]

As adapted in the field of EU external relations, where Community and intergovernmental decisions sometimes overlap, the new method presents the following characteristics:

1. Policy objectives are adopted by the European Council, based on the Commission's propositions. The Commission negotiates the agreements, whose entry into force also has to be approved by the European Parliament.
2. The rights and duties of the third countries are defined by political and economic agreements concluded individually with the EU (contractualization of relations, soft law). Third countries have to define their responsibilities in more detailed public national documents. They can (re)negotiate with the Commission and EU Member States in bilateral committees the conditions under which these reforms must be implemented (e.g. negotiation chapters in the enlargement process, renegotiation of political and economic agreements).
3. The Commission manages the monitoring process at its headquarters in Brussels, through its delegations abroad and the bilateral committees.
4. The Commission and the Member States support the implementation process through financial and technical assistance. The Member States facilitate exchange of good practices through European programmes coordinated by the Commission and national assistance measures.
5. The actors affected by the policy can (but need not) be consulted during the phase of negotiation and agreement with the EU, through the elaboration of national documents or at the level of the Member States and/or the Commission. On a case-by-case basis, they can participate as observers in European agencies and committees, as well as in European programmes. This should contribute to an exchange of views and perceptions which can generate a process of mutual learning.
6. Experts from the Member States and other regional organizations (OECD, Council of Europe, Organization of Security and Cooperation in Europe (OSCE)) participate in the peer review process. The Commission publishes annual evaluations, which are transmitted to the Council and the European Parliament.
7. The policy objectives are readjusted at the European level on the basis of evaluations and propositions of the Commission. They are accepted by the European Council and form the basis for further adaptation in the foreign policy process.

The hypothesis that the characteristics of the OMC/EES inspired the new method introduced in 1997 in the enlargement strategy was confirmed in interviews conducted from 2000 to 2005 with almost half of the team which participated in the development of the 'Agenda 2000'. This adaptation from the internal to the external sphere of the EU was undertaken firstly to ensure that the Member States would agree on the norms that they want to export abroad, especially in fields like administrative and judicial capacity where there is no *acquis*, and secondly to ensure the implementation and enforcement of EU norms and values in the future Member States, which, despite the asymmetrical character of the process, remain sovereign states before formal accession.

2.3 On which features does the 'overarching' method rely?

Interestingly, this new 'overarching' method has the potential to bridge the gaps between the pillar structure of the EU because the objectives are adopted by the European Council and managed by the Commission, the institutions common to all three pillars. It therefore allows for the definition of European 'umbrella' or 'overarching' policies, thus abolishing the logic of 'pillarization' as proposed in the Constitutional Treaty of 2005 and the Lisbon Treaty of 2007.

In order to do so, it relies on methods that had already been used in previous enlargement rounds and foreign policies. Although there is a large literature on EU internal policy modes and governance (Marks et al. 1996; Sandholz and Stone Sweet 1998; Eising and Kohler-Koch 1999; Wallace 2006), few authors have thus far, focused, on EU external policy modes (Friis and Murphy 1999; Lavenex 2004; Schimmelfennig and Sedelmeier 2004). In an analogy to the modes or methods identified by Helen Wallace (Wallace 2006), the EU may be said to have developed six ways of managing its external relations: a security mode, a diplomatic mode, a regulatory method, a redistributive method, a Community method, and a flexible method of coordination (analogous to the OMC).[9] However, in practice these methods are complementary. They overlap and evolve over time. In a sectoral or vertical sense, they are able to adjust to their contexts, which means that the lessons learned from implementation, and from interaction with the receiving partners are taken into account, and react back on the method and the policy fields where they are used. In a cross-sectoral or horizontal sense, one can think of these complementary methods as also affecting each other. Thus, one (or several) method(s) is (are) able to perfect the other(s). This is why the overall method we identified has to be conceived dynamically. In our view, it developed gradually at the EU level and through the everyday interaction of the processes of both European integration and enlargement.

In point of fact, each previous enlargement added new challenges for the EC/EU, which reacted by adapting, in an incremental and cumulative way, its latest internal policy innovations to its external context. In the case of the Central

and Eastern European Countries (CEECs), the first reaction during *Perestroika* was to sign economic and association agreements (the regulatory method), which were complemented by a policy of humanitarian, financial, and technical assistance (PHARE programme,[10] the redistributive method). After Maastricht, these were replaced by European agreements, which institutionalized a political dialogue (political–diplomatic method). In 1995, the Commission issued a White Paper which served as a non-binding guide for the candidate states on the *acquis* to be adopted order to integrate the Internal Market (community method) (European Commission 1995). In 1997, the Commission realized the shortcomings of the Community approach in implementing the necessary reforms. Knowledge about how to implement the *acquis* and how to 'copy' national policies where there was no formal *acquis* was mobilized through a new method of external policy coordination in order—it was hoped—to change people's cognitive views and behaviour in the CEECs (Tulmets 2003, 2005*a*). The security mode was only marginally mobilized due to the weak development of the CFSP *acquis* and the reluctance of the EU to use these methods; furthermore, the NATO accession process ensured the expected results. Therefore, the EU started the fifth enlargement process with a more traditional method in domains mainly involving 'hard' law and progressively introduced more flexible methods to cope with less communitarized or wholly uncommunitarized issues. Implementation, interaction with the candidate countries, and the iterative use of these complementary methods have resulted in the emergence of an innovative overarching method at EU level which was able to cope with the various phases of decision making and implementation.

Thus, the European Union has at its disposal a range of methods ranging from unilateral to more interactive ones, from coercive to voluntary ones (Dolowitz and Marsh 1996), which have been interpreted in the academic literature through various approaches ranging from rationalist to constructivist (e.g. Saurugger and Surel 2006). The combination of these various methods of integration allows not only for the formulation of conditionality, but also of new forms of negotiation. Conditionality became a fundamental element of the EC/EU's enlargement and development policies at the end of the 1980s, continuing during the 1990s (Smith 1998; Schimmelfennig and Sedelmeier 2004). However, after its negative experiences with the use of sanctions, for example, in South Africa and Russia (De Wilde d'Estmael 1998; Portela 2007), the EU is, in general, reluctant to use coercive methods and tends to favour positive over negative conditionality. Negative conditionality is used to rescind concessions or implement sanctions when norms, values, or objectives are not respected. Positive conditionality is used to allocate aid and other incentives when EU norms, values, and objectives are respected. In the case of the fifth enlargement, this was the first time that the EU made a clear reference in its foreign relations to upholding democratic principles and human rights, and to the realization of institutional reforms as conditions for aid and support. The conditionality

Table 12.1. The 'overarching' method in EU's foreign relations

'Overarching' method (combined approach)						
Policy modes or methods	Security mode	Diplomatic mode	Regulatory method	Redistributive method	Community method	Method of coordination
Means	Police and military means	Political dialogue, negotiations, diplomatic means	Economic agreements: EA, AA, PCA . . .	Technical and financial assistance	'Hard law': treaties, directives, regulations . . .	'Soft law': benchmarks and commitments in agreements, new public management
Results expected	Peace, order	Democracy, respect of human rights	Liberalisation of markets, free trade	Stability, investments (transports, environment . . .)	Respect of EU *acquis*, legal reforms	Implementation, better mutual (cultural) understanding
Sanctions	Visa bans, arms embargo, deterrence, military intervention	Diplomatic sanctions. Enlargement: no opening of accession negotiations, no accession	Suspension of agreements, embargo	Suspension of assistance	No possible sanction through European Court of Justice	Evaluations, peer pressure, naming and shaming
Conditionality	*Negative conditionality* (suppression of advantages if norms and values are not respected)			*Positive conditionality* (allocation of assistance and other incentives if norms and values are respected)		*Negotiated conditionality*
Strength of approach	Coercive– –					Voluntary
	Unilateral– –					Interactive

EA = European agreement; AA = Association agreement; PCA = Partnership and Cooperation Agreement.

clause present in the Europe agreements then served as a reference for subsequent economic agreements with transition and developing countries. But the EU still tends to favour the development of negotiated relations over coercive or unilateral measures.

2.4 Does this 'overarching' method represent a 'new architecture of experimentalist governance'?

The method identified in the field of the EU's external relations can be conceived as an 'overarching' or 'meta' method, which presents many similarities with the 'new architecture of experimentalist governance' proposed by Sabel and Zeitlin (2008, this volume) in the field of EU internal policies, which involves the following four features:

- Establishment of framework goals and metrics.
- Elaboration of plans by 'lower-level' units for achieving them.
- Reporting, monitoring, and peer review of results.
- Recursive revision of goals, metrics, and procedures in light of implementation experience.

Like Sabel and Zeitlin's experimentalist governance architecture, this overarching method is not totally new. It is new in the sense that it did not exist several years ago, but it relies on both 'old' and 'new' methods, which are increasingly interlinked due to the growing interconnection of sectoral issues in internal policies as well as external policies. The methods composing this meta-method can no longer be conceived as hermetically confined to a specific policy sector: whatever their origins, they are now increasingly employed complementarily to tackle cross-sectoral, thematic issues. This mix of methods thus contributes to policy learning and adaptation of solutions from one field to another to tackle specific, cross-sectoral issues (e.g. human rights, sustainable development, etc.). The conditional elements in the EU's external policies are typical examples of these kinds of cross-sectoral issues, as their definition keeps evolving.

Therefore, one should conceive the new 'overarching' approach dynamically: implementation on the ground feeds back to each separate method of EU integration, which can then help to revise and complement or perfect the others. This is documented in all the contributions to this book. Most authors highlight the realization of far-reaching reforms in the policy fields they analyze during the late 1990s/early 2000s. They all point to the limits of the classical Community method and at the necessity to complement it with a more flexible approach, soft law, less binding measures and stakeholder participation in policy making. This should enhance mutual learning and control in the implementation phase, as well as the legitimacy of EU policies. This occurred first in policy fields linked directly with the internal market and

was then extended to others. Ingmar von Homeyer sees a major change in the field of environment after the inclusion of the sustainable development paradigm in the Treaty of Amsterdam of 1997 and the launching of the Cardiff process, which involved the use of targets, indicators, regular monitoring, and evaluation. Burkard Eberlein identifies the creation of fora and councils of regulators in the energy sector after successive rounds of legislation in 1999 and 2003. Patrycja Dąbrowska explains how the new Community legislative framework for genetically modified organisms (GMOs) which appeared between 2001–5 contains soft measures (guidelines, quantitative and qualitative indicators, benchmarks) which provide for better flexibility in interpretation and differentiation in implementation. Jörg Monar details how actions plans, programmes and other common measures have been used from 1999 onwards (e.g. the Tampere programme, The Hague programme) to implement various innovative decisions in Justice and Home Affairs. Olivier De Schutter demonstrates major policy innovations in the field of fundamental rights towards greater participation and mutual control through networks of experts. The other contributions to this book highlight similar observations and mainly see the rise of procedures of consultation and participation through the extension of comitology procedures or the creation of fora and regulatory networks within the European Union.

In my view, these reforms are symptomatic of an adaptation process which occurred in anticipation of the enlargement in 2004 (see also Tulmets 2005*b*). Some candidate countries asked the Commission to provide them with lists of the *acquis* they should adopt as part of their accession obligations. Very often, the various Directorate Generals (DGs) of the Commission had no such precise lists, and while working on them, they discovered legislative gaps at the EU level. The regular reports evaluating the reforms in the candidate countries were also an opportunity for the Commission to notice the lack of EU law in particular sectors and to prepare proposals for European directives. New Community law could then be included during revision of economic and political agreements and represent a basis for perfecting possible sanction mechanisms or conditionality clauses. Some Member States were also worried about gaps between the EU 15 and the candidate countries not only in regard to economic and social issues, but also in the field of internal security and border management. These also served as incentives for internal EU reforms, which often began on the basis of soft law, generated common rules and hard law, and sometimes could be inscribed in the EU treaties before the official date of accession as a legal measure ('hard' law) to put pressure on the candidates (e.g. the Amsterdam treaty of 1997, the Nice treaty of 2000, and even the Constitutional Treaty of 2004/Lisbon Treaty of 2007—not yet ratified).

Therefore, one has to conceive the traditional and less traditional sectoral methods as interlinked, and as representing the driving force behind the 'overarching' method described above. In this sense, one cannot speak of an entirely

new architecture of experimental governance, but instead of an overarching method composed of a patchwork of complementary methods combining traditional and innovative patterns of deliberation and decision making, of techniques for implementation, monitoring, and evaluation. As I will detail below, this overarching method in external relations was first adopted in enlargement policy and then in the European Neighbourhood Policy and to some extent in development policy (e.g. Tulmets 2003; Börzel and Risse 2004), a case which I will not investigate in detail here. Interestingly, since recently, similar elements can be found in other areas of the EU's foreign relations, such as democracy promotion (Olsen 2000; Youngs 2002; Zielonka 2007).

3 Experimentalist governance in enlargement

This section covers the seven characteristics of the overarching method identified above regarding enlargement policy, which is still being applied to candidate countries such as Croatia and Turkey.

3.1 The definition of common objectives: accession conditions

According to the new method, common objectives are proposed by the Commission and agreed by the European Council. In 1993 at the Copenhagen European Council, EU Member States agreed that candidate countries would have to fulfil three criteria, known as the Copenhagen criteria, before they would be able to join the Union. The candidates would need to have: (*a*) stable institutions guaranteeing democracy, the rule of law, human rights, and minority rights; (*b*) a functioning market economy and the capacity to cope with competitive pressures inside the EC; (*c*) the ability to adopt the *acquis* and to accept the aims of political, economic, and monetary union. These criteria were accepted on the basis of various propositions of the Commission issued between 1991 and 1993. In 1994/5, after the Essen European Summit, the Commission published a White Paper serving as a non-binding guide for the candidate states on the *acquis* to be adopted in order to integrate the Internal Market. However, the strategy also insisted on elements of economic deregulation. In 1995 at the European Council of Madrid, the Member States introduced a further condition of 'good governance', namely the administrative and judicial capacity not only to adopt, but also to implement the whole *acquis communautaire* (EU law and the decisions of the European Court of Justice). As already mentioned, the notion of institution building or state capacity in European cooperation policy can be identified as a paradigm shift that took place gradually throughout the 1990s in European external relations as a critique of the 'Washington consensus'. After 1997, the EU also asked candidates to have 'good neighbourly relations', to respect the principle of

sustainable development, and to take over the Schengen *acquis*. Later on, candidates were also obliged to respect the EU fundamental rights defined at the end of the 1990s and agreed in the Charter of Fundamental Rights. Reviewing these developments, one can say that the Copenhagen criteria have consolidated or even 'constitutionalized' the practice of past enlargements on political, economic, and legislative grounds and have gradually evolved along with the internal integration process of the EU (and vice versa). One may also consider that these criteria represent the EU's identity, that is, the values and norms that all Member States have agreed to share within the European Union and to promote abroad.

3.2 Contractualization of relations and 'soft law'

Since 1998, the rights and duties of the candidate countries have been inscribed in bilateral agreements between the EU and the candidate countries called Accession Partnerships. These include a paragraph on conditionality and detail all the issues that will be discussed during the enlargement process in the various negotiation chapters. The candidates define their own objectives, which they have to fulfil in terms of legislative reforms, in more detailed documents like the National Programme for the Adoption of the *Acquis* (NPAA), the Action Plan for Administrative and Judicial Capacity, or the National Development Plan. These documents are used to define the scope of the reforms in terms of institutional changes and financial investments.

The aim of such documents is to foster responsibility among the candidate countries and make them behave like future Member States. As a matter of fact, accession to the EU not only opens the way to rights and benefits, but also to duties. The Accession Partnership thus represents a political agreement, a sort of contract in which both parties undertake to respect their commitments, in addition to the economic agreement. The other documents may be considered as elements of 'soft law', defined as 'rules of conduct which in principle have no legally binding force, but which nevertheless may have practical effects' (Snyder 1994: 198). They also open a way for the EU to check whether the candidates are able to fulfil their duties.

During the whole accession process, the content of about thirty chapters is negotiated between the candidate countries, the Commission, and the Member States. These chapters are important because they highlight issues concerning which candidates still have reforms to undertake and can obtain 'transition periods' to implement some of them, mostly due to the necessity of large investments (e.g. for environmental protection). Technical negotiations take place in the framework of the European Agreement Committees (the EU side consists mainly of representatives of the Commission and some national experts). More political or diplomatic negotiations are organized in the framework of an official bilateral committee (consisting of foreign ministry representatives,

permanent representations of the Member States in Brussels, and Commission officials).

This procedure and the aforementioned documents should ensure the respect of the principle of differentiation, that is, of the distinctive features of the national context in which the criteria are to be applied.

3.3 Monitoring

The monitoring process is conducted by the Commission at its headquarters in Brussels and especially, since the reform of 1997 introduced a process of decentralization, by the delegations of the Commission abroad (Tulmets 2005*a*, 2005*b*). The discussions, organized in the framework of the technical committees, can also indicate how reforms are being introduced and implemented in the candidate countries. Thus to manage the practical steps of accession negotiations and enlargement, the Commission relies on 'governance by committees' (Joerges and Neyer 1997).

The monitoring process takes place on the basis of agreed documents, that is, the Accession Partnerships, the NPAA, the Action Plan for Administrative and Judicial Capacity, and the National Development Plan. The Commission also mobilizes various sources to keep track of the reforms introduced in the candidate countries: regular reports from non-governmental organizations, think tanks, universities, local experts, assistance projects, etc. The monitoring process takes place within a specific timeframe and deadlines proposed by the Commission.

3.4 Implementation: assistance and exchange of best practices

During the fifth enlargement, the EU made use of various assistance programmes to support the implementation of the reforms in candidate countries. The Commission and specific committees representing Member States' interests manage these instruments. The PHARE programme was the main instrument used until 1999, when it was supplemented by ISPA (Instrument for Structural Policies for Pre-Accession, supporting investments in infrastructure, transport, the environment, and regional development) and SAPARD (Special Assistance Programme for Agriculture and Rural Development). In 1995, the PHARE programme was already complemented by an instrument called TAIEX (Technical Assistance Information Exchange Office), created to assist the candidate countries in adopting and implementing the *acquis* in the Internal Market field. It provides information from a database on the *acquis* and finances the dispatch of independent experts on short-term missions to the candidate countries.

However, it was agreed in 1997 that these experts, who often work for private consulting companies and were seen as promoting policies of deregulation,

have insufficient knowledge about the implementation of the *acquis* and about institutional capacity. A new instrument, known as 'Twinning', was therefore created to mobilize experts from the Member States' administrations to support capacity building in candidate countries and institutional adaptations through emulation, imitation, and socialization (Tulmets 2005*a*, 2005*d*). Twinning aims particularly at making the expertise of Member State practitioners available on a specific issue—public administration and judicial capacities—where the EU has almost no *acquis*. Thus, it supports the promotion of good practices outside the EU, in order to make the candidates comply with the European *acquis* and other practices within the EU. However, the aim of such institutional partnerships is to develop cooperation on a day-to-day basis and thus to replace the top-down 'teacher–pupil' situation of classical technical assistance through regular communication between professionals in the same sector. Therefore, interviews with Twinning advisors show that the latter can also learn something from their everyday work on the reforms in a candidate country. There were instances in which they managed to introduce new technologies and technical solutions in the candidate countries which were still in the process of discussion in their home countries and thereby learned some interesting lessons about how these could be implemented at home, as, for example, when French experts advised on reforms in the Polish agricultural sector. Sometimes, they could also learn from technical management solutions inherited from the communist pasts of some countries, as was, for example, reported by Belgian experts working on the Water Framework Directive in Hungary. Given the new approach to civilian cooperation that Twinning projects could offer and the interesting crisis prevention tools they could provide (e.g. in relation to minority issues and border management), it was rapidly adopted in the CARDS (Community Assistance for Reconstruction, Development and Stabilisation) programme[11] and is now part of the Instrument of Pre-Accession (IPA) aimed at (future) candidate countries.

3.5 Participation and consultation of actors concerned by the reforms

Before the opening of accession negotiations, the actors concerned by the reforms in the candidate countries had rarely been consulted at the national or the EU level. For some interlocutors in particular, this was because EU laws had to be adopted in a relatively short time. Even parliamentary representatives from the candidate countries did not have time to discuss the new laws at length: the priority was to pass them very quickly so that the candidates could demonstrate their compliance with EU law. Nevertheless, the Commission realized during the second half of the 1990s that the lack of consultation and participation of social partners and actors concerned by the laws had consequences—specifically, that these laws were not implemented. Therefore, after 1998, the Commission not only tried to put pressure on the candidates to

create conditions for such national consultations, but it also tried to organize consultations in Brussels on the more technical issues of enlargement with social partners, NGOs, and various civil society actors. For many analysts, this decision came rather late (when a large part of the reforms had already been accepted at the governmental level in the candidate countries), and the representatives in Brussels did not always take seriously the suggestions made by the various stakeholders. Another innovation at this level was to let representatives of the candidate countries take part in the activities of EU agencies and committees, so that they could better understand the internal functioning of the European Union (European Commission 1999*c*). Thus, they would be able not only to prepare for their future roles as members, but also to comply better with the EU's rules and values through a process of 'socialization' from *within* (as observers and actors participating in EU policies) and not only from *without* (as receivers of external assistance). Interaction between the EU and the candidates could therefore occur not only in the candidate countries, but also in the EU itself, thereby contributing to a process of mutual understanding, adjustment, and perhaps transformation, as the participants of Twinning projects and other stakeholders taking part in such projects have reported in interviews with the author.

3.6 Peer review and evaluation

The Commission is responsible for evaluating the reforms undertaken in the candidate countries and ensuring that the accession criteria are implemented. In order to do so, Commission officials from the various DGs write a report on each country and a general report summarising the overall results. They use various sources of information: peer reviews, quarterly and final reports on technical assistance, Twinning and TAIEX projects, independent reports by think tanks, NGOs, etc. The annual evaluations list the progress of each candidate on every accession criterion and present the state of the art on the negotiation of each chapter. They also formulate some recommendations for the further realization of the goals in question. The Commission strongly encourages peer reviews because as it has limited internal expertise, it needs to draw on external expertise. This is particularly the case in fields where there is no (or almost no) *acquis* such as institutional capacity, human rights, or minority policy. Hence the Commission often works in cooperation with experts from the Member States and with other regional organizations like the OECD, the Council of Europe, and the OSCE. The Commission also relies on the evaluation reports of these organizations, as well as on evaluations of EU projects (technical assistance, TAIEX, Twinning, etc.) to write its annual reports for the Council about each candidate country. The quarterly and final reports on the Twinning and TAIEX projects in particular provide valuable information on the state of legal and institutional reforms in specific sectors of the candidate

countries. However, their quality varies greatly, so the officials in Brussels are not always able to rely on them systematically. It would be useful to improve this instrument of sectoral evaluation so that it could not only perform the function of real EU peer reviews, but also contribute to generalizing learning more effectively for the preparation of the annual communications of the Commission.

As the reports are made public and candidates' progress is compared (according to the regatta principle), the country and general reports not only favour mutual emulation, but also single out the laggards not complying with the accession objectives.

3.7 Adjustment: refinement of objectives at the EU level and the impact on EU internal policies

During the phases of monitoring, negotiation, and evaluation, the Commission also identifies the weaknesses of the criteria and the elements missing in the negotiation chapters. The writings of general and country reports are occasions to identify shortcomings in European law and thus also weaknesses in conditionality. If one considers the process of enlargement as being mainly the externalization of EU internal policies, it is thus not surprising to notice that the evaluations of reforms in the candidate countries have an important side effect within the European Union itself. In order to evaluate whether EU law and benchmarks are actually incorporated into national law and implemented in the candidate countries, the various DGs of the Commission, especially DG Enlargement, need to rely on precise references such as directives, regulations, or politically agreed benchmarks. During this process, it often occurred that the various DGs had either unreliable references or no references at all to propose for evaluation. Various legal and institutional deficiencies were thus identified in the EU's internal policies, which also made it necessary to reform EU policies and even to communitarize some of them prior to accession. One of the most obvious examples is in the field of Justice and Home Affairs. The revision of the EU treaties in 1997 (Treaty of Amsterdam) was the occasion for transferring part of the third pillar to the first pillar, especially in matters concerning visas which were a problematic issue during enlargement (e.g. Lavenex 2004). The perspective of accession also had an impact in sectors where the EU originally had to rely on international treaties to ensure the respect of key rules and values, such as human rights and minority issues. The adoption of the Charter on Fundamental Rights of the European Union was one response to the lack of a legal basis for reference in the evaluations, as well as the accession negotiations. However, after Austria's experience with the entry into government of Jörg Haider's right-wing populist party, the EU also had to invent new structures to make sure that these values would be respected within the Union, at least until the Charter is incorporated into the EU treaties. The Network of

Independent Experts on Fundamental Rights, for example, was created for this purpose in 2002. It monitors the situation of fundamental rights in all Member States, for example, through the publication of regular reports on each EU Member State.[12] The link with enlargement is quite clear: the first report issued in 2003 already included the candidate states, which acceded to the EU in 2004. Environmental policy is also another good example where the EU introduced some internal reforms and treaty provisions before enlargement to make sure that key principles, like sustainable development, would be respected.

The Commission's reports on the candidates help to update the EU's conditionality due to the fact that European integration continues to evolve in relation to sectoral policy issues. These reports form the basis for the communication on the enlargement and/or strategy paper that the Commission issues each year and which points to the missing elements or imperfections in the objectives defined for entering the EU. These documents—or at least a large part of their content—are generally agreed upon or adopted by the European Council. They therefore create a way for the EU to update and perfect its policy, as well as to insure a certain dynamic in the process. Nevertheless, the candidates perceived this updating process as the imposition of new criteria postponing effective enlargement. EU accession was therefore often seen as a 'moving target' and the whole negotiation process as asymmetrical.

The preceding sections explained how far a parallel can be drawn between the OMC, as defined in the EU's internal policies, and the new method identified in the fifth enlargement of the EU. Some elements were not discussed above but display further evidence of identical features, as listed in Table 12.2.

Nevertheless, the adaptation of the OMC in the EU's external policies shows that crucial differences persist between the initial philosophy, as developed in EU internal policies, and its adapted version in external relations (see Tulmets 2005*b*). The experience of enlargement shows that:

- The candidate states did not really participate, in the extent of the definition of sectoral reform objectives, in the framework of the Accession Partnerships. They only approved the way certain fields of the *acquis communautaire* might be respected and adapted to their national context.
- Because of legacies of the past, participation of private actors in the precise definition of the common objectives and commitments, as well as in the implementation of the policy has remained limited in the candidate countries.
- The exchange of good practices mainly took place on a one-way basis in the framework of assistance projects and also in Twinning, i.e. from the Member States to the candidate countries.

Table 12.2. Incremental adaptation of the OMC in enlargement policy

OMC (European Employment Strategy, Luxemburg, 1997)	Enlargement policy ('Agenda 2000', 1997)
(1) European objectives	Accession criteria
(2) (a) National Action Plans (b) Annual or biannual policy cycles	Avis on accession Accession Partnerships, National Plan for the Adoption of the *Acquis* (NPAA), Action Plan for administrative and judiciary capacities Negotiation cycles, Programming of assistance
(3) Monitoring, Indicators when *Acquis* is not precise	Monitoring *Acquis* lists of the Commission DGs, Twinning Contracts and reports
(4) Benchmarks/exchange of good or best practices	Benchmarks in the NPAA, TAIEX, Twinning Contracts and reports
(5) Participation, consultation of social partners	Consultation of social partners at the national level and participation at the Commission level
(6) Commission's Progress Reports	Regular Reports of the Commission to the Council
(7) Reformulation of objectives and policy	Refinement of accession conditions and of EU internal Policies

Sources: Own compilation from European Council on Employment (1997); European Council (1997).

- The evaluations of the Commission concerned only the candidate states and supported emulation among them.

Furthermore, the method as used in the enlargement has evolved over time since the accession perspective was given to the countries of the Western Balkans and Turkey. Some elements come from the experience with the war in the Western Balkans in the 1990s, which had important consequences for European foreign policy. The war in Kosovo was particularly conducive to the creation of a European Security and Defence Policy (ESDP) and to the adoption of an approach in the field of crisis management which presents similar characteristics as the 'overarching' method defined earlier. As a matter of fact, under the German Presidency of the European Council, guidelines were established to coordinate the resources of the Member States in non-military crisis management. The Helsinki Council of December 1999 adopted an 'Action Plan for non-military crisis management of the EU' with four priority areas—civilian police, rule of law, civilian administration, and civil protection—which were approved at the Feira European Council in 2000. Civilian police and special units were envisaged for targeted interventions in countries where public security problems and weak institutions could make purely civilian interventions too risky, and a European Gendarmerie Force was created for ESDP operations. As far as the rule of law is concerned, the experience of the Balkans and Kosovo showed that substitute measures are initially needed to replace failing or non-existing

state structures. They would primarily focus on law and order and the penal system. Civilian administration can be provided by the EU in order to assume on a temporary basis the management and performance of the usual administrative tasks of regions in crisis. In 2002, Community Civilian Protection Mechanisms were established as a civilian protection tool within the EU, as well as for external missions of EC humanitarian aid.[13]

4 Adaptation from enlargement to the European Neighbourhood Policy

In 2003, in anticipation of the 2004 enlargement round, the European Union launched a new policy aimed at offering an innovative framework for cooperation with the surrounding Community of the Independent States (CIS), the Mediterranean countries, and the countries of the southern Caucasus.[14] Although the European Neighbourhood Policy (ENP), as it was finally called, aimed at avoiding further enlargement, many tools developed for the previous enlargement rounds, as well as the method identified above were incorporated in the new strategy. The way that the ENP emerged within the European Commission highlights the strong links between the two policies. The idea of the ENP was developed in 2002 by DG Enlargement as a response to various political initiatives on 'Wider Europe' coming mainly from the United Kingdom, Sweden, Poland, and Germany.[15] In 2003, the 'Wider Europe' Task Force, composed of civil servants from DG Enlargement and DG Relex, was formed to address the EU's relations with its eastern neighbours. In 2004, when the ENP was officially launched with the larger aim of integrating both eastern and southern, the staff from DG Enlargement involved in the Task Force were moved to DG Relex (Interviews with DG Enlargement, 2003–4, and DG Relex, 2006). This restructuring only partly explains why the original policy ideas and instruments of the ENP were adapted from the experience of enlargement. Policy transfer and adaptation occurred at four main levels: policy ideas, philosophy, method, and assistance (Tulmets 2006). However, the conception of asymmetry in relations with the EU is different in the ENP: while in the enlargement process, the candidates had to follow the rules of the EU to be able to enter the club, the ENP countries have no obligation to follow these rules. Some countries have declined the invitation to participate in the ENP or to sign ENP agreements (e.g. Russia, Algeria). Others have signed agreements but do not take the Action Plans seriously (e.g. Israel). The ENP countries remain sovereign states in contrast to candidate countries, which agree to prepare themselves to cede part of their sovereignty to the EU. Hence, conditionality does not function the same way in ENP as in enlargement. This is also why the Commission has regularly revised the ENP strategy in order to take into account the various reactions of the countries concerned so that the policy

would be taken seriously and dialogue and participation would increase. I will focus on the way the 'overarching' method used in the process of enlargement was adapted to the ENP and review the seven characteristics identified earlier.

4.1 The definition of common values

The similarities between the ENP's common values and the accession conditions are particularly striking. In his 2002 speech which launched the idea of a Wider Europe strategy, the then President of the Commission, Romano Prodi proposed 'to set benchmarks to measure what we expect our neighbours to do' and added that the EU 'might even consider some kind of "Copenhagen proximity criteria" ' (Prodi 2002). Thus, neighbouring countries have to respect 'commitments to shared values' relatively similar to the Copenhagen accession criteria

> that is respect for human rights, including minority rights, the rule of law, good governance, the promotion of good neighbourly relations, and the principles of a market economy and sustainable development as well as to certain key foreign policy goals. (European Commission 2004*b*)

Policy discourses on the ENP are now clearly constructed around three main issues—security, stability, and prosperity (Prodi 2002; European Commission 2003*a*)—which are then defined in greater detail in separate action plans on the internal market, cooperation in justice and home affairs, sustainable development, and foreign policy (European Commission 2004*c*). These elements are presented in the Commission communications on the ENP published in 2003 and 2004. They have been agreed by the European Council to launch the policy and its assistance instrument.

4.2 Contractualization of relations and soft law

As with enlargement, the rights and duties of the ENP countries are inscribed in bilateral agreements with the EU called 'Action Plans'. These Action Plans very much resemble the Accession Partnerships as they are also organized by objectives and topics. Their content is very similar to the negotiation chapters defined for the accession process. Interviewed Commission officials explained that they had to propose a solution to the Council in 2002 within a very short timeframe. Hence they sometimes just 'copied and pasted' the documents they had been working with for enlargement.

In the ENP, the opening of negotiations on the country Action Plans clearly depends on a precondition, i.e. the existence of a bilateral contract with the EU like an Association Agreement (AA, for MEDA countries)[16] or a Partnership and Cooperation Agreement (PCA, Enhanced Agreements for TACIS countries)[17] (Interview, DG Relex, April 2006).

After an individual Action Plan is negotiated, the objectives are defined in a more detailed way by the individual ENP countries in a national document which is often called a Development Plan. There, again, the aim is to give responsibility to the ENP countries and to help them to decide on how they want to accomplish the reforms and objectives they have agreed upon in the Action Plans. Negotiations take place in the framework of bilateral committees of the AA or the PCA.

4.3 Monitoring

To manage the ENP through policy coordination, the Commission also relies on 'governance by committees' (Joerges and Neyer 1997*a*). As with the Accession Partnerships, the negotiation of the Action Plans—typical soft law instruments—is led by the Commission (in the framework of the Association Agreements committees) and then agreed by the Council. To monitor the Action Plans, the ENP does not establish new bodies, but instead makes use of the 'old' institutional structures of the Partnership and Cooperation Agreements (PCA for the NIS) or the Euro-Mediterranean Association Agreements, which include:

> (i) the 'Association Council' —composed of the 25 EU foreign ministers, the President of the European Commission, European Commissioner for External Relations-ENP, the SG/HR CFSP and the foreign minister of the (. . .) Partner, and (ii) the 'Association Committee'—composed of diplomats and officials on both sides. (Pardo 2005: 254)

In addition, bilateral subcommittees are established for discussion of technical issues (such as the environment, energy, human rights, or migration). Interestingly, these Action Plans have enabled the Commission to establish subcommittees on Human Rights, which the economic agreements (AA, PCA) did not previously permit.

As in enlargement, the monitoring process is ensured on the basis of the agreed documents, the Action Plans, Development Plans, or other documents issued by the ENP countries. The Commission also relies on various other sources (reports of NGOs, local experts etc.) to monitor the whole process. In contrast to enlargement, the ENP countries have refused to set any deadlines to complete this monitoring process. Thus the Commission cannot rely on a specific timetable to increase the pressure on the ENP countries for compliance.

4.4 Implementation: assistance, exchange of good practices, crisis prevention

The European Neighbourhood and Partnership Instrument (ENPI), launched in 2007, which replaces the previous programmes MEDA (for Mediterranean

countries) and TACIS (for former Soviet countries), has taken over several costly instruments of the pre-accession strategy, at four levels: (*a*) Cross-Border Co-operation (CBC) (security and border management), (*b*) Twinning, (*c*) TAIEX (good governance and rule of law) and (*d*) participation in EU programmes. These instruments, especially Twinning and TAIEX, aim at promoting the exchange of good practices between EU Member States and the neighbouring countries.

In June 2006, the Commission agreed to include TAIEX (database and expertise on the Internal Market) in the ENPI to complement Twinning. As one of the aims of the ENP is to offer the neighbouring countries 'a stake in the EU's internal market' (European Commission 2003*a*), DG AidCo tried to incorporate TAIEX in its unit dealing with Twinning on the model of the Institution-Building unit of DG Enlargement.[18]

Twinning was adopted in TACIS and MEDA at the beginning of the 2000s. Pilot projects began in 2003 in the TACIS countries in the form of the Institution-Building Partnership Programme, though 'without real success' (Interviews, AidCo, April 2006). Since then, a harmonized handbook on Twinning was issued in June 2005, and the program has been introduced in Jordan, Morocco, Lebanon, Tunisia, Egypt, the Ukraine, and the countries of the Southern Caucasus. Due to the political character of some projects, its adoption in neighbouring countries mainly depends on the political willingness of their governments to accept them. Even during enlargement, experts were often perceived as 'spies of Brussels', and the risk that they are perceived as such in the ENP is higher without the 'carrot' of accession (Interviews, DG Enlargement, 2004; AidCo, 2006). In the ENP, Twinning projects cover the sectoral priorities mentioned in the Action Plans and thus provide advice in the fields of the internal market, justice and home affairs, energy, transport, communication, environment, research and innovation, and social policies. In December 2007, the Commission also proposed to introduce a governance facility to improve the possibilities of assistance with institution building.

However, the ENP also deals with issues of crisis prevention and crisis management which are more challenging than in the 2004/08 enlargement. Several of the countries concerned are struggling with internal crises or are linked to regional ones, and their geographical proximity is perceived as a danger for the EU's stability and security. In its strategy documents, the Commission mentions the tense situations in Transnistria (Moldova), between Morocco and Western Sahara, in the Middle East, and in the southern Caucasus (European Commission 2004*b*). However, the 'intervention by non-military personnel in a crisis with the intention of preventing the further escalation of the crisis and facilitating its resolution' (Nowak 2006: 16) can be dealt with either under the Community framework or within the European Security and Defence Policy (ESDP). So far, the difficulties encountered when trying to coordinate these two types of measures have tended to undermine the coherence of the ENP strategy

(Nowak 2006; Crombois 2008; Delcour and Tulmets 2008). However, the ESDP mission Eurojust Themis in Georgia and the border management mission EU-BAM in Ukraine/Moldova have contributed to the development of a new way to deal with civilian crisis prevention and management in the EU's external relations through the combination of methods from the first and third EU pillars. Hence civilian crisis management might be considered as a further tool in the EU's capacity building with priorities covering the four issues of policing, rule of law, civil administration, and civil protection (Nowak 2006: 19). However, the ENP has so far focused more on conflict prevention and post-conflict rehabilitation rather than on direct involvement in conflict management or resolution (Crombois 2008; Popescu 2005).

4.5 Participation and consultation

The idea of participation is also important in the ENP strategy. The Commission recognizes that consultation of public and private actors in the countries concerned is essential to enhancing the perceived ownership of policy decisions. The involvement of these actors in the implementation of reforms is also seen as central for effective internalization of and respect for the norms and values promoted abroad by the EU. The Commission documents suggest that transnational integration through (policy) networks may increase by opening internal cooperation programmes to persons from third countries, especially in the fields of education, research, and culture, and by supporting 'people to people' cooperation projects (European Commission 2003*a*). For the Commission, this should enhance the participation of non-governmental organizations in these programmes and, correspondingly, the exchange of worldviews, knowledge, and experience on a civilian basis. This draws on the experiences of eastern enlargement and of the Anna Lindh Foundation in dealing with southern countries. As in the case of enlargement, the Commission also proposed to allow representatives of the ENP countries to participate in Community agencies and programmes (European Commission 2006*b*). The proposition was accepted by the Council in April 2007. These procedures, it is hoped, would enable the views of the ENP countries to be heard in parallel to the bilateral (political) dialogue, which is thought to be an important instrument of peace building and conflict prevention.

However, on the ground, participation faces various shortcomings. This is partly due to the rigidity and complexity of European procedures (negotiation of the Action Plans, difficulties for NGOs in accessing funds), to contradictions in the ENP (people-to-people activities vs. strict national visa policies), and to domestic contextual reasons (difficulties of ownership and participation in authoritarian regimes with politicized administrations and controlled civil societies). Furthermore, not all agencies and programmes are open to external observers, and cooperation has to be accepted on a case-by-case basis (European Commission 2006*b*).

4.6 Peer review and evaluation

The country Action Plans serve as a political document for defining cooperation and assistance projects and monitoring reforms and commitments. As in enlargement, 'the European Commission acts as the ENP's secretariat' (Pardo 2005: 254). The control of engagements and the implementation of reforms are ensured through the monitoring and evaluation mechanisms embodied in the annual country reports and peer review processes. In 2006, the Commission published its first comprehensive report to the European Council in order to assess progress in the implementation of the ENP. A review of the Action Plans was undertaken in 2007 (thus within two years of their adoption) based on assessments prepared by the Commission in close cooperation with the High Representative for the Common Foreign and Security Policy.

4.7 Adjustment: refinement of objectives at EU level

After the publication of further strategy documents and evaluations by the Commission, objectives are redefined by the European Council. One can highlight the numerous similarities between the method adapted in enlargement during the 1990s and that used in the ENP.

By focusing on the need for the Neighbours to respect their commitments to common norms and values, i.e. to nationally and politically agreed objectives, the EU tries to cover the asymmetry of conditionality with a new philosophy based on mutual understanding and commitments. In this 'negotiated conditionality', attraction and persuasion play important roles. As a result, the new strategy seeks to shift part of the responsibility for success or failure onto the shoulders of the third countries themselves, and thus to enhance the external legitimacy of the EU policy. So far, the benchmarks have not always been precise and commonly defined by the third states, deliberative procedures have remained rather limited, and sanctions applied only to third states, which highlights the underlying asymmetry of the partnership. Hence high expectations are placed on the measures proposed by the Commission in its 2006 Communication concerning 'people-to-people' measures and participation in European agencies and committees (European Commission 2006*b*), which should revise the EU strategy by opening up new opportunities for the ENP countries.

5 Adaptation to other foreign policy fields

A closer look at other foreign and external policies of the European Union indicates that the 'overarching' approach defined above has spread and been adapted to economic and political relations of the EU with other third countries.

Table 12.3. Incremental adaptation of the method of enlargement in the ENP

Enlargement policy ('Agenda 2000', 1997)	**European Neighbourhood Policy (Communication of the Commission, 2003)**
(1) Accession criteria	Commitment to common values
(2) (a) Avis on accession, Accession Partnerships, NPAA, ActionPlan for administrative and judiciary capacities	(a) Country reports of the Commission, (jointly agreed) Action plans, Development plans of ENP countries
(b) Negotiation cycles, Programming of assistance	(b) Negotiation cycles of Action plans (3 years), Programming of assistance (TACIS, MEDA and after 2007, European Neighbourhood and Partnership Instrument)
(3) Monitoring, *Acquis* lists of the Commission DGs, Twinning contracts	Monitoring, *Acquis* lists of the Commission DGs, Twinning contracts
(4) Benchmarks in the NPAA, TAIEX and Twinning contracts	Benchmarks in the Actions plans, TAIEX and Twinning contracts
(5) Consultation of social partners at the national level and participation at the Commission level	Participation at the national level and at the Commission level, 'people to people' activities
(6) Regular Reports of the Commission to the Council	Report of the Commission to the Council
(7) Refinement of accession conditions	Refinement of common values and objectives

Sources: Own compilation from European Council (1997); European Commission (2003a).

Political conditionality was, for example, included in economic agreements not only between the EU and African countries, but also with those from Latin America and Asia. In the 1980s, the third Lomé agreement already contained provisions on political matters, but negative conditionality was added only in Lomé IV (1990–2000) before the possibility of political and economic sanctions was included in the agreements with Central and Eastern European countries to prevent violation of human rights, democracy, and the rule of law. However, the negative experience with an overly rigid conditionality approach in enlargement and the innovations of the 1997 reform ('Agenda 2000') introducing a more 'negotiated approach' also had an impact on EU agreements with other third countries. From 2000 on, political dialogue was stepped up as an instrument of conflict prevention to avoid the use of sanctions. A process of definition of benchmarks, monitoring, peer review, and evaluations in the framework of institutionalized committees officially open to the participation of actors from civil society became a recurrent practice in EU external relations with third states. This process was introduced not only in relations with the signatories of the Lomé/Cotonou agreements. Szymanski and Smith, for example, show that the EU–Mexico Global Agreement was one of the pioneers in which this new approach was used as it represents 'the first transatlantic free trade accord agreed by the EU' to entail political conditions and be concluded with a state 'that has absolutely no possibility of joining the EU'

(Szymanski and Smith 2005: 172). Interestingly, as in the ENP, some of the officials involved in negotiating this agreement had previous experience with the previous EU accession process (Interviews, EU Commission, 2007). We find a similar rhetoric and institutional structure in the EU–Mexico Global Agreement as in the pre-accession strategy: an EU–Mexico Joint Council was established to monitor relations and take decisions regarding the EU–Mexico relationship—a provision specified that cooperation might expand into other areas by mutual consent, and the agreement was flexible enough to set additional standards. As Youngs notes, the use of an autonomous permanent joint council with mixed competencies and political/economic cooperation conditioned on human rights and democracy may serve as a model for other non-association agreements between the EU and third countries, as in the Mediterranean and in Asia (Youngs 2002; Szymanski and Smith 2005: 189). Furthermore, the idea of partnership and bilateral, reciprocal agreements is central to the Commission's rhetorical attempts to gain legitimacy in relation to the more unilateralist approach of the United States, and to develop its own identity as a 'soft' or 'civilian' power (Tulmets 2007; Delcour and Tulmets 2008). EU action in the field of civilian crisis management also builds increasingly on such an approach aimed at developing dialogue and at mobilizing civilian methods in the field of foreign policy (Crombois 2008; Nowak 2006).

A growing number of scholars have identified similar patterns of development in the EU's external relations. For Börzel and Risse (2004) and Zielonka (2007), this is symptomatic of the impossibility for the EU to tackle mounting external challenges through the traditional Westphalian approach of political and economic governance 'characterized by a clear hierarchical institutional structure, rigid laws, and regular controls and penalties' (Zielonka 2007: 168). As the European Union is constantly challenged by external economic and security instability, the approach which consisted in extending the traditional Westphalian model through enlargement and conditionality has reached its limits, and the EU needed to find other ways to respond in a peaceful way to them. The EU has thus developed, on an experimental basis and at the impetus of the Commission, a policy of exporting its internal policies abroad. This goes beyond the formal decisional processes of Community and CFSP/ESDP policies and is characterized by a polycentric-networked approach managed at the European level through negotiation and monitoring within committees of benchmarks and good practices. Accountability in the management of the political, economic and financial agreements is ensured through reporting on and publicizing the state of the negotiation and implementation of the agreements. In this way, the EU's external governance has become 'increasingly non-territorial, multilevel, and multicentred' (Zielonka 2007: 179). However, this approach is still hampered by the fact that it does not (or cannot) promise accession, as in the ENP and other EU foreign policies, so that its realization depends on the political willingness of

the third states to cooperate more closely with the EU. As the EU only reluctantly uses the 'shadow of hierarchy' of negative conditionality (Börzel and Risse 2004), it is probable that it will further develop the experimental track used in the last decade to enhance its role and specificity on the international stage.

6 Conclusion

In this chapter, I have argued that a method similar to the Open Method of Coordination (OMC) was introduced in the 1990s in the field of the EU's external relations via enlargement policy. The two methods are not strictly the same, since the context of usage is different. External relations involve states which are not yet members of the EU or never will be. Interestingly, the process of enlargement also had a reciprocal impact on EU internal policies in that some methods found to put pressure on candidates and to ensure respect for accession conditions have been subsequently introduced within the EU itself. In this sense, one might speak of a mutual construction process based on learning and adaptation on both sides. The case of the European Neighbourhood Policy shows that a similar approach was developed from 2003 on for the new neighbours of the enlarged EU in a situation where conditionality cannot play the same constraining role. As the beneficiary countries currently have no perspective of accession, there are only spaces for enhanced dialogue, participation, and cooperation in a differentiated and adjusted (bilateral) manner. This approach has also been adapted to other foreign and external policies of the European Union, for example, towards Africa, Latin America, and Asia, first in the framework of economic agreements and then increasingly in relation to human rights and institution building as well as to crisis prevention and management.

Notes

1. Europeanization is generally defined as a top-down and 'incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making' (Ladrech 1994: 69). See also the work of Radaelli, and Risse and Börzel.
2. There is a large literature on European governance which challenges the top-down approach in insisting on bottom-up and horizontal perspectives to show the absence of linear or unilateral decision and implementation processes. Joerges and Neyer (1997*a*) see European governance as a heterarchical process with different centres of decision and implementation. Thus, in this view, the EU works neither entirely hierarchically nor anarchically.

3. Richard Rose defines policy adaptation as occurring 'when a program in effect elsewhere is the starting point for the design of a new program allowing for differences in institutions, culture, and historical specifics. Adaptation rejects copying every detail of a program; instead, it uses particular measure as a guide to what can be done' (Rose 1993: 31).
4. Policy networks may be defined as 'includ[ing] all actors involved in the formulation and implementation of a policy in a policy sector. They are characterised by predominantly *informal* interactions between *public and private* actors with distinctive, but *interdependent interests*, who strive to solve problems of collective action on a central, *non-hierarchical level*' (Börzel 1997: 5).
5. So long as the candidates are not members of the European Union, the Commission cannot have recourse to the European Court of Justice and other legal means of sanctions.
6. On coherence and consistency in the EU's external policy, see Duke (1999); Nuttall (2005).
7. On output and input legitimacy, see Scharpf (1999*b*); Beetham and Lord (1998).
8. For a more detailed presentation of the OMC, see, for example, Goetschy (1999); Trubek and Trubek (2005*b*); Sabel and Zeitlin (2008: 289–92).
9. For a detailed presentation of the EU's internal policy modes, see Wallace (2006: 77–89). For a presentation of the EU's resources in the field of foreign policy, see Smith (2005).
10. PHARE: *Pologne-Hongrie, Aide à la Reconstruction Economique* (Poland–Hungary, aid for economic reconstruction).
11. This programme was created in December 2000 for the Balkan countries, excluding Slovenia.
12. For more on this, see Alston and De Schutter (2005*b*); Tulmets (2005*b*).
13. For more on civilian crisis prevention, see Nowak (2006).
14. The countries concerned by the ENP are Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia, and Ukraine.
15. The common letter of Chris Patten/Anna Lindh of 2001, the letter from Jack Straw to the Spanish presidency, speeches from Polish ex-president Kwasniewski, Polish strategies on Wider Europe, and German–Polish strategies on the ENP.
16. MEDA: Financial and technical measures for the reform of the economic and social structures in the framework of the Euro-Mediterranean Partnership (1995).
17. TACIS: Technical Assistance to the Commonwealth of Independent States.
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