

# Journal of Contemporary European Research

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# Journal of Contemporary European Research

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Introduction

## Sixty-Five Years of European Governance

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## Abstract

The key achievement of European integration in the realm of policymaking is a radical transformation in governance which transcends simple notions of hierarchy and may take the form of direct intervention or the establishment of guidelines or norms, in which governance is shared by multiple institutional actors across multiple levels. The articles in this special issue demonstrate the creative and often fragile solutions found to address the challenges facing Europe by analysing changes in governance over time, at various points since the origins of the European integration project, in a range of institutions and policy areas. European governance has evolved from a simple state interventionist model to a complex system of 'governance of governance', employing both hierarchical and non-hierarchical governance modes combined in innovative ways.

## Keywords

Governance; Institutional change; European Union; policies; multilevel policymaking

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European integration faces strong headwinds sixty-five years after the Treaty of Paris establishing the European Coal and Steel Community was signed. Awarded the Nobel Peace Prize for helping 'transform most of Europe from a continent of war to a continent of peace' (Nobelprize.org 2012), the European Union today faces persistent unemployment, the challenges of a common currency without a common fiscal policy, illiberal governments in Hungary and Poland, even the possibility of a British exit. Refugees desperately seeking safe haven encounter discrimination and antipathy, and anti-immigrant sentiment – promoted by the National Front in France, Pegida in Germany, Geert Wilders in the Netherlands, and similar groups elsewhere – appears to be growing across Europe, placing stress on the Schengen system of no internal border controls and the promise of a common EU citizenship. All these developments are undergirded by growing euroscepticism that sees the nation-state, rather than European cooperation and common institutions, as the proper locus of loyalty and best placed to solve problems. Yet even in times of crisis such as these, the EU continues to be admired for its powerful impact on governance process and outcomes. Since the EU's post-war origins, governance in Europe has been fundamentally transformed; European integration has not resulted in the kind of federal union that some envisioned, but the EU affects virtually all political decisions in Europe today. What makes the EU truly unique and relevant are its groundbreaking institutional framework and its innovative governance arrangements.

Shared governance and policymaking have long played central roles in European integration. Some policy areas have demonstrated a strong European component since the 1950s, but the importance of European coordination and responsibility increased substantially in the 1980s and 1990s with the single market project. Today it is difficult to find a policy sector in which EU institutions do not share competence with member states or at least help coordinate decisions. Many concepts and approaches have been advanced to describe and explain this growth in European governance. As the role of the state generally has become more multifaceted, the governance and policymaking landscape in Europe has become ever more complex. EU institutions often have policy formulation or coordination roles but generally lack all but the most basic resources to ensure implementation. European publics, often ignorant or sceptical of EU governance, generally continue to hold national governments accountable, not least as these governments often find it convenient to blame 'Brussels' for unpopular policies. The risk of such responsibility without accountability is that it might

lead to a democratic deficit or to a compromise of national approaches without a European solution. The articles in this special issue clarify where responsibility and accountability lie and explain the evolution of policymaking competences that are increasingly shared in Europe's multilevel governance system.

## GOVERNANCE

European integration has fascinated scholars since its origins, with particular attention paid to the new institutions and coordinated policymaking that have resulted. The EU is seen as 'the most successful example of institutionalized political cooperation in history' (Meunier and McNamara 2007) in which a 'major thrust of European integration has been to lower barriers, to break down impediments to movement, to make borders disappear or at least lose the significance they once had' (Maas 2007: 120), resulting in an 'unparalleled experiment, lacking obvious historical or territorial precedents, and with each reform fraught with contestation, risk, and uncertainty' (Dawson, Enderlein and Joerges 2015: 2-3). The evolution of European governance can be summarised as an 'unstable and contested reallocation of authority to the European level' (Schakel, Hooghe and Marks 2015: 169) and, despite contestation and instability, EU institutions work to 'extend the Union's internal rules, norms, standards, and governance processes beyond its borders', thereby enhancing both European and global governance (Zeitlin 2015: 8). The degree to which European governance can actually be 'democratic' remains an open question (Dahl 1999), yet recent research on politicisation demonstrates the continuing difficulty of importing concepts such as 'democracy' into the sphere of European governance because different kinds of European governance are demanded by different people, in different settings and countries, and even by the same people at different times (Wilde, Leupold and Schmidtke 2016). The 'crisis' context post-2008 has arguably led to a 'hardening' and (re-)hierarchisation of EU regulation in key policy areas, while central institutions such as the Commission adroitly use their 'soft powers' in ways that buttress their influence (Dehousse 2016). Perhaps the wisest approach is for those who value multi-tiered governance with overlapping memberships – as seems best suited for the European Union, which cannot easily (nor probably should aspire to) become a traditional state with hierarchical governance – to 'accept that this means valuing 'semi-sovereign' governments and 'moderate' senses of membership' (Smith 2013: 69). Viewed through a broad lens, despite the considerable changes that have taken place in the EU's membership, policy scope and institutional structure, the result indeed appears to be semi-sovereign governments with moderate (rather than unitary and exclusive) senses of membership. The articles in this special issue provide a theoretically informed analysis of European governance, analysed over time across key institutional and policy settings.

Since this special issue focuses on the 'governance' of the European Union, it is important to define the concept, a task that is particularly necessary since the term is often contested and ambiguous. The *Oxford Handbook of Governance* begins by stating that 'governance is not a unified, homogeneous, and hierarchical approach to the study of politics, economics, and society' (Levi-Faur 2012: 9). In speaking of governance, particularly in the European Union, Bartolini reiterates this sentiment: 'various conceptions of governance do not share a set of constitutive features, a defining conceptual core to which additional features can be cumulatively added to identify its specific manifestations' (Bartolini 2009: 2). Nevertheless, there is some agreement that the expression is meant to delineate a focus that is broader than simply government and its institutions. While structure remains an important consideration, describing and explaining the process aspect of governing also matters (Bartolini 2009: 14; Levi-Faur 2012: 8). The study of governance suggests a heightened emphasis on the actors involved, because it often seeks to highlight that governance might be shared between different levels of government (the national, supranational, and sub-national), between government and non-governmental entities, or that governance may be shifting between public and private market forces. Thus, the special issue treats governance as being not

only direct intervention into national policy, but also the establishment of guidelines and frameworks, which are sometimes more normative than positive.

Indeed, concentrating on governance has also been instrumental in delineating how the very act of governing may be transformed from the standard conception of following the command of a hierarchically, centrally situated government to newer modes of governance in which compliance is not entirely mandatory, in the interest of furthering parallel goals such as learning, increased participation, and democratic legitimacy. In line with this latter concern, the concept of 'good governance' has emerged, which identifies government practices such as transparency, merit-based advancement, and the inclusion of various stakeholders in policymaking and uses these as the basis for setting standards (Weiss 2000). Thus, governance approaches share a common interest in policymaking and implementation, and the ways in which the competences for these are distributed across a variety of actors. With a common focus not merely on the location of policymaking authority but also on the type of authority that is exercised either directly or indirectly through the setting of guidelines, the contributions in this special issue examine governance through a more nuanced analysis that identifies three separate orders of governance.

### ***Governance of the European Union***

The study of governance has assumed particular relevance within studies of the European Union, which have spawned such concepts as neofunctionalism, multilevel governance, and new governance, to name a few. As Börzel (2012) argues, traditional international relations theories that are heavily state-centric, as well as comparative politics approaches that do not adequately appreciate the transnational or supranational nature of the EU, often fail to factor in all the dynamics of the EU as well as governance approaches that more ably capture inter- or trans-governmental negotiations consisting of public actors from different policy sectors and/or levels of government. The pre-eminent theories concerning the EU's initial creation and development, neofunctionalism and intergovernmentalism, focused on whether European integration follows a path prescribed primarily by the member states or by the supranational institutions that they empowered. Indeed, the standard mode for examining European governance – as exemplified by the approach in Marks, Scharpf, Schmitter and Streeck's *Governance in the European Union* (1996) – is to determine the level at which authority for decision-making resides.

However, this is far from the only conception of governance commonly applied to study the EU. In recognition of the degree to which the term 'governance' has co-evolved with European integration, the *Handbook of Governance*, which is otherwise organised by broader concepts such as democratic, economic or global governance, devotes an entire section with four chapters to the EU alone, though no other particular polity, national or international, is addressed in such a manner. Initially, supranational and intergovernmental theorising viewed the contestation over policymaking competence as involving the member states and the supranational level. This simple dichotomy has been modelled as a relationship between the principals, the states, which delegate their authority to an agent, the supranational institutions, which act rather independently, subject to a few controls in the form of shared decision-making and periodic monitoring (Pollack 1997). This parsimonious model and the general focus on the national versus the supranational are challenged by the reality that some competences for decision-making, and particularly implementation, reside at the sub-national level where regions and municipalities also share in governing.

In response, the idea of multilevel governance was coined in reference to the fashion in which the EU has established special fora and procedures that also draw in subnational polities (Marks, Hooghe, and Blank 1996). Beyond looking further downward to identify additional stakeholders involved in the governance of the EU, scholarship has also expanded outward, granting greater

attention to non-governmental actors and their ability to impact governance and become empowered in the implementation of EU policy. Here, one often speaks of self-governance or self-regulation, which entails the degree to which producer groups have been entrusted with the task of legal harmonisation with the ability to set enforceable European standards largely beyond the control of either the member states or the EU level.

The emergence of such a variety of governance configurations challenges standard conceptions of politics that highlight government's tendency to centralise and monopolise authority within itself, and instead testifies to the pragmatic nature of European integration in which goals may be accorded primacy, over the question of who will carry out these tasks. This agnosticism as to the level at which policymaking should occur and which political actors should be involved, together with the novel challenge of negotiating the transference of partial or even complete competences, is reflected in the variety of governance processes that have blossomed. New, or experimental governance, refers to new patterns of governance that have taken their place alongside the traditional Community Method through which the Commission was largely tasked with drafting policy which was then debated between the Council of Ministers and the European Parliament before finally resulting in concrete EU legislation.

Thus, new governance is characterised by less hierarchical decision-making by a variety of actors, including non-government entities, while its primary *telos* is not to create uniform binding laws, but rather to create a network for discussing policy innovation and learning from the successes and best practices from a variety of polities and polity levels. Projects such as NEWGOV, which studies new governance and the dynamics surrounding its emergence, re-emphasise the synergy between the EU and the concept of governance, but their temporal focus falls short of capturing the entire span of European integration since such practices are indeed newer, and have emerged largely only since the 1990s, or at the earliest the late 1980s (Héritier and Rhodes 2011). They sketch an important aspect of EU governance and the path it may follow in the future, reminding us what makes the EU unique and pertinent; but explaining the development of governance in the EU involves a different focus and set of questions.

This cursory review illustrates that there is no single European governance mode, and, indeed, that is precisely why this special issue seeks to explore the variety of different governance styles that are in place across various policy domains and to explain how this came to be so. Articles in the special issue cover the entire experience of European integration since its inception. This allows us to chart broad trends more clearly and identify significant degrees of change over time.

## SIXTY-FIVE YEARS OF EUROPEAN GOVERNANCE

This special issue's virtue lies in its temporal breadth and its concentration upon a single aspect of the EU. Sixty-five years is a suitable juncture to reflect upon changes in the EU, particularly since an examination over time renders transformations that may otherwise be obscured by their incremental nature more vivid and offers the opportunity to compare the starting point to the current situation. Conversely, by focusing on a single key aspect such as governance, it is possible to apply greater nuance to the analysis, especially when it is investigated across different institutions and policy areas.

A common concern of the analyses contained within this issue is whether changes have been transformative or not, and whether such change transpired incrementally or through key institutional reforms. Of the diverse approaches to governance, there are a few conceptions of the term that have proved to be the most common guides for analysis in this volume. The majority of the contributors analyse governance through the standard notion of a division of policymaking

authority between member states and the supranational agents they initially empowered. Most follow Tömmel's (this issue) gloss on Kooiman's (2003) conception of three orders of governance, ranging from direct intervention to setting guidelines to creating a normative framework. Some articles also bring out the multiple levels across which governance competences are distributed, and whether private actors are also involved. While some pieces discuss the degree to which non-hierarchical means of governance have also been introduced, this plays a far lesser role than in the new governance literature generally. Finally, there is also consideration of how the idea of 'good governance' has been adopted and adapted by the Commission. Thus, while several aspects of governance are addressed, the conceptions under consideration demonstrate sufficient commonalities to yield comparable findings.

Summarising across the examinations of both institutions and policy areas, a few important points emerge that may not surprise, yet which can now be asserted with greater confidence, not just when speaking of European integration overall, but also across multiple EU domains. First, changes in governance have often been transformative, but they most commonly display an incremental path of change in which the process often assumes an independent dynamic through which the growing independence of the supranational actors appears to be tolerated largely for the sake of pragmatism. Second, in many areas the crucial changes, or indeed the initial changes, in governance nature or practices have intensified in the last 25 years. Certainly the creation of the European Union in 1992 plays a role here, but as the issue's contributions concerning various different areas of governance confirm, it has often taken the EU quite a long time actually to 'grow into' the new governance patterns contemplated by Maastricht. Third, though new governance approaches highlight the multiple levels and actors increasingly implicated in EU governance, it is national governments and EU institutions that remain central. Further, government institutions generally, rather than non-governmental actors, still wield the overwhelming degree of authority in decision-making processes that remain largely hierarchical.

### *The Governance of Institutions and Policies*

The special issue's articles examine the development and evolution of governance in individual aspects of the European Union, some more focused on institutions and others on policies. First, Ingeborg Tömmel's contribution casts a broader gaze upon EU governance generally, arguing that it has evolved from a simple state interventionist model, based on hierarchical means of political steering, to a complex system of governance, using both hierarchical and non-hierarchical governance modes and combining them in innovative ways. This process constitutes an evolution from a simple concept of governance aimed at directly steering developments in the member states to a complex system of governance of governance, that is, a system aimed at directing or shaping the governance of the member states. The article explains both incremental changes and more fundamental transformations in EU governance as responses of the EU, in particular the Commission, to policymaking deadlocks. This analysis highlights what becomes evident throughout the other articles: the variations among policy areas in the distribution of powers across government levels, and in the use and ever more complex combinations of governance modes from both the hierarchical and non-hierarchical spectrum. Tömmel's article provides a framework for conceptualising European governance as a system of governance that shapes the governance of the member states, and then distinguishes between four phases, elaborating the major turning points in the evolution of European governance, which serve as analytical tools that other special issue contributions follow for ordering the highly complex empirical material on EU governance across the various institutions and policy areas.

The institutional focus begins with Neill Nugent's examination of the overall decision-making structure of the EU and the extent to which progressive enlargements have challenged the ability of

the EU to continue to govern effectively and efficiently. Governance in this case refers to the ability of the Commission and Council to draft and implement solutions to the problems that come before them effectively, in other words it refers to the EU's decision-making capacity. Enlargement has been an issue for the EU since 1961, and is thus an ongoing process, which has been matched in an incremental and reactive fashion by institutional adjustments. Nugent concludes that these formal changes to decision-making processes have been facilitated by attitudinal changes among national governments that have recognised that with so many diverse member states and areas of policy involvement, decision-making flexibility must be accorded paramount importance.

Michelle Cini examines the concept of 'good governance' as it relates to public ethics through the establishment of structures and policies to govern the conduct of public servants. Her article considers the development of the discourses and practices around public ethics that have emerged since the 1990s in the European Commission. The article charts how good governance issues appeared on the Commission's agenda, in part as a consequence of growing concerns about the legitimacy of the European integration process, but only transformed into an actual agenda as a consequence of the scandal surrounding the Commission's resignation in March 1999. Nevertheless, despite this event, Cini argues that this new discourse did not mark a further transformation in the governance of public ethics in the Commission, as public ethics from 2005 was marked in practice more by continuity and incrementalism than by dramatic change. The article draws attention to the importance of the governance of governance (meta-governance) within the EU institutions, while emphasising the important distinction that exists between discourses and practices of governance in that context. It argues that while governance discourses are often characterised by a language of transformation, institutionally, the practices of governance may continue to evolve incrementally.

A further institution under examination is the Court of Justice of the European Union. Jessica Guth's article begins with an assessment of the early case law that transformed the treaties from simple international law obligations between member states into an integrated legal order directly applicable in member states. She argues that without these decisions European integration would have been far slower, if not impossible. Although the legal order itself has remained fairly static, the Court retains an activist stance, continuing to make decisions that transform certain policy areas, thereby assuming a position of authority and power in the institutional framework which could not have been foreseen and which is not welcomed by all. The article concludes with an analysis of how and why the member states have tended to accept the court's activism or, at least, have been unsuccessful in curbing the Court's power to expand the scope of EU law. By analysing the development of the Court from an interdisciplinary perspective that brings together law and politics, the article encourages a more critical debate on the role of the Court as both a legal and a political institution.

A final institutional article is Paul Stephenson's analysis of the little-studied institution of the Court of Auditors, highlighting how it has evolved from simply auditing expenditure to actually questioning the policies of other EU institutions. Examining the beginnings of European administrative governance in the area of financial control, Stephenson reveals how initial attempts to scrutinise Community expenditure gradually led to more assertive demands from the Commission, Council, and Parliament to justify institutional and policy expenditures. Through a historical institutionalist analysis, it traces the defining moments that have shaped audit governance, and how the nature of the audit function has itself changed since Maastricht, and has coped with fraud, euroscepticism and the financial crisis. The analysis demonstrates how the European Court of Auditors has achieved greater independence, and precisely how this has also generated greater contestation over what its mandate should actually be.

The articles dealing with policy areas begin with Michele Chang's analysis of a policy area currently undergoing dramatic transformation: Economic and Monetary Union (EMU). Chang uncovers the

normative aspects of governance that have been enhanced through the economic crisis that began in 2008. Since that time, third order governance in the form of greater acceptance for EU-level intervention has also enhanced opportunities for first and second order governance. The former is in evidence through the expansion of the ability of the European Central Bank to determine binding policies, as well as the establishment of new bodies such as the European Stability Mechanism or the Single Supervisory Mechanism. Chang argues that second order governance remains the standard mode in those areas where the normative framework has not shifted, permitting only incremental advancement in such areas. Unless there were normative changes concerning the acceptability of intervention on a certain issue or support from hegemonic powers such as Germany, the sovereignty of the member states has remained largely as protected as it was during the formation of the EMU.

Sandra Eckert's article on regulatory governance in energy policy examines decentralisation tendencies in the multilevel system as well as the degree of delegation of regulatory competencies towards private actors in an effort to test the supranational centralisation hypothesis. Despite having initially been an area where the European level assumed direct policymaking authority, this tendency has receded over time, as governance capacity in this area has centred on setting institutional and procedural rules. Eckert argues that this has been accomplished through a combination of governance networks in the area of competition policy and agency governance, self-regulation in areas with incomplete governance capacity on cross-border issues, and soft governance mechanisms that bridge policy areas and governance levels. This can be successful where framework provision combines with hierarchy, but contradictory policy goals and resistance from lower levels remain considerable obstacles. Concretely, this has meant that EU energy policy has undergone incremental change with the development of an *acquis* in related areas (internal market, environment, security of supply) and the establishment of an Agency for the Cooperation of European Energy Regulators (ACER).

Roberto Dominguez takes on the daunting task of uniting the three separate facets of EU external relations in a single article. Here, trade has been the most orthodox with the Commission wielding substantial leverage since the early 1960s. The political-diplomatic sector, on the other hand, has witnessed the steady development of permanent communication practices and formal and informal institutions. Finally, in the military-security sector, governance is limited to cooperation, which has remained cautious and practically underdeveloped in terms of integration processes, in spite of several attempts in the early days of the European integration project. Dominguez pays particular attention to the degree that institutions – either existing ones such as the Commission or European Parliament, or newly created positions such as the High Representative – are empowered by the member states to participate in the formulation of policies, as well as actual decisions on implementation. Here he demonstrates how the differing pace and degree of transference of governance competences clearly reflects the varied salience of these three different domains of external relations.

Willem Maas considers the development over six decades of the concept of European citizenship, from the initial introduction of free movement rights for certain workers in the European Coal and Steel Community to current debates about making EU citizenship an autonomous status no longer dependent on member state nationality, or at least encouraging coordination of rules on citizenship acquisition and loss. In his comparative analysis of the development of citizenship in nation-states, Maas demonstrates that the introduction of central rights that took primacy over local ones empowered individuals and redrew the relationship between the governments of the centre and those of the units. Similarly, Union citizenship limits the power of member states to treat their own nationals worse than nationals of other member states. Many cases decided at the Court of Justice of the European Communities, particularly since the entry into force of the Maastricht Treaty, can be seen as attempts to grapple with the new constitutional status of Union citizenship. Whichever future direction these debates take, it is clear that the introduction and growth of a common legal

status for EU citizens has profoundly altered the nature of Europe and the meaning of European integration for its citizens, which forces even notionally sovereign EU member states to coordinate their citizenship and nationality policies.

In his article, Alexander Caviedes focuses on the development of governance in immigration and asylum. Freedom of movement for EU workers has always been part of the Communities and has expanded incrementally, both in terms of who benefits from this right and the degree to which member states retain control over such movement. Immigration policy was not initially within the ambit of the European Community, and only become an area of EU competence through the Maastricht Treaty. Since then, governance has developed over three distinct periods that saw expanding authority for the Commission, together with increased involvement from the Court of Justice and the European Parliament and greater relevance of EU agencies such as Frontex. Within the individual migration policy domains, member states retain the greatest sovereignty in labour migration and family reunion. Caviedes concludes that there has been relatively greater supranational involvement in the areas of irregular migration and specifically asylum, whether through the involvement of EU agencies, or through legislation and court rulings setting concrete obligations that impact actual behaviour.

The issue concludes with Maurits van der Veen's study on public opinion concerning the EU, and whether this is impacted by the nature of EU governance in discrete policy areas. Survey data suggests that public support for the Europeanisation of particular policy areas has changed over time, dependent on changes in the level of integration in those areas. Further, issue-specific support for (or opposition to) Europeanisation appears to have a measurable effect on support for the overall European integration project, specifically when Europeanisation has in fact taken place. This is an important matter and the proper tone on which to conclude the issue, since it probes the question of efficacy, not simply in definitional terms, but in practice, because it seeks to determine whether public perceptions of having relinquished authority to the EU are accompanied by greater support for such policies, or whether this triggers some form of backlash.

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To conclude, this issue pursues three principal objectives. First, to conduct a comprehensive evaluation of 65 years of European governance in a targeted manner that considers a variety of both institutions and policy areas. Second, to analyse 'second order' governance that focuses on the balance of competences between the central supranational actors and the member states that have empowered these institutions. Third, to analyse developments in the various areas to determine the extent to which changes in institutions and policy have been transformative, and demonstrate whether this has proceeded in an incremental fashion or through moments of major institutional reform that were intended to produce the desired consequences. This approach to analysing governance issues and how these have evolved throughout Europe's integration experiment is at the cusp of current EU studies. We hope it will contribute to the continuing debates over what type of polity the EU is, where it is heading, and how it can best achieve the many expectations of and responsibilities placed on shared governance in Europe.

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Research Article

## EU Governance of Governance: Political Steering in a Non-Hierarchical Multilevel System

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## Abstract

This article analyses 65 years of European governance as a process that has evolved from a simple model, based on hierarchical means of political steering, to a complex system of governance, using both hierarchical and non-hierarchical governance modes and combining them in innovative ways. The central thesis is that European governance constitutes a system of governance of governance, aimed at shaping and directing the governance of the member states. The article elaborates a conceptual framework by drawing on Kooiman's concept of three orders of governance. It identifies European governance as predominantly second order governance, focussing on the creation of appropriate procedures and institutional settings that structure governance processes. Empirically, the article provides an overview of the emergence and consolidation of a system of governance of governance in four phases. Furthermore, it analyses the creation of appropriate procedures and institutional arrangements in three selected policy areas. It thus highlights how second order governance is incrementally shaped. The article concludes that the evolving system of governance of governance reflects the multilevel structure of the EU and the need to balance permanently the contradictory policy objectives, governance modes and implementation strategies of the European and the national government levels, as well as the divergences among the member states.

## Keywords

EU governance; Policymaking; Second order governance; Cohesion Policy; Competition Policy; European Employment Strategy

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The governance of the European Union (EU) has recently drawn much scholarly attention. In particular, a lively debate has emerged on new modes of governance, roughly defined as non-hierarchical means of political steering (e.g. Borrás and Conzelmann 2007; Eberlein and Kerwer 2004; Héri-tier 2003; Sabel and Zeitlin 2010; Szysczak 2006). Scholars of new modes of governance assume that these phenomena emerged only recently and that they particularly characterise those policy areas where the European level lacks clear competences. Thus, new modes of governance are perceived as central characteristics of the European polity with its incomplete competences and constrained authority vis-à-vis the member states. Other scholars, however, contest these claims; in their view, the Union, like nation states, predominantly relies on hierarchical means of steering, generally exercised through legislation (e.g. Börzel 2010).

In contrast to both these positions, I argue here that the dichotomy between hierarchical and non-hierarchical governance modes is not helpful to understand the specifics of European governance. The Union has always relied on both forms of governance, even though we do observe an increase and also a sophistication of the non-hierarchical spectrum in recent years. What distinguishes European governance from governance in national political systems is its increasing reliance on *governance of governance*, or what Kooiman (2003) terms second order governance. The term governance of governance refers to the establishment of steering mechanisms which do not directly focus on the final addressees of a policy, the citizens of Europe or economic actors, but primarily address national governments in such a way that they themselves establish governance modes which serve to achieve policy objectives defined at European level.

This, however, is not to say that the governance of governance has been a characteristic feature of European integration since its inception. On the contrary, after initial attempts with rather traditional forms of state interventionism, more sophisticated governance modes triggering governance transformations in the member states evolved only slowly over a longer period of time, together with the expansion of European policymaking. Moreover, these governance modes did not permeate all policy areas in the same way and intensity (we still find a mixture of varying approaches across EU policies) and their development and sophistication is by no means complete. Hence, at present, the Union is not marked by a fully developed system of governance of governance; yet we can observe an increasing tendency to organise governance processes in such a way that they channel the governance of the member states in the desired direction.

The move from a predominantly state interventionist model to a system of governance of governance was not the result of an intentionally steering actor with a clearly defined goal, for example the European Commission. Instead, it was the outcome of intense interactions between the European and the national government levels or else the supranational and the intergovernmental institutions in the process of building and expanding EU policymaking. Whereas European level actors and particularly the Commission aspired to regulate and harmonise the European space, national governments were eager to safeguard their autonomy and pursue their own policy objectives. The contradictory goals and objectives of the two levels hampered both sides in achieving their aspirations; such contradictions could only be reconciled by stepwise embarking on governance processes which allowed to a certain extent for directing the policies and developments in the member states, without, however, constraining too much their autonomy. Thus, over a longer period of time, the EU has increasingly established governance modes which channel the governance of the member states into a direction defined at European level. It has thus adapted its governance approaches to the reality of a multilevel system, where the European level lacks the full spectrum of competences and member states are still sovereign, at least formally.

However, when framing EU governance as an emerging system of governance of governance we have to bear in mind certain caveats. First, EU governance does not straightforwardly focus on shaping the governance of the member states. Instead, as a consequence of the ongoing contestation between the Union and the member states about policy objectives and the division of powers between the levels, EU governance of governance takes shape in such a way that it allows a balancing of the diverging policy objectives of the two government levels. In order to facilitate and stabilise such balancing acts, the Union has to establish appropriate procedures and corresponding institutional arrangements for defining common ground. In other words, establishing a system of governance of governance or second order governance is not limited to establishing appropriate governance modes at the European level, but also requires careful institution-building that enables the continuous adaptation of governance processes to varying circumstances. Second, governance modes which focus on directing the governance of the member states mainly work through indirect steering mechanisms; yet these should not be confused with new or non-hierarchical modes of governance. Indirect steering mechanisms may entail both hierarchical and non-hierarchical modes of governance. Their indirect impact results not from the steering mechanisms as such, but from a longer sequence or a whole chain of interlinked steering mechanisms. Third, a system of governance of governance is not by definition soft in its impact. Even though it does not directly intervene in day-to-day matters in the member states, it can significantly constrain the room for manoeuvre of national governments to pursue their own policy objectives or even compel them to follow a strict European route. Fourth, a system of governance of governance does not automatically result in corresponding adaptations at the national level. On the contrary, national governments and authorities use many ways to evade, circumvent or even counteract the stimuli, pressure or even coercion 'from above'.

Departing from these theses and caveats, this article presents an overview of how the European Union stepwise established a system of governance of governance. The central question is how and why the EU has increasingly embraced such a form of second order governance. Additional questions are how the process of establishing second order governance took shape, and how and why major turning points occurred during this process. As part of a special issue aimed at reviewing 65 years of European governance, the article is not so much about new empirical findings regarding EU governance, but aims at re-conceptualising the EU's governance in light of the rich literature on the issue.

The article is structured as follows: the next part elaborates a conceptual framework for grasping the phenomenon of an emerging European system of governance of governance. This framework draws on Kooiman's (2003) concept of three orders of governance and adapts it to the specific context of the EU. European governance is classified mainly as second order governance, aimed at shaping the procedural and institutional *context* for structuring governance processes. The third part provides a brief overview of the evolution and expansion of EU policymaking and the corresponding diversification of its governance modes. It identifies four phases, which each contributed in a specific way to developing a European system of governance. The fourth part analyses selected paradigmatic cases of establishing procedures and institutions which constitute important building blocks for second order governance. The examples presented refer to cohesion policy, competition policy, and the European Employment Strategy (EES), policy areas that were established in different phases of integration and hence vary in their dominant governance modes from hierarchy via negotiation to cooperation.<sup>1</sup> The final part concludes that European governance evolved to its current form in response to conflicts between the European and the national government levels. Firmly organised procedures and institutional settings for joint decision-making serve to balance the diverging policy objectives and strategies of public and, partly, also non-state actors. Second order governance thus provides the framework for managing the conflicting relationships among the relevant actors and improving the effectiveness of European policymaking.

## THE CONCEPT OF GOVERNANCE OF GOVERNANCE

In his seminal work on 'Governing as Governance' (2003), Jan Kooiman distinguishes three orders of governance, termed first, second and third order governance. In first order governance, 'governing actors try to tackle problems or create opportunities on a day-to-day basis' (Kooiman 2003: 135). However, since 'problem solving and opportunity creation ... are embedded in institutional settings', the creation and maintenance of these institutional settings is second order governance. 'In first-order governing, the emphasis is on governing as a process, whereas in second-order governing attention is focused on the structural aspects of governing' (Kooiman 2003: 153). In a similar vein, other scholars also distinguish between governance as a process and governance as a structure (see e.g. Mayntz 2004; Börzel 2010). Finally, third order or meta-governance refers to norms shaping the governance process. Governing changes and '(re)design processes from a normative point of view is the essence of meta-governance' (Kooiman 2003: 171).

In applying Kooiman's typology to the EU, we can state that the Union rarely deals with first order governance. For obvious reasons, it does not engage in resolving day-to-day policy problems or in defining detailed policy measures. The EU forms an additional government level superimposed on the member states, but it does not have any competences to define policies directly for its territory, let alone to implement them. The Union's governance therefore mainly focuses on framing and structuring the policymaking and governance of the member states.

This is not to say that the Union completely stays away from tackling policy problems. However, since the member states are at least formally sovereign, the Union aims at tackling such problems by

directing the governance of the member states in a way that they themselves are stimulated or even compelled to address these problems. Where competences are given, the European level may set rules or boundaries to the governance of the member states, and thus use hierarchy as a governance mode. Furthermore, it can establish rules for establishing market mechanisms, which implies using competition as a governance mode. In other cases, where competences are incomplete or lacking, the EU reverts to less hierarchical governance modes, such as negotiation and cooperation. In all cases, the Union primarily engages in second order governance.

Exercising second order governance implies creating, in addition to the basic institutional structure and procedural norms of the Union, procedural avenues and institutional arrangements that provide, in various ways, direction to the governance of the member states (Bulmer and Padgett 2005). Procedural avenues are often laid down in formalised regulations, so that participation is binding for all actors involved in policymaking. In addition, a host of informal practices accompanies these formalised procedures and in many cases also precedes them. Institutional arrangements include the establishment of permanent or temporary committees, advisory boards, inter-governmental or transnational networks or expert forums. These arrangements as well are partly regulated by European legislative acts, but are partly also based on informal agreements and practices among the actors involved. Both procedural avenues and institutional arrangements are designed to fulfil a broad set of functions in the governance process. Procedures chiefly serve to stabilise the governance process where competences are not clearly defined and the authority of decision-making and action is not allocated to specific actors. Institutional settings are created where powers are shared by diverse actors and thus have to be pooled in order to make the governance process work. Both procedural and institutional arrangements serve varying functions, ranging from the exchange of ideas and visions or a mere advisory role to more specific policy functions, e.g. the definition of objectives, the elaboration of proposals, the design of implementation strategies and, finally, the evaluation of the achievements of a policy. Implicitly, such arrangements also serve as a framework for learning and socialisation processes among the actors involved, so as to improve policymaking and governance processes continuously (Sabel and Zeitlin 2010). Finally, such arrangements provide legitimacy to EU policymaking, since the elected bodies of the member states participate in them.

The European Union, by governing through second order governance in this way, aims at compensating for its lack of authority vis-à-vis the member states and at tackling the diversity *among* the member states. In other words, the Union strives to create the procedural and institutional framework for balancing the diverging policy objectives of the European and the national government levels and promoting convergence among the member states.

The EU also engages in third order or meta-governance. It promotes certain norms and objectives which guide its own activities and frame policymaking in the member states (Daviter 2007). The most basic norm underlying European governance is that of free markets and fair competition. This norm often serves to expand EU policymaking or the Union's influence on national policies, as has been the case with the liberalisation of public utilities (Schmidt 2004). Another, more specific example is the Union's, and particularly the Commission's, role in framing the discourse on lifelong learning. This norm serves as a template for a broad set of reforms in the education systems of the member states (Klein forthcoming). Common norms can even be identified in the push for coordinating issues of citizenship acquisition and loss, as Maas argues in this issue. In short, the Union engages in processes of meta-governance in order to transform fundamentally the economic and social organisation of the member states.

To sum up, the European Union plays a prominent role in exercising second and also third order governance, while the responsibility for first order governance remains mainly the domain of national political systems and, partly, non-state actors. Through second order governance, the Union

shapes the procedural and institutional environment that structures governance processes. Through third order or meta-governance, it pushes norms that constitute an overarching framework for reforms in and convergence among the member states. The Union thus builds a *system of governance of governance*. The next sections, focussing mainly on second order governance, provide empirical evidence of these processes.

## THE EVOLUTION OF EU GOVERNANCE

As noted in the introduction, the EU and its precursors, the European Communities (EC), did not start from the outset with establishing a system of governance of governance. On the contrary, such a system evolved only slowly through a long process of trial and error and experiments with various governance approaches. Underlying this process was the persistent – though varying in its intensity – conflict between the European level and the member states about the scope of EU policies, the objectives to be pursued in common, the transfer of competences, and the extent of national autonomy. These conflicts often caused deadlocks in the process of European policymaking; yet in the longer run, they resulted in changes in the dominant governance approaches (Héritier 1999; Szyszczak 2006). Deadlocks particularly arose where member states refused to transfer competences to the European level, while European action was clearly needed. Yet, they also emerged in other cases, e.g. when the design of European policies was incoherent or infeasible, when member states and other addressees were reluctant to or incapable of duly implementing policies, or when the policy environment changed. It was these deadlocks which stepwise triggered a fundamental transformation of European governance, aimed at shaping and framing the governance of the member states. Within this process, four distinct phases can be observed, which, except for the first, added innovative features to the EU's governance approach and at the same time transformed earlier approaches. During the first and the third phase, supranational forces were comparatively influential in shaping EU governance, whereas the second and the fourth phases were marked by the dominance of the intergovernmental institutions and actors. Yet in all phases, the tension between the intergovernmental and the supranational institutions and the resulting compromises were decisive for how European governance took shape. Its concrete form depended mainly on whether and to what extent member states were willing to act in common or to preserve their autonomy, and the creativity of the Commission in finding solutions for often contradictory goals. The overall process resulted in a dense web of procedures and institutions facilitating further experiments with governance approaches and also their diffusion across Europe.

The first phase started with the establishment of the European Communities in the 1950s. The founding fathers envisaged both creating a common market and establishing a set of policies to counteract market failures. They first built a Community for Coal and Steel (ECSC), soon followed by a European Economic Community (EEC) and an Atomic Energy Community (EURATOM). Whereas the common market was favoured by all national governments, policy measures for dealing with market failures were more controversial. They were strongly inspired by state interventionism (Milward 1984), that is policy measures intervening directly into the economic sphere, and implied uneven distributional impacts. Nevertheless, national governments agreed on setting up a few policies of this realm, for example a Common Agricultural Policy (CAP) that compensated market failures mainly through price support and certain measures in the steel and atomic energy sectors.

None of the interventionist policy concepts resulted in major successes. The projected interventions in the coal and steel sector, among others the envisioned setting of production quotas in case of declining demand, were never implemented; instead, the member states themselves managed the industrial output, and later the decline, of these sectors. Similarly, the atomic energy policy remained primarily a national concern. The subsidy scheme of the CAP evolved to a dysfunctional dinosaur consuming large parts of the Community budget. All these policy failures proved that

simple and direct forms of hierarchical intervention, based on the policy model of nation states, could not and did not work in the multilevel and multi-polity setting of the EC. They failed due to both the hesitance of the European institutions, in particular the Commission, to exert pressure for due implementation, and strong resistance from the member states against any intervention 'from above'. Only the customs union as a first step towards creating a common market was quickly accomplished. Yet even the accompanying market-making policies<sup>2</sup> in competition matters failed to be implemented. The Commission did not use its far-reaching powers in this sector as it experienced much opposition from the member states (Cini and McGowan 2009). Not surprisingly, therefore, the EC and particularly the Commission embarked at an early stage on devising alternative routes towards political steering.

The second phase began in the late 1960s, when attempts were made towards further integration in order to improve the functioning of the common market. The Commission pushed for setting legally binding, common industrial norms and technical standards for the whole Community (Egan 2001). However, it met enormous resistance; national governments did not wish to transfer powers in this area or could not agree on common standards. The process ended with the European level defining only some basic principles, while the task of setting concrete standards was devolved to private, transnationally organised bodies. The first features of a governance of governance emerged.

The obstacles to directly setting European norms and standards did not only apply to the common market; even more so, they affected social and environmental regulation. The unwieldy procedures of decision-making at the European level and the enormous diversity among the member states made all attempts at harmonisation of such regulation an impossible mission. Many legislative proposals in this period ended up in non-decision and stalemate. Thus during the 1970s and early 1980s, further experiments emerged which focused on shaping the context for member states' governance. European legislation increasingly took the form of framework regulations or directives, defining only the objectives to be achieved, while the implementation of these objectives was left to the discretion of the member states. A prime example are the directives for gender equality, adopted from the mid 1970s onwards (MacRae 2010). New distributive policies were set up (the Regional Fund) or existing ones reformed (the Social Fund and the Guidance Section of the Agricultural Fund). The subsidies provided by these Structural Funds were bound to certain basic principles; within this framework, member states were free to implement their policy objectives and priorities. Furthermore, a technology policy was initiated by inviting European industrialists to a round table that was to devise a policy concept. Finally, various forms of intergovernmental cooperation were set up in order to expand the realm of European policymaking, e.g. in monetary matters and foreign policy. All these cases reveal that the Community embarked on innovative forms of governance at an early stage. More importantly though, they also reveal that, even at this stage, European governance tended to focus on creating procedural avenues and institutional arrangements for closer cooperation with and among the member states, and, partly, also non-state actors. Nevertheless, successes during this phase were limited, since both the financial incentives to implement European objectives and the mechanisms of policy coordination were still weak.

The third phase began in the mid 1980s, when the project of completing the single market gave a strong boost to European policymaking. The project implied adopting an unprecedented quantity of new legislation, and thus reverting to hierarchical governance modes. Yet, in fact, regulating the single market largely implied deregulation and thus establishing the context for competition to work as a governance mode. Furthermore, specific strategies of additionally using market mechanisms as governance modes emerged, induced by the Cassis de Dijon judgment of the European Court of Justice (ECJ) in 1979. The judgment stated that goods produced according to the legal standards of the state of origin could freely be traded across the Community. The Commission was quick to transform this principle into a much broader governance strategy (Schmidt 2007; Sievers and Schmidt 2015). Henceforth, harmonisation of national standards and regulations resulted from

market pressures and ensuing legal adaptations within every member state. This relieved the European level from the burden of setting detailed norms and standards and deferred the omnipresent distributive conflicts among the member states to the anonymous forces of the market.

In the context of the single market project, the Commission forcefully applied the competition rules to private enterprises and the member states, and it also succeeded in using these rules for other than the intended purposes, i.e., for pushing through the liberalisation and privatisation of public utilities. Furthermore, it relied on market mechanisms for inducing such policy innovations in the member states (Schmidt 2004). In the wake of the single market, another outstanding policy project was launched, Economic and Monetary Union (EMU). In this case, both the European and the national government level share responsibility. Yet at the European level, taking authoritative decisions regarding monetary policy is delegated to an independent agency, the European Central Bank (ECB), detached from any political interference. By contrast, national governments are entrusted with safeguarding macro-economic stability, directed only by certain basic parameters set at European level.

During this phase, the Union also embarked on a broad set of new policies which were often merely based on some form of cooperation under a European umbrella. This refers particularly to a set of policies mentioned in the Maastricht Treaty, i.e., education, vocational training and youth, culture, public health, consumer protection, trans-European networks, energy, civil protection, and tourism. In these cases, the role of the EU is defined as supportive of policy coordination among the member states. The Commission 'shall take any useful initiative to promote such co-ordination' (Art. 129 (2) TEC 1992) and the Council 'shall adopt recommendations' or 'incentive measures' (Art. 129 (3) TEC 1992). The Maastricht Treaty also opened up an opportunity for the social partners to negotiate themselves on legislation (Falkner, Treib, Hartlapp and Leiber 2005). However, these policies did not result in major successes, mainly because they often lacked an appropriate institutional underpinning.

The Maastricht Treaty further expanded EU policymaking through establishing the Second and Third Pillar for Foreign and Security Policy as well as Justice and Home Affairs. Both domains envisaged transnational cooperation and common action under intergovernmental control. These forms of 'intensive transnationalism' (Wallace 2010) are increasingly underpinned by procedural norms and corresponding institutional arrangements.

The fourth phase began in the mid 1990s, when the expansion of European policymaking slowed significantly and member states were less willing than ever to transfer powers to the European level. This is the phase where the Union systematically turned to creating new procedures and institutional arrangements that left to the member states and non-state actors a maximum of discretion, while still directing their activities through various, mainly cooperative, governance modes and mechanisms. Furthermore, certain powers which the EU had held since the early years of integration were transferred back to the national level. Yet also in these cases, the Union kept control through setting regulatory frameworks and establishing transnational networks for cooperation under the auspices of the Commission (as discussed in more detail below). Finally in this phase, the Union expanded its influence to third states through systematic transfers of policy and governance approaches.

Beginning in the mid 1990s, the Commission designed a new procedure for joint policymaking and implemented it first through some experiments on a small scale. The basic features of the procedure, which later came to be known as the Open Method of Coordination (OMC), were laid down in the Employment Title of the Amsterdam Treaty (Art. 125-129 TEC 1997). In 2000, the Lisbon European Council acknowledged the OMC as a much broader tool for inducing fundamental economic and social reforms in the member states so as to improve the competitiveness of the

Union as a whole. In the framework of implementing this so-called Lisbon strategy, member states remain formally autonomous to define their own policy objectives and reform concepts; yet participation in the OMC and respecting its rules, anchored in primary and secondary legislation, is mandatory.

After the turn of the century, the Union devolved competences to the member states in policy areas that were earlier its exclusive domain. For agricultural policy, it henceforth set only the basic parameters for a fundamental reform, while the member states could design and implement such reforms according to their own preferences. In competition policy, certain competences were devolved to national authorities; yet these authorities had to cooperate within transnational networks under the auspices of the Commission (see below).

During the entire phase, the Union engaged in policy transfers to third states. In the process of Eastern enlargement, it used *conditionality* as a means to achieve its intentions (Schimmelfennig and Sedelmeier 2004). Conditionality appears at first sight as a particularly strict governance approach, and it is indeed strict in its impact, since the addressees often have no other choice. In fact, however, it is a means to induce the addressees to comply voluntarily with EU rules and standards, in exchange for certain benefits. Thus the candidate countries of Central and Eastern Europe which aspired to benefit from accession to the EU not only had to accept the *acquis communautaire*, but also to adopt European governance approaches and corresponding institutional provisions, including the creation of a lower government level. Policy transfers were also strongly promoted in the framework of the European Neighbourhood Policy (ENP), involving the neighbouring states of Eastern Europe and the Southern Mediterranean. In these cases, the Union applies a soft form of conditionality, demanding, for example, respect for human rights and good governance, but also adaptations to European governance approaches in exchange for market access and good relationships with the Union. Policy transfers are also a primary motive of the EU when engaging in bilateral relationships with regional organisations worldwide.

More recently, the economic and financial crisis of the EU resulted in new policy initiatives at the European level. The governance of EMU particularly now appeared insufficient and incomplete in face of pressures emanating from financial markets and the sovereign debt problems of a larger part of the member states (see Chang in this issue). This, however, did not result in setting directly impacting rules at European level, even though many observers and experts demanded or proposed such measures. Instead, due to the reluctance of the member states, new policy measures such as the six-pack and the two-pack encompass a set of procedures for channelling policies and governance processes at the national level into the desired direction, while EU institutions supervise compliance with the rules governing EMU. Moreover, in the case of the debtor states, the European Council decided to apply strict conditionality. Financial transfers to the debtors, first from the European Financial Stability Facility (EFSF) and then the European Stability Mechanism (ESM), were granted only in exchange for compliance with European norms, rules and demands. In addition, compliance is assured by unprecedented forms of surveillance over legislation and reforms within those states.

Altogether, the fourth phase is characterised by significantly developing and improving the procedural and institutional dimension of EU governance, while refraining from attempts to intervene directly in the member states, let alone in third states. Thus, in this phase, expanding, deepening and refining the mechanisms of second order governance was of primary concern.

Summarising 65 years of European governance points to a gradual process, focussing increasingly on directing the governance of the member states. During this process, the initial attempts towards establishing direct policy interventions, particularly in cases of market failures, were replaced by governance approaches which devolve responsibility to many institutions and actors at several government levels. The European level sets basic norms and rules; furthermore, it creates

appropriate procedural and institutional arrangements to direct the behaviour of national governments and, partly, also other actors; ultimately, it tends to transform the governance approaches of the member states. The whole process is marked by various qualitative changes which divide it into four phases.

The *first phase* is marked by clear transfers of powers to the European level in a limited set of policy domains. Accordingly, governance during this phase relies on hierarchical rules for market-making and interventionist measures for market-correcting policies. However, most of the interventionist measures ended up in non-implementation or in policy failures. Thus, the *first turning point* occurred as early as the end of the 1960s, when European institutions intended to expand the realm of policies, yet experienced all sorts of resistance from national governments. The *second phase* is therefore marked by both stalemates in expanding EC policies and first experiments with new governance approaches. These new approaches for the first time took the autonomy of, and the diversity among, the member states into account and experimented with devolving responsibility to a broader spectrum of actors. However, a *second turning point* came about in the mid 1980s when the European Commission, in view of economic crises and the challenges of globalisation, aimed at completing the single market. While market creation enjoyed consensus among the member states, other policy projects remained contested. Therefore, the ensuing *third phase* is marked by a double tracked strategy. The single market and adjacent issues, particularly monetary union, were subject to clearly defined rules which, however, often focussed on intensifying market mechanisms. Corresponding neo-liberal norms served as an additional means of directing national policies. Where policymaking was expanded to new areas, coordination of national policies was the preferred governance approach. Unsurprisingly, these developments evoked a backlash that led to a *third turning point*, triggered by stronger resistance from national governments against European interference and a more explicit refusal to transfer further powers to the EU. Accordingly, the *fourth phase* is characterised by establishing new procedures and institutional arrangements for directing the governance of the member states and even third states, while national governments still retain much discretion. These governance approaches encompass rule setting accompanied by strong surveillance mechanisms and even strict conditionality to ensure compliance as well as policy coordination in the framework of organised procedures and appropriate institutional settings.

The four phases outlined above and the respective turning points did not come about because an enlightened actor (for example the Commission) made an explicit choice for them. They rather evolved through a process of trial and error in response to deadlocks in the policy process. Such deadlocks occurred because member states were often extremely reluctant to transfer competences to the European level or to implement European policies duly. In the face of such deadlocks, European governance evolved to more complex and more indirectly impacting methods of political steering. Altogether, a sophisticated system of governance of governance evolved that allows for *permanently balancing* the diverging policy objectives, priorities and preferences of the various government levels and, partly, also non-governmental actors.

## **CREATING PROCEDURAL AVENUES AND INSTITUTIONAL SETTINGS FOR THE GOVERNANCE OF GOVERNANCE**

As noted above, together with the expansion of European policymaking, a wide variety of procedural avenues and institutional settings emerged which provide the context for exercising governance of governance. While some of these procedural and institutional innovations are specific for just one policy or issue area, others permeate nearly all EU policies; hence they are essential building-blocks for a European system of governance. In this section, I focus on such paradigmatic innovations by tracing how they were first developed in one policy area, then further refined and expanded, and

finally transferred to other policy areas or even used as templates for the whole spectrum of EU policies.

For this purpose, I selected three cases: the system of partnership in cohesion policy, the transnational networks in competition policy, and the OMC procedure in the European Employment Strategy. These cases differ in that the respective policy areas were established in different phases of the evolution of EU governance (the first, second and fourth phases respectively) and hence vary in their dominant governance mode from hierarchy to negotiation and cooperation. The cases show that second order governance is not inherently linked to either hierarchical or non-hierarchical means of political steering but builds on both, depending on the policy area at stake and the enabling or constraining attitude of national governments towards European interference in their affairs.

### ***Case 1: The System of Partnership in Cohesion Policy***

EU cohesion policy was set up in 1975 by establishing the Regional Fund. The Fund provided subsidies to the member states for the implementation first of projects and later of programmes aimed at developing less favoured regions (Allen 2010; Bache 2008; Bachtler and Mendez 2007; Hooghe and Marks 2001). The member states perceived the Fund as a financial transfer mechanism between rich and poor, while the Commission, from the outset, aimed at directing the policies of the member states towards new objectives and governance modes (Wozniak Boyle 2006). However, every attempt in this direction met strong resistance from national governments. The Commission first responded to this stalemate by involving additional actors (regional authorities and specialised agencies) in policy implementation and by negotiating with governments and agencies on policy objectives and implementation strategies. However, the Commission's influence remained limited until it succeeded in establishing stable institutions for such negotiations.

Thus, with the 'grand' reform of the Structural Funds in 1989, the Commission introduced the so-called system of partnership (Bache 2008: 39-53). A Council regulation defined this partnership as cooperation between the European, the national and the regional government levels in order to achieve common goals. In fact, partnership implied an institutional arrangement for sequenced negotiations among the government levels on the elaboration, adoption and implementation of assistance programmes for less favoured regions. Partnership allowed for regular interactions among the government levels of the EU; it thus created a *vertical nexus* between the formally disconnected government levels and compensated for the lack of hierarchical relationships between them.

Once 'invented', the system of partnership soon expanded within cohesion policy and to other policy domains. Within cohesion policy, several reforms (1994, 2000 and 2007) expanded partnership so as to include a broad spectrum of non-state actors and finally civil society in policymaking, in spite of strong opposition from national governments (Bache 2008). In 2013, another reform made the system of partnership more binding for all actors involved by introducing so-called 'partnership agreements', i.e. contracts between the Union and national governments on policy programmes and implementation.

The system of partnership has been widely transferred to other policy areas and domains. For example, in the framework of the European Neighbourhood Policy, an Eastern as well as a Mediterranean Partnership was set up. Furthermore, partnership constitutes a guiding principle in the Europe 2020 strategy, aimed at a broad set of reforms in the EU (Zeitlin and Vanhercke 2014: 20). More generally, it has become the EU's preferred concept for fostering cooperation among

public and non-state actors and for subduing opposition from national governments to such forms of cooperation.

The rationale underlying the establishment and expansion of the system of partnership is obvious. Through the corresponding interactions, the Commission can put more pressure on member states to adapt to European policy goals and governance approaches. By establishing direct links with sub-national governments and non-state actors, which are in general more receptive to EU interference, it can further expand its influence. Conversely, it can also stimulate the commitment and ownership of public and non-governmental actors in designing and implementing their policies and adapting them to European objectives. Most importantly though, partnership allows for the creation of a *vertical nexus* between government levels and for stimulating *horizontal interactions* among governments of the member states, public and non-state actors, as well as the EU and third states. Partnership thus provides both a procedural avenue and a stable institutional framework for exercising and improving multilevel governance within the EU, and even beyond its borders.

### ***Case 2: Transnational Networks in Competition Policy***

The EU's competition policy was set up with the founding of the Communities as a necessary complement to the creation of a common market (Akman and Kassim 2010). The basic norms regulating this policy were laid down in the ECSC and later the EEC Treaty. As with other policies of the time, hierarchical rule was the dominant form of governance, and the Treaties entitled the Commission to take forceful action in cases of distortion of competition. Such interventions referred to restrictive practices (the formation of cartels), the abuse of a dominant position (monopoly) and (unjustified) state aid (Cini and McGowan 2009).

In spite of these far-reaching powers at the European level, policy implementation advanced subject to delays (Cini and McGowan 2009). The Commission rarely used its competences to impose harsh measures on national governments and private firms. It was only with the completion of the single market in the late 1980s that a broader consensus emerged around a forceful competition policy. However, even this situation did not generally result in straightforward decisions on pending cases; rather, the Commission preferred to negotiate solutions with the addressees and, later, to establish mediation procedures for resolving conflicts (Van Miert 2000; Lehmkuhl 2009). Thus, competition cases were often settled by compromises instead of unilateral decisions. Moreover, implementation remained highly selective as the Commission suffered from an overload of cases. The situation changed only after decentralising powers to the national level and establishing institutions that provided an arena for joint policymaking.

In 2003, a major reform devolved parts of the EU's powers in competition policy back to the national level (McGowan 2005; Wilks 2010). The reform allowed member states to deal with minor competition cases themselves; yet each state had to establish a competition authority in the form of an independent agency. Delegates of these agencies cooperate in transnational networks under the auspices of the Commission. Distinctive networks deal with the major themes of competition policy: cartels, merger control (monopolies) and state aid. The networks serve to discuss problems of unfair competition, exchange experiences and give advice to colleagues who deal with difficult cases. In addition, they elaborate opinions on and proposals for further European policy initiatives or for common strategies and standards to be pursued at the national level. In sum, the networks coordinate national policies horizontally as well as vertically with the (in this case far-reaching and path-setting) policy initiatives and strategies of the Commission.

The rationale underlying the partial decentralisation of a hitherto highly centralised policy lies by no means in weakening the European level; on the contrary, the reform serves to improve the coherence and authority of competition policy (McGowan 2005). Acting through transnational networks under the guidance of the Commission serves to diffuse European policy objectives and governance practices to national authorities and agencies. The rules laid down in the Union's primary and secondary legislation and the long-standing experience of the Commission in competition matters ensure that European policy objectives and practices prevail when solving pending cases and designing new governance approaches. Yet member states' competition authorities also bring in their positions and preferences, so that the networks provide an arena for continuously presenting and balancing differing viewpoints, while unilateral decisions of the Commission become obsolete. Thus, the initial top down approach of competition policy transforms into a more complex model where multiple actors negotiate on appropriate policy solutions and cooperate in order to adapt governance approaches to both the Union's aspirations and the varying national contexts, while still complying with the basic norms and rules set at European level.

Cooperation through transnational networks is widely used in other policy domains as well; the networks may vary from loosely organised forms to firmly institutionalised structures. Transnational networks characterise policy initiatives where the European level has hardly any competences and coordination of national endeavours is the priority, as for example in energy policy or the broad spectrum of projected reforms subsumed first under the Lisbon strategy and currently the Europe 2020 strategy. However, they also characterise well-established policies, where simple hierarchical forms of governance proved ineffective, as the example of competition policy shows. In all these cases, transnational networks function as transmission belts between the government levels and among the member states, in order to elaborate jointly on and transfer policy and governance approaches across the Union.

In sum, transnational networks play an important role as institutionalised avenues to improve European policymaking, either through partly decentralising a formerly highly centralised policy from the European to the national level (competition policy) or by rejoining national policies under a European umbrella (energy policy) or, as is most often the case, through enabling intensive interactions in both directions (Europe 2020 strategy). Although these institutional arrangements are vertically integrated, with the Commission often playing a leading role, their purpose is also to achieve horizontal integration among the institutions of the member states. These arrangements facilitate both the transfer of EU policy and governance approaches to the national level and horizontal policy transfers among the member states.

### ***Case 3: The European Employment Strategy (EES)***

The Commission had long attempted to establish a European employment policy, and it used many straightforward as well as subtle strategies to achieve this goal. Yet the member states successfully resisted any such attempts. Only under pressure of high unemployment rates in the mid-1990s, did they accept a mere coordinative role for the EU in this area. Accordingly, the Union institutionalised a *procedure* for coordinating national policies and ultimately inducing policy change and governance innovations within the member states: the OMC.

The EES is not the exclusive but it is the most paradigmatic case for OMC governance. The Amsterdam Treaty, adopted in 1997, included for the first time an Employment Title which defined a procedure for coordinating the policies of the member states (Art. 125-129 TEC 1997). The procedure later became to be known as the OMC, after the Lisbon European Council in 2000 formally adopted it as a means to reform a broad set of national policies.

According to the Amsterdam Treaty, the EES is organised as a continuous process of policy coordination and close interactions among the government levels of the EU. It encompasses four stages: the European Council starts by drawing conclusions on the employment situation in Europe, and the Council adopts policy guidelines that provide orientation to the policies of the member states. Then the member states draw up National Action Plans (NAPs) that specify their projects and plans in the employment area. After a period of implementation, the member states submit reports on their performance in matching European objectives and fulfilling their plans. Finally, the Commission elaborates a synthesis report and the Council draws conclusions on this report and reformulates the guidelines. Where necessary, it also gives policy recommendations to individual states. This four stage process, involving the European and the national government levels, is accompanied by benchmarking, peer reviews and the exchange of best practice experiences in order to improve its effectiveness (Art. 129 TEC 1997).

Already in 1997, before the Amsterdam Treaty came into force, the Commission embarked on coordinating the employment policies of the member states. After initial experiences with the procedure, the Union enacted several reforms (Armstrong and Kilpatrick 2007). A first, minor reform in 2003 reduced the number of guidelines, but set more quantitative targets; furthermore, it expanded the coordination cycle to two years. A second, major reform in 2005 merged the Employment Strategy with economic surveillance in the framework of the Stability and Growth Pact. Henceforth, an integrated set of guidelines was formulated for both these policies, whereby one third of the guidelines referred to the EES. The NAPs were replaced by National Reform Programmes (NRP) and the coordination cycle was expanded to three years. A third reform in 2010, coinciding with the launch of the Europe 2020 strategy that was to replace the Lisbon strategy, introduced so-called Headline Targets which serve as frames for the member states to set their own targets in their NRPs (Weishaupt and Lack 2011). At the same time, reporting on national policies was integrated into the broader reporting procedures of the European Semester, that is the improved multilateral surveillance system regarding member states' economic policy (Zeitlin and Vanhercke 2014).

Thus, the EES has undergone a series of reforms during a comparatively short period of its existence which brought about major policy shifts. These reforms increasingly sought to accommodate the reluctance of the member states against European interference, by granting them more room to design their own policy concepts and governance approaches. At the same time though, they introduced a variety of mechanisms that make European guidelines and later Headline Targets, as well as country specific recommendations, more obliging, without, however, resorting to binding instruments. The rationale underlying the EES is to stimulate the commitment of national governments in the employment area, to orientate them on innovative governance approaches, and to trigger more convergence among the member states (Zeitlin and Vanhercke 2014).

Whether the Union has achieved the desired impact is still a contested issue; yet it clearly influenced national activities in the field. Thus, Weishaupt and Lack (2011: 33) assume that the OMC process 'has triggered critical reflections of policy, shaped national policy agendas, introduced common focal points such as flexicurity and the New Skills agenda, and – arguably – convergence of policy instruments in the long run can be expected'. Similarly, Zeitlin and Vanhercke (2014) emphasise that the procedures offer ample room for reflexive learning and socialisation processes.

Unsurprisingly, the OMC as a procedure for joint decision-making and policy surveillance has been transferred to a wide variety of policy areas. This ranges from policies where the European level hardly has any competences, such as the strategy against poverty and social exclusion, to well-established policies like cohesion policy. The 2007 reform introduced the OMC procedure in cohesion policy as an additional instrument to define policy targets and to improve the authority of the Union vis-à-vis the member states.

### *The Three Cases in Perspective*

Even though the three cases clearly differ in their dominant governance modes – varying from hierarchy to negotiation and cooperation – they increasingly display common features as a consequence of procedural and institutional innovations. Thus, competition policy was initially characterised by hierarchical governance, typical for the first phase of EU policymaking. In the face of various deadlocks in implementation, the highly centralised policy model was reformed by partially devolving competences to the member states and institutionalising transnational networks for joint decision-making. Cohesion policy reflects the governance modes characterising the second phase, with the European level setting basic rules and member states implementing their own policies. Since the rules were hardly respected, the Union introduced partnership as an institutionalised framework for negotiating on policy concepts and implementation strategies. The EES is a typical product of the fourth phase, when European governance increasingly relied on procedures for coordinating national policies. However, even the EES underwent significant reforms in a short period which further increased member states' discretion within the coordinative framework, yet made compliance with European norms and standards more compelling. Thus, in all cases, procedural and institutional innovations allowed for exercising governance on the governance of the member states. Furthermore, the governance approaches developed or refined in the framework of these cases are most broadly applied in other policy domains. In fact, they permeate the whole spectrum of European policies and thus constitute fundamental building blocks for making the governance of governance work.

In sum, the transformation of governance as described in this section tends to build both a vertical nexus between the government levels of the EU and a horizontal nexus among the member states, either through institutional settings or merely procedural arrangements. This allows for regular and intense interactions among all institutions involved, including non-state actors, and for directing their governance, without, however, violating their autonomy in formal terms.

### **CONCLUSIONS**

Drawing conclusions on the evolution and sophistication of a European system of governance reveals a process marked by a long sequence of searching for appropriate means and ways of political steering. Starting in the 1950s with a concept of hierarchical governance in a few sectors, it soon turned out that this model of political steering suffered from limited effectiveness. The multilevel setting of the EU and the lack of authority of the European level vis-à-vis the member states opened up a wide variety of loopholes for national governments to evade, circumvent or undermine interference 'from above'. Accordingly, further transfers of powers to the European level were limited to market-making policies, where legally binding rules established the framework for competition to work as a governance mode. In all other policy areas, more complex governance modes evolved, which offer to the member states a varying degree of room for manoeuvre for governance and policymaking within a European frame.

In the context of the EU multilevel system, hierarchical governance is reserved to specific policy and issue areas, where a far-reaching consensus among the member states is already achieved. Yet even in these cases legally binding rules do not directly impact on addressees, but set the framework for another, more indirect governance mode, competition, to work via the 'invisible hand' of the market. In all other policy areas, which are much more contested between the European and the national government levels as well as among the member states, governance processes are increasingly organised through procedural and institutional provisions which enable building of the necessary consensus on a case by case basis. Governance processes channelled through such procedural and institutional provisions should not be viewed as 'soft' forms of governance. On the

contrary, since these innovative approaches are firmly embedded in a dense web of legally binding rules, member states are obliged to participate, to cooperate and also to comply with the norms and standards elaborated in this context. The procedural and institutional arrangements intensify communication and interaction among the government levels of the EU and across the member states. They give member states a much more active and prominent role in EU policymaking as well as in the coordination of national policies under a European umbrella. At the same time though, they function as often highly compelling transmission belts for the transfer of the EU's norms, procedural mechanisms and governance practices to the 'lower' levels.

The EU's governance approach of largely formalised procedural avenues and institutional arrangements that involve member states in policymaking is best captured by Kooiman's concept of second order governance. In light of the EU's multilevel system, the Union's activities in second order governance resulted in the establishment of a system of governance of governance. Such a system and the corresponding procedural and institutional provisions serve to compensate for the manifold shortcomings inherent in the multilevel structure of the EU. It reflects the need to balance permanently the contradictory policy objectives, governance modes and implementation strategies of the European and the national government levels, as well as the divergences among the member states.

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1 For the definition of four ideal-types of governance modes – hierarchy, competition, negotiation, cooperation – see Tömmel 2009.

2 For the distinction between market-making and market-correcting policies, see Scharpf 1999.

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Research Article

## Enlargements and Their Impact on EU Governance and Decision-Making

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## Abstract

This article examines the impact of enlargements on EU governance and decision-making, especially legislative decision-making. It is shown that all EU enlargement rounds, other than the first, have served to help improve the EU's decision-making capacities, by promoting treaty and other changes that have made decision-making processes more efficient. The legislative outputs of the decision-making processes have declined in recent years, but this is for reasons other than enlargement.

## Keywords

Enlargements; EU decision-making; EU governance; qualified majority voting

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The EU has been enlarging for over forty years. It has done so via a series of enlargement rounds: the first round (of 1973), the Mediterranean round (of the 1980s), the EFTAn round (of 1995), and the 10 + 2 round (of 2004/07). Only the most recent accession – of Croatia in 2013 – has not clearly been part of an enlargement round, though in time it is likely to come to be seen as the trailblazer of a (very drawn-out) Balkan enlargement round.

Enlargement has thus long featured, as a highly prominent issue, on the EU agenda. This article focuses on the relationships between enlargements and the EU's decision-making processes and capacities, particularly in respect of the making of legislation. By not only increasing the number of member states but also by increasing the diversity of member states, enlargements have inevitably posed major challenges for the EU's legislative decision-making mechanisms. How have they adjusted and responded to these challenges, and what have been the consequences?

Many changes have, of course, been made to the EU's institutional and decision-making arrangements over the years, but they have not all been related to enlargements. The increased policy scope of the EU has been another driving factor. So have growing concerns about the 'democratic deficit', which have led to the EP's powers being progressively increased. In this article attention is restricted to changes that have, in large part at least, been a response to enlargements.

The article is structured as follows. The first section examines the ways in which the EU has prepared for and has adjusted to enlargements. The second section explains how the extent of institutional and decision-making changes has been constrained by a requirement that the EU should not be *too* efficient. The third section analyses the impacts of enlargements on EU decision-making outcomes. The article finishes with some general conclusions.

### PREPARING FOR AND ADJUSTING TO ENLARGEMENTS

The prospect of an enlargement round has always given rise to concerns that accessions will make EU governance, and especially legislative decision-making, more difficult. Such concerns have arisen primarily from the fact that enlargements mean there is the prospect of more national needs and preferences having to be satisfied, or at least accommodated, if agreements are to be reached.

The first enlargement round, of 1973, duly made legislative decision-making more difficult. It did so because it occurred at a time when the EC was: 1) seeking to move into more contentious policy areas – notably in respect of the internal market, where much of the necessary negative integration had been achieved and there was now the challenge of focusing more on positive integration; 2) greatly hampered in its ability to take necessary decisions both by there being only very limited treaty provisions for majority voting and also by the impact of the 1966 Luxembourg Compromise – which combined to result in virtually all significant decisions needing the unanimous approval of all member states. The accessions of Denmark and the UK in particular strengthened decision-making rigidities, with both being generally opposed to policy expansion and both insisting on upholding the Luxembourg Compromise.

So, the addition of three more member states compounded existing decision-making difficulties and helped to produce the infamous years of Eurosclerosis – when decision-making in many policy areas, including the core internal market policy area, virtually ground to a halt to the background of seemingly never-ending disputes between member states over, for example, the product standards to be applied to such goods as chocolate, beer, and lawnmowers.

However, subsequent enlargement rounds have not been so damaging to the EU's ability to make decisions. Indeed, in some respects they have improved the EU's decision-making capacities by encouraging the member states to anticipate and react to enlargements by progressively adjusting institutional and decision-making arrangements so as to ensure that decision-making gridlock does not occur when (the ever-larger number of) member states disagree on a policy matter. As the following sub-sections on changes that have been made in advance of and in adjusting to enlargements show, some of the changes that have been made are formal in nature and have been entrenched in the treaties whilst others have been informal.

### ***An Increased Availability of Qualified Majority Voting***

The founding treaties of the 1950s stipulated that the great majority of decisions requiring Council of Ministers approval must be taken by unanimity. Only very limited provision was made for qualified majority voting (QMV). This meant that the extent and speed of decision-making on most issues could be dictated by the most reluctant member state.

All of the major rounds of treaty reform that have been undertaken since the founding treaties – starting with the 1986 Single European Act (SEA) and continuing through the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, the 2001 Nice Treaty, and the 2007 Lisbon Treaty – have included extensions to the availability of QMV as a core component. The increasing size of the EU's membership has been an important driving force behind these extensions, with it being recognised that more member states necessarily makes decision-making more difficult, especially when decisions can be made only by unanimity.

Such has been the extent of the extensions that have been made over the years to the treaty-based availability of QMV that it can now be used for over 90 per cent of legislation. Unanimity is required only for decisions in a few high-profile and sensitive areas – such as treaty reforms, enlargements, taxation, and foreign and external security policy.

### ***An Increased Willingness to Use Qualified Majority Voting***

Extending the availability of QMV would serve little purpose if there was not also a willingness to use it. Little such willingness existed for the fifteen years or so after the Luxembourg Compromise, except for a limited number of procedural matters and matters where a timetable was pressing. However, a willingness began to develop from the early 1980s – that is, after Greece became a member in 1981 and as the major phase of the Mediterranean enlargement, with the Portuguese and Spanish accessions, moved to its conclusion – and has continued to do so. The strong preference for consensual decision-making remains, but the culture of the Council has changed in such a way as to result in voting no longer being viewed as necessarily needing to be avoided.

Votes are now explicitly used in about 20 per cent of the cases where they could be, and in about another 10 per cent of cases they are implicitly used in the sense that states that are known not to be in favour of a proposal choose not to register a dissenting vote. When there are formal votes, it is unusual for more than a couple of states to abstain or vote against. (There is a considerable academic literature on voting in the Council. See, for example: Golub 2012; Häge and Naurin 2013; Hosli, Mattila & Uriot 2011; Naurin and Wallace 2008; Thomson 2011.)

It might have been expected that the 2004/07 enlargement would have increased the use of voting, bringing in as it did not just many more member states but also member states that in important respects had different policy needs than the EU-15. No such increase has occurred. What has occurred, however, are two significant developments that may be said to amount to an increase in *de facto* voting. First, the shadow of the vote has become increasingly important, with the possibility of a vote being called resulting in member states in a non-blocking minority being more willing to negotiate the best deal they can get rather than be formally outvoted. This is especially so in Council formations that deal with a lot of specific and technical legislation and is less so in formations where legislation is not so common and where much of what there is covers politically sensitive matters (Deloche-Gaudez and Beaudonnet 2011). Second, there has been an increased practice of governments that are opposed to proposals registering their opposition not through casting dissenting votes but through issuing dissenting statements that are attached to the published minutes of Council meetings. This practice enables governments to signal their concerns to other policy actors and domestic audiences, whilst at the same time also enabling them to be seen by the governments of other member states to be abiding by the consensual culture of the Council and as being helpful in difficult circumstances.

A willingness to use QMV has now even spread to the European Council, which was first given the power to use QMV – for the nomination of Commission Presidents-designate – by the Nice Treaty. On the first occasion QMV could have been used for this purpose, in June 2004, the European Council preferred to stay with its traditional consensual decision-making mode, even though there were two candidates who almost certainly would have received qualified majority support had a vote been called. However, in June 2014, when the *Spitzenkandidat* (top candidate) system was employed by the EP to pressure the European Council to accept its nominee, Jean-Claude Juncker, QMV was used – with the UK and Hungary voting against (Nugent and Rhinard 2015).

### ***An Increased Use of Restricted Access Meetings to Facilitate Decision-Making***

The just-described increased availability of and willingness to use QMV in the Council and European Council is a practical reaction to the changed circumstances brought about both by enlargements and by the EU's widening policy portfolio.

Another practical reaction has been increased decision-making activity outside of formal decision-making bodies, usually in restricted access meetings. The situation in Council meetings since the 2004/07 enlargement shows clearly why this has occurred:

- Ministerial level meetings may well have 150 or so member state and institutional representatives in the room at any one time, not counting interpreters. COREPER meetings may have 100 or so and working parties may have around 70.
- In consequence of the number attending, meetings need to be held in cavernous rooms, with microphones necessary and with there being little possibility of much meaningful eye contact between people who are not sitting near to each other.
- Speaking interventions often take the form more of the reading of pre-prepared statements than of real negotiations.
- Ministers, especially senior ministers, have become increasingly reluctant to attend, particularly when there are no key issues on an agenda, and when they do attend they often are not present for the whole meeting.

Given this nature of Council meetings, and with many more allies now being required if qualified majorities on proposals are to be found or are to be denied, much of the political activity that is necessary for decisions to be able to be made takes place on the margins of meetings and in a myriad of pre-meeting informal settings in which representatives of different combinations of member state governments gather on both bilateral and multilateral bases. This pattern even reaches up to European Council level, as the mushrooming in recent years of all sorts of pre-summit meetings – many of which have been focused on the eurozone crisis – illustrates.

Restricted access meetings can allow national representatives to exchange views more frankly and easily than they can when the representatives of all governments are present. As such, they can facilitate decision-making, not least by enabling pre-decisions to be made, especially when representatives of key member states are involved in the meetings.

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In the context of EMU, two particularly important, functionally specific *and formal* restricted access meetings have been established. One of these is the Eurogroup of ministers, which was created in 1998 as an unofficial gathering of Ministers of Finance from eurozone states and which, in recognition of its increasing importance, was given legal status by the Lisbon Treaty. The other is the Euro Summit, which emerged out of the eurozone crisis and which was given formal status by the 2012 Treaty on Stability, Coordination and Governance (TSCG – the so-called Fiscal Pact Treaty, which is an extra-EU treaty). Heads of State or Government of eurozone members may attend all Euro Summits whilst Heads of State or Government of member states that have ratified the TSCG but which are not eurozone members may attend for certain agenda items. As Wessels (2015: 206) has shown, the frequency of Euro Summit meetings depends on ‘the issues at hand and on the overall political context’. So, there were four meetings in each of 2011 and 2012, one in 2013, and none at all in 2014. In 2015, the Greek crisis brought Euro Summits to the very centre of the decision-making stage.

### ***Institutional Changes Designed to Provide Better Leadership***

The EU was long thought to suffer from something of a leadership deficit that was damaging to decision-making efficiency and effectiveness. There was no shortage of policy actors offering leadership in particular contexts and at particular times – with the Commission, the Council

Presidency, and groups of member states (especially France and Germany) much to the fore – but as the EU grew larger and became involved in an ever wider range of policy activities EU political elites began to sense an increasing need for a more focused and consistent leadership that could increase the EU's decision-making capacity.

This felt need, which was intensified from the late 1990s as the prospect of a major enlargement round including ten Central and Eastern European countries (CEECs) grew closer, formed an important part of the background to the decision – first taken at the 2000 Nice summit and then elaborated at the 2001 Laeken summit – to convene a Convention on the Future of Europe, which quickly came to be known as the Constitutional Convention. The Convention laid the bases for the inclusion in the Lisbon Treaty of two new institutional positions designed to give the EU greater leadership potential and strengthen EU decision-making capacity. One of these new positions was the post of semi-permanent and full-time European Council President. The other was the post of High Representative of the Union for Foreign Affairs and Security Policy, which was a considerably revamped and upgraded version of the post of High Representative for the Common Foreign and Security Policy which had been established by the Amsterdam Treaty.

Another, and related, recent efficiency-minded institutional change intended to improve leadership has been a reform of the Council Presidency system. The Council Presidency used to rotate between the member states on a six-month basis, but following the 2004 enlargement it was decided to arrange it in groupings of three states. This change – which grew out of a long-standing practice of preceding, current and succeeding Presidencies working closely with one another in a system known as the troika – was taken partly to assist (the now much larger number of) small member states with the heavy duties associated with the Presidency and partly to try and improve continuity and enhance consistency between Presidencies. The new system was formalised and strengthened in a Declaration annexed to the Treaty of Lisbon, which stated that the Presidency would now 'be held by pre-established groups of three Member States for a period of 18 months'. In practice, this change is not seen by EU practitioners to have had much of an impact (interviews conducted in Brussels).

### *Increasing Numbers of Decision-Making Processes*

When the EC was established in the 1950s a fairly simple and hierarchically-based decision-making system was created in the form of the Community method (Dehousse 2011; Buonanno and Nugent 2013). However, as Ingeborg Tömmel demonstrates in her article in this special issue, as the EC attempted to move into an increasing number of policy areas and as it also enlarged, the Community method proved to be too rigid and inflexible for types of policy development that touched on particularly sensitive issues or on matters that sharply divided the member states. Accordingly, since the late 1960s, when foreign policy began to be developed, and more particularly since the early 1990s, when pressures to expand greatly the range of the policy portfolio intensified, increasing use has been made of a variety of non-hierarchical policy approaches that employ an array of indirect steering mechanisms. The use of these approaches, which are essentially intergovernmentally-based, has resulted in a mushrooming of decision-making processes that are more flexible and less constraining than the classic Community method. Foremost amongst these newer decision-making processes are various forms of the new modes of governance (NMG), and especially the open method of coordination (OMC), which have come to be used for a wide range of social and economic policies – many of them as part of the Lisbon Strategy/Europe 2020 policy programme (Büchs 2007; Copeland and Papadimitriou 2012; Héritier and Rhodes 2011).

So, an increase in the number of policy processes to accommodate differing national positions has been another way of dealing with the challenge of ensuring that the growing number of member states brought about by enlargements has not resulted in decision-making impasses. Precisely how large the number of increased policy processes has been obviously depends on the criteria that are used for counting them. A figure of well over 100 formal decision-making processes can be identified if account is taken of what may be thought of as important but not necessarily 'first rank' variations – with the former including, for example, whether or not the European Economic and Social Committee and the Committee of the Regions must be consulted on a policy proposal. If attention is narrowed to first rank variations the figure naturally drops, but it remains, by comparison with decision-making processes in national political systems, still very high. An indication of this is seen in the figure given by the Constitutional Convention, which identified no fewer than 28 significantly different procedures (Buonanno and Nugent 2013: 83).

### ***Increasing Differentiation***

A central assumption when the EC was founded was that all member states should and would fully participate in all policies (see Eckert, Maas, Tömmel this issue). There was to be no picking and choosing of which policies to participate in and there were to be no laggards in honouring policy commitments. In short, all member states were to swim abreast in policy terms.

For the most part, this expectation and accompanying obligation continues. However, it does not do so in pristine form. This is because since the late 1970s, and more particularly since the early 1990s, there has been an increasing acceptance in EU circles that there are circumstances in which some member states will not, and sometimes even should not, be full participants in particular policies. To use the term that has come to be generally utilised for describing this phenomenon, the need for some policy *differentiation* has come to be accepted (Leuffen, Rittberger & Schimmelfennig 2013).

Differentiation is the starkest way in which the EU has responded to the situation brought about by enlargements whereby its membership has come to include states that either have no wish, or do not have the capacity, to be part of particular policy initiatives and activities. This heterogeneity of membership has resulted in the development of policy areas where one or more member states do not participate, do not fully participate, or participate in distinctive ways. It is very striking in the context of an analysis of the impact of enlargement on EU governance and decision-making that none of the founding member states has sought to use differentiation to opt out, even partially, of a major EU policy activity, whilst two of the three states of the first enlargement round (Denmark and the UK) have been differentiation's most active users.

There are different types of differentiation, some of which are formal and some of which are informal.

### ***Formal Differentiation***

Formal differentiation consists of two main types: *à la carte* and *multi-speed*.

*À la carte differentiation* is the more important type in that it involves member states choosing not to participate in a policy or part of a policy. The European Monetary System, which was developed from the late 1970s with the UK not participating, was the first instance of such differentiation. It was followed in the mid-1980s by the Schengen System, from which the UK and Ireland opted out. *À la carte* differentiation was then given a considerable boost when the Maastricht Treaty gave it

formal authorisation. The authorisation was very specific, taking the form of permitting the UK and Denmark not to participate in the third stage of EMU and allowing also the UK to opt out of the Social Charter. Along with the Treaty's creation of the intergovernmental CFSP (Common Foreign and Security Policy) and JHA (Justice and Home Affairs) pillars, these opt-out provisions can be seen as laying foundations for a less rigid treaty base for policy development. As Majone (2005: 15) has put it:

It is now clear... that the differentiation or flexibility that appeared in several forms in the TEU was no momentary aberration – a sort of *à la carte* integration – but the clear indication of an emergent strategy for achieving progress in politically sensitive areas, even at the price of a loss of overall coherence of the system.

The Amsterdam Treaty widened the Maastricht 'dispensations' by providing for 'Provisions on Closer Cooperation' in the Community and JHA pillars. This authorised policy development within the treaty framework but with not all member states involved, subject to a number of safeguards and conditions – including that such cooperation be open to all member states, 'is only used as a last resort', and 'does not affect the "*acquis communautaire*"' (TEU post-Amsterdam Treaty, Article 43). The Amsterdam Treaty did not extend closer cooperation to the CFSP, but did allow for a different kind of flexibility within this policy area in that it allowed for member states not to apply CFSP decisions under specified circumstances. The Nice Treaty subsequently extended the remit of closer cooperation – which it renamed enhanced cooperation – to the CFSP pillar (but with military and defence matters excluded), and made it easier to operationalise by replacing the Amsterdam stipulation that a majority of member states must be involved in a closer cooperation initiative by a stipulation that only eight (increased to nine when Bulgaria and Romania joined the EU in 2007) must be so. The Lisbon Treaty largely confirmed the post-Nice position, but dropped the military and defence policy exclusion.

The perceived divisive nature of enhanced cooperation is an important reason why it was initially not used. However, it has gradually come to be seen as being more acceptable and is now occasionally being utilised, such as for the establishment of a European patent – from which Italy and Spain opted out because of objections to the limited use of languages in the operation of the scheme. It may in time prove to be very significant for the use of enhanced cooperation that at the time of writing several member state governments are supporting its use in one of the most sensitive policy areas of all: taxation. More particularly, some governments (the exact number keeps varying, but hovers around 11) are seeking to use enhanced cooperation for the creation of an EU financial transactions tax.

The other main type of formal differentiation is *multi-speed differentiation*, which occurs when a member state or states wish to participate in a policy but judge themselves, or are judged by others in authority, to be not yet sufficiently prepared or able to do so. The first clear example of multi-speed differentiation occurred with the launch of the single currency phase of EMU in 1999, when Greece was excluded (although only until 2001 as it turned out) because the Commission, supported by the Council of Ministers, decided that it did not meet the qualifying convergence criteria. The 2004-07 enlargements then saw multi-speed differentiation on a mass scale, with the new member states all initially being prevented by their terms of accession from becoming EMU or Schengen members until they had established their credentials for membership. (Seven of the ten 2004 acceding states have since become eurozone members – the Czech Republic, Hungary and Poland are the exceptions – whilst nine of them have been admitted into the Schengen Area – with Cyprus being the exception.)

### ***Informal Differentiation***

The word 'differentiation' is usually applied only to the formal à la carte and multi-speed processes of the kind that have just been described. However, as Andersen and Sitter (2006) have argued, there is a strong case for applying it more widely because opting out or exclusion from a policy area are not the only ways in which there is variation between member states in their policy engagement. There are other ways, of which an especially important one is when what Andersen and Sitter call 'autonomous integration' exists. This occurs when weak demands for single organisational and behavioural patterns at EU level combine with strong national level pressures for the maintenance of established national practices. Situations of this sort are particularly common in some of the more sensitive economic and social policy spheres, including those covering industry, employment, and social welfare. In such circumstances, one of two types of policy instrument is commonly used. The first type involves EU laws, usually in the form of directives, which allow considerable flexibility in national transposition and application. A particularly graphic example of such a law is a directive that was agreed in March 2015 – after years of highly-charged political conflict – on the use of genetically-modified crops (GMOs) in the EU (*Official Journal* 2015). Under the directive, EU member states are, subject to some restrictions, able to restrict or ban the cultivation of GMOs in their territory, but are not able to block the authorisation process at EU level. The second type of policy instrument involves non-legal mechanisms such as communications, recommendations, and resolutions. Member states may be strongly pressured to abide by the requirements of the contents of such policy instruments, but the instruments themselves have no binding force behind them. This is one of the main criticisms of the OMC, which relies heavily on soft law instruments.

But whether or not legal instruments are used, autonomous integration involves member states being accorded considerable flexibility in the ways in which they apply decisions. Naturally, where this flexibility exists, the need for member states to oppose the taking of the relevant authorising decisions is weakened: which is precisely why the above-mentioned GMO directive was able to be (eventually) passed.

### **CONSTRAINTS ON BEING TOO EFFICIENT**

The EU has thus adjusted itself in many ways so as to ensure that enlargements have not resulted in its decision-making capacities grinding to a halt. But, it has always been restricted in how far it has been able to go in making such adjustments. Two, in practice overlapping, constraints have existed, both of which are found – to differing degrees and in varying forms – in all federal and quasi-federal systems.

#### ***A Reluctance and Unwillingness to Maximise the Efficiency of EU Decision-Making Processes***

There has been a reluctance of some member states and an unwillingness of others to go as far in pursuing decision-making efficiency as 'advanced integrationists' have wished. (In democratic systems, efficient decision-making may be said to consist of decisions being able to be made relatively quickly by a restricted number of policy actors operating on largely majoritarian bases.) States that are not in the 'integration fast stream', and especially states where eurosceptic tendencies are pronounced, are not naturally predisposed to support more 'efficient' EU decision-making processes and the loss of national control that is entailed unless clear national benefits will result.

The UK, with its concerns about the preservation of national sovereignty, has long been the most 'problematic' state in this regard (though, in a notable exception to the customary UK position, Mrs Thatcher actively supported the use of QMV for the passage of legislative measures to give effect to the Commission's programme of 'completing' the internal market by 1992). But, the UK has not been alone in wanting a slower integrationist pace than 'fast integration' states such as Belgium, Italy and Luxembourg normally have preferred. Denmark, Sweden and more recently the Czech Republic, Hungary and Poland have, for example, also been in the 'slow integration stream' on particular issues. Sometimes, even states normally associated with strong integrationist positions have adopted cautious stances towards 'efficiency reforms'. Such was the case, for example, with Germany in the Intergovernmental Conference (IGC) that produced the Amsterdam Treaty, when domestic political difficulties resulted in Chancellor Kohl being unwilling to agree to all of the extensions to QMV most other states either wanted or were prepared to accept.

A point meriting note here is that prior to the 2004/07 enlargements it was widely assumed, especially by those in the 'intergovernmental school' of EU Studies, that the new Central and Eastern member states would be particularly sensitive to sovereignty-related issues and hence would be less-integrated minded than most existing member states. In practice, as a group they have not proved to be so.

### ***The Need to Retain the Confidence of All Member States in Decision-Making Processes***

Like all federal and federal-like systems, the EU must retain the confidence of its constituent units (the member states). It cannot be too majoritarian in its governance arrangements. It is a voluntary organisation, so retaining the confidence of members is vital. If member states were to feel their needs and preferences were not being reasonably accommodated within decision-making settings they could become highly disruptive members (as the UK has been at various times) and could even come to question the value of membership.

The EU, therefore, has always had to balance the need for decision-making efficiency with the potentially conflicting need of ensuring that all member states feel they have a fair involvement in decision-making processes. Accordingly, several 'inefficient' features of decision-making processes are deliberately 'built in' to reassure member states – especially eurosceptic-leaning and smaller member states – that their policy needs and preferences will be both heard and will not be, and indeed cannot be, easily ignored or by-passed. The most notable of these 'inefficient' features include the (over) large sizes of the College of Commissioners and the EP, and the continued use of decision-making by unanimity in the European Council for *virtually all* decisions and in the Council for *some important* decisions.

### **THE IMPACT OF ENLARGEMENTS ON DECISION-MAKING OUTCOMES**

So, over the years the EU has made various changes and adjustments to its decision-making structures and processes that, in large part, have been designed to enable it to adapt to enlargements. But it has also retained features of its original structures and processes – such as one Commissioner for each member state and the unanimity requirement in the Council for a few highly sensitive policy areas – that may be viewed as making for decision-making inefficiencies. What does the evidence indicate with regard to where, in practice, the balance lies between decision-making efficiency and inefficiency?

### *The Volume of Decisional Outputs*

It is easy to make a case that notwithstanding the ‘improvements’ that have been made to EU decision-making processes, EU decisional outputs are less than satisfactory. Too many policy areas can be portrayed as being not sufficiently developed, whilst too many of those that are developed can be presented as being based not on clear and strong policy decisions but rather on decisions that are rooted in compromises in which there is something for everyone.

However, the critique should not be overdone, for there clearly have been very considerable EU-level policy and legislative achievements over the years. To cite just a few of the EU’s most important policy advances since the 1995 enlargement: EMU and the single currency have been established and operated; the internal market has continued to deepen on many fronts, with significant legislation having been passed in such key areas as the liberalisation of network industries, the opening-up of services, and protections for consumers; justice and home affairs policy has mushroomed, with many measures adopted – on matters including visas, management of external borders, and police and judicial cooperation – in pursuit of the goal of creating an ‘area of freedom, security and justice’; and the foreign and external security policies have both greatly advanced, to the point that the EU now has launched over 30 civilian/police/military operations – something that was almost unimaginable until relatively recently.

This success of EU policy and legislative processes since the 1995 enlargement can be judged not only in qualitative terms but also in quantitative terms, with the EU having continued to produce a very considerable volume and a wide range of policy and legislative outputs each year. Focusing here just on legislative outputs, Hix (2008), König, Luertgert & Dannwolf (2006) and others have indicated that the volume of legislation in the early 2000s was lower than it was in the first half of the 1990s. But, this depends on what is counted, for the total number of ‘basic’ legislative acts (that is, excluding ‘amending’ acts) actually rose: from a total of 1500-2000 per year in the first half of the 1990s to 2500-3000 in the first half of the 2000s. If directives, which are usually the most important legislative acts, only are counted, there is indeed a decline, but it is only slight – from 40-60 in the first half of the 1990s to 35-45 in the first half of the 2000s (EUR-Lex 1990-2005). So, the figures show no sign of the 1995 EFTAn enlargement having greatly diminished the EU’s decision-making capacity.

The EUR-Lex figures for the years immediately after the 2004 enlargement show the total number of basic acts per year falling back to between 1500-2200, but the number of directives held steady – albeit within a wider band of between 16 (2007) to 76 (2009). A number of academic studies – usually using narrower tabulation criteria than EUR-Lex and employing variable measuring techniques – have also shown no significant reduction in the total number of acts being adopted in the early years following the 2004 enlargement (see, for example Best and Settembri 2008a; Hagemann and De Clerk-Sachsse 2007). Taking figures compiled by Best and Settembri (2008b), comparing two twelve month periods before and after the 2004 enlargement, a total of 479 acts were adopted under the Greek and Italian Presidencies in 2003 whilst 455 were adopted under the British and Austrian presidencies in the second half of 2005 and the first half of 2006. However, whilst Best and Settembri’s figures indicate no significant decline in the total volume of EU acts, they do show a decline in the proportion that are legislative acts: from 56 per cent to 49 per cent, thus confirming the more widely-observed feature of EU policy and decision-making processes of a decline in the use of the Community method to make legislation and an increase in the use of other methods to produce non-legislative outputs.

So, the last two enlargement rounds have not resulted in a significant overall decline in the volume of EU legislative activity. Moreover, in so far as there has been a marginal decline in legislative outputs since the early 1990s, it is not accounted for by enlargements. Focusing on directives, a

number of – in practice overlapping – reasons can be identified for the decline. One is that the particular circumstances of the late 1980s and early 1990s, when the EU was very much in policy expansionist mode and required a very high volume of legislation – not least in regard to ‘completing the internal market’ – no longer apply. A second reason is that, as Hix (2008) has emphasised, the nature of the policy agenda has shifted in the direction of more contested and divisive issues. There used to be a broad consensus amongst policy actors about the principle of creating the internal market, but once the essential foundations of the market were largely in place and the political debate moved onto the extent to which and the ways in which the market should be social or economically liberal in character, consensus became less easy to find and decisions became harder to make. A third reason is that since the early 1990s it has become logistically more difficult for the Commission to bring forward legislative proposals. It must, for example, now produce impact assessments for any new legislation of significance and it must be able to justify new legislative proposals in terms of the principles of subsidiarity (EU actions must be more likely to advance policy goals than national actions) and proportionality (EU actions must not exceed what is necessary to achieve the objectives of the treaties). The working assumption has thus become that new EU-level legislative activity must be seen to be ‘fully justified’ – which, inevitably, has made the Commission more cautious about bringing forward legislative proposals. A fourth reason is that as the EU has moved into more difficult and sensitive policy areas – of both a socio-economic nature, such as Lisbon Strategy/Europe 2020-related policies, and of a non-economic nature, such as security-related policies – then so has much of its policy-making activity become focused on using non-legislative policy instruments. In such policy areas the member states often accept that there is a need for EU policy activity but are not necessarily persuaded that this need always take the form of enacting binding legislation.

A fifth reason, which had been ‘lurking’ for some time but that has been greatly boosted by the rising tide of euroscepticism that has accompanied the post 2008-economic and eurozone crises, is widely-felt concerns that the EU has not sufficiently prioritised the core policy challenges facing the Union. Such concerns have led to various initiatives over the years – initially under the general heading *Better Lawmaking* and more recently *Better Regulation* – which have included drives for more focused and more effective legislation, and also only for legislation that is absolutely necessary. This latter drive ‘took off’ in 2012 and has continued to date: only 11 new directives were passed in 2012 and only 14 in 2013 (EUR-Lex 2012 and 2013). The figure of 53 directives in 2014 might at first sight appear to indicate that the drive came to a halt, but 2014 was untypical as it included the last few months of the 2009-14 Parliament, which like previous outgoing Parliaments used its dying days to push through unfinished business. The drive was returned to after the 2014 EP elections, with the incoming Juncker Commission proposing in its 2015 Work Programme only 23 ‘new initiatives’, of which just fourteen were anticipated as being at least partly legislative in character (European Commission 2014, Annex I).

### *The Speed of Decisional Outputs*

EU policy processes are subject to great variations in terms of how quickly they proceed. Whereas at the national level a government with a working majority in the legislature can normally be confident of making reasonably rapid progress with a policy initiative, at the EU level no such assumption can be made – especially if the policy issue in question is controversial and/or is strongly contested.

Examples of very slow, and in some cases no, decision-making in seemingly important policy areas are not difficult to find. Corporate taxation policy is an example of the latter, with the Commission having first made the case for some harmonisation of corporate tax rates and shifting responsibility for corporate taxes from the national to the European level as long ago as the early 1960s – a decade

before the first enlargement. But, nothing much beyond the loose 1997 voluntary Tax Code and legislative instruments to deal with specific tax problems, such as double taxation, have been achieved. In consequence, the Commission's attention has increasingly turned more to the need for a common corporate tax base, but this idea has also met with stiff resistance from some member states.

An example of very slow decision-making is provided by the EP and Council regulation on The Registration, Evaluation, Authorisation and Restrictions of Chemicals (REACH). Proposed by the Commission in October 2003 – for the purpose of reducing health risks and protecting the environment through the required registration and authorisation over an eleven-year period of some 30,000 substances – the Regulation was not passed until December 2006, by which time its contents had been much diluted. The protraction of the policy process was occasioned by the complexity of the legislation (it was some 1,000 pages in length!) and by fierce disagreements in and between the Council and EP – that were partly fuelled by intense lobbying from environmental and business interests – about where the balance should lie between environmental protection on the one hand and competitiveness on the other.

However, slow though EU policy processes can be, they are not necessarily so. Several factors can make for a relatively speedy legislative process. The extent to which a proposal is or is not controversial is, of course, one factor. Another is the availability of QMV in the Council. And a third factor is the applicable legislative process, with measures that are subject to the one-stage consultation procedure naturally tending to proceed more quickly than those that are subject to the potentially three-stage ordinary procedure.

It was noted above that the 2004-07 enlargement has not in itself reduced the volume of policy outputs. The evidence in regards to whether it has reduced decision-making speeds is not wholly consistent. Two major research studies of the early post-enlargement years showed that decision-making speeds did slow, albeit only relatively marginally, as a result of the enlargement (König 2007; Hertz and Leuffen 2011), but two other studies detected no such decreases (Golub 2007; Best and Settembri 2008a and b). The explanation for the contrasting findings of the studies lies in a mixture of differences in the methodology used and differences also in the decisions being studied.

Yet, however one evaluates the empirical evidence, it is clear that, notwithstanding the increased transaction costs involved, the 2004-07 enlargement round has not *significantly* slowed the speed of EU decision-making. There appear to be three main reasons for this. The first reason is that policy actors from the 2004-07 member states rapidly adapted to the EU's prevailing decision-making norms and mores, and particularly to coalition dynamics. So, representatives from the new member states quickly came to recognise, as much as representatives from EU-15 states have long done, the importance of coalition formation and of not being isolated in the Council. The second reason is that the pre-2004 trends of increasingly using explicit and implicit QMV and settling matters as early as possible (notably by reaching agreements at first reading under the ordinary legislative procedure), both of which quicken decision-making, have continued. The third reason is that the enlargement round further stimulated the already developing movement away from the use of tight legislation towards the use of policy instruments that give more room for adjustments to suit local circumstances. This is most obviously the case with the increasing use of non-legislative instruments, but even where legislative instruments are used they are often now looser and more flexible in form than they formerly were. As such, they are more likely to be politically acceptable.

What then are decision-making speeds? Taking legislative proposals that are subject to the ordinary procedure, during the 2009-14 Parliament the average period from the Commission issuing a proposal to it being finally adopted was 19 months (European Parliament 2014: 10). Since the 19 months is an average, much legislation naturally passes at a faster speed. So, legislation that is

agreed at first reading – which now constitutes over 85 per cent of concluded ordinary procedures – averages 17 months (ibid). Best and Settembri (2008b) calculate that what they categorise as ‘major’ legislative acts take, on average, almost 900 days from the initial reference from the Commission to the Council and EP to adoption, while ‘ordinary’ acts take almost 400 days and ‘minor’ acts take just over 200 days. These timescales are longer than is common in national legislatures, but given the enormous diversity of interests and the large number of actors that are involved in EU decision-making processes they are not as protracted as perhaps might be anticipated. That said, the figures just given do not, of course, allow for acts that the Commission would like to have proposed but did not do so because it knew that they had no chance of attracting the required support.

## CONCLUSIONS

The EU has adjusted its decision-making arrangements over the years so as to ensure that as the number of member states has increased so has the sometimes predicted decision-making paralysis been avoided. In addition to formal changes that have been made to decision-making processes, attitudinal changes amongst decision-makers have also been important, with it having become increasingly recognised and accepted that – in an EU with now so many member states and so many areas of policy involvement – decision-making flexibility is vital if the EU is to be able to function in a reasonably efficient manner.

The combined effect of the changes has been to ensure that legislative processes have continued to be reasonably efficient, both in terms of the volume and speeds of outputs. Where the changes have impacted most has been on the organisational nature of the EU itself. This is most obviously seen with differentiation, which is both making the EU a more internally varied organisation and is altering what it means to be an EU member state. The increasing use of differentiation is usually presented by supporters of the European integration process as being regrettable because it loosens the nature of the EU, but it is also highly functional in that it enables integration to proceed.

Like most of the other changes to decision-making processes that have been noted in this article, differentiation has been introduced and developed in a pragmatic and adaptive way rather than being laid down at a distinct moment as part of an intended transformation of the EU system. But, the shifts in the nature of governance that the changes have brought about may certainly be thought of as amounting to a de facto transformation.

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Research Article

## Good Governance and Institutional Change: Administrative Ethics Reform in the European Commission

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## Abstract

The European Union institutions have always taken an interest in their own internal governance. In the 1990s, this interest began to be characterised by a greater reflexivity, increasingly allied to the concept of 'good governance'. One example of this was in the field of public ethics where the European Commission came to recognise the importance of establishing structures and policies to govern the conduct of public servants (whether MEPs, Commissioners or EU officials). Drawing on historical institutionalism, this article considers the emergence and evolution of the Commission's public ethics system after 1999. The article distinguishes between the formative and post-formative stage in the system's emergence and evolution, arguing that in both periods, structural factors and agency, both externally and internally, were important in explaining institutional change. What was especially important in the formative period, however, was the intensity of the primary external driver of change, which in the case of the European Commission was the scandal over unethical conduct and mismanagement which hit the institution in 1998-9.

## Keywords

Good governance; Ethics; European Commission; Administrative reform; Institutional change

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For six decades, scholars have attempted to map and explain the evolution of the European integration process. Much of the focus of this research in recent decades has taken as its starting point the emergence of a system of European governance, which Tömmel (in this volume) has identified as comprising four phases. The concomitant 'governance turn' in the academic literature, which emerged in the 1980s, has dissected this evolution, making a major contribution to the study of European Union (EU) politics and policy-making. At the same time, it has also allowed researchers to reflect at length on the distinctive characteristics of EU governance.

While debates on modes of EU governance, the particularities of European policy regimes, the role of expertise, and the challenges involved in addressing the EU's democratic deficit have dominated the governance agenda, a less developed strand of governance research has emerged on 'good governance' or the 'quality of governance' (Huberts 2014). Good governance tends to rest on a set of rather abstract but worthy principles such as reliability, transparency, impartiality and honesty. These principles carry within them normative assumptions about what constitutes the 'good' in good governance. Administrative reforms are often concerned therefore with translating general principles into workable aspects of public policies or the governing systems that underpin them (see, for example, Huberts 2014). Public ethics is one such area of activity, and is the focus of this article.

'Ethics' in this context refers not only to the standards and principles that shape the behaviour of individuals and groups, but also to the institutional rules that allow these principles to be translated into practice. It is situational and concerned with role morality rather than universal values (Năstase 2013). *Public* ethics involves the application of these standards and principles to politicians, office-holders and civil servants through the establishment of ethics systems. In this article the focus is on an administrative ethics system. Since the 1990s, many public organisations in Europe have begun to develop such systems. They have done this by adopting ethical principles, ethics rules or codes of conduct, by introducing ethics training and by requiring staff to complete declarations listing their financial and other interests. Ethics systems comprise therefore the universe of structures, policies

and rules, underpinned by explicit principles and standards, designed to improve the conduct of individuals and groups as they perform their specific roles and to contribute to the quality of governance.

This article focuses on public ethics in the European Commission. It examines the gradual process by which the ethics system emerged and evolved during two distinctive periods, 1999-2004 and 2005-2011. The focus on public ethics is justified given the limited research conducted on this issue in the context of the EU institutions and the sensitive and contested nature of ethics reforms, which offer a fertile testing ground for research on the drivers of institutional change.

The article argues that in both the formative and post-formative periods institutional change was driven by structural factors and reform agents, both external and internal to the Commission. What distinguished the formative period, however, was the *intensity* of the primary external driver of change, which in the case of the European Commission was the scandal over unethical conduct and mismanagement which hit the institution in 1998-9. Thus, the article argues that to understand institutional change it is important not only to identify which factors are important, but also the qualities embodied in those factors. This argument draws from a body of research on institutional change that has emerged out of earlier work on historical institutionalism (for example, Mahoney and Thelen 2010; Pierson 2004; Rittberger 2003). It adds to this literature by highlighting the importance of the intensity of external drivers at the formative stage, while rejecting the assumption made in early institutionalist research that the drivers of change differ substantially at the formative and post-formative stages of institutional change.

The article also draws on a broader literature on administrative ethics (for example, Cooper 2001; Huberts, Maesschalk and Jurkiewicz 2008; Lawton 1998) as well as on the few studies that address the EU institutions (such as Cini 2007; Dercks 2001; Hine and McMahon 2004; Năstase 2013). Both Năstase (2013) and Cini (2014) have applied institutionalist approaches to earlier studies of public ethics in the European Commission. This article complements these studies, by offering new empirical material, and further developing the application of institutional theory by focusing attention on the drivers of institutional change. The empirical sections of the article are drawn from primary documents and from interviews which the author conducted in the European Commission in 2006 and 2011.

The article begins by explaining the concept of institutional change which is found in the relevant theoretical literature on historical institutionalism, and by identifying a simple framework which guides the empirical sections below. By way of contextualising the research, it then discusses the origins and content of the 'good governance turn' of the 1990s and 2000s, focusing particularly on the European Commission. The third section then provides a more detailed empirical/narrative account of this 'turn' by examining formative change in the shape of the establishment of an ethics system for EU officials after 1999. The fourth section adopts the same approach for the post-formative change after 2005, after which a concluding section draws out the argument.

## **HISTORICAL INSTITUTIONALISM AND INSTITUTIONAL CHANGE**

The theoretical aim of this article is to explain which drivers are important in accounting for institutional change (see also, in this issue, Eckert, Maas and Stephenson). Institutional change is defined here as a broad church encompassing the establishment of institutions (formative institutional change or simply formative change), and the reconfiguration of existing institutions (post-formative institutional change or post-formative change). A third category, incremental institutional change, which is a more gradualist process of change, is not discussed in this article. Institutional change has been a difficult subject for new institutionalists. It is especially problematic

for rational choice and sociological (or normative) institutionalism as these approaches rest on equilibrium assumptions. Historical institutionalism has shown more promise. It emphasises the importance of either grand institution-forming ruptures or relatively incremental path dependent trajectories. In the case of the latter, an internal dynamic drives institutional development; whilst for the former, institutional change is driven primarily by external (exogenous) shocks which force breaks with past practice. This usually involves a de-legitimisation of earlier institutional arrangements and the forging of a critical juncture which opens a window of opportunity for reform agents to promote new institutional arrangements (Thelen, Steinmo and Longstreth 1992).

A new wave of institutionalism reflects dissatisfaction with early historical institutionalist accounts of institutional change, however. Thus, alternative explanations now draw attention to a broader range of factors that might explain institutional change. Mahoney and Thelen's (2010) work, for example, points to a variety of processes at work, including what they term as 'layering' and 'exhaustion'. Others demonstrate how 'change agency' or 'institutional entrepreneurship' (Levy and Scully 2007; Mahoney & Thelen 2010: 22-27; Rao, Morrill and Zald 2000: 240) have been underplayed in historical institutional accounts of institutional change.

The main fault lines in identifying the drivers of institutional change revolve around the structure/agency and internal/external dichotomies. This rather simplistic distinction is used as a basic heuristic framework for this article, notwithstanding that institutional change is most likely a complex phenomenon and its origins multi-causal.

*Figure 1: Drivers of Institutional Change*

	External	Internal
Structure	A	B
Agency	C	D

Figure 1 presents the four potential drivers examined in this article. In this schema, external drivers include the kind of shocks that result from scandal and intense media attention (A), but also include external institutional pressure from individual or collective actors (C). Internal drivers, for the purposes of this article, are factors that are internal to the organisation within which the institution (policy, system or regime) is located. They might include the actions of reform agents (D), or a path dependent logic that results from the sunk costs associated with existing institutional practices (C). Structural factors are rules, institutions, practices and cultures; while agency is an attribute of individual or collective actors, and concerns their capacity to act (independently).

## THE EU 'GOOD GOVERNANCE TURN' IN CONTEXT

For much of its history, the Commission was distinguished by its technocratic approach to governance, which can be traced back to Jean Monnet's administrative organisation in the 1950s (Fransen 1999; Radaelli 1999: 31). This reflected the early bias of Community policy towards regulation. However, Monnet's model failed to gain the acceptance of the Community member states (Duchene 1994: 214; Monnet 1978: 245) and by the time the EEC was established in 1958 there was little expectation that the EU Administration would take anything other than a bureaucratic form. Yet the kind of bureaucracy the Commission became was still one imbued with a particular technocratic ideology and practice (Radaelli 1999: 194), one which emphasised the importance of efficiency, expertise, elites and functional interest intermediation, and which had little to say about democratic accountability, openness and representation.

It was not until the early 1990s that the Commission began to come to terms with the disaffection many ordinary citizens in Europe were feeling towards the European integration project (see van der Veen, this issue). A change in the discourse emerged, gradually followed by some alteration, albeit limited, to Commission practice. Institutional rigidities formed barriers to fundamental change however (Haines 2003-4). The Commission was not only set in its ways structurally and procedurally, but it also suffered from an organisational culture that was extremely resistant to change (for example, Abélès, Bellier & McDonald 1993; Bellier 1995).

This did not necessarily stop the Commission from proposing initiatives to improve the quality of EU governance, however. Indeed, by 2000, European governance comprised one of its four strategic objectives. This led to the publication in 2001 of the White Paper on European Governance (European Commission 2001). Its objective was to bring the EU closer to its citizens by improving the effectiveness and democratic legitimacy of EU policy and policy-making. The White Paper identified five principles of good governance – openness, participation, accountability, effectiveness and coherence (European Commission 2001: 10). It sought to encourage closer relations with both local and regional actors and with civil society organisations in the design and implementation of European policy, and to promote improvements in the quality of European legislation. The approach emphasised the importance of inputs into the policy process, particularly in the form of enhancing participation (Börzel, Pamuk & Stahn 2008: 21).

The agenda promoted by the Commission included a permanent dialogue with civil society and the introduction of a new European Citizens' Initiative, which for the first time allowed citizens (backed by one million signatures) to propose legislation in an area in which the EU had competence. It involved a communications policy which set a new tone as it was designed with the aim of listening and explaining better. The agenda also supported initiatives of longer standing which included the promotion of subsidiarity to strengthen the role of regional and local actors in EU policy-making, and the extension of the powers of the European Parliament which allowed representative democracy to continue to evolve in parallel with the new focus on participatory democracy (European Commission 2001).

While it took the lead in promoting these good governance initiatives, the Commission was also still seen as part of the problem. Composed of two distinct component parts, the administrative services and the political executive (Cram 1999), the Commission's functions reflect the tension between these two elements. The explicitly political functions of the Commission have generally been held in higher esteem than the Commission's administrative functions. At the same time, the institution prided itself on performing its policy tasks exceptionally well, seeing no incentive in addressing the more mundane administrative and management problems which had been identified in reports as far back as the 1960s. Yet management problems affected the quality of policy implementation, an important aspect of good governance. With success judged more in terms of legislative output than on whether the objective of the legislation was ultimately achieved, the flipside of the Commission's prioritisation of policy-making became its 'management deficit' (Metcalfe 1996). It was only after 1999 that this issue began to be addressed through a major reform of the Commission (2000-2004). The reform emphasised the importance of *throughputs* within the governance process and directed attention to how the Commission's own internal systems and the conduct of its staff might improve, as a core element in the promotion of good governance. One way in which this was translated into concrete policy was through the introduction of a new Commission ethics system.

#### **THE EUROPEAN COMMISSION'S ETHICS SYSTEM 1999-2004: FORMATIVE CHANGE**

The resignation of the College of Commissioners in March 1999 was a critical moment in the history of the European Union, the product of a deepening malaise felt by European citizens towards the

Brussels-based bureaucracy. In the months before and after the resignation, there was much discussion in Brussels and in the media as to how the Commission had to change. Most of this took the form of a diagnosis of the Commission's problems. While the Commission was presented with a clean sheet of paper on which to construct its own reform, the discretion available to it at this time should not be exaggerated as the political context precluded any extensive period of reflection. Indeed, on his nomination as President of the European Commission at the Berlin European Council in March 1999, Romano Prodi had no choice but to act quickly. As the Presidency Conclusions put it:

The new Commission should speedily put into effect the necessary reforms ... for the improvement of its organisation, management and financial control ... launching a programme of far reaching modernisation and reform ... to ensure [the] highest standards of management, integrity and efficiency (European Council 1999).

Capitalising on a wave of reform-mania, Prodi launched his presidency with a range of initiatives, many of which had been included in the recommendations of the Independent Experts' Second Report (CIE 1999), published in September 1999. Some of these initiatives had ethical implications. For example, from mid-1999, Prodi revised the codes of conduct drafted earlier in the year (European Commission 1999) and addressed the Commission's 'culture of immobility' by reshuffling senior staff and limiting, to between five and seven years, the time senior officials could remain in the same post. He made sure that Commissioners were prepared to offer their resignations if requested to do so; and changed the system of appointing Commissioners' personal offices (cabinets) to minimise nepotism and favouritism (Nugent 2001: 56; Peterson 2000: 17-18; Stevens & Stevens 2001: 103: 197:460).

Prodi's decision to allocate the reform portfolio to Neil Kinnock was both pragmatic and symbolic. Although there was some criticism that he was too closely associated with the previous (discredited) Commission (Westlake 2001: 696-700), it was important that the reform job should go to someone who was already familiar with how the Commission operated. Kinnock had his own ideas about what was wrong with the Commission, and recognised that what was needed was a 'root and branch' reform, rather than a minor adjustment that did little more than pay lip-service to the Commission's critics. Kinnock hit the ground running, putting together a reform team which by January 2000, in the space of nineteen weeks, produced a consultative document, and by March 2000, the seminal White Paper on Administrative Reform (European Commission 2000a and 2000b).

At both the political and administrative levels, those involved in the reform recognised the importance of taking advice from outside the Commission. They consulted experts with experience of private and public sector administration both in Europe and elsewhere. They also sought advice from international organisations including the World Bank and the Organization for Economic Cooperation and Development (OECD) and professional organisations such as the International Institute of Auditors. The aim was to benchmark the ideas circulating at the time in the Commission and to provide a sounding board for Commission initiatives (Kassim 2004: 42).

Organisation was important; but so too was communication. This was important as there was resistance to change from within the Commission. Some felt that aspects of the reform constituted an attack on the rights and conditions of the Commission administration, deflecting attention away from the Commissioners who held political responsibility; others expressed concern that with its emphasis on management, the reform constituted a rejection of the institution's political mission. Yet another perspective saw the reform as the rejection of the original Franco-German model of administration in favour of a Nordic or an Anglo-Saxon model (interviews 1 and 2; Dorandeu and Georgakakis 2002). Yet, despite opposition there were also voices heard within the Commission in support of the reform, officials pleased to see the end of practices associated with the Commission's pre-reform culture (Kinnock 2003).

The 'human resources' dimension of the reform took the form of an overhaul of the EU Staff Regulations. Because of the need to achieve an inter-institutional consensus, this aspect of the reform was one of the most contentious. Title II of the Staff Regulations, dealing with the rights and obligations of officials covers a range of potential conflicts of interests that could potentially be faced by Commission and other EU civil servants, focusing in particular on issues of independence and discretion, freedom of expression, outside activities, spousal interests, whistleblowing and post-employment obligations. This part of the Regulations was rewritten in the period between 2000 and 2003.

Ensuring high standards of ethical conduct is particularly important where financial matters are concerned. Reforms to the Commission's financial accountability, control and internal audit frameworks necessitated a revision of the EU's Financial Regulation (EU Council/European Parliament 2002). Ethical considerations were once again deeply integrated within the broader changes proposed (Kinnock 2001; Kinnock 2002: 21-28), with the aim of constructing a 'culture of responsibility' within the Commission. The Directors-General heading the Commission's administrative services were to play a crucial role in guaranteeing ethical standards, through the practical and symbolic significance of putting their signature to an Annual Declaration, an act which arguably sat at the very centre of the Commission's new ethics system (Cini 2007: 135).

At the centre of all aspects of the Commission's work were the twenty-four Internal Control Standards (ICS). These were based on international guidelines which had been developed in 1992 by the Committee of the Sponsoring Organizations of the Treadway Commission, known more commonly as COSO, representing US organisations interested in anti-fraud, control and audit-related issues. These guidelines were disseminated within the public sector by INTOSAI, the umbrella organisation for the government audit community. It is worth noting that the latter's guidelines were amended in 2001 to include ethics as one of the four objectives of internal control (along with economy, efficiency and effectiveness). But even before this, in 2000, the Commission's first control standard, ICS-1, reflected a burgeoning interest in ethics. The standard had the specific aim of ensuring that officials were aware of the ethics rules (European Commission 2001: 7).

Although ethics was largely integrated within the wider reform, there were also a number of discrete initiatives set out in the White Paper's Action Plan (European Commission 2000b). At least ten out of a total of 98 actions dealt with ethical issues, though Hine and MacMahon claim that more, around half of the actions, had a significant ethical dimension (Hine and McMahon 2004: 30). They agree however that terms such as 'ethics' and 'propriety' were used sparingly in the White Paper. Of note amongst these initiatives was a proposal to set up an inter-institutional Advisory Committee on Standards in Public Life, an initiative which was ultimately dropped because of lack of support outside the Commission. A further initiative comprised the complete overhaul of the rules on whistleblowing.

By 2002, there was a greater willingness in the Commission leadership to talk more openly about ethics. A page devoted to the subject appeared on the Commission's reform webpage. The content of this page suggested a preference for a prohibitive rule-based approach, emphasising both regulation and enforcement, even if this was allied with an assumption that over time the rules would alter the conduct and perhaps even the attitudes of officials (Kinnock 2004: 7-12). Further guidance took the form of the revised 'Administrative Guide to the Conduct Expected of Commission Officials', produced in November 2003. The guide originated with the European Ombudsman who had been concerned about the lack of detail within the Staff Regulations (European Ombudsman 2002). In the context of the reform it was presented as a response to Action 92 in the White Paper covering sound project management. Yet again, this had the explicit aim of helping to raise awareness of ethics and standards of conduct in the Union (European Commission 2004).

Throughout this period, the Commission experienced ongoing criticism, often kept in public view by 'whistle-blowers' such as Paul van Buitenen and Marta Andreasen. This provided an ever present backdrop to the reform process, but also tells us much about continuities within the Commission's culture. The Commission has always tended to be defensive when attacked, and even after 1999 continued to take a strident and literal approach to its critics. The Commission's knee-jerk reaction to criticism was to deny it and then go on the counter-attack. This is precisely what happened when the Eurostat affair blew up. This complex scandal, which involved the setting up of illicit bank accounts by senior Commission officials and the mismanagement of relations between Eurostat and external bodies, preoccupied the 'Brussels village' over much of 2003 and into early 2004. The case reawakened earlier concerns about the Commission's capacity to keep itself in check, and also showed the Commission to be slow in accepting that there was even a case to answer (Cini 2007: 90). Belatedly, in response to the Eurostat affair, the Commission produced an Action Plan, covering staff mobility, a revised Code of Conduct for Commissioners, and the further strengthening of the internal audit system, as well as the setting up of a new unit on 'Ethics' in the Secretariat-General to coordinate ethics-related issues in order to improve the flow of information within the Commission (interviews 1 and 3).

In sum, the period between 1999 and 2004 was characterised by the establishment of an ethics system for Commission officials. The primary modus operandi of this system was through rules directed at Commission officials, based on the logic that these rules would ultimately provoke a change in behaviour, ensuring high ethical standards (Năstase 2013). A secondary concern was that officials should have an awareness of the rules. This new ethics system was integrated within the wider administrative reform process which was driven by external demands placed on Commission leaders in the period after the Resignation. Yet, those in charge of the reform process within the Commission were able to use their discretion to design a reform (of which the ethics system was a component) which was in many respects surprising. The Reform was wide-ranging; but, perhaps as a corollary, it also played down the importance of ethical issues. Moreover, while the approach it adopted with regard to ethics was traditional, with a preference for regulation familiar to Commission officials, it did not speak to the cutting-edge research agendas of public ethics academics nor of organisations like the OECD.

### **THE EUROPEAN COMMISSION'S ETHICS SYSTEM: POST-FORMATIVE CHANGE 2005-11**

In 2005, the new Commissioner responsible for administrative affairs, Siim Kallas, saw an opportunity to make his mark by launching a package of initiatives under the rubric of 'transparency', of which the 'ethics of officials' was one element (Kallas 2005). This took the Commission by surprise. While Barroso was alert to the need to respond quickly to ethics-related issues, administrative issues were not high on his agenda. Where ethical issues did capture his attention, they concerned the ethics of Commissioners. From the outset, Kallas's approach was different from that of Kinnock. As Kallas put it:

A strong ethical culture is a far more effective approach to eliminating the risk of inappropriate action than the creation and enforcement of more rules. We need to find the right balance between trust based on a common understanding of principles of behaviour and supervision of respect for rules (Kallas 2006).

Henceforth there would be frequent references to the danger of having too many rules, reflecting a post-reform discourse prevalent in the Commission that viewed the Kinnock reforms as overly bureaucratic (Bauer 2008: 691-707).

Within Kallas's European Transparency Initiative (ETI), ethics did not have a high profile, however, and little action was taken in the first years of the Barroso I Commission. The internal control

standards were revised, with the total number reduced from 24 to 16. However, the ethics standard was retained as the new ICS-2, albeit re-labelled as 'ethical and organisational values' (European Commission 2007a). With the ETI, however, the first step taken on ethics was the commissioning of an expert report on the ethics of high office-holders. The call was drafted by BEPA, the Commission's in-house 'think tank', in early 2007 and the project was completed by a multinational team of European academics the same year. The Report's focus on high office-holders skewed the ethics agenda towards Commissioners and senior Commission officials (Demmke et al. 2007), but its conclusions did allow the Commission to claim that the Commission's ethical rules were very much in line with those in comparator organisations (European Commission 2008). Beyond the upbeat headline, the Report also made a number of recommendations, some of which were picked up in a Commission Communication on Ethics approved in 2008.

The Commission has since been keen to emphasise that the content of the Commission Communication (usually known as the Kallas Communication), was inspired by an 'Ethics Day' which was held in July 2006 at the instigation of the Secretary-General (European Commission 2007b; European Commission 2008). The Ethics Day brought together officials with an interest in ethics to review the ethics framework and discuss practical cases and dilemmas. Together with the results of an accompanying survey sent out to all Commission officials four weeks before the event, and which provoked 2707 responses (Utrecht School of Governance 2008: 44), the Commission was also able to claim that the ethics agenda had been shaped from the 'bottom-up' (Kallas 2006). This was important given the sensitivities around ethical issues. However, it is clear that the approach adopted in the Communication was very much the approach also advocated in the expert report. In particular, the Report had suggested that there was no evidence to suggest that more rules made for a better ethics system; and they argued that more attention should be placed on integrity measures. They also played down the importance of an inter-institutional framework (Demmke et al. 2007: 139-142) in the form of an inter-institutional agreement, which would establish a common set of ethics rules across the EU institutions, with an inter-institutional advisory committee playing the role of arbiter in difficult cases.

After the Ethics Day, a working group was set up (European Commission 2007b) to consider three themes: awareness-raising and ethics policy; the clarification of rules/enforcement; and the setting up of an ethics infrastructure and focal point. The aim of the initiative was not to regulate, but to 'enhance the environment for professional ethics' and 'consolidate and promote an ethical culture' in order to create a modern, coherent, accessible and understandable ethical system. The initiative was not intended to replace the old system, but to supplement it (European Commission 2008: 2-3). Even so, the Communication pushed the Commission's ethics system in a new direction.

The Communication brought together a number of ethics-related actions. It recommended the agreement of a Statement of Principles (a draft of which was included in the Communication); it proposed major improvements to the Commission's internal ethics webpages; and it foresaw the development of new ethics training programmes. It recommended the establishment of a network (infrastructure) of ethics correspondents across the Commission's services, who could liaise with the 'centre' on ethical issues; and it also foresaw a one-stop shop online approval system for authorisation requests and the processing of declarations. Further clarification of the Staff Regulations in the form of new or revised Commission Decisions was recommended under the headings of 'favours, gifts and hospitality' and 'outside activities and assignments', alongside a check-list on the website to help officials identify potential or actual conflicts of interest (European Commission 2008: 3-5). The Communication was seen internally as a low-key administrative matter, internal to the Commission, and of no particular interest outside it (interview 1; Euractiv.com 7 March 2008). Indeed, in the absence of any scandal, little attention was given to the Communication at the time.

Between 2008 and 2011, Kallas's cabinet (and its successor, that of Maroš Šefčovič), together with DG Human Resources and the Secretariat-General, worked to implement the initiatives set out within the Communication. At the end of 2008, an audit was conducted by the Internal Audit Service (IAS) to judge whether the existing ICS on ethics was being implemented effectively (European Commission 2009). Covering two horizontal and four operational services, the outcome of the audit was positive, and its interim recommendations were much in line with the content of the Communication, allowing the Commission to get on with the job of implementation much as it would otherwise have done (DG HR 2009: 14).

This was not a particularly speedy process, but progress was made. By mid-2011 the draft Statement of Principles had been widely discussed and was posted on the Commission's intranet, though it was not formally approved or amended as had originally been planned. The network of ethics correspondents was in place in 2010, coordinated in the first instance by IDOC, but with plans to move this to the unit in DG HR responsible for ethics (interview 2; interview 4). Diversity of ethics management practice across DGs was encouraged, as the Commission's services designed ethics days and codes in line with their own policy needs. The new ethics website on the Commission's intranet (MyIntraComm) was up-and-running by 2009 (DG HR 2009). This included access to an internal paper, the Practical Guide to Ethics (European Commission 2011), explanatory pages on a range of ethics issues (contained in the Staff Regulations), and a series of informative case-studies (interview 2; interview 5). The one-stop shop for online ethics approvals was set up, but technical problems had delayed implementation, and as of early 2011, only one online approval route (on outside activities) had been activated. New training courses were also drafted, with more planned. Finally, work began to clarify the rules on favours, gifts and hospitality, and the revision of the existing Commission Decision on outside activities (DG HR 2009; DG HR 2011; interview 1; interview 2).

A parallel development which came out of the blue was the European Ombudsman's intervention into the field of Commission ethics in 2010-11. The Ombudsman's goal was to construct a set of public service principles (originally labelled 'ethical principles' but this was dropped) for the European administration. An initial request for information from the European network of Ombudsmen produced various options, which were then amalgamated into a proposal sent out for consultation in early 2011 (European Ombudsman 2011). Although it was not the first time the European Ombudsman had sought to influence ethical practices in the EU institutions, this initiative provoked a rather hostile response from within some quarters in the Commission as it failed to acknowledge that a similar exercise had already been initiated in-house. In the end, the initiative was quietly dropped.

In sum, in the period after 2005, the Commission's ethics system was characterised by a distaste for regulation, reflecting wider cultural norms asserted by organisational leaders within the Commission (also echoed in the negative discourses on the Kinnock reforms, as well as the top-down hostility to further institutional change in the post-Lisbon Treaty period). The agenda was not a deregulatory one, but there was recognition that regulation alone was insufficient, and that it could even be counterproductive. This reflected the weak position of the Commission externally. As well as greater emphasis placed on integrity measures, there was also a strong push on awareness of the rules (Năstase 2013).

## CONCLUSION

This article examines post-formative and formative institutional change in the case of the European Commission's ethics system, and finds that both structural factors and agency, external and internal to the Commission were important in both periods. This conclusion expands on the claim, and adds

to it by reflecting on the importance of *intensity* in differentiating between these two stages of institutional change.

More generally, the article reflects a relatively recent phenomenon within EU governance, labelled here as its good governance turn. Whereas in the period from the construction of the EEC to the early 1990s little emphasis was placed on quality of governance issues within the EU institutions, the good governance turn comprised a growing recognition by actors in the EU institutions that the democratic deficit formed a fault line running through the integration process. Increasing emphasis on the quality of governance brought principles such as accountability, transparency, representation and participation to the top of the EU's agenda, while also opening up new debates on efficiency and effectiveness. This led to a number of initiatives, including several on the public ethics of the EU's officials. Since the late 1990s, within the Commission, two distinct periods in ethics policy were identified – that of 1999-2004, a period of formative change characterised by a regulatory-enforcement approach; and 2005-2011 where the focus shifted in the direction of a softer integrity-orientated approach which emphasised implementation, both in letter and spirit, of the rules.

So what can we learn about European governance from this account of the formation and evolution of a public ethics system in the Commission? The lessons relate primarily to the way in which new governance systems emerge, and how they evolve; that is, they concern institutional change. Thus, moving to the empirical case, the article distinguishes between the *formation* of the ethics system on the one hand, and post-formative change, on the other. In the case of the former, the 'good governance turn' provided the broad external political context for the introduction of the new system, reinforcing the confidence of the European Parliament in its attacks on the Commission in the late 1990s. The 1999 resignation crisis, which could not have happened without this new EP confidence, led directly to the administrative reform which enabled the agreement of new rules that formed the foundation of the new ethics system. Within the Commission, the far reaching nature of the reform allowed for new initiatives on public ethics, just as those opposed to such reforms became morally weaker in their resistance to them. Key reform leaders, most notably Romano Prodi and Neil Kinnock, provided the necessary internal leadership to ensure that the new ethics system would form part of the wider management reform agenda. Therefore, we see that to understand formative change in this case, it is necessary to take into account not only the importance of external structural shocks and the external institutional context, and external actors, but also internal factors, in terms of both institutional discretion (if only up to a point) over reform content, and the leadership of key reform agents (see Figure 2).

Figure 2: Drivers of Ethics Reform (Formative)

	External	Internal
<b>Structure</b>	Good governance turn; major scandal, leading to historic reform	Discretion over internal reform (partial)
<b>Agency</b>	European Parliament; media	Reform agents

At the post-formative stage, particularly in the period after 2005, the external political context remained important as the effects of the 'good governance turn' continued to be felt, and as the European Parliament continued to wield power over the Commission. As in the late 1990s, scandals (most notably Eurostat) were the external drivers of change, supplemented by the Parliament's continuous push for further ethics-related reforms as a way of enhancing their control over the Commission. A growing antipathy to regulation within the Commission supported the use of a softer approach to the management of ethics. The use of soft instruments meant that there were no internal institutional barriers to reform as new initiatives could easily be developed and

implemented with little opposition. This has much in common with the parallel development of new governance modes, including those that fall under the rubric of the Open Method of Coordination. The arrival of a new Commissioner, Siim Kallas, who was keen to make his mark on the Commission despite a rather lacklustre portfolio, and his decision to include ethics in his European Transparency Initiative also generated momentum in the direction of further reforms (even if these were not implemented with any haste) (see Figure 3).

Figure 3: Drivers of Ethics Reform (Post-Formative)

	External	Internal
Structure	Good governance agenda; scandal	Growing antipathy to regulation
Agency	European Parliament; media	New Commissioner, Siim Kallas

Therefore, we see in explaining post-formative change that here too both internal and external drivers were important, as were both structural factors and reform agency. What differed of course was precisely how they mattered, or to put it differently the particular *qualities* of the factors at work. The crucial difference was the *intensity* of the initial external shock, which, coupled with all the other relevant factors, made (trans-) formation more likely.

What then might be the broader implications of this research, given the emphasis in many of the contributions in this volume on European governance from the perspective of power dynamics and inter-institutional balance? It is certainly possible to argue that reforms within the Commission have allowed that institution to inhabit a moral high-ground vis-à-vis the other EU institutions that have been slower and more reluctant to engage with such reform. But there is little evidence of such an argument carrying weight outside of academic circles. In practice, the reforms introduced to date, together with increasing pressure from activist NGOs, have served to strengthen the European Parliament's resolve over gaps and weaknesses in the Commission's ethics system. Although evidence on this point is scant, it seems unlikely that the Commission's reputation will have been strengthened as a consequence of engaging in this good governance turn. Although after 2011 the ethics agenda continued under a new Commissioner, Maroš Šefčovič, the latter taking forward his predecessor's transparency agenda, the Euro crisis seemed to draw attention away from the EU's good governance initiatives. Whether this is a temporary measure remains to be seen.

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Research Article

## Transforming the European Legal Order: The European Court of Justice at 60+

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## Abstract

The European Court of Justice has played a pivotal role in the transformation of international law obligations between Member States into an integrated legal order with direct applicability and effect in those Member States. This article explores whether or not the ECJ continues to be relevant to EU governance and integration and whether it continues to transform the legal orders of the Member States. It briefly outlines the early case law which transformed the legal order, and the preliminary reference procedure as an important element of that transformation, and then considers the extent to which the ECJ continues to act in ways which are transformational even though the legal order itself has remained relatively static. The EU citizenship jurisprudence serves as a useful example of how integration is driven forward by the Court. This article argues that the Court's decisions do continue to have significant impact on areas of law and policy and EU governance generally. It illustrates this argument using gender equality law and Human Rights as pertinent examples and concludes that the ECJ remains relevant in governance terms as it continues to drive forward EU integration in many areas and influence the development of law and policy across the Member States.

## Keywords

European Court of Justice; Governance; EU Legal Order

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The European Court of Justice (ECJ)<sup>1</sup> has played a pivotal role in the transformation of international law obligations between Member States into an integrated legal order with direct applicability and effect in those Member States. While a significant amount of literature has been devoted to the Court's jurisprudence and key decisions have been analysed in detail in the legal literature, the ECJ has received relatively little attention from a political or governance perspective.<sup>2</sup> The article thus begins with a brief assessment of the early case law which transformed the treaties into an integrated legal order applicable directly in Member States and argues that without these decisions EU governance would look very different today. The focus on case law is important as it is through the case law of the ECJ that we are able to interpret the Court's intentions. Unlike other EU institutions, the Court cannot set out its policy priorities or the direction it wishes to go in. It must remain silent about any designs or priorities it may have and speak through its legal decisions. Those decisions are then open to interpretation by commentators who must try and deduce the extent to which the ECJ does indeed have a grand plan and what that plan is.

The role and status of the ECJ is, however, affected by more than its decision making and judgments and this article considers why Member States have not only accepted the legal order as created by the ECJ but also its case law more generally and why, rather than curbing the Court's power, Member States have instead allowed it to expand into more and more areas. Finally, the article

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<sup>1</sup> Now of course it is more accurate to refer to the Court of Justice of the European Union as an umbrella term covering the ECJ, the General Court and specialist tribunals. For ease of reference, the term ECJ is used throughout this article and although this is mostly accurate, it is acknowledged that the exact meaning of that term has changed over time.

<sup>2</sup> There are of course notable exceptions such as Karen Alter, *The European Court's Political Power*. (Oxford: Oxford University Press, 2009) and more recently Mark Dawson, Bruno DeWitte and Elise Muir, *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar, 2013).

considers whether the transformative nature of the Court's decisions is limited to those early cases or whether it has continued to change the legal and political landscape. Although the legal order itself has remained fairly static following the early transformation, the Court remains active and has continued to make decisions which transform certain policy areas and embrace certain modes of governance. In doing so, the Court assumes a position of authority and power in the institutional framework which supports and encourages increasing judicialisation of the EU.

## TRANSFORMING THE LEGAL ORDER

The role of the ECJ in shaping the EU as we know it today should not be underestimated. The EU is very much based upon legal documents, legal principles, the rule of law and the workings of the ECJ. It is a Union for lawyers characterised by an increase in legal actions brought to the EU by EU citizens represented by EU law specialist lawyers, and this increasing role of lawyers and Courts in the regulation of EU matters is seen by some to be a move towards American style adversarial legalism, with the emergent version in the EU being termed as Eurolegalism.<sup>3</sup> Eurolegalism, so Kelemen argues, is the result of fragmented governmental and economic power and is in fact a far more important mode of governance in the EU than so-called modes of new governance which are dealt with in detail by both Michelle Cini and Ingeborg Tömmel<sup>4</sup> in their contributions to this special issue. Whether or not Kelemen's view is justified is open for debate, but his argument does raise the question of how a set of treaties setting out international law obligations between signatory states became a situation where the legal order has been so transformed that judicialisation of EU regulation and governance is commonplace.

Early analyses place the Court firmly at the centre of the EU's legal universe, seeing it as a key player shaping law and legal development. Other commentators sideline the Court as an institution merely doing the bidding of the most powerful Member States and thus as an institution which is inherently governed by politics rather than the rule of law. The exchange between Garrett<sup>5</sup> and Mattli & Slaughter<sup>6</sup> sets out the arguments for those respective positions clearly but, as Karen Alter<sup>7</sup> notes, there now seems to be a consensus that the truth lies somewhere between those two positions; with the Court having significant autonomy without being immune to political processes and Member State or EU institutional interests.

Principles which are key to the functioning of the EU legal order as we now know it cannot be found in the Treaties, certainly not the early ones as Shaw notes: '[The Treaty provisions] give no hint, however, that the obligations undertaken by the Member States under the Treaties they have signed are relevant at any level other than that of international law'.<sup>8</sup> Fennelly makes the same point,

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3 Daniel R. Kelemen, *Eurolegalism The Transformation of Law and Regulation in the European Union*, (London: Harvard University Press, 2011).

4 Michelle Cini, 'Good Governance and Institutional Change: Administrative Ethics Reform in the European Commission', *Journal of Contemporary European Research*, 12(1) (2016): 440-454; Ingeborg Tömmel, 'EU Governance of Governance: Political Steering in a Non-Hierarchical Multilevel System', *Journal of Contemporary European Research*, 12(1) (2016): 406-423.

5 Geoffrey Garrett, 'The Politics of Legal Integration in the European Union,' *International Organization*, 49(1) (1995): 171-81.

6 Walter Mattli and Anne-Marie Slaughter 'Law and Politics in the European Union: A Reply to Garrett,' *International Organization*, 49(1) (1995): 183-90.

7 Alter, *The European Court's Political Power*.

8 Jo Shaw, *Law of the European Union*. Third Edition, (Basingstoke: Palgrave, 2000).

recognising the role of the ECJ at the same time: 'The treaties did not provide for direct effect, still less for supremacy. They established the Court of Justice, which filled the gap'.<sup>9</sup>

In hindsight, it is easy to say that the development of EU law was inevitable but this is too simplistic. While Shaw notes that the Court 'has consistently given a maximalist interpretation of the authority and effect of EU law ... to ensure that 'the law is observed'',<sup>10</sup> Alter points out that 'the ECJ's agency matters – the ECJ can choose to play a minimalist role, interpreting law narrowly and even illogically when there is little social support for the law it is asked to apply'.<sup>11</sup> Furthermore, 'there is no set of unidirectional hypotheses that predicts when, why and how the ECJ will be activist or influential'.<sup>12</sup> Nonetheless it is clear that the ECJ has been 'legally audacious [and] politically successful in altering so completely the terrain in which [it] operate[s]'.<sup>13</sup>

The case of *Van Gend en Loos*<sup>14</sup> is a 'famous stepping stone of legal doctrine, but [also] a breakthrough in the political relationship between member states and the club'<sup>15</sup> as it turned what was for all intents and purposes an international legal framework into a new legal order which applied not only at international level between Member States but also to citizens of those Member States. In 1964, the Court built further on its decision in *Van Gend* and the ideas of direct applicability (that is the legal mechanism that the EU Treaties and Regulations apply in all Member States without the need to be transposed into national law) and direct effect (that is the legal mechanism that individuals can rely directly on EU law in their national Courts to enforce EU law rights granted to them) established in it by clarifying the principle of supremacy in *Costa v ENEL*<sup>16</sup> and then *Internationale Handelsgesellschaft*: 'The law born from the Treaty [cannot] have the Courts opposing to it rules of national law of any nature whatsoever...'.<sup>17</sup> The cases 'represented, not just in their time but permanently, a giant leap on the road to European integration'.<sup>18</sup> In *Francovich and Bonifaci v Italy* the ECJ went further:

It must be held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible.<sup>19</sup>

By the 1990s therefore, the Member States had been 'judicially tamed'<sup>20</sup> and the ECJ had completed the transformation of the treaties 'from a set of horizontal legal arrangements between sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the EC territory'.<sup>21</sup>

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<sup>9</sup> Nial Fennelly 'The European Court of Justice and the Doctrine of Supremacy: *Van Gend en Loos*; *Costa v ENEL*; *Simmethal*' in, Miguel P Maduro, and Loic Azoulai (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 39-46.

<sup>10</sup> Shaw, *Law of the European Union*.

<sup>11</sup> Alter, *The European Court's Political Power*.

<sup>12</sup> *ibid*, at 4.

<sup>13</sup> Karen Alter, *The European Court's Political Power*, (Oxford: Oxford University Press, 2009), at 5.

<sup>14</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1.

<sup>15</sup> Luuk Van Middelaar, *The Passage to Europe*. Translated by Liz Waters. (London: Yale University Press, 2013), at 49.

<sup>16</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>17</sup> Case C-11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>18</sup> Fennelly, 'The European Court of Justice and the Doctrine of Supremacy'.

<sup>19</sup> Case 6&9/90 *Francovich and Bonifaci v Italy* [1990] ECR I-5357 at 5415.

<sup>20</sup> Van Middelaar, *The Passage to Europe*, at 80.

<sup>21</sup> Alec Stone Sweet 'Constitutional Dialogues in the European Community', in Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence*, (Oxford: Hart Publishing, 1999), at 305-330.

In doing so, the ECJ reserved for itself the power to define key concepts which impact on governance at EU and Member State levels. Governance competence is shifted away from Member States whose laws must now comply with the interpretation of EU law by the ECJ. Although Tömmel in this issue points out that procedural avenues are often shaped using Directives and Regulations, the ECJ also has a role to play in second order governance<sup>22</sup> and these cases set the foundations for that. They also, of course, set the foundations for increasing judicialisation of EU policymaking and are instrumental in shaping modes of governance. Tömmel notes that the EU builds a system of 'governance of governance'; the ECJ, through its early case law, ensured that the system is one which remains open to judicial scrutiny.

It is difficult to know whether the transformation of the legal order and its impact on governance was intentional or accidental. Mayer argues that the decision in *Van Gend en Loos* is not likely to have seemed that dramatic to the judges at the time and was simply an attempt at creating a conceptual and methodological way of working which was 'detached from classical public international law constraints'.<sup>23</sup> Mayer points to the fact that the decision in *Van Gend en Loos* and its consequences are perhaps not that far removed from the views on European integration of the six Member States at the time and draws attention to a 1963 case note by Ophüls<sup>24</sup> who states that the Court simply reiterated the 'predominant view'. However, it is equally likely that the legal revolution brought about by this series of cases was accidental. As Rasmussen points out, *Van Gend* was 'a narrow decision that depended on two new judges whose nomination less than a year before had been far from straightforward'.<sup>25</sup>

Whether or not *Van Gend en Loos* was intended to transform the legal order, the case certainly changed the legal landscape. Arguably, the cases that came next were less about transformation and more about an evolution which consolidated the position established by *Van Gend en Loos*. The principles they established were presented on a case by case basis making the changes appear incremental and less radical.<sup>26</sup> For example the decisions on state liability came, for some, as another transformation and radical shift in how EU law should operate and how Member States should be held to account for breaches of their obligations. However, there is considerable evidence that this decision should not have come as such a surprise. The Court had already held that Member States must make good any unlawful consequences of a breach of Community law,<sup>27</sup> and a little later, in 1973, the Court declared admissible an action for infringement of Member States' obligations even though the Member State had remedied the situation.<sup>28</sup> Admissibility was based on the possible interest to an individual in relation to a Member State's responsibility while they were in breach. From there to state liability is a very small evolutionary, rather than transformative, step.

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<sup>22</sup> J. Kooiman, *Governing as Governance*, (London: Sage, 2003) and Tömmel, 'EU Governance of Governance'.

<sup>23</sup> Franz C. Mayer, 'Van Gend en Loos: The Foundation of a Community of Law', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 21.

<sup>24</sup> Carl F. Ophüls, 'Anmerkung zum Urteil des EuGH vom 5.2.1963 - Rechtssache 26/62' *Neue Juristische Wochenschrift*, 16, (1963): 1751.

<sup>25</sup> Morten Rasmussen, 'From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 83.

<sup>26</sup> M. Shapiro 'The European Court of Justice', in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law*, (Oxford: Oxford University Press, 1999).

<sup>27</sup> Case C6/60 *Humblet v Belgium* [1961] ECR 1128.

<sup>28</sup> Case 39/72 *Commission v Italy* [1973] ECR 101.

## TRANSFORMING NATIONAL LEGAL ORDERS: THE ACCEPTANCE OF EU LAW

The relationship between EU law and national law and Member State politics is not based solely on the ECJ's activities but also depends on how Member States have reacted to and engaged with the EU legal framework over time. This part of the article briefly considers the preliminary reference procedure as a vital part of this relationship. In this context, it has been noted that 'one of the most important aspects of the Court's contribution has been its characterization of the relationship between the EU and national law'.<sup>29</sup> In what Mancini called an 'exercise of remarkable judicial creativity',<sup>30</sup> the Court distanced itself from established international law principles and developed an 'organic connection between the Court of Justice and the national Courts'<sup>31</sup> in the form of the preliminary reference procedure. As well as being important for the development of ECJ jurisprudence and its political and legal credibility because it provides a link between the EU and national Courts and encourages the interpretation of key legal concepts, the preliminary reference procedure and the way it has been used also helps explain the development of EU law in the Member States and their acceptance of it.

For more than 40 years, this system has successfully managed the myriad complexities of legal integration. It has also heavily conditioned legislative outcomes in a wide range of policy domains, and it has helped to determine the course of European integration more generally. But the system has never been 'perfected'. It has evolved continuously, often unpredictably, in response to a steady stream of challenges to supremacy arising from litigation of EC law in national Courts.<sup>32</sup>

It is beyond the scope of this article to describe and explain the preliminary reference procedure in detail, suffice it to say that in hearing preliminary references from national Courts, the ECJ interprets the law and answers the exact questions referred. The national Courts must then apply the law, following the ECJ's guidance, to the factual situation before them.

As well as making the enforcement of EU law rather more practical than leaving it to EU institutions, allowing the national legal systems to take on the role of adjudicating EU law rights has a profound impact on EU integration and governance. One reason the ECJ has been so successful in driving EU integration forward and developing policy areas is the relatively high number of cases brought by citizens which raise EU law questions, have been referred to the ECJ and which have therefore allowed the ECJ to interpret areas as it sees fit.<sup>33</sup> However, for the EU legal system to develop in the way that it did, it had to be accepted by the Courts of the Member States. The preliminary reference procedure gives Member States' Courts a stake in the proceedings. Or put differently, it co-opts them into the EU legal system, making them part of it. That is not to say though that national Courts accepted the ECJ's jurisdiction without any conflict at all. Given Member States' concerns about the loss of sovereignty to the EU, it is not surprising that Courts across Member States were also a little wary of the ECJ and its role, or rather the impact the ECJ would have on their role. As the highest Courts in Member States, and often the only Courts with jurisdiction over questions of constitutional law, many of the Constitutional or Supreme Courts across the EU were reluctant to refer questions to the ECJ, sometimes even explicitly reserving the right to decide such questions for themselves and ignoring the principle of supremacy of EU law. There was, and to some extent still is, therefore a power struggle between the highest Member State Courts and the ECJ as to who can define

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<sup>29</sup> Shaw, *Law of the European Union*, at 27.

<sup>30</sup> Mancini 1998 quoted in Shaw, *Law of the European Union*, at 29.

<sup>31</sup> Shaw, *Law of the European Union*, at 29.

<sup>32</sup> Alec Stone Sweet, 'The Judicial Coup d'Etat and the Problem of Authority: CILFIT and Foto-Frost', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 201.

<sup>33</sup> Court of Justice of the European Union, Annual Report, Luxembourg 2015, [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/) [accessed 26 October 2015].

important constitutional principles and decide key cases, and who, in the case of potentially unpopular decisions, is willing to do so.<sup>34</sup> Overall though, 'in practice, the relationship between the Court of Justice and the national Courts, including supreme Courts, has worked reasonably well'.<sup>35</sup>

However, there is also another power struggle to consider; one which is inherent in every legal system which has an appellate structure and which in this case goes some way towards explaining how the EU legal order became incorporated into national legal systems. This is the power struggle between lower Courts and higher Courts in the Member States. Being able to refer questions of EU law to the ECJ gives lower Courts considerable power and the ECJ has always protected lower Courts' right to refer. By giving the lower Courts a stake in the EU legal order, the ECJ has avoided constant power struggles with supreme or constitutional Courts and has opened an avenue for a steady stream of cases which in turn normalises the process and leads to acceptance of EU law in Member States. It, of course, also leads to increased judicialisation of EU integration and policymaking because it is the ECJ, through the national Courts, which is expanding the scope of EU law and policy. The statistics show that in most Member States, significantly more references come from courts other than the highest level or constitutional Courts.<sup>36</sup> The focus of defining law, legal principles and their scope thus shifts away from law makers and to the Courts, firmly embedding the ECJ's role within governance structures.

### THE WORK GOES ON: TRANSFORMATIVE EVOLUTION?

So far this article has considered the initial transformation and subsequent evolution of the EU legal order. It then considered one of the key processes and its use by the ECJ in ensuring Member State acceptance of the European legal order and EU law more generally. The final question to consider is whether the ECJ has continued to transform the legal order it created. In this final part of the article, I argue that although there have been several decisions which have had significant impacts in their respective substantive areas such as *Baumbast*<sup>37</sup> or recently *Zambrano*<sup>38</sup> (closely followed by *McCarthy*<sup>39</sup> and *Dereci*<sup>40</sup>) in relation to citizenship, *Coleman*<sup>41</sup> in relation to discrimination law, and *Hoefner v Macroton GmbH*<sup>42</sup> in relation to competition law for example, there have not been any decisions which have made significant changes to the legal order itself. Since *Van Gend en Loos*, the legal order has remained fairly static with the ECJ claiming authority to define important concepts and questions and extending the reach of direct effect into more and more areas. However, some of its decisions do have a significant impact on questions of governance.

The citizenship jurisprudence, for example, provides an example of the ECJ's expansive interpretations of EU law and its willingness or even desire to push the development forward

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<sup>34</sup> Imelda Maher, 'National Courts as European Community Courts', *Legal Studies*, 14(2) (1994): 226-243; Alec Stone Sweet, *The Judicial Construction of Europe*, (Oxford: Oxford University Press, 2004); M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', *European Law Journal*, 11 (3) (2005): 262-307.

<sup>35</sup> David Edwards, 'CILFIT and Foto-Frost in their Historical and Procedural Context', in Miguel P Maduro and Loic Azoulay (eds), *The Past and Future of EU Law*, (Oxford: Hart Publishing, 2010), at 173.

<sup>36</sup> Court of Justice of the European Union, *Annual Report*, Luxembourg 2015, [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/) [accessed 26 October 2015] at 117-119.

<sup>37</sup> Case C-413/99. *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7136.

<sup>38</sup> C-34/09 - *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177.

<sup>39</sup> Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011].

<sup>40</sup> Case C-256/11 *Dereci and others v Bundesministerium für Inneres* [2011] ECR I.

<sup>41</sup> C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

<sup>42</sup> Case C-41/90 *Hoefner v Macroton GmbH* [1991] ECR I-1979.

incrementally in spite of considerable Member State resistance.<sup>43</sup> A further example can be found in relation to the fiscal compact. Since March 2012, the ECJ, through the Treaty on Stability, Coordination and Governance, has the power to enforce Member States' commitment to the 'fiscal compact' section of the Treaty. While the legal order itself is not affected by this as such, the step is potentially transformative. As Chalmers notes,

Policing the constitutional retrenchment of public finances is an unusual role for a Court. However, in the ECJ's case it is not a one-off role, and the new task is symptomatic of the Court moving increasingly to centre stage in fiscal and welfare policy-making within the European Union.<sup>44</sup>

The development of competition law in the EU provides another useful example as to how the ECJ drives the evolution of the legal order and the transformation of policy areas forward. Elsewhere in this special issue, Sandra Eckert provides a comparative analysis of regulatory governance in the energy and competition sectors which provides valuable insights.<sup>45</sup> Suffice it to say here that the ECJ's acceptance of soft law instruments allows and facilitates the coming together of various modes of governance mixing the traditional community method with new modes of governance, and placing soft law instruments on a firm constitutional footing using general legal principles such as legal certainty.<sup>46</sup> The ECJ has therefore acknowledged and accepted the multi-level, often non-hierarchical modes of governance discussed in detail in Ingeborg Tömmel's contribution.

It is beyond the scope of this article to explore all of these areas and indeed the contributions to this special issue explore some of the most relevant questions in greater detail, but exploring some of these areas provides an insight into how and why the ECJ's jurisprudence continues to be important for questions of governance in the EU.

One such area where the ECJ has transformed the legal landscape across the Member States is that of gender equality. Prechal commented: 'Gender equality law has played a pivotal – in many respects pioneer – role in the field of enforcement of Community law in general and in particular for the protection of rights, which individuals derive from that law'.<sup>47</sup> This area therefore serves as a useful example to illustrate the ECJ's transformational role and explore the extent to which this transformation is part of a grand plan to drive EU integration and favour particular modes of governance. The case of *Defrenne II*<sup>48</sup> provided the first example of directly effective Treaty rights being enforceable against a private institution (or person) rather than a Member State and as a result citizens benefit from a highly effective mechanism to enforce EU Law rights through national Courts. The impact on governance is clear: cases result in national legislation which is under scrutiny being changed and laws in other Member States also being reviewed. In *MacCarthys Ltd v Smith*<sup>49</sup> the English Equal Pay Act 1970 was shown to be incompatible with EU law and had to be changed

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<sup>43</sup> Jessica Guth and Edward Mowlam, 'The Evolution of European Union Citizenship - Where Does Zambrano Take Us? *The Law Teacher*, 46(1) (2012): 75 -82. See also Maas in this special issue, Willem Maas, 'European Governance of Citizenship and Nationality' (2016), *Journal of Contemporary European Research*, 12 (1): 532-551.

<sup>44</sup> Damian Chalmers 'The European Court of Justice has taken on huge new powers as 'enforcer' of the Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinised' *EUROPP* entry posted on March 7, 2012, <http://blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer/> [accessed 26 July 2013].

<sup>45</sup> Sandra Eckert, 'The Governance of Markets, Sustainability, and Supply. Toward a European Energy Policy', *Journal of Contemporary European Research*, 12 (1) (2016): 502-517.

<sup>46</sup> Oana Ștefan, 'Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union', (Kluwer, 2013).

<sup>47</sup> S. Prechal, 'Achievements and Trends in EU Gender Equality Law' (2005), [online] available at [www.euroinfo.ee/malta/pdf/c4.pdf](http://www.euroinfo.ee/malta/pdf/c4.pdf) [accessed on 30 November 2015] at 35.

<sup>48</sup> Case C-43/75 *Defrenne v Sabena (No.2)* [1976] ECR 455.

<sup>49</sup> Case 129/79 *MacCarthys Ltd v Smith* [1980] ECR 1275.

and a series of cases following on from that clarified the important aspects of gender equality law (*Bilka Kaufhaus GmbH*,<sup>50</sup> *Kalanke*<sup>51</sup> and *Marschall*<sup>52</sup>). The ripple effect of those decisions was felt across the EU and had a significant impact on gender equality law at the national level<sup>53</sup> resulting in increasing integration, the potential for further litigation and thus increasing judicialisation.

Undoubtedly, the case law of the ECJ has transformed gender equality law but was this deliberate? Jo Shaw notes that the Court has ‘cloaked itself in something akin to a feminist cloak almost always only where some gain can be obtained in terms of reinforcing its own legitimacy within the system’.<sup>54</sup> The move to transform equality law in *Defrenne II*<sup>55</sup> and cases that followed may thus have rather more to do with the ECJ’s awareness of its own position within the EU institutional framework than with a predominant concern with gender equality.<sup>56</sup> The ECJ has clearly shown an awareness of its position and the possibility that its powers may be limited by Treaty and that there is thus a need to safeguard its position and not be seen to make decisions with significant and potentially costly consequences for Member States. Once such balancing act can be seen in the cases relating to pensions and equal pay.<sup>57</sup> Once the ECJ had concluded that Article 119 had direct effect and that occupational pensions were included in the definitions of pay, the Council attempted to limit the severe financial consequences for many employers by issuing Directive 86/378<sup>58</sup> on pensions which gave Member States time to implement the effects of equal pay legislation on pensions. In *Barber v Guardian Royal Exchange*,<sup>59</sup> the ECJ essentially overruled that Directive by stating that differences in pensionable age based on sex were discriminatory and had to be eliminated; the ECJ did however limit the retrospective effect of that decision. Nonetheless, the Member States’ governments reacted strongly to a decision with potentially crippling financial implications for employers, they added a protocol to the Maastricht Treaty<sup>60</sup> and that protocol limits the application of the principle of equal treatment to any work after the Barber decision. The ECJ did get the opportunity to respond<sup>61</sup> and could, arguably, have decided to fight back. However, the possibility of jeopardising its future position and the future acceptance of ECJ jurisprudence meant that, instead, the ECJ accepted the protocol. ‘In effect the Court’s ruling said: ‘this is what we meant all along. The member governments did not overrule us; they simply helped us clarify a point’’.<sup>62</sup> The balancing act did not stop there though. It seems likely that the EU Member State governments

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<sup>50</sup> Case 170/84 *Bilka Kaufhaus GmbH v. von Hartz* [1986] ECR 160.

<sup>51</sup> Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] IRLR 660.

<sup>52</sup> Case C-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-06363.

<sup>53</sup> K. Alter and J. Vargas, ‘Explaining Variation in the Use of European Litigation Strategies. European Community Law and British Gender Equality Policy’, *Comparative Political Studies*, 33(4) (2000): 452-482; L. Anderson, ‘European Union Gender Regulations in the East. The Czech and Polish Accession Process’, *East European Politics and Societies*, 20(1) (2006): 101-125; D. Schiek and V. Chege (2009): *European Union Non-discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, (London, New York: Routledge-Cavendish).

<sup>54</sup> J. Shaw, ‘Gender and the Court of Justice’, in De Burca, G and Weiler, J.H.H. (eds) *The Court of Justice*, (Oxford: Oxford University Press, 2000), at 142.

<sup>55</sup> Case C-43/75 *Defrenne v Sabena (No.2)* [1976] ECR 455.

<sup>56</sup> Jessica Guth, ‘Law as the Object and Agent of Integration: Gendering the Court of Justice of the European Union, its decisions and their impact’, in Gabriele Abels and Heather MacRae (eds), *Gendering European Integration Theory: Engaging New Dialogues*, (Leverkusen: Barbara Budrich Verlag, 2015).

<sup>57</sup> See Case 80/70, *Defrenne v. Belgium* [1971] ECR 445, Case 43/75, *Defrenne v. SABENA* [1976] ECR 455, Case 170/84, *Bilka Kaufhaus GmbH v. von Hartz* [1986] ECR 1607 and Case 262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889. See also Geoffrey Garrett, Daniel R. Kelemen and Heiner Schulz, ‘The European Court of Justice, National Governments, and Legal Integration in the European Union’ *International Organization*, 52(1) (1998): 149–76.

<sup>58</sup> Directive 86/378 OJ 1986 L225/40.

<sup>59</sup> Case 262/88, *Barber v. Guardian Royal Exchange* [1990] ECR I-1889.

<sup>60</sup> Treaty on European Union, Protocol No. 2 on Article 119.

<sup>61</sup> Case 109/91, *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers – en Schoonmaakebedrijf* [1993] ECR I-4879.

<sup>62</sup> Geoffrey Garrett et al. ‘The European Court of Justice’, at 167.

intended to limit the application of Article 119 generally but the ECJ held in two cases<sup>63</sup> that the retrospective application of the principle of equal treatment was not limited in relation to the right to join an occupational pension scheme and claims to do so could therefore be backdated. The ECJ did, however, give Member States a way of limiting claims by holding that claimants would have to pay their historical contribution in order to join the scheme retroactively so while the decisions are theoretically far reaching and supportive of gender equality, they are quite limited in practice, making them more acceptable to the Member States.

This series of cases shows the power play between EU institutions and between the ECJ and Member States which sees the ECJ pushing the limits of what Member States will accept but not pushing beyond those limits and risking a significant push back which may limit its power in the future. Nonetheless, it is worth noting that the ECJ has been instrumental in shifting the focus of EU policy by changing the weight afforded to different issues and by insisting on expansive interpretation of concepts such as pay, even if allowing the application of those principles to be time limited. The earlier economic focus of decisions gave way to social policy concerns with the ECJ declaring in *Deutsche Telekom AG* that:

the economic aim pursued by Article 141 of the treaty [on equal pay], namely the elimination of distortion of competition between undertakings established in different Member States is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.<sup>64</sup>

The ECJ is a strategic player in the institutional set up of the EU and has a significant impact on shaping law and policy, the cases above are one illustration of that.

Finally, the ECJ's approach to human rights issues is worth mentioning as this is widely predicted to be the next area for significant legal development in the EU context. With the EU's accession to the European Convention on Human Rights and its own Charter annexed to the Treaties, the ECJ is set increasingly to decide on matters of Human Rights and is likely to decide them in a different way to their previous approach. As Stone Sweet points out, 'lawyers and judges will be more comfortable working with a codified text than with unwritten general principles',<sup>65</sup> which governed this area until recently. The result might well be increased rights-based litigation, thus increasing judicialisation. This area also serves as an example of how the ECJ continues to try and safeguard its position in the institutional framework and to try and ensure that decisions remain open to judicial scrutiny. The opinion on the EU's accession to the European Convention, delivered by a full Court at the end of 2014, gives us some insight.<sup>66</sup> The ECJ notes that the European Court of Human Rights (ECtHR) jurisprudence would be binding on all EU institutions including the ECJ and that the ECJ's rulings on human rights issues could not bind the ECtHR. However, the ECJ pointed out that this 'cannot be so as regards the interpretation which the Court itself provides of EU law and, in particular, of the Charter of Fundamental Rights of the European Union'.<sup>67</sup> The ECJ went on to consider the lack of arrangements for dealing with the overlap in jurisdiction between the Courts and points to the possibility of undermining the effectiveness of the preliminary reference procedure and the effectiveness of EU law overall. On the question of whether the ECtHR can rule on questions in which the ECJ has had prior involvement, the ECJ commented: '[t]o permit the ECtHR to rule on such

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<sup>63</sup> Case 57/93, *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541 and Case 128/93, *Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583.

<sup>64</sup> Case C-50/96 *Deutsche Telekom AG v. Schröder*, [2000] E.C.R. I-743, at paragraph 57.

<sup>65</sup> Alec Stone Sweet, 'The European Court of Justice', in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law*, Second Edition, (Oxford: Oxford University Press, 2011), at 152.

<sup>66</sup> OPINION 2/13 OF THE COURT (Full Court) 18 December 2014 EU:C:2014: 2454.

<sup>67</sup> Court of Justice of the European Union, *Annual Report*, Luxembourg 2015, [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/) [accessed 26 October 2015] at 12.

a question would be tantamount to conferring on it jurisdiction to interpret the case law of the Court of Justice'.<sup>68</sup> The ECJ also seems less than impressed that the ECtHR, as the law now stands, would have jurisdiction to review certain acts/omissions which the ECJ currently does not have jurisdiction to review (mainly acts and omissions relating to Common Foreign and Security Policy matters) noting that:

[t]he Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.<sup>69</sup>

The ECJ is asserting its position vis-à-vis the ECtHR and highlighting that it sees the interpretation of the ECHR as part of its remit. The power play between the Courts and between the EU institutions and the Courts will provide a rich area for research in the future and will go some way to highlight the extent to which the ECJ continues to be transformational.

The preceding examples have given an insight into how the ECJ seems to be transforming EU law and policy areas even where the legal order remains static. Shifts in focus on substantive areas are partly due to questions being posed by Member States' Courts but are also influenced by the ECJ's approach to the questions posed and the decisions they make as decisions are likely to lead to further legal development and possibly litigation.<sup>70</sup>

The ECJ's reach is wide in scope. There are no policy areas with which the Court has not in some way engaged. As Jacobs notes, the EU 'is based on the rule of law to a far greater extent than any previous or contemporary international or transnational organisation'.<sup>71</sup> That emphasis on the rule of law and the importance of law in the expansion of the EU's remit, has led to policy areas evolving over time on a case by case basis as legal arguments have built on previous ones and the ECJ has based its decisions on precedent. However, there are some decisions which have transformed policy areas or at least had the potential to do so even in circumstances where there is no transformation of governance structures or the legal order, individual decisions do very much matter for individual policy areas and ultimately also for how governance operates.

## CONCLUSION

'The EU provides one of the most important examples of extensive judicialisation ever documented across a wide range of policy areas'.<sup>72</sup> There are clearly elements of what Kelemen has termed Eurolegalism. The importance of the ECJ and of litigation in shaping the EU legal system should not be underestimated. The ECJ transformed the treaties into something far more relevant to Member States and their citizens than they would otherwise have been and thus opened the (flood) gates for litigation on EU law issues. This article has illustrated how the early decisions of the ECJ transformed the legal order completely by declaring EU law supreme, directly applicable and often directly effective and then making Member States liable for breaches of their obligations. Once that legal

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<sup>68</sup> Court of Justice of the European Union, *Annual Report*, Luxembourg 2015, [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/) [accessed 26 October 2015] at 12.

<sup>69</sup> Opinion 2/13; paragraph 256.

<sup>70</sup> There is a significant body of work around legal mobilisation which considers the impact on EU case law and policymaking on litigation strategies in an EU context. See for example Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, (Cambridge: Cambridge University Press 2007) and Lisa Vanhalla, *Making Disability Rights a Reality? Disability Rights Activists and Legal Mobilization*, (New York: Cambridge University Press, 2011).

<sup>71</sup> Francis G. Jacobs, *The Sovereignty of Law: The European Way*, (Cambridge: Cambridge University Press, 2007), at 35.

<sup>72</sup> Stone Sweet, 'The European Court of Justice', at 145.

order had been established, it was accepted by Member States partly because of the way the preliminary reference procedure has been used by the ECJ to protect lower national Courts' rights to refer questions, thus giving them and citizens a stake in the functioning of the EU legal order. It is therefore likely that the ECJ played a key role in instigating what Tömmel<sup>73</sup> has considered the second phase of governance. Without the ECJ's actions it would have been impossible for integration to move forward in the way that it did, perhaps resulting instead in it doing so away from the political gaze and in a rather more hidden fashion. Arguably, the Court then also paved the way for the third phase as integration had progressed to such a point where deliberate liberalisation of the market was possible. Finally, the article considered whether the ECJ continues to be transformational and concluded that while it might continue to transform policy areas, the legal order itself has remained static. That is not to say that the ECJ is no longer relevant in governance terms, it continues to drive forward EU integration in many areas and influence the development of law and policy across the Member States.

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<sup>73</sup> Tömmel, 'EU Governance of Governance'.

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Research Article

## Sixty-Five Years of Auditing Europe

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## Abstract

This article surveys the evolution of multi-level audit governance in the European Union. It traces sixty-five years of financial control, from the work of a single auditor at the European Coal and Steel Community (1952) to the creation of the Audit Board of the European Communities (1959-1977), and from the establishment of an independent European Court of Auditors (1977) to audit the newly established EU budget, to the setting up of a European Anti-Fraud Office (1999). The article addresses the challenges of securing effective cooperation between audit bodies at the national and supranational level. It also analyses how the Community's external auditor started to 'hold to account' EU policies and traces the tensions and inter-institutional conflict that arose between the Court and the Commission and Council. Using an analytical approach set out by Tömmel (2016) that recognises different 'modes of governance', it identifies the main *phases* and *turning points* that have shaped audit governance. It shows how the audit task has changed since the Maastricht Treaty, and considers the way the Court works to identify error and fraud in budgetary spending, acknowledging the challenges of shared implementation for policies financed by the budget. The latter part of the article addresses current institutional reform and innovation. It examines the dilemma for audit governance brought by the Eurozone financial crisis and the emergence of new tools and mechanisms paid for by taxpayer money beyond the EU budget.

## Keywords

Accountability; EU budget; European Court of Auditors; Evaluation; Fraud; Implementation

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Financial accountability is a subset of administrative accountability, itself at the heart of political accountability. Financial accountability depends on external control and effective scrutiny through audit. The approach to audit practice in the European Union has been influenced by the European integration process, by inter-institutional politics and by the norms and values that have emerged over time at the supranational level inside today's European Court of Auditors (henceforth 'the Court') (1977) as well as 28 national audit offices. How have structures emerged to 'give account' of public policies financed by the EU budget? How have institutions shaped audit practice to underpin the mechanisms, rules and procedures used in the governance of financial control today?

Auditing is carried out in an increasingly complex and fraught system of 'shared governance': *internally* in the member states at the programme/project level of intervention (i.e. by the final beneficiaries), and in the Commission and national ministries at the level of policy programming; *externally* by private auditors at programme/project level and by the national audit offices and European Court of Auditors at the policy level. The Court of Auditors promotes accountability and transparency by assisting the European Parliament (henceforth 'the Parliament') so it can 'give discharge' on budgetary expenditure, but depends on cooperation with national audit offices (supreme audit institutions). It has struggled to promote the concept of 'single audit' to reduce duplication and overlap.

In the current economic climate, sound public policy audit and the rigorous financial control of EU funds are more crucial than ever. There is considerable political pressure upon the EU institutions, member states and national parliaments, to be more accountable to the European taxpayer

regarding how their money is spent. The EU currently seeks to promote the value-added of EU policies, i.e. to demonstrate 'additionality' and value for money to citizens. Indeed, the 'EU Budget Focused on Results' conference of 22 September 2015 brought together 500 participants, including the Commission President Jean-Claude Juncker and leading Commissioners, to discuss how to improve the efficiency of spending and to achieve more with the limited resources available (European Commission 2015a).

Current developments in the control framework at EU and national levels affect the 'chain-of-accountability' that enables the Commission to take overall responsibility for the implementation of the budget. The euro crisis, budgetary pressures, negotiations for the multi-annual financial framework 2014-2020 and new tools of economic governance have brought major challenges to public accountability. The legal mandate of the European Court of Auditors has traditionally been limited to the EU budget. Recent developments have called into question who should audit the Commission's new European Fund for Strategic Investment (EFSI) that puts forward 21 billion Euros of EU funding alongside 5 billion Euros of money from the European Investment Bank (EIB) (European Commission 2015b; European Parliament and Council 2015).

The first aim of this article is to provide a broad overview of the development of audit governance over the last 65 years, and to trace the institutionalisation of financial control. The second aim is to understand why there is pressure to reform the Court and what the challenges ahead are in terms of improving audit. The analysis is informed by the work of Tömmel (this issue), after Kooiman (2003) and Tömmel and Verdun (2009), which identified four 'phases' in the evolution of European governance, and a series of accompanying 'turning points': the end of the 1960s, when the Commission sought to expand the realm of its policies but met with resistance; the mid-1980s, when the Commission and member states faced up to the need for political action in the face of globalisation; the mid-1990s, when national governments refused the major transfer of competences to the European level; and 2008 with the global financial and Eurozone crises. To what extent do these phases align with the phases of audit governance?

This sorting mechanism of phases and turning points offers an alternative to the notion of *critical junctures* found within the literature on historical institutionalism (Hall and Taylor 1996; Pierson 1996; Pollack 1996). As such, rather than identify incidences of *path dependence* and *unintended consequences* in audit governance over time (Stephenson 2013), the article considers the three orders of governance at play: 'first order' governance concerns the actual process of actors solving problems; 'second order governance' relates to the creation and maintenance of institutions and the structural aspects of governing; 'third order' governance (or 'meta-governance') pertains to the norms shaping the governance process, what would elsewhere be a concern of sociological institutionalism (Bulmer 1993; Kooiman 2003; Tömmel 2016; Tömmel and Verdun 2009; Zafirovski 2004).

The article argues a number of points. First, the Court is traditionally not engaged in first order governance tasks; it does not make policy or seek to solve problems. However, the shift towards performance audit sees it making recommendations and offering solutions that can (in theory) help other multi-level actors in the execution of first order tasks. The Court cannot itself act upon its special reports – problem-solving depends on the action of other supranational, national and subnational actors taking up its audits, be it through legislative scrutiny (Parliament and Council, national parliaments) or as part of *ex post* evaluation and policy reformulation (Commission, national ministries). Second, for four decades the Court has been 'interpreting' its mandate, long experimenting with its institutional design (second order tasks), in reaction to the changing demands of audit from policy expansion. This has, in turn, led to high error rates in financial control processes at lower levels, i.e. second order tasks performed elsewhere. The main challenge has been to check the institutional systems and processes for administering the monies used in policy implementation.

The Court continually asserts its legitimacy through the cultivation and promotion of audit norms and standards (third level governance). It derives its legitimacy from the way it engages with, and plays an active role in, international technical bodies of audit and accounting that cultivate and promote professional audit standards, including INTOSAI, the International Organisation of Supreme Audit Institutions. At the more micro level of the institution, its organisational leadership and management asserts that the Court's professional norms underpin its work; the Court *contributes* to delivering accountability.

The next section does two things: it introduces the audit function in the EU and provides a brief literature review of the scholarship to date on audit governance. The subsequent section, using Tömmel's *phases* and *turning points* as a sorting mechanism, provides a broad longitudinal analysis of over six decades of institutionalisation to chart how the institutional architecture of financial control and the approach to audit have evolved. The conclusion examines how successive phases of audit governance correspond to the recognised phases of EU governance more generally.

## BACKGROUND TO AUDIT

### *Role and Function of Audit in the EU*

Audit in the EU is meant to be a shared governance arrangement with the member states, but there is ambiguity over roles (Castells 2005). As Sánchez Barrueco (2011) asserts, in a true system of shared management, the Internal Audit Service of the Commission would conduct the internal control on national authorities, just as a government department would do for the domestic budget. The challenge is that the member states' national authorities still perceive the Commission as an external control actor, even if vertical relations have improved since the Commission's proposal for an integrated control framework (European Commission 2006). Caldeira (2005), the current president of the Court of Auditors, has examined the notion and desirability of a 'single audit' meant to avoid 'overlapping and uncoordinated controls' at various levels (2005: 185), concluding that it could offer 'reasonable, but not absolute, assurance on the legality and regularity of transactions' (2005: 207).

Articles 285-287 (TFEU) define the role and prerogatives of the Court. Its audit is to be carried out with the aim of improving financial management, as well as making European citizens aware of how public funds are used, based on records and, if necessary, on the spot. The Court may request any information required to complete its task successfully from the EU institutions, national audit institutions and all persons, bodies and organisations in receipt of payments from the European budget. In practice, the Court checks the level of risk within the financial management systems of public authorities at regional and local level. It engages in spot-checks and carries out financial and compliance audits by sampling transactions throughout the project cycle, from a payment claim for incurred expenditure to its eventual reimbursement. In addition, the Court is increasingly engaged in performance audit, assessing the effectiveness, efficiency and economy (the three 'E's) of EU policies, and publishing its findings and recommendations in special reports.

The Court has set out general principles for internal control systems to operate in accordance with a 'single audit' model, based on the idea that each level of control, in a multi-level governance EU, builds on the preceding one (Court of Auditors 2004). The aim was to prevent duplication and reduce overall costs, while decreasing the administrative burden on auditees. The Commission increasingly relies on information provided by national audit bodies. However, the Court recognises the challenges of relying on the results of audits carried out at lower levels. Only four member states – Denmark, the Netherlands, Sweden and the United Kingdom, all net providers of the EU budget -

have agreed to provide national declarations of assurance, and yet the Court is meant to provide a single declaration that covers the whole of EU budgetary expenditure.

One might question whether one should expect the Parliament to 'sign off' the accounts of the Commission if 28 national parliaments and national audit offices (supreme audit institutions) are unwilling to do so to account for the validity of audits conducted in the member states on domestic transactions? In short, as García Crespo has stated, while EU integration has involved social, economic and fiscal policy, with a strong budgetary instrument, this trend has not been matched by 'the development of an adequate financial management and control system able to provide the assurance that European public funds are soundly expended' (2005: xi).

### *Existing Scholarship to Date*

Power (1997) introduced the notion of 'audit society', arguing that the rise in audit had its roots in political demands for accountability and control. White and Hollingsworth (1999) made an explicit link between audit, accountability and government. They suggested that audit, as an accountability mechanism, had been underplayed to date and that greater significance should be attributed to its role in delivering both democratic accountability and, within government, managerial accountability.<sup>1</sup> Harlow made the point that 'no one ever sat down to make a blueprint of a new system of audit for the EU, suited to its particular needs. It has simply been left to evolve' (2002: 116). Bemelmans-Videc, Lonsdale and Perrin (2007) addressed the dilemmas of public sector accounting and audit with a view to 'making accountability work' in practice.

The institutionalisation of early financial control and the emergence of the Audit Board of the European Communities from 1951 have been analysed through extensive archival material (Stephenson 2016). Scholars have provided limited insights into the early days of the European Court of Auditors (House of Lords 1987; Isaac 1977; Price 1982; Sacchetti 1977; Wilmott 1984; Wooldridge and Sassella 1976). De Crouy-Chanel and Perron (1988) provided a valuable introduction in French to the Court's historical development after its first ten years. From a legal perspective, Kok (1989) saw the Court as an enigma – after a decade up and running, it was merely 'the other European Court in Luxembourg'. Herein lies the confusion since its creation, for the Court is not a court; it is an advisory body with no legal powers. Desmond (1996) provided valuable insights into the management of European finances, but it is Laffan (1999; 2003a; 2003b; Karakatsanis and Laffan 2012) who has made the most significant contribution to our understanding of the Court by addressing inter-institutional relations over time, and conceiving of principals and agent in audit practice. She explored the dynamics of EU financial accountability, considering it as a subset of administrative accountability that contributes to parliamentary accountability – audit findings inform scrutiny processes – and explored the emergence of the Court as the EU's 'financial conscience'. With Inghelram (2000) again focusing on legal issues, we can see that few scholars researched the Court in its early years, though the Court published an overview of the first twenty years of audit activity (Court of Auditors 1998a).

Jumping ahead a decade, and taking into account the creation of new institutions, there has been a modest revival of interest in the institutional dimension of audit governance. Kourtikakis (2010) examined the European Ombudsman vis-à-vis the Court while Stefanou, White and Xanthaki (2011) analysed the establishment of the European Anti-Fraud Office (OLAF). Cipriani (2010), an official at the Court, wrote an extensive think-tank piece on the relationship between accountability and political responsibility when it comes to the EU budget. Sánchez Barrueco (2011) analysed the link between EU legitimacy and audit governance post-Lisbon, and more recently the implication of crisis on financial accountability in the EU (Sánchez Barrueco 2015). Meuwese (2011) looked at the Court's new involvement in impact assessments. Stephenson (2014) examined the procedure for appointing

members of the Court and the role of collegiality, as well as the shift to performance audit (Stephenson 2015). De Bondt (2014) questioned the focus on accountability in performance audit, positing that the Court's special reports would be more effective if they focused more on securing learning on the part of final beneficiaries who manage EU funds. Are the goals of accountability and learning mutually exclusive? Karakatsanis (2015), another Court official, considered the notion of accountability and its implications for audit today – how accountable can we expect to be in a policymaking environment of increasingly complex financial tools that are distant and abstract? Finally, Aden (2015) looked to the future and the possible creation of a European Public Prosecutor's Office.

## **KEY PHASES IN THE EVOLUTION OF EUROPEAN AUDIT GOVERNANCE**

In sixty-five years of Community spending, supranational audit governance has evolved from a single auditor at the European Coal and Steel Community (ECSC) in 1952, to around 950 staff members at today's European Court of Auditors, of whom 450-500 carry out audits. The Court cooperates with supreme audit institutions (SAIs) in the member states. Today's architecture of audit governance includes the Commission (internal audit services), Parliament (Budgetary Control committee) and the Council (Budget committee), while extending to international organisations, non-binding coordination committees (Contact Committee) and private auditors (such as Ernst & Young).

### ***First Phase (1952-1972): the Struggle for Perceived Legitimacy and Independence***

At the outset, the auditing of accounts was carried out separately for each Community. The Council stipulated the number of posts and the length of mandate: two years for the European Coal and Steel Community's comptroller (Commissaire aux Comptes, ECSC) and five years for the Audit Board of the European Communities (1959-1977). Tasks were limited to producing the annual report on Community expenditure, including observations, but without any scope to pursue further action, or demand that corrective action be taken. The foundations of Community audit were built on the existing practice of the founding member states. The part-time Audit Board was responsible to the Council. At the outset it was composed of one representative from each of the six national audit offices, who travelled once a month to Brussels, staying for two or three days. This was a time of great uncertainty for the 'founding fathers of audit' with the ECSC comptroller effectively mentoring them by sitting in on monthly meetings, overseeing the new temporary body and advising on operational procedures.

The exercise of giving discharge for the first year of accounts (1958) was considerably delayed. In the preface to its first report, the Audit Board mentions institutional resistance on the part of the Commission, when it came to providing receipts and answering questions. The auditors would have difficulty, despite being in Brussels, securing cooperation from third parties on questions concerning how monies were spent. The Audit Board requested justifications for institutional expenditure (purchase of furniture and equipment, telephone calls, travel, salaries), soon upsetting the Commission. In its first two years, it requested clarifications from the Commission on staff salaries and pensions, office furniture, chauffeurs, telephone calls, and travel abroad – and it had not even begun committing funds to policy areas.

Likewise, Euratom (the European Atomic Energy Community) showed great recalcitrance when the Audit Board set out to visit Ispra (the location of the nuclear research facility), claiming that the nature of Euratom activities was sensitive and confidential. The problem was the Audit Board's lack of political independence. Its reports were not even published, they were simply sent to all three

Community institutions, notably so that the Parliament and Council, as part of their then joint procedure for giving discharge on the Commission's accounts, could discuss them; there was no follow-up on their work. Audit was merely a formal *a posteriori* audit of expenses by examining and certifying receipts (O'Keefe 1994: 178).

The audit function expanded rapidly as the Commission began to commit funds through agricultural, fisheries, research & development, and development policies. Even at this stage, however, the auditors did not envisage the audit function would involve site visits, but saw this as the task of the member states' own supreme SAIs. In these early years of audit governance, the approach was haphazard, an amalgam of existing national approaches – each member state with differing national political cultures and legal-administrative traditions – which was slow (based on correspondence by letter) and using limited technologies. Governance was heavily intergovernmental and with limited vertical cooperation. Acquiring information depended crucially on cultivating good relations with senior officials and repeatedly asserting that the Audit Board had an official remit to request information on behalf of the Council.

The creation of a Contact Committee in 1960 provided a coordination structure that could stimulate horizontal communication and exchange of best practice in audit. This non-political assembly, membership of which is voluntary, brings in SAIs across Europe, with annual meetings and a series of issue-based task forces. It has proven to have limited effectiveness but nonetheless provides a forum in which the Court and member state bodies can engage in dialogue about audit norms (third order governance). The Committee played a role in setting up the Court of Auditors, inviting it to become a member of the Committee in 1978.

The Merger Treaty in 1967 was a key legal development, establishing a single Audit Board for all three communities (ECSC, Euratom and EC) composed of six, then nine, part-time members and with 24 auditors and support staff (O'Keefe 1994). ECSC mentoring came to an end; its auditor was left simply to audit the ECSC's institutional expenditure (but not expenditure related to its activities in coal and steel). Yet, there was already talk within the Council and the Parliamentary Assembly of reinforcing external control and the recognised need for more permanent audit governance structures (European Parliament 1973).

### ***Second Phase (1973-1991): Forging a Common Audit Culture, Facing up to Institutional Conflict***

The creation of a directly elected European Parliament was a first real turning point and key moment of political spillover in the integration process. The Parliament could not accept budgetary responsibility for taxpayers' money without an independent external controller in place. The 1973 report by the President of the Committee on Budgetary Control, Heinrich Aigner, called for the creation of a European audit office (European Parliament 1973). The imminent introduction of a system of own resources gave the Parliament good grounds but the Council objected, arguably on the grounds of comparative power distribution – creating a Court of Auditors would introduce a further Community body, indirectly reinforcing the role of the Parliament.

In the face of a number of newspaper stories exposing incidences of fraud in the use of agricultural funds, there was increasing pressure on the Commission and Parliament to demonstrate what was achieved for the taxpayer through Community policies. How *accountable* was European governance? There was a renewed focus on (third order) normative notions of *transparency* and *responsibility* implicit in the drive for *value for money*. The emerging normative concept of accountability drove the (second order) institutional architecture of audit at the supranational level. The establishment of an independent Court of Auditors thus resulted from the transformation of the budgetary process of the Community with the Treaty reforms of 1970 and 1975 ('Brussels Treaty'),

whereby financial accountability was linked to the norm of *democratic* budgetary control. These basic principles were anchored in the two treaties, but were difficult to implement. As a result, the Parliament set up new structures and procedures internally – including the ‘discharge procedure’ and the establishment of the new Budgetary Control Committee (CONT).

The Court of Auditors was constituted on 18 October 1977 and did its best to interpret the concept of ‘sound financial management’ as broadly as possible. The then-head of the European Court of Justice (ECJ), President Kutscher, said at the time, that the Court’s ambition was to become ‘Europe’s financial conscience’, and arguably it continues to consider itself as such. The Court had to ‘agree and establish an organizational structure; internal principles, processes and procedures for auditing; and relations with the bodies that it had to audit’ (Laffan 2003a: 797). It also needed to forge its own culture and methodology reconciling French-Mediterranean legal approaches to audit that traditionally emphasised legal compliance and regularity with the Anglo-Saxon focus on performance and value for money.

Only two Members of the Audit Board moved to the Court in 1977. There was reluctance at managerial level to ‘take up’ where the Board had left off. Nonetheless, the Court was no blank slate, with some auditors moving to the new institution, bringing established practices from Brussels to Luxembourg, including the norm of *collegiality*, best embodied in the college of members – one member (and their cabinet) per member state – as laid down in Article 1 of its internal rules. Nothing was set out to determine the Court’s internal organisation but the new rules made clear that the Members of the Court were themselves required to have previously belonged to an external audit body in their respective country or be ‘especially qualified’ for the office. Collegiality allowed for each member to have own responsibilities and, with the creation of audit groups from October 1985, to head up their own section.<sup>2</sup>

In 1983, the Stuttgart European Council invited the Court to produce a report on ‘sound financial management’. This was an opportunity to establish audit governance at the European level. Directors of the audit groups inside the Court were asked to check the soundness of financial management in the three main areas of expenditure: the Agricultural Guarantee Fund (Common Agricultural Policy), structural funds and development aid, on the basis of observations made by the Court in its latest reports. The Court highlighted political and administrative shortcomings in the conduct of Community policies – often related to the Commission’s own financial management systems and internal audit procedures – which ‘caused a chill in relations with the Commission, which proposed, without success, that the Court should not be allowed to publish an opinion without the consent of the requesting Institution’ (O’Keeffe 1994: 183). In short, the Court had attempted to formulate normative statements on issues of financial management but met with considerable resistance from the executive. The Court subsequently secured a higher level of authority and control, clearing the way for it to put forward assertions and value judgements on the soundness of EU policies, as it does today in its special reports.

The Court provides administrative support to EUROSAI (European Organisation of Supreme Audit Institutions), established in 1990 as the newest of seven regional groupings of INTOSAI. This is a vital area of third order governance and a forum in which norms are shaped, negotiated and thereafter internalised. Work is organised into four teams: capacity building, professional standards, knowledge sharing, and governance and communication. INTOSAI strives for good governance, including accountability, transparency and integrity. Its objectives are: to promote professional cooperation among SAI members and other organisations; to encourage the exchange of information and documentation; to advance the study of public sector audit; to stimulate the creation of university professorships in this subject; and to work towards the harmonisation of terminology in the field of public sector audit.

In short, over the first 15 years, the Court emerged as a 'living institution' (Laffan 1999), building up its expertise, developing its own audit culture and methodology, and asserting itself as an independent body, working to deliver its findings to the European Parliament.

### ***Third Phase (1992-1999): Securing Official Status and Providing Assurance***

The Maastricht Treaty was a second turning point. Drafted in 1991, it raised the Court's status to official institution from 1 November 1993, conferring upon it new powers, and making its Luxembourg seat permanent. It introduced the 'Statement of Assurance' (commonly known as the 'DAS' or '*Déclaration d'Assurance*'), whereby the Court collects annual data on financial management and reports on the degree of error in various policy areas as its contribution to the discharge procedure on the Commission's annual accounts. Its report to the Parliament and Council covers the reliability of transactions carried out using the EU budget. The first DAS, delivered in November 1995 (for the year 1994), flagged up the weakness of accounting, in terms of management and control systems, within the multi-level administrations of the EU. The Court acknowledged that the information it received was often incorrect or incomplete – as such the Court extrapolates when it comes to providing 'assurance'.

Maastricht also underlined the role of 'special reports' and enabled the Court to submit 'observations' at any time as well. Article 206 modified the provisions concerning the discharge procedure so that the Council and Parliament were formally required to consider the special reports in addition to both the annual reports and replies of the institutions to the observations of the Court. This signalled an area of task expansion, and one to which the Court would allocate more of its resources over the next 20 years as it shifted towards performance audit, while maintaining its compliance obligations.

There is discussion today as to whether or not to continue with a full annual DAS - often referred to as 'core business' inside the Court – or to carry out a selective DAS (i.e. not audit all policies each year). Some Court officials feel the media focuses excessively on the Court's annual report to the detriment of its other audit reports, and even then fails to understand its findings, often confusing 'error' with 'fraud'. Nonetheless, most agree that the introduction of the DAS empowered the Court and that it remains central to its role as the EU's external auditor.<sup>3</sup>

### ***Fourth Phase (2000-2008): Organisational Change and Task Consolidation***

The resignation of the Santer Commission as a result of financial irregularities picked up by the Court was a third turning point. Audits revealed the severe dysfunction in the financial management and control by the Commission. This must be seen as a turning point in the institutionalisation of audit governance in the EU since it soon led to the creation of a new institution 'devoted' to fraud. The Court was critical of the internal structure of the Commission's Unit for the Coordination of Fraud Prevention (UCLAF), which 'more or less painted a picture of a disorganised Commission unit in which internal administration was either non-existent or not functioning' (Stefanou, White and Xanthaki 2011: 159). Its 1998 special report was instrumental in the development of a new legislative framework to create the Anti-Fraud Office (OLAF) in 1999 (Court of Auditors 1998b).

The paradox is that Commission President Santer had emphasised his commitment to develop constructive relations between the Court and Commission, after two difficult decades marked by inter-institutional conflict and distrust. The Commission had been 'very defensive, resents criticism, and is slow to change its rules and procedures', even referring to its audit dialogue as an 'adversarial procedure' (OJ C 330/299, in O'Keefe 1994: 184). O'Keefe (1994: 185) refers to 'the impression of

warfare', citing the 'inexcusable' clash over the 1989 exercise, where the Commission refused to provide the Court with information on cases where approval had not been given by the financial controller. The Court has supported the hybrid nature of OLAF, recognising that it benefits from the Commission's administrative and logistical support structure, but been wary of OLAF encroaching on its territory. A more formal link between the two would arguably have given the Court additional powers, making it the EU's 'all-seeing eye' and upsetting the overall institutional balance (Stefanou, White and Xanthaki 2011: 160).

In December 2001, the Convention on the Future of Europe was meant to prepare a new constitution, representing a window of opportunity to improve audit governance. However, as Flizot (2012) points out, the reflection document on the functioning of the institutions produced by the Convention of January 2003 only related to the five main institutions (including the European Council), even though the Court had been given formal institutional status at Maastricht in 1992 (European Convention Secretariat 2003).

The draft European Constitution (2004) and Intergovernmental Conference (IGC) (2007) prior to the Lisbon Treaty proposed removing this EU institutional status. The Contact Committee of the heads of the national audit offices (SAIs) expressed concerns about the future of the Court in the EU's institutional architecture. At a meeting in Prague in December 2003, the committee drew up a resolution (Contact Committee 2003), which it sent with a letter addressed to Berlusconi, president of the IGC, signed by the two committee co-chairs (the acting president of the Czech SAI and the UK's comptroller and auditor general), stating:

- The Contact Committee would like to state that an institution entrusted with external audit of public finance should be placed at the same level as the bodies it audits. Therefore, it considers that the mentioning of the European Court of Auditors among the 'other institutions and bodies' is not appropriate. The right place for the external auditor of public finance is, in the opinion of the Contact Committee, in the single institutional framework.
- The Contact Committee is of the opinion that independent of the outcome of the IGC on the above mentioned issue, the Treaty (Article III-312, par. 3) should be amended in order to ensure the European Court of Auditors its own part in the budget. A separate budget is one of the guarantees of the independence of any Supreme Audit Institution. (Contact Committee 2003.)

As a former Spanish member of the Court asserted, it was only because the Court of Auditors and Contact Committee (of national audit offices) reacted in time that it remained an official institution in the Treaty on the Functioning of the European Union (see Articles 285-287 of consolidated version) (Court of Auditors 2012: 5).

At the time, some member states submitted proposals on how to reorganise the Court, but nothing was done: 'the great issues were found to be so overwhelming that all other matters were put aside. And the court itself did not seek to raise the issue' (Stefanou White and Xanthaki 2011: 159). The Nice Treaty (in force 2003) did at least legally recognise the need to adopt internal rules formally at the Court. It encouraged a better institutional framework and improved conditions for cooperation between the Court and SAIs, while (crucially) maintaining the autonomy of each, and supporting the continued role of the long established contact committee. The member states formally stipulated there should be one member per member state (then numbering 15) rather than overhauling the Court and introducing a smaller College of three to seven members, as some member states (including the Netherlands) had proposed. Political decision-makers shirked any reform, failing to face up to the prospect that enlargement would see the Court's management almost double in size.

The Court warned of the critical impact of the 2004 enlargement on its functioning, fearing the excessive fragmentation of its decision-making and management – its collegial leadership structure was threatened. In 1994 there were just 400 staff, of whom 200-250 were auditors, but within a decade the staff had doubled to 800. Each Court member had a private office of five posts, meaning almost one in five staff members was engaged in top-down management activities outside the regular audit function. College meetings became formal and more secretive, where previously non-members had sat in while members discussed freely. The number of special reports published annually fell from fifteen to six as decision-making to launch new audits slowed and the management of audits in progress became more complex.

Facing political pressure from the member states, the Court underwent a critical self-assessment exercise in 2007, followed by an external peer review exercise in 2008, which endorsed the Court's audit management framework (Court of Auditors 2008). Subsequently, the introduction of new internal rules in 2010 created vertical chambers, with decision-making powers delegated to them, away from the College. It freed up decision-making after the paralysis brought about by enlargement but led to the reinforcing of internal silos, and fragmentation, as each chamber competed to outperform the other. A communications department was created around the President to promote the Court's activities and professionalise the presentation and dissemination of its special reports, which, less dense than the annual reports, could make 'arresting reading' (O'Keefe 1994: 183). The Court was now viewed as 'rigorously independent and objective, without an axe to grind' (ibid: 194), even if it still struggled with external visibility. We see the Court concentrating resources on its external projection (and perceived legitimacy) as a highly professional body in the vanguard of audit practice globally, i.e. it is engaged in third order governance tasks. Nonetheless, much of this phase was essentially concerned with second order tasks related to the establishment of new structures, the consolidation of existing rule and frameworks, and the re-organisation of an institution, i.e. restructuring in order to govern more effectively.

#### ***Fifth Phase (2009-): Coping with Crisis and Complexity – Risk, Relevance and Responsiveness***

The 2008 financial crisis was arguably a fourth turning point, raising huge questions about the needs of audit governance in the EU (Sánchez Barrueco 2015). The legal base for the existing Community medium-term financial assistance facility gives the Court the right to carry out financial controls or audits that it considers necessary (Council 2009). With the creation of a European Financial Stabilisation Mechanism (EFSM) in 2010, the Court had a similar right to audit the beneficiary and to audit the reliability of loan disbursements as part of its task to audit the implementation of the EU budget (Council 2010).

In 2010, the Court submitted proposals for enhanced surveillance of member states' fiscal policies, macroeconomic policies and structural reforms, and in 2011 it discussed with member state SAIs how to audit the European Semester (Court of Auditors 2011). The situation was different for the European Financial Stability Facility (EFSF) – essentially a private company with 100 per cent sovereign ownership under national (Luxembourgish) law. The agreement between the Euro Area member states and the EFSF had no provision for external public audit, but a private auditor was appointed to check financial assistance up to 440 billion Euros.

The public hearing at the EP in May 2012 may have been a missed opportunity (European Parliament 2012; 2014). Its President, Vitor Caldeira, spoke of a set of values developed to help the institution play its role effectively: *independence, integrity, impartiality* and *professionalism* – values that emerged over time by interpreting its mission from the Treaty. He did not push for treaty reform to give it the competence to audit beyond the EU budget, but referred to the Court becoming 'a more efficient knowledge-based organisation' and spoke of the need to 'streamline the key processes by

which we create and transfer that knowledge' (Caldeira 2012). As the Estonian member of the Court further stated:

The Court's mandate as established by the Treaty provides the reference framework for the Court to fulfil its role as the independent external audit body of the Union. The mandate does not only consist of obligations – like the DAS – but ensures a rather big room for manoeuvre for the Court to carry out its mission. Plainly speaking, the mandate [...] allows the Court to keep in line with international auditing standards and new developments in the EU, and the proposals [a]rising from our current debate will definitely influence how we interpret our mandate (Kaljulaid 2012).

A second peer review report criticised the responsiveness of the Court, in terms of the time taken to conduct special reports and the timely launching of new audits on high-risk topics (Court of Auditors 2014a). In October 2014 the Court published its first Landscape Review (Court of Auditors 2014b), which takes up Bovens, Curtin and 't Hart 's (2010: 41) model of accountability, advocating it to be 'the relation between 'actors' and a 'forum', in which actors inform the forum about their conduct and performance'. As such, the Court considers that it 'accounts' for the performance of the EU budget vis-à-vis the Parliament's Budgetary Control Committee. By recognising that 'the forum is vested with the authority to judge the actors and requires them to take corrective actions if necessary' (Court of Auditors 2014b: 11), the Court places the onus for further action or mandate on the Parliament. In November 2014, the Court elected a new Member for Institutional Relations (MIR) to reform working practices with the Parliament and the Council, in the hope of securing more impact from its work from decision-makers. It has been working hard to secure direct access to the sectoral (spending) committees beyond CONT (Budgetary Control), in order to maximise the impact of its works with MEPs and the legislature.

The question remains whether the Court has the financial expertise and in-house knowledge to audit new tools of economic governance. How exactly to divide up work in this area, between public and private auditors, and between EU institutions and national supreme audit institutions? The arrangements for future external public audit remain uncertain. The former first Director General and Chief Internal Auditor at the Commission has claimed: 'we will witness the systemic consequences of working with empty toolkits on matters which are of global monetary significance'. He asserted that the Court must play a 'macro-prudential diagnostic role' so that it is 'more robust' in its assessment of the effectiveness of policies and activities, and to 'minimize financial fragility' throughout the EU (Muis 2012).

In January 2015, the Commission proposed the 'European Fund for Strategic Investment (EFSI)' or 'Juncker Plan' (European Commission 2015b). The EFSI established a trust fund within the European Investment Bank (EIB). A guarantee of up to 16 billion Euros was to be set up, backed by the EU budget using funds to a total of 8 billion Euros. The money was intended to mobilise over 300 billion Euros in investment. In March, acting quickly, and in cooperation with the European Parliament, the Court was able to publish an opinion critical of the Commission's proposal, which had failed to recognise the audit mandate of the Court on *all* revenue and expenditure of the EU (Court of Auditors 2015; Euractiv 2015; UK Parliament 2015). The Court made the point that 'instruments where the EU collaborates with the private sector need to have an adequate level of transparency and accountability of public funds', and successfully secured partial rights of audit (Court of Auditors 2015: 8).

In early 2016, the Court is introducing internal reforms in an attempt to be more flexible and responsive as an organisation. It is abolishing the thirty or so units and the role of *head of unit*. The *director* of each chamber can henceforth designate a *head of task* for each audit that is directly responsible to a *reporting member* (of the Court); the *director* can also delegate own responsibilities for the management of staff and finances to a *principal manager*. Yet these plans ignore what many

inside the Court see as the long-standing 'elephant in the room': the persistently top-heavy management. This reform aims to show the Members of the Court active in day-to-day auditing, which may be an attempt to appease critical voices from the European Parliament and the member states (Sender 2012). Members (with their qualified cabinet staff) may or may not choose to play a greater role in leading performance audits. Reform also means the creation of a large pool of auditors, and potentially, more direct working relations between junior auditors and senior members. While this flatter, more flexible structure might seem attractive, the removal of middle management structures brings uncertainty for junior staff in terms of career progression, and the availability of steady professional supervision and guidance. It raises questions also regarding the competence of non-auditor Court Members to lead technical work. The reform logic appears to be inspired by a model for organisational reform both fit for, and authored by, a private sector audit firm, rather than a large EU public sector institution. Court officials themselves admit that only time will tell.<sup>4</sup>

## CONCLUSION

European audit governance sees the Commission, national audit offices and the Court of Auditors striving to avoid duplication and overlap in the financial control of the EU budget. Despite official status conferred at Maastricht, the Court of Auditors has arguably not managed to assert itself on an equal footing with the other EU institutions, though perhaps this is to be expected given that it was a relative latecomer, and owing to the comparative lack of interest in *ex post* governance issues, as opposed to *ex ante*; there is great political interest in renegotiating the EU budget, but less interest in evaluating how the budget fared.

The last decade has seen considerable activity in terms of internal reform, with professionalisation, a greater focus on communication with stakeholders, and an increased concern for the impact of budgetary spending. The Court has promoted its special reports, which offer an assessment of 'value-for-money' and give recommendations to the Commission as to how greater policy effectiveness might be achieved in future policy expenditure. Its recommendations are practical, aimed to improve the effectiveness of implementation by the Commission and the member states by reinforcing financial systems management – and to this extent, the Court is arguably engaged in first order governance problem-solving.

The Court clings to its values of *independence* and *collegiality*, regularly looking to its original Treaty mandate, which arguably has room for further interpretation. This is particularly important vis-à-vis the Parliament, which increasingly makes requests for new audit topics; the Court listens but is not obliged to follow. It has become bolder in its institutional discourse; it is not *becoming a living institution* (Laffan 1999: 251), it is now alive and kicking. Nonetheless, the Court still essentially exercises second order and third order tasks. The move towards performance audit should help other actors engaged in policymaking be more effective in their first order governance tasks if they are able to act upon findings.

The Court is a norm-setter at the international level, and takes the lead when it comes to drafting audit standards for performance audit. What its continual pursuit of better technical standards and audit norms does most is to contribute to improving audit and financial management processes (second order tasks) in other multi-level institutional settings, the logic being that the adoption of better audit methodologies and harmonised approaches by final beneficiaries at the regional and national levels will lead to less error in compliance audit, i.e. actors will perform their second order tasks of administrative governance more correctly, regardless of whether policy is effective.

In European audit governance there has been a slight time delay in the turning points compared with those delineated by Tömmel (2016). Many of these have come about as the result of exogenous factors such as treaty change, as well as institutional and economic crises. The *first phase* of audit governance saw the ECSC making tentative beginnings at financial control and thereafter an Audit Board (1959-1977) that was politically and financially dependent on the Council and which relied on an amalgam of member state approaches, influenced by national approaches to audit. The *first turning point* did not come at the end of the 1960s when the EC sought to expand its realm of policies but arguably in 1973 with the Budget Committee's report making a case for an independent Court (European Parliament 1973). A *second phase* in audit governance saw the newly established Court experimenting with institutional design in response to the number and shape of policies implemented. It encountered conflict with the Commission but sought to assert itself through a number of reports and declarations. A *second turning point* did not come in the mid-1980s but with the recognition of the Court as an official institution at Maastricht in 1991, which emphasised the role of performance audit and introduced the DAS for compliance audit.

During a *third phase*, this newly empowered Court set about reinforcing its audit capacity and expanding in size, adopting common audit norms and playing an active role in the newly established EUROSAI. There was soon a *third turning point*, not, however, in the mid-1990s, but in 1999, with the resignation of the Santer Commission over allegations of fraud, which triggered the creation of a new body, OLAF, purely to pursue suspected cases of fraud. In this *fourth phase*, particularly since the arrival of a new president in January 2008, we have seen a more visible and emboldened Court, that is highly professionalised and that has taken on private sector norms. It is a phase of existential questioning about its mandate. The Court has undergone self-assessment, subjected itself to peer review, and confidently asserted its own ideas about audit and accountability that place the onus on parliamentary scrutiny. Its special reports are tackling riskier issue areas, but the Court strives to secure greater impact from its reports and to promote learning among financial managers at programme/project level.

Arguably, 2008 already saw a *fourth turning point*, triggered by the European financial crisis. The 2012 public hearing at the Parliament made a case for Court reform, including possible treaty change, accepting the challenges the EU now faces – and the limited mandate of the Court – to audit billions of euros of European (non-budgetary) expenditure effectively. This *fifth phase* may see key changes in the governance of audit, not only in terms of institutional redesign internally at the Court, but with the possible introduction of a European Public Prosecutor and other second order governance innovations in order to bolster European governance (Aden 2015).

In sum, the basic structures of audit governance have emerged through significant moments of treaty revision and institutional creation/dissolution, though also crisis – in the broader EU institutional architecture and the global financial system. However, the internal organisation, methodologies and social dynamics of the Court itself have evolved much more incrementally and may depend on leadership style, the amalgam of cultures and legal-administrative traditions. More research is needed to understand the life and practice of the Court and those factors shaping audit norms over time.

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<sup>1</sup> There is no room within this article to discuss the breadth of accountability literature (see Curtin, Mair and Papadopoulos 2010).

<sup>2</sup> There have been controversies over the election of some members to the College (see Stephenson 2014).

<sup>3</sup> Impression based on more than 60 interviews conducted at the Court from February to July 2015.

<sup>4</sup> As above.

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Research Article

## The (Ever) Incomplete Story of Economic and Monetary Union

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## Abstract

This article applies the governance typology used in this special issue to the evolution of euro area governance. The article begins with a description of Economic and Monetary Union's original governance structure, with third order governance (shared norms) present in varying degrees in monetary, financial and fiscal governance. While a shared consensus on the importance of an independent central bank to pursue price stability allowed for the creation of the European Central Bank, euro area governance was otherwise limited to the coordination of national policies. Since the crisis, shifting norms (third order governance) allowed for the creation of new bodies (e.g. the European Stability Mechanism and the Single Supervisory Mechanism) and the expansion of the powers of existing institutions (particularly the ECB). In areas where no normative changes occurred (fiscal and economic policy coordination), second order governance has been marked by incremental changes to existing institutions. The degree to which economic governance has become more hierarchical depends both on the strength of third order governance norms and the preferences of large states like Germany either to retain their own sovereignty or create additional rules that bind member states.

## Keywords

Governance; Euro area; Economic and Monetary Union; European Central Bank

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With the 1992 Maastricht Treaty, the European Union committed to the creation of Economic and Monetary Union (EMU) in three stages, culminating in the introduction of the euro on 1 January 1999. The sovereign debt crisis, however, prompted numerous reforms in economic governance (Chang, Menz and Smith 2014). The so-called Four Presidents' Report noted the need for 'a genuine economic and monetary union' to be created (Van Rompuy with Barroso, Juncker and Draghi 2012) to replace the extant system that proved to be poorly equipped to deal with the economic crisis. This official acknowledgement of the incomplete nature of monetary union was followed up by the Five Presidents' Report that explored further how to 'complete' (Juncker et al. 2015: 2) monetary union through the strengthening of democratic legitimacy, while continuing to develop and adapt the euro area's institutional architecture to the post-crisis environment.

How has EMU governance changed since its original inception and what were its primary drivers? Has there been a fundamental shift in euro area governance? Using the governance typology established by Kooiman (2003; see also Tömmel, this issue), this article examines the evolution of EMU governance in terms of its guiding norms (third-level governance) and institutionalisation (second order governance). The article begins with a description of EMU's original governance structure that was based on four pillars (monetary, financial, economic, and fiscal) (European Commission 2015a), with third order governance present in varying degrees in monetary, financial and fiscal governance. Second order governance differed substantially, as only the monetary pillar allowed for the delegation of power to a supranational institution, the European Central Bank (ECB), while financial, economic and fiscal governance were relegated to different degrees of cooperation between member states.

The article then continues by examining governance and its transformation since the crisis. Shifting norms (third order governance) have allowed for the creation of new institutions, particularly within the context of banking union and the European Stability Mechanism and the expansion of the powers of existing institutions, particularly the ECB. In areas where no normative changes occurred (fiscal and economic policy coordination), second order governance has been marked by ‘layering’ and ‘copying’ existing institutions (Verdun 2015). Indeed, in this ‘fourth phase’, European economic governance (Tömmel 2016) has been marked by the creation of institutions that shape member state governance, yet through modes that respect maximum national sovereignty. The degree to which economic governance has become more hierarchical depends both on the strength of third order governance norms and the preferences of large states like Germany either to retain their own sovereignty or create additional rules that bind member states.

### THE ORIGINAL DESIGN OF EMU

According to Kooiman (2003), governance orders can be characterised according to levels of activity. First order governing concerns day-to-day affairs, second order governing deals with institutional arrangements that establish the framework within which first order governing takes place, and third order (or meta-) governing refers to normative governance principles that feed into the other levels of governance. How can we understand EMU in such a framework?

According to the European Commission (2015a), EMU consists of four main policy areas, particularly for the Eurozone:

- Coordination of economic policy-making between Member States
- Coordination of fiscal policies, notably through limits on government debt and deficit
- An independent monetary policy run by the European Central Bank (ECB)
- Single rules and supervision of financial Institutions within the euro area
- The single currency and the euro area.

In the monetary, fiscal and financial pillars, one can see third order governance in varying degrees, as some norms were more widely shared than others. Specifically, the stability culture permeated the monetary and fiscal pillars while the efficient markets hypothesis provides the theoretical basis for the preference for ‘light touch’ regulation (Quaglia 2010) in financial regulation. Second order governance in the form of the institutionalisation of these norms differed substantially, resulting in the delegation of policy to the euro area level in monetary policy but the retention of national competences in fiscal and financial policy. Economic policy lacked third order governance, resulting in minimal levels of institutionalisation.

The dominant norm in the euro area is that of the stability culture, which refers to the importance of price stability and fiscal rectitude to the economy. Germany was the primary advocate of the stability culture, though some of its ideas were widely shared. Ideas on the importance of price stability and the success of independent central banks in achieving it led to the delegation of monetary policymaking to, first, the German Bundesbank in the European Monetary System, and then the ECB (Dyson 2000). Moreover, an independent central bank was an indispensable part of monetary union for Germany (Loedel 1999).

The remaining pillars of EMU did not involve a similar transfer of power to the supranational level or the creation of powerful new institutions. Instead, the EU sought to reconcile European policy goals with those of national governments, including disagreements among the latter (Tömmel 2016). On the fiscal side, the Maastricht Treaty says very little beyond the convergence criteria on debt and

deficits. This would later get fleshed out in the Stability and Growth Pact (SGP), in which member states would continue to adhere to the deficit criterion in the Maastricht Treaty to ensure long-term fiscal rectitude (Heipertz and Verdun 2010). While this norm (part of the stability culture) constituted a third order form of governance, its second order institutionalism was limited to a rules-based regime rather than the creation of independent institutions; no normative consensus existed that would justify a more hierarchical governance structure at this time. Indeed, the fiscal ideas related to the stability culture were not widespread like the ideas relating to price stability and central bank independence. Germany was the main advocate of the SGP, reflecting the intergovernmental nature of the institutional configuration of monetary union (Heipertz and Verdun 2010).

The Maastricht Treaty also featured what became known as the 'no bailout clause' (now Article 125 TFEU) that made it illegal for one member state to assume the debts of another. Despite sharing a single currency, the Maastricht Treaty did not allow for a shared fiscal capacity. The assumption was that if all the member states duly followed the rules and kept deficits low, there would be no need to come to the rescue of another member state. The sovereign debt crisis quickly revealed the inadequacy of this rules-based system. The third pillar is the financial pillar. Prior to the financial and debt crises, member states retained authority for financial supervision under the Lamfalussy process, which provided a framework for EU-level financial regulation with the input of national regulators and supervisors. Although cross-border banking increased after the introduction of the euro, supervision remained national and regulation only 'light touch' (Quaglia 2010) due to the prevailing norms established by the efficient markets hypothesis (Fama 1970). As with the monetary pillar, the EU can be seen as engaging in meta-governance processes in its dissemination of norms advocating such 'light touch' regulation. Unlike monetary policy, this did not lead to more hierarchical governance in this area but second order governance in the form of directives and regulations created through the Lamfalussy process (Quaglia 2010), with no centralised supervision. Instead, a 'battle of the systems' (Story and Walter 1997) arose with member states using different types of institutions to supervise domestic financial systems. For example, some used national central banks as supervisors, others used separate financial supervisors, and sometimes financial supervision was divided between multiple institutions.

The economic pillar was based on even looser cooperation between member states than the fiscal pillar, with no overarching norms to guide governance at a meta level. Economic policy cooperation refers to a wide range of economic activity, including but not limited to pensions, labour markets, health care systems, taxation, wage developments and market liberalisation. Whereas the fiscal pillar was based on hard law and had the possibility (albeit never used) of sanctioning member states that broke the SGP rules, the economic pillar had no such measures. The Maastricht Treaty made economic policies a 'matter of common concern' (Article 103 TEC), with the Lisbon Strategy in 2000 (renewed in 2005) and currently the Europe 2020 Strategy (replacing the Lisbon Strategy in 2010) setting targets for member states covering employment, research and development, climate change/energy, education, social inclusion and poverty reduction in order to 'create conditions for smart, sustainable and inclusive growth' (European Commission 2015b). Nevertheless, this pillar remains as the coordination of national economic policies under 'soft law' (Hodson and Maher 2001).

Institutionally, EMU's main actors included the European Central Bank, the Ecofin Council, and the European Commission (DG ECFIN and DG MARKT). First, the European Central Bank formed monetary policy for the euro area as a whole. Despite the ECB's independence, its capacity to act as a central bank akin to that of the Federal Reserve or the Bank of England was limited. Specifically, the ECB did not have the power to act as the lender of last resort, a typical function for a national central bank. Article 101 TEC (now Article 123 TFEU) prohibits monetary financing, meaning the overdraft facilities, credit facilities, or direct purchase of debt instruments from EU institutions,

bodies, offices or agencies as well as central governments, regional, local or other public authorities and other bodies governed by public law (Buiter and Rahbari 2012). These prohibitions stem from the aforementioned ideas regarding the importance of price stability, which would be threatened by such monetary financing. Moreover, some member states, particularly Germany, refused to consider establishing a fiscal union or a political union which implies shared responsibility for other member state liabilities (Heipertz and Verdun 2010). Second, the Commission (DG ECFIN) performed economic and fiscal surveillance and drafted recommendations regarding member state adherence to Stability and Growth Pact rules as well as Broad Economic Policy Guidelines, which would then be confirmed (or not) through a qualified majority vote by Ecofin. Finally, DG MARKT initiated financial regulation that was passed by Ecofin (with the participation of the European Parliament).

In addition to these institutions, two others are worth noting. First, the Ecofin Council also met in another formation, that of the Eurogroup (finance ministers of the member states participating in EMU) that met prior to Ecofin meetings. The Eurogroup was created from a compromise between France's interest in a more accountable central bank and Germany's defence of the ECB's independence. While a consensus had emerged regarding the utility of central bank independence and the importance of price stability for the economy, not all member states had a history of independent national central banks; instead, central banks in countries like France and Italy took orders from the Treasury (Goodman 1992). While such banks did not enjoy the same success as their independent counterparts in achieving price stability, they did have the advantage of democratic accountability. The French government thus proposed an 'economic counterweight' to the European Central Bank, or a *gouvernement économique* that posed 'an explicit challenge to the ECB's goals and goal-setting and operational independence' (Howarth 2007: 1062). Predictably such a proposal aroused German opposition, given its potential threat to the future central bank's independence. The compromise was what would become the Eurogroup, which would conduct informal meetings but lacked both decision-making authority and a legal personality. Nevertheless, the Eurogroup became an important forum for the exchange of ideas between the finance ministers of euro area countries. Eurogroup meetings provided participants with the opportunity to enjoy a frank exchange of views and to 'pre-cook' the Ecofin meetings in which decisions would be taken (Puetter 2006). Over time, the Eurogroup would also become more institutionalised, though this would not necessarily make it more effective (Hodson 2011).

Second, the European Parliament played a limited role in legislation in this area. Although it conducts hearings with the ECB that are akin to the hearings held by the US Federal Reserve before Congress, the European Parliament holds no authority over the ECB and cannot force compliance with any of its recommendations, whereas theoretically Congress could revoke the independence of the Federal Reserve. Although the latter is an extreme and unlikely occurrence, it does underline the respective degrees of accountability of the Federal Reserve to Congress versus the ECB's accountability to the European Parliament. Nevertheless, these hearings allowed the European Parliament to boost its profile and the ECB to claim greater accountability and transparency (Chang 2002). Parliament's role in financial regulation was restrained until the passage of the Lisbon Treaty in 2009 gave it co-decision power, placing it on equal footing with Ecofin. Since then, the EP has a mixed record in the expansion of its powers (Rittberger 2014).

There were serious concerns about the ability of European states to cope with a single currency given their economic diversity. The solution was to make entry into Economic and Monetary Union conditional on achieving the Maastricht Treaty convergence criteria: exchange rate stability;<sup>1</sup> interest rate convergence;<sup>2</sup> inflation rate convergence;<sup>3</sup> 3 per cent deficit limit; and 60 per cent public debt limit. These criteria reflected German concerns over fiscal sustainability and macroeconomic stability, as per the stability culture. However, not all countries decided to join EMU. Two states, Denmark and the UK, obtained opt-outs from monetary union. In addition, Sweden refrained from joining by deliberately not meeting the criterion on exchange rate stability (by not

entering its currency into the successor to the European Monetary System). After the Maastricht Treaty, however, no more opt-outs for monetary union were given and all subsequent EU member states were expected to adopt (eventually) the euro as their currency.

The original economic governance system for EMU did not incorporate the insights from optimum currency area theory (Mundell 1961), particularly the need for a way to deal with asymmetric shocks. The 1990 Commission study had dismissed optimum currency area theory as 'too narrow and somewhat outdated' (European Commission 1990: 31). The euro area lacked the fiscal capacity and labour mobility advocated by optimum currency area theory (Bayoumi and Eichengreen 1993). This can be attributed to a combination of economic norms (third order governance) along with intergovernmental preferences (i.e. German) that resulted in hierarchical governance when it came to monetary union but was limited to fiscal, economic and financial cooperation of national policies. The original governance of EMU therefore mixed hierarchical (ECB) with non-hierarchical (fiscal policy, economic policy, financial supervision) governance (Verdun 2009). This varied configuration was the only way that member states would allow such policy discussions in the EU, as they were reluctant to lose even more policy levers after losing monetary policy and the ability to devalue their national currency under EMU.

## THE NEW ECONOMIC GOVERNANCE OF THE EURO AREA

The onset of the global financial crisis and the subsequent sovereign debt crisis exposed the deficiencies in these earlier ideas. Although often accused of doing too little, too late, the EU did respond with a comprehensive set of governance reforms that at least partially addressed the weaknesses of the original governance system. These weaknesses included an overreliance on rules (Pisani-Ferry 2010); a lack of financial supervision (Eichengreen 2012); and a lack of fiscal capacity giving the EU the power to tax and spend (De Grauwe 2006) or deal with crises (Verdun 2015). Such institutional weaknesses were compounded by a series of false assumptions regarding the operations of markets and the evolution of EMU.

### *False assumptions behind EMU*

The first fallacy was the assumption that monetary policy dedicated solely (or mostly) to price stability was sufficient and that price bubbles (like real estate bubbles or other asset bubbles) should be pricked after the fact (Mishkin 2007). Real estate prices boomed in certain areas of the USA as well as in Europe, egged on by low interest rates in both regions. Central banks could have helped stem the burgeoning crisis by raising interest rates earlier than 2004. As explained by Roubini (2006: 87):

bubbles may lead to economic distortions as well as financial and real economic instability ... optimal monetary policy requires monetary policy authorities to react to such bubbles over and above the effects that such bubbles have on current output growth, aggregate spending and expected inflation.

Second, the assumption of efficient markets, based on the efficient market hypothesis (Fama 1970), provided the rationale for the 'light touch' financial regulation that proliferated in the previous decade. Investors did not behave as rationally as presumed and seriously underpriced risk in the case of the subprime mortgage loans and the collateralised debt obligations that were based on them. Moreover, despite the explosion of cross-border banking in Europe, supervision remained at the national level rather than granting the EU stronger powers (Quaglia 2010). The De Larosière report (2009), written by a high-level working group tasked by the European Commission to investigate the causes of the global financial crisis, concluded that the lack of macro-prudential

supervision was a major cause of the crisis and recommended that ‘an Institution at EU level be entrusted with this task’ (De Larosiere 2009: 39). This false assumption of quasi-self-regulating efficient markets had contributed to government complacency with national-level supervision despite the important growth of cross-border finance.

Another false assumption on the part of the EU was that EMU would lead to economic convergence. According to the European Commission’s ‘One Market, One Money’ study (1990), EMU was expected to promote convergence and reduce regional disparities. Instead, economies diverged once the pressure of meeting the Maastricht Treaty criteria was removed. Moreover, reform fatigue in the aftermath of achieving EMU membership made member states less inclined to undertake further structural reforms. Considering their easy access to financing thanks to the low interest rates all euro area countries obtained, this was perhaps understandable. This lack of economic convergence was recognised by the European Commission (2008) even before the onset of the crisis, though it was not clear how this would eventually impact the euro area just one year later. Indeed, despite the no bailout clause and the prohibition of monetary financing by the ECB, investors assumed that the EU/euro area would surely come to the rescue of one of their own if circumstances demanded it. This led to an underpricing of risk as investors failed to account for differences in economic conditions between euro area countries (De Grauwe and Ji 2013; Ghosh, Ostry and Qureshi 2013). When Greece’s troubles mounted in late 2009 and 2010, investors were forced to disavow such notions, leading to the creation of the (temporary) bailout mechanism of the European Financial Stability Facility (EFSF) and eventually the European Stability Mechanism (ESM).

How did the EU reform its system of economic governance? Slowly and under threat. The EU’s response to the global financial crisis and sovereign debt crisis required a flurry of emergency summits that repeatedly claimed that a comprehensive solution had been reached, only to require additional measures shortly thereafter (Smeets and Zimmerman 2013). The initial response to the global financial crisis brought about an incremental adjustment regarding financial regulation, establishing the European System of Financial Supervision (ESFS). This entailed the upgrading of the existing Lamfalussy committees to ‘authorities’, e.g. the Committee of European Banking Supervisors became the European Banking Authority, the Committee of European Securities Regulators became the European Securities and Markets Authority, and the Committee of European Insurance and Occupational Pensions Supervisors became the European Insurance and Occupational Pensions Authority. In addition, a new institution was created, the European Systemic Risk Board, to look for systemic risks to the European financial system. While these changes were a step in the right direction, they were a rather tepid response considering the magnitude of the global financial crisis that preceded it. Indeed, one of the most important recommendations from the De Larosière Report was the creation of European-level financial supervision. Nevertheless, strong political pressure kept banking supervision in the hands of national authorities (Quaglia 2010). The new European System of Financial Supervision did nothing to change this.

### **REFORMING EMU: THIRD ORDER GOVERNANCE CHANGES**

As the sovereign debt crisis wore on, each of the aforementioned pillars of EMU experienced reform. Both third order and second order changes can be identified as norms shifted in some areas (especially crisis management and financial supervision) and in other cases evolved more gradually and concerned only second order institutional adjustments. On the one hand, one can see considerable continuity in that German preferences (based on ideas from the stability culture) strongly influenced the pace and content of the reforms. On the other hand, the ECB also emerged as an indispensable actor in euro area governance.

As set out above, the EU created a temporary bailout fund (European Financial Stability Facility), followed by the permanent bailout fund, the European Stability Mechanism (ESM) (Gocaj and Meunier 2013). The European Court of Justice has ruled that the ESM is not incompatible with Article 125 TFEU (the no bailout clause), as the funds in the ESM are only disbursed if a country abides by a conditionality programme akin to those traditionally required of countries receiving IMF support (the IMF was a partner in the euro area bailouts from 2010-2014 as part of the troika) (European Court of Justice 2012). This involved a normative shift away from the original governance structure that assumed that crises and fiscal transfers could be kept at bay by adhering to rules (like the convergence criteria and SGP), thereby constituting a third order governance shift.

Second, third order governance changes also can be seen in the expansion of the influence of the European Central Bank. The ECB attained greater prominence during the crisis for its use of non-standard monetary policy and its role as a key interlocutor of governments undergoing structural reform, both bilaterally and as a member of the troika. During the crisis, the European Central Bank emerged as a quasi-lender of last resort (Buiter and Rahbari 2012; Hu 2014; Micossi 2015). While central banks like the Federal Reserve and the Bank of England already enjoyed such legal authority, this was explicitly denied the ECB due to the fiscal and political implications of such a move. Nevertheless, in an effort to prevent the implosion of the euro in the face of the inaction of member state governments, the ECB embarked on non-conventional monetary policy like the Securities Market Programme (SMP) (purchasing government debt in limited amounts on secondary markets), the Long-Term Refinancing Operations (LTROs) (which provide cheap liquidity to banks), the Outright Monetary Transactions (OMT) (purchasing government debt in unlimited amounts on secondary markets in exchange for an ESM bailout, though the OMT has never been used), and quantitative easing (Micossi 2015). The ECB has justified these measures on the need to repair the monetary transmission mechanism, as the financial fragmentation in the euro area meant that the ECB's standard monetary policy was not influencing investors sufficiently. The non-standard measures were controversial in that they arguably had fiscal and political implications, particularly if the plans went awry and the ECB suddenly found itself with bad assets on its balance sheets. Others feared that the ECB's policy would engender moral hazard, allowing governments to ease up structural reforms once the ECB's actions reduced market pressure. Moreover, there were political ramifications, as ECB action came at the price of concomitant member state actions to buttress economic governance (Yiangou, O'Keeffe and Glöckler 2013).

In addition, the ECB's advisory role towards governments became much more prominent (Salines, Glöckler and Truchlewski 2012). This took place both through bilateral communications between the ECB and government leaders and through the ECB's participation in the troika. Then-ECB President Jean-Claude Trichet wrote to the Irish Finance Minister in November 2010 on behalf of the ECB Governing Council, urging Ireland to agree to an adjustment programme or risk having its Emergency Liquidity Assistance (in which the national central bank provides exceptional funding to solvent financial institutions) cut off (European Central Bank 2010). Similar letters were addressed to Italy and Spain (Draghi and Trichet 2011) in 2011, in which the ECB President (first Trichet and then his successor Mario Draghi in the letter to Italy) urged the respective governments to undertake structural reforms and improve public finances. The implication was that without such actions, the ECB would cease its support of these countries' bond markets in its SMP. While the ECB clearly had a stake in the continued viability of these economies and their public finances, particularly given that its balance sheet was expanding with their sovereign debt, it is difficult to maintain the fiction of the ECB as strictly a technocratic actor rather than a political one (though this advisory role was foreseen in Treaty Article 127.4 TFEU - see Salines, Glöckler and Truchlewski 2012). The ECB has thus been called a 'strategic actor' (Henning 2016) and a 'policy entrepreneur' (De Rynck 2015), underlining its more politicised role.

Finally, the ECB participates in the troika along with the IMF and the European Commission. They are in charge of the surveillance and implementation of financial assistance programmes of countries receiving official aid from first the EFSF and now the ESM. The ECB's involvement in the troika has raised questions of a possible conflict of interest (Pisani-Ferry, Sapir and Wolff 2013; Sapir, Wolff, De Sousa and Terzi 2014). First, the ECB's role in the troika could diverge from its interest in maintaining price stability. For example, it could relax its pursuit of price stability in order to ease pressure on a country under a bailout programme. Second, being in the troika could influence the ECB's liquidity policy. For example, the ECB could be overly generous with its provision of liquidity in the interest of the programme country's success. Finally, the ECB's purchases of sovereign debt have made it an important creditor, which could make it too stringent on the level of budgetary consolidation during programme negotiations.

The expanded role of the ECB constitutes another example of a third order shift in EMU governance. Rather than a technocratic actor concerned with price stability, the ECB is actively involved in political decisions that have redistributive consequences (Torres 2013). Moreover, the ECB's efforts to 'do whatever it takes' (Draghi 2012) to save the euro through non-standard measures also indicates an internal normative evolution that was brought about by the crisis.

Another third order shift in norms can be seen in the creation of the banking union. In June 2012, the euro area committed to the creation of a banking union, starting with the designation of the ECB as the Single Supervisory Mechanism. In 2014, the ECB assumed the direct supervision of about 130 of the largest banks in the EU, working with the European System of Financial Supervision, particularly the European Banking Authority (EBA). The EBA retains its role of implementing a single rulebook (consisting of directives and regulations from the Commission) and encouraging supervisory convergence across the EU. Therefore, while the ECB would be directly responsible for large banks, it would still have to work with national supervisors that retained authority over the rest of the banking system. This stipulation stemmed from German concerns over its regional banks that would not fare well under centralised supervision, having enjoyed preferential consideration from regional governments and national bank supervision (Howarth and Quaglia 2013). In 2013, banking union was buttressed with the Single Resolution Mechanism for winding down banks in difficulty. This would be decided by a Single Resolution Board comprised of representatives from the ECB, the Commission and national authorities. A pan-European deposit guarantee, which numerous economists argue is an essential element of banking union (Enderlein et al. 2012), did not occur due to concerns that some countries (like Germany) would be perennial net contributors to such a scheme (Howarth and Quaglia 2013). Though an EU directive on common deposit schemes exists, there is no mutualisation. Nevertheless, banking union constitutes the most significant governance change to EMU since the introduction of the euro. The delegation of authority over an area as economically significant and politically sensitive as finance indicates a shift in favour of ideas that view a single currency and financial stability as being incompatible with national supervision (Schoenmaker 2011) given the interdependence of sovereigns with their banks (Pisani-Ferry 2012).

## **REFORMING EMU: SECOND ORDER GOVERNANCE CHANGES**

Reforms to the pillars of fiscal and economic policy were limited to second order shifts. The pillar of fiscal cooperation was strengthened considerably, but in a very specific way. Fiscal integration did not imply the large-scale pooling of resources. Instead it involved strengthening the existing predilection for controlling national budgets. First, the Stability and Growth Pact was strengthened as part of the 'six-pack' legislative package on economic governance that went into force in 2011. The original narrative of the sovereign debt crisis emphasised fiscal laxity because the original country to come under threat (Greece) had a long history of excessive public spending. This is despite the fact that some of the other countries (Ireland and Spain) that were labeled as 'PIIGS'

(Portugal, Italy, Ireland, Greece, and Spain) had abided by the SGP prior to the global financial crisis reaching Europe in 2008. Therefore, in 2010 both the European Commission and the Van Rompuy Task Force advocated stronger fiscal rules that would entail greater automaticity so as to avoid another incident such as occurred in 2003 when the SGP rules were suspended due to political motivations (Chang 2006; 2013). In addition, the six-pack put debt on equal footing with deficits, defined an 'expenditure benchmark' as part of each country's medium-term budgetary objective, and introduced a macroeconomic imbalances procedure (Savage and Verdun 2016).

The march towards more fiscal consolidation in Europe continued in late 2011, when the idea of a 'fiscal compact' was introduced by Mario Draghi at a hearing with the European Parliament. The fiscal compact set additional budgetary rules that were to be implemented in national law and monitored at the national level by independent institutions; non-compliance could result in financial sanctions. In the context of market speculation against the sovereign bonds of euro area countries in the periphery, it would play a role in calming market expectations in two ways. First, it would be 'the most important element to start restoring credibility' (Draghi 2011). Second, it was essentially a quid pro quo for action on the part of the ECB: if the governments committed to such a fiscal compact, the ECB would respond with LTROs (Yiangou et al. 2013). Thus the fiscal compact became part of the Treaty on Stability, Coordination and Governance (TSCG) that was signed on 2 March 2012. Originally, the TSCG was supposed to be part of a revision of the Lisbon Treaty, but British opposition led to a separate treaty from which EU member states could opt out. Both the Czech Republic and the UK declined to sign the TSCG, which included not only the fiscal compact but measures to strengthen euro area governance like the creation of regular summits (Hodson and Maher 2014).

The EU further reinforced its budgetary surveillance with the entry into force of the two-pack legislative package in May 2013 (Savage and Verdun 2016). This introduces a common budgetary timeline and allows the Commission additional opportunities to examine national budgets. If the Commission deems that a country's budget does not comply with SGP obligations, the member state will be asked to submit a revised plan. For countries experiencing financial difficulty, EU-level control is strengthened further. Certain elements of the fiscal compact were integrated into EU law through the two-pack, such as the preparation of economic partnership programmes by countries that break the SGP and the mandatory ex-ante coordination of debt issuance by member states. The reinforcement of the economic pillar comes largely from its rationalisation, with previous efforts to link policy surveillance with fiscal surveillance as part of the March 2005 reforms of the Stability and Growth Pact and the Lisbon Strategy continuing with the creation of the European Semester in 2011. This is an annual policy cycle, in which the European Commission considers the fiscal and structural reform policies of EU member states, offers recommendations, and provides surveillance of the implementation of commonly agreed policies. As noted by Marzinotto, Wolff and Hallerberg (2011), the European Semester contains two procedural innovations: national governments must submit their Stability (for euro area countries) or Convergence (for non euro area countries) programmes on budgetary policies, in compliance with the SGP, prior to their discussion by national parliaments to improve economic policy coordination; and member states submit their Stability or Convergence Programmes at the same time as their National Reform Programmes on economic policies, in compliance with the Europe 2020 strategy, to account better for any complementarities and spillover effects.

In addition, economic policy coordination plays a role in the new Macroeconomic Imbalances Procedure, which is a macroeconomic surveillance procedure to avoid economic bubbles. It appears to contain a deflationary bias in that deficit countries tend to find themselves under pressure of the procedure but not surplus countries (De Grauwe 2012; Gros 2012; Gros and Busse 2013), indicating normative continuity with the aforementioned stability culture. Hence, this constitutes only a second order governance change and not a third. While the EU's efforts in fiscal and economic policy governance have been multi-pronged, they do not represent a normative shift. They reinforce the

existing preference for budgetary stability, thus constituting incremental changes to second order governing. Similarly, the reforms related to economic policy coordination tended to reinforce existing institutions and instruments rather than upend them (Verdun 2015). As with the pre-crisis governance system, their structure and content was largely determined by German preferences that are outlined in the stability culture.

## **CONCLUSION: THE NEW EURO AREA GOVERNANCE**

The economic governance of the euro area has seen incremental changes to second order governance as well as third order changes in norms and economic ideas. As discussed above, fiscal governance reforms were limited to second order changes in the sense that they strengthened the existing SGP. Similarly, the economic governance reforms show continuity in both form and substance, with the Europe 2020 strategy trying to improve economic growth and competitiveness (as with its predecessor, the Lisbon Strategy) and institutionally still relying on the use of soft law. Even in these areas, however, we can see more diversity in economic governance structures. As Verdun (2015) argues, while some new institutions (like the six-pack and two-pack) fit within the normal procedures of the EU, others (like the fiscal compact) 'copied' the intergovernmental structure of agreements like the Schengen agreement on free movement. This created a new type of institutional structure for fiscal and economic policymaking in addition to the use of Community (hard) law in the case of fiscal policy cooperation and soft law in the case of economic policy cooperation.

The largest changes came in the fields of monetary policy and financial policy regulation where third order governance changes took place. In monetary policy, the EU has assumed the role of quasi-lender of last resort, increased its political profile as advisor of national governments in economic and financial policy, and has become the supervisor of the euro area banking system. In the case of financial policy regulation, the initial crisis response can be seen as incremental, perhaps demonstrating a path-dependent logic (Salines, Glöckler and Truchlewski 2012). The sovereign debt crisis and threat of the euro area's implosion prompted stronger reforms that resulted in banking union, indicating a third order shift on issues like financial regulation and supervision.

What conclusions can we draw from euro area governance reforms more generally? The first is that the European Central Bank constitutes a rising power. It transformed from a largely technocratic body with a very specific function to one of the major political actors in the European Union. While this rise can partially be explained by the leadership vacuum in the EU, one must also consider the ECB's role as a policy entrepreneur (Chang 2014; De Rynck 2015; Henning 2016). The crisis presented a strong challenge to existing ideas of euro area governance, including the adequacy of a central bank focused solely on price stability. Moreover, the mandate of the ECB has expanded to include banking supervision as well as overseeing structural reform as a troika member.

Second, Germany has cemented its position as the euro area's leader. While Germany's significance in economic governance since well before EMU is undeniable, the crisis made it even more apparent. First, France's traditional role as Germany's partner became less pronounced as French President Hollande sought alternative political allies (Schild 2013), leaving the preferences of Germany and its fellow creditor countries as the primary drivers of policy. Nevertheless, Germany's traditional pro-European stance sits uneasily with the policies it has pursued during the crisis, particularly its reluctance to mutualise any debt. The bulk of the assistance given during the sovereign debt crisis must eventually be repaid, and more innovative ideas like Eurobonds have been rejected. Germany has therefore been a reluctant hegemon (Bulmer and Paterson 2013), constrained by domestic political concerns (Bulmer 2014).

Finally, euro area governance became increasingly hierarchical in numerous respects, especially in regard to surveillance. Banking union has centralised banking supervision, particularly for the largest banks (Howarth and Quaglia 2013). Fiscal policy reforms have increased the surveillance capacity of the European Commission, even allowing it to interfere in member state budgets in certain situations (Savage and Verdun 2016). For countries experiencing financial difficulty, demands from its EU partners can become onerous indeed.

For all the criticism that the euro area has done too little, too late, by the standards of European integration these governance reforms moved at lightning speed. Only under severe market pressure could the euro area governments overcome their differences (such as in the creation of the ESM or banking union) or allow another actor to step in and buy time, thereby increasing its own power in the process (e.g. the ECB). While these reforms may still be far from ideal, they do represent an overall strengthening of the economic governance framework.

The state of EMU remains 'incomplete', both theoretically and institutionally. Theoretically, debates continue to rage regarding the need for a more robust banking union and a greater fiscal capacity or fiscal union. Institutionally, the Five Presidents' Report (Juncker et al. 2015) outlined plans for the deepening of EMU in ways that would strengthen convergence, competitiveness and democratic legitimacy. In the absence of third level ideational shifts in governance, the EU's ability to achieve 'a complete economic and monetary union' (Juncker et al. 2015: 20) is uncertain.

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<sup>1</sup> Normal fluctuation margins provided for by the exchange rate mechanism of the ERM 2, for at least two years, without devaluing against the euro.

<sup>2</sup> Average nominal long-term interest rate that does not exceed by more than two percentage points that of, at most, the three best performing member states in terms of price stability

<sup>3</sup> A rate of inflation which is close to that of, at most, the three best performing member states in terms of price stability.

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Research Article

## The Governance of Markets, Sustainability and Supply. Toward a European Energy Policy

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## Abstract

European energy policy dates back to the founding days of integration, yet the emergence of supranational governance is a recent development. The article examines the extent to which European policymakers have succeeded in building up governance capacity, and what the facilitating and impeding factors were that have shaped the governance mix. The conceptual framework differentiates between orders of governance in the multilevel context, and between policy modes involving hierarchical and non-hierarchical settings and varying actor constellations. The article finds that governance capacity has emerged where second order governance (institutional and procedural rules) is concerned, while first order governance (the concrete policy process) remains the remit of national and private actors. This becomes even more obvious once the interaction between policy modes is taken into account: governance networks enhance governance capacity in the area of competition policy and agency governance; self-regulation by industry constitutes a fall-back option in case of insufficient governance capacity on cross-border issues; soft governance helps to bridge multiple policy areas and levels of governance. The article concludes that second order governance may prove effective where it combines with hierarchy but that it may fail to overcome both trade-offs between contradicting goals and resistance at lower levels.

## Keywords

Competition policy; Energy policy; European integration; Governance; Internal energy market

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There are only a few policy areas in which the European integration process can be traced back to the founding days of the Communities and where we can study 65 years of European governance, as the theme of this special issue suggests. The energy sector is a particularly interesting case due to its fundamental transformation as an area of public policy. Today's energy challenges have a completely different outlook compared to the rationale behind the European Coal and Steel Community (ECSC) back in 1951. At the same time, some key issues such as security of energy supply have time and again dominated the policy agenda, as have the difficulties of establishing supranational governance capacity in the field of energy. Thus, the history of European integration on energy policy is puzzling given that the sector constituted a nucleus of the European integration process and never disappeared as a European policy priority, yet we have seen decades of missed opportunities to shift governance towards the supranational level. An EU-wide governance framework only emerged with the realisation of the internal energy market from the late 1980s onwards. Throughout the last two decades it was advanced by the increased salience of issues relating to sustainability and security of supply. To shed light on the evolving and changing governance framework in European energy policy, the paper tackles the following research questions: *To what extent have policymakers succeeded in their efforts to build up governance capacity in the field of energy over the last six decades? What were the facilitating and impeding factors that have shaped the emerging governance mix?*

The first part of the article develops the conceptual framework, which in the second part is applied to the energy sector. In the context of this special issue, the article relies on Kooiman's seminal work on governance (Kooiman 2003). Of particular relevance is his distinction between second and first order governance, as it helps to capture variation over time and across levels. The conceptualisation of

individual policy modes furthermore differentiates between hierarchical and non-hierarchical configurations, and varying actor constellations. In the empirical part, the extent to which the governance of markets, sustainability and supply has become a 'European' issue is analysed in a longitudinal perspective. The facilitating and impeding factors that have shaped the emerging governance mix are then studied in more detail with respect to specific policy modes.

### CONCEPTUALISING GOVERNANCE IN A DYNAMIC MULTILEVEL SETTING

The conceptual framework used in this special issue builds on Kooiman's distinction between third, second and first order governance (Kooiman 2003: 133-189; and in this issue, especially Caviedes, Chang, Maas). Meta-governance or third order governance is about the normative dimension that shapes the governing process, i.e. the realisation of governance norms such as rationality, responsiveness, effectiveness and legitimacy (Kooiman 2003: 170-189). Second order governance is about the structural and institutional setting, and first order governance about the day-to-day policy process (ibid.: 135-169). Second and first order governance are at the core of the flourishing literature on governance, which studies both the aspects related to the structure and process of policymaking (Börzel 2010; Mayntz 2005). Reflections on policy effectiveness and legitimacy at the level of meta-governance have been particularly relevant in the European context (Bolleyer & Reh 2011; Héritier 2003). The objective here is to map and explain the emergence of the governance mix in a specific policy field, focusing on aspects of first and second order governance. When answering the research question about impeding and facilitating factors, however, considerations relating to meta-governance such as policy effectiveness and legitimacy will also be of relevance. As argued by Ingeborg Tömmel elsewhere in this issue, at the European level we predominantly find instances of second order governance. First order governance - 'where governing actors try to tackle problems or create opportunities on a day-to-day basis' (Kooiman 2003: 135) - at the supranational level is mostly limited to the process of problem-definition, agenda-setting and decision-making, while implementation is delegated to lower levels. At the stage of problem-definition and agenda-setting it is necessary to make a convincing case that certain policy problems are better solved at the European, rather than at the national level (Lelieveldt & Princen 2011: 211-14). The policy output produced by European policymaking mainly results in second order governance, that is, the way in which 'problem solving and opportunity creation (first order governing) are embedded in institutional settings' (Kooiman 2003: 153). The predominance of governance of governance (Tömmel 2016) is due to functional factors, such as the scarcity of resources needed to build up governance capacity, as well as to political factors, including the resistance at lower levels to fully transferring policymaking competencies to the supranational level.

In order to understand the institutional structures and procedures on which such governance of governance in the European multilevel polity relies, various modes of governance have been discussed in the literature (e.g. Börzel 2010; Buonanno & Nugent 2013, chapter 7; Wallace & Reh 2015: 97-111). The conceptual framework to be applied here integrates various dimensions. On the one hand, the conceptualisation integrates Kooiman's differentiation between second and first order governance. On the other hand, it integrates the differentiation between hierarchical and non-hierarchical modes, as well as variation in terms of actor involvement. The discussion of hierarchy and actor involvement features prominently in the literature on European governance (Börzel 2010; Tömmel & Verdun 2009), and in the literature on new modes of governance in particular (Héritier 2003; Héritier & Lehmkuhl 2008). Integrating Kooiman's orders of governance adds analytical edge to the ongoing discussion about European governance. Consider the case of the various networks. While all networks operate at the level of second order governance, they do not necessarily rely on non-hierarchical modes, nor do they always include private actors. By contrast, where 'network' governance is understood in a narrow sense, it refers to an ideal-typical constellation alongside

markets and hierarchies (Powell 1990). In such ideal-typical policy networks public *and* private actors engage in informal negotiations, interact with equal status and engage in voluntary agreements that are collectively binding (Börzel 1998: 260, 265; Börzel & Heard-Lauréote 2009: 138). Such networks hardly exist in policy practice (Börzel 2010: 192), which is why the conceptualisation used here does not presuppose a non-hierarchical setting, but rather integrates purely public networks as well. Table 1 provides for an overview of governance modes that are specifically relevant in communitarised policy fields: competition policy, joint decision-making, agency governance, private governance and soft governance. These policy modes relate to the type of policy output (binding versus non-binding) *and* the ways in which such output is implemented (directly applicable versus decentralised modes of implementation). Soft governance, for instance, refers to non-hierarchical modes of coordination in the process of implementing policy goals, and not merely to ‘soft law’ as a specific type of policy output which is used by the Commission as an agenda-setting device (Braun 2009).

Table 1: Conceptualising European Governance

Governance Order Policy Mode	Second Order	First Order
<b><i>Hierarchical, public actors involved</i></b>		
<b>Competition policy</b>	European network of national authorities	European competition authority / national competition authorities
<b>Joint decision-making</b>	COM initiative Council and EP co-legislate	National authorities and private actors
<b>Agency governance</b>	European network of national agencies	Federal or single European regulator / national regulatory authority
<b><i>Non-hierarchical / private actors involved</i></b>		
<b>Private governance</b>	European network of (public and) private actors	Private actors
<b>Soft governance</b>	COM proposals and monitoring, coordination between member states, EP advisory role	National authorities

The first, and potentially most centralised, policy mode is competition policy. Where the European Commission becomes active as the highest competition authority in Europe, we encounter a rare case of first order governance at the European level. This configuration has also been conceptualised as ‘supranational centralisation’ (Börzel 2010: 198-200). To be sure, there are other instances of supranational centralisation in the case of the European Central Bank or the rulings of the European Court of Justice (ECJ). These governance modes where unelected supranational institutions do make decisions that directly apply in the member states are important for market-making policies or ‘negative integration’ (Scharpf 1999, chapter 2.2). The Directorate General (DG) Competition within the European Commission is the supreme competition authority in Europe, which draws on powers

granted by the treaties. European competition policy has experienced a trend towards decentralisation as discussed in the literature (e.g. Blauburger & Töller 2011; Lehmkuhl 2009; Tömmel 2016; Wilks 2015). Rather than seeking to concentrate first order governance capacity at the European level, the Commission has increasingly delegated cases towards national competition authorities. In order to do so it has been relying on the European Competition Network (ECN) as a device for second order governance.

Joint decision-making (Börzel 2010: 200-202) is the governance mode where the Commission holds the right of initiative, and where the Council and the European Parliament are co-legislators (ordinary legislative procedure in the Lisbon Treaty). It is the standard avenue to generate secondary law, even in the area of market-making policies, where the European Commission holds competition law prerogatives to engage in unilateral action. The option of introducing liberalising Commission directives based on Article 106.3 (TFEU) has hardly been used due to a variety of political reasons (discussed in detail by Schmidt 1998). The decision-making costs under joint decision-making are high, requiring agreement in the European Parliament and amongst the member states in the Council. Compared to negative integration, which relies on treaty-based competencies with no need for costly negotiation, European law-making faces a real risk of a joint decision-trap (Scharpf 2006). It is especially to avoid these decision-making costs and the risk of deadlock that policymakers may favour non-hierarchical or new modes of governance as an alternative route (Héritier 2003). The policy output of the joint decision mode mostly falls into the category of second order governance since European law usually defines broader policy and regulatory frameworks, rather than steering policy practice in detail. To be sure, this 'regulatory mode' of policymaking based on legal instruments and leaving more flexibility in implementation, had largely replaced the 'Community method' during the 1990s (Wallace & Reh 2015: 104). A more interventionist style of governance which had been used in the area of market integration as a means of harmonisation, failed to provide the desired results (Young 2015: 118-119). Second order governance is thus not only less demanding in terms of governance capacity at the supranational level, but also leaves more flexibility to lower levels and accommodates diverging national preferences. In the European multilevel system building up governance capacity through Community law usually faces resistance from lower levels of policymaking. When seeking to Europeanise new policy areas, therefore, the Commission and other interested actors will try to expand their policy remit in the framework of existing competencies.

Agency governance is another mode of hierarchical steering. The increasing number of European agencies could point to a trend of centralisation through 'agencification' (Levi-Faur 2011). Yet these agencies usually engage in second order rather than first order governance, relying on networks of national authorities. So far, first order governance through a federal or single European regulator has only been discussed as a scenario in the literature (Thatcher & Coen 2008: 814-815). The reasons why we do not see more supranational centralisation in the form of agency governance are at least threefold: the European Commission faces legal obstacles in delegating executive powers in line with the so-called 'Meroni doctrine' established by a ECJ ruling in 1958 (Chamon 2011; Majone 1997); the Commission is reluctant to establish a powerful agency which would compete with its own powers (Vos 2000); finally, the member states try to resist a major shift of regulatory competencies towards the European level, which would disempower national regulatory authorities (Thatcher & Coen 2008).

The term private governance is used in a broad sense including various possibilities of private actor involvement. Private actors may take part in the process of second order governance where they participate in governance networks composed of stakeholders and/or policymakers. Self-regulation by industry falls into the category of first order governance. Private actors formulate policy goals and engage in a detailed implementation process. Empirically, pure self-regulation is an unlikely scenario since private actors usually operate in a setting where political actors set either policy goals and/or procedural rules (Prosser 2010: 5-6), or at least cast a shadow of hierarchy (Héritier & Eckert 2008).

Self- or co-regulation thus involves governance of governance by public actors where these seek to steer the behaviour of private actors.

Soft governance occurs where interaction is non-hierarchical and outcomes are non-binding. Actor-wise it is usually initiated and monitored by the European Commission, but in essence relies on a process of voluntary coordination between the member states. The European Parliament's role is mostly confined to giving advice. The so-called 'Open Method of Coordination' (OMC), formalised during the Lisbon European Council in 2000, is a paradigmatic case of soft governance (Borrás & Jacobsson 2004). Soft governance sets broad policy goals at the European level, but leaves their implementation entirely to the national level. It is 'soft' in that it does not involve sanctions, but relies on mechanisms of reputation and learning. Therefore, it has also been discussed as an instance of 'experimentalist governance' (Sabel & Zeitlin 2010) which is characterised by a recursive and multilevel process relying on reporting, peer review and deliberation.

Network governance, private governance and soft governance are alternative routes of policymaking which, following the argument of this issue, should be particularly relevant in the EU context. Their emergence has been explained by factors relating to political capacity or policy effectiveness, and legitimacy aspects in the literature. Policy makers may benefit from non-binding coordination or the involvement of private actors thanks to lower transaction costs combined with enhanced policy flexibility (Héritier 2003). Others have emphasised the democratic quality of these governance modes in facilitating processes of learning and deliberation and allowing for participation in the policy process at lower levels of governance (Sabel & Zeitlin 2010).

The ways in which policymakers have built up capacity at the level of first and second order governance over time will be mapped in the following section. I will then go on to discuss how relevant individual configurations of the various policy modes are, and which factors have contributed to their emergence.

## **BUILDING UP EUROPEAN GOVERNANCE CAPACITY IN ENERGY POLICY**

In the field of energy we can distinguish between policy problems relating to markets, sustainability and security of supply. For each, the European Commission, alongside other agenda-setting actors, needs to make a convincing case that the different economic, environmental and social goals of energy policy are better served at the European level than at the national level. The evolution of European governance capacity in energy policy has experienced different phases: during a first phase (1951-1957) the energy sector experienced pioneering change with the creation of the European Coal and Steel Community (ECSC), the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). A relatively long phase of stagnation (1958-1986) followed when subsequent efforts to shift energy governance towards the European level failed. During a third phase (1987-2002), the creation of an internal energy market triggered new dynamics, while the current fourth phase is one of consolidation and diversification (2003 to present).

The ECSC Treaty constituted the foundational moment of both European integration and European energy policy (Matlány 1997: 14-19). By creating a common market in coal and steel, the objective of the ECSC was related to political stability as much as economic integration. The ECSC pursued a rather interventionist style of governance *à la française* (see also Tömmel in this issue), and it remained limited in scope. In particular, at this stage, market integration was not considered for the electricity and gas sectors: while the so-called Spaak Report (The Intergovernmental Committee established by the Messina Conference 1956: 126-133), suggested the creation of Euratom and urgently recommended European action to secure sufficient energy supplies, it also argued that the

specificities of electricity and gas were incompatible with liberalisation (ibid.: 126). In governance terms, the authors of the report saw no need to expand the decision-making powers of the ECSC to new areas (ibid.:127-129). Although the Euratom Treaty established a European competence in selected areas of priority, it did not necessarily shift governance toward the supranational level where member states were free to choose policy measures. While in some areas coordination and cooperation was envisaged, for instance to pool resources and diffuse knowledge, in other areas Euratom engaged in risk regulation, by setting basic standards to protect workers and the population. Overall, Euratom emerged in a context where member states were keen to preserve their energy and military strategic competencies (Barnes 2008: 111). The Treaty remains in force to today, and has allowed the Commission to build up expertise specifically in the area of nuclear energy in dedicated departments (Black 1977: 179). While the ECSC was terminated in 2002, the basic institutional structure introduced during this foundational period remains in place.

This first, foundational period in the 1950s was followed by a second phase of almost three decades of stagnation. In the 1960s and 1970s, policymakers launched several initiatives, but at this stage no common framework emerged (Black 1977: 80-191). In 1958, the European Commission called for a coordinated energy policy in order to tackle the challenges posed by security of supply (EEC 1958: 48-49). In 1964, EEC member states envisaged the creation of an internal market and a common energy policy, yet no action beyond the declaratory level followed (Pollack, Schubert & Slominski 2010: 71). Throughout the 1970s, cooperation either remained bilateral in nature, was elevated above the European to the international level, or resulted in soft, intergovernmental modes of coordination. In direct reaction to the first oil crisis, several bilateral agreements were concluded by European states, and in 1974, all EEC members except France joined the International Energy Programme (Black 1977: 188-191). The International Energy Agency was set up as an autonomous organisation within the structures of the OECD, and an urgency mechanism to secure oil supply was also established. Besides international cooperation outside the Community, cooperation between member states entirely relied on non-binding mechanisms of soft coordination. Examples of such intergovernmental cooperation are the energy strategies agreed in 1974 and 1986 (Council of the European Communities 1974; 1986). By the early 1990s, energy policy was seen as being one of the 'weakest' areas of European integration (George 1991; Padgett 1992: 55). From a longitudinal perspective, however, such a lack of tangible results in building up institutionalised governance capacity should not be overemphasised. Rather, the persistent efforts of the Commission in setting the policy agenda prepared the ground for later integration steps.

Compared to stagnation throughout the two previous phases, the realisation of the internal market project can be seen as a 'turning point' (Matlárý 1997: 19). During this third phase, the Commission enjoyed increased leverage due to two avenues for activism: the internal market agenda and environmental policy. The 1987 Single European Act paved the way for the Single European Market and codified a European competence in the area of environmental policy. Energy-related measures could be adopted using prerogatives in either of these two policy fields, and the Commission produced a considerable number of policy proposals: the 1988 Strategy Paper 'The Internal Energy Market' (COM (88) 238) identified the opportunity costs of not realising market integration, promoted competition and market integration as key policy principles, and suggested a range of policy measures on electricity and gas. This was followed by a package of proposed legislation in 1989 on the transmission of gas (COM (89) 334) and electricity (COM (89) 336). The 1990 communication on 'Energy and Environment' (COM (89) 369) tackled the issue of environmental policy integration. Thus, by the beginning of the 1990s, the cornerstones of the economic and environmental dimension of energy policy had been defined.

The Maastricht Treaty codified, for the first time, a European competence in the area of Trans-European Networks (TENs), and an *acquis* of secondary law emerged from the mid-1990s onwards. EC directive 96/92 tackled liberalisation in the electricity sector, followed by directive 98/30 on gas

markets. In many ways these first directives were emblematic cases of governance of governance, setting a broad institutional framework which left ample leeway to member states when it came to concrete policy choices regarding regulatory authorities, access regimes and network ownership. The 1990s also saw a broadening energy policy agenda around the issues of competitiveness, security of supply and sustainability, with the Commission publishing various policy proposals during the mid-1990s (e.g. COM (94) 659, COM (95) 682, COM (97) 599). In the area of renewables, for instance, a non-binding target became enshrined in secondary law with the adoption of a directive in 2001 (directive 2001/77/EC). In substance, however, little progress was made in terms of 'greening' the European energy policy at this stage (Collier 2002: 176). By the end of this third phase, integration efforts had produced a solid policy output in the area of energy markets, while common policies on sustainable energy and security of energy supply still needed to be developed.

During a fourth phase, the energy *acquis* was consolidated and diversified: two additional rounds of legislation specified the rules governing market integration, a second renewable directive was adopted, and a dedicated energy chapter was introduced into primary law. The issue of energy security also gained in salience following the 2004 and 2007 enlargements (Buchan 2015: 359). In the area of market integration, a second legislative package, including separate directives on electricity (2003/54/EC) and gas (2003/55/EC), narrowed the range of options for the member states in the implementation process on a number of issues, in part through binding requirements on the introduction of an independent sector regulator as well as on regulated access to the electricity network. In 2009, European policy makers concluded negotiations on a third legislative package governing electricity and gas markets (directives 2009/72/EC and 2009/73/EC) through a more stringent regulatory framework, to be discussed in further detail below. Also in 2009, policymakers agreed on a new directive on renewables, which for the first time imposed binding targets on the member states (directive 2009/28/EC). Although in both areas, market integration and sustainability, binding objectives as well as a broad regulatory framework have been agreed at EU level, their implementation left ample discretion to the national level.

Similarly, the Lisbon Treaty codified a European competence in the energy field (Article 4 TFEU) but did not fundamentally alter policy dynamics. Energy policymaking falls into the remit of the ordinary legislative procedure, tax issues excluded, without interfering in national choices concerning the energy mix (Article 194 TFEU). In the field of security of supply a so-called 'solidarity clause' (Article 122 TFEU) requires member states to cooperate in cases of energy shortages. Under its President, Barroso (2004-2014), the Commission sought to push for further achievements, notably relying on soft law measures (Braun 2009): a Roadmap on Renewable Energy (COM (2006) 848) set out a strategy to increase the share of renewables; the Communication '20 20 by 2020' (COM (2008) 30) envisaged a 20 per cent target to be reached by 2020 in the area of emission reduction, a 20 per cent share in renewable energies, and a 20 per cent increase in energy efficiency; 'Energy 2020' (COM (2010) 639), forming part of the horizontal strategy 'Europe 2020' (COM (2010) 2020), reiterated these 20-20 targets; an updated strategy for the period to 2030 set a 40 per cent target for emission reduction, an EU level 27 per cent target for the share of renewable energy consumption (not imposing binding targets on the member states), and an indicative 27 per cent target for improvement in energy efficiency (European Council 2014).

Seen from a longitudinal perspective, the triangle of policy goals around markets, security of supply and sustainability, was followed in turn by second order governance measures in order to shape first order governance at the national level. The idea of an internal energy market, initially designed by economic elites (Matlár 1997: 19), came to be accepted as the policy paradigm of European energy policy (McGowan 2008; Youngs 2011: 47-48). In the area of security of supply the Commission used enlargement as a policy window to push for stronger European activism specifically in the area of gas supplies (Maltby 2013). Overall, the security of supply issue became so dominant in the policy discourse that a 'securitisation' of energy issues has been diagnosed (Natorski & Herranz Surrallés

2008). As these various policy objectives around markets, sustainability and security of supply do often involve trade-offs, they have, however, not been realised to the same extent (Buchan 2015). The EU's 'market liberalism' has been found to conflict with 'economic nationalism' especially where security of supply issues becomes increasingly important (McGowan 2008). In this context, securitisation strategies have been used by both EU and member state actors to argue in favour of *and* against a further shift of governance capacity to the European level (Natorski & Herranz Surrallés 2008). While the 'green Europeanisation' of energy policy overall has been more successful in terms of policy output when compared to security of supply issues, environmental issues are ultimately addressed in the internal market context (Solorio 2011: 405). There has furthermore been a shift towards a narrow focus on climate change goals which arguably impinges on the realisation of a wider sustainability agenda (Solorio 2013). At the same time, climate policy integration has been judged to be insufficient in areas such as renewables and gas pipelines in order to reach long-term climate policy objectives (Dupont & Oberthür 2012). The effectiveness of European second order governance in shaping substantive policy choices at the national level therefore plays an increasingly important role in view of multiple policy goals, multiple levels and heterogeneous interests in an ever wider Union.

### GOVERNANCE OF GOVERNANCE IN THE EUROPEAN ENERGY SECTOR

Energy policy has transformed substantially since 1951. We have seen the emergence of an institutional and policy framework at the level of second order governance, while first order governance mostly has been left to the member states. How the governance of governance operates in the energy sector is addressed in this section. The focus is on the governance of markets, but also on governance devices which help to link internal market issues to the wider energy policy agenda. The characteristic constellations of European governance in energy policy are summarised in Table 2, applying the conceptual framework developed above (see Table 1).

The role of competition policy is eminent, but not so much at the level of first order governance as one might expect. Threatening to use competition law prerogatives helped the Commission to push through its liberalisation agenda during the first round of market legislation (Schmidt 1998), but a systematic link between competition policy and market-making secondary law was only established in the context of negotiating the third legislative package 2007-2009 (Eberlein 2012; Eikeland 2011a: 26-29; 2011b: 250-254). There is thus intense interaction between the use of competition law powers and the joint decision mode. DG Competition, cooperating closely with DG Energy, launched a major enquiry into competition in electricity and gas markets in the run up to the third legislative package. The enquiry proved to have a strong signalling effect in the area of ownership unbundling. In retrospect, the 'shadow of hierarchy' (Héritier & Lehmkuhl 2008; Scharpf 1993) cast by European competition law has been more effective than the third energy package introduced in 2009, which, due to political opposition, ran short of imposing ownership unbundling on the member states. Since DG Competition has limited capacity to deal with individual competition law cases, it seeks to steer competition policy at lower levels by tackling visible, high-profile precedent cases. Table 2 depicts the configuration in energy competition policy where the ECN diffuses policy practice towards national competition authorities, so that the bulk of first order governance in the member states should follow the direction of the few cases of first order governance at the supranational level.

As the evolution of energy policy has illustrated, the joint decision mode is conducive to a policy output which predominantly provides for second order governance. This leaves room for discretion to national authorities and the energy industry in implementing the *acquis*, i.e. to engage in first order governance (see Table 2 below). As in the area of competition policy, the Commission seeks to steer regulatory reform and change at lower levels through network structures. To that end, it

granted a formal mandate to the body of national regulatory authorities, the Council of European Energy Regulators (CEER), which generated policy advice as the European Regulators' Group for Electricity and Gas (EREG, created by COM decision 2003/796 EC). The third legislative directive lifted regulatory cooperation to the next level with the creation of an Agency for the Cooperation of Energy Regulators (ACER, EC no. 713/2009). ACER very much functions as a networked agency, as it relies heavily on the national IRAs' staff and resources, and thus is a far cry from the single or federal regulator model discussed previously. Some observers have argued that the institutional choice was at least partly motivated by the Commission's 'desire to dominate a weak agency' (Buchan 2015: 354). However, the member states overall are also reluctant to shift regulatory powers held by their national authorities towards the European level. As a result of the three legislative packages, independent energy regulators form a constitutive part of the multilevel regulatory architecture, and they play a key role in implementing the *acquis* at the level of first order governance. Agency governance at the supranational level, by contrast, is predominantly second order governance, as illustrated in Table 2.

Besides national administrations and regulators, private actors also engage in first order governance and implement European energy law. Of particular relevance are the infrastructure owners who run the long-distance and high-speed transportation lines. There is a risk that the integration of national and regional energy markets will fail without sufficient cross-border capacity – and close observers have argued that the European approach has to refocus on physical infrastructure to prevent this (Helm 2014). Transmission system operators (TSOs) have engaged in voluntary cross-border cooperation for decades out of technical necessity, while a truly European outlook has only emerged in reaction to the single market project. The European association of TSOs (ETSO), created in 1999, has operated various voluntary schemes. The third energy package attributed a formal mandate to the TSOs with the creation of a 'European Network for Transmission System Operators' for Electricity and Gas (ENTSO-E and ENTSO-G). ENTSO-E prepares the network codes for electricity grids and therefore is instrumental in implementing the internal energy market. Network structures were thus first introduced by private actors in order to engage in cross-border cooperation, and subsequently they have been used by DG Energy to steer infrastructure-related policy issues. The policy output of such network structures with targeted participation is much more tangible than that of wider stakeholder networks such as the Florence or Madrid energy fora, which were initiated by the Commission in the late 1990s as a mode of 'regulation by cooperation' (Eberlein 2005). While they have been conducive to new forms of institutionalised cooperation within the CEER and ETSO, the fora have not delivered as decision-making bodies (Eberlein 2003, 2005; Vasconcelos 2001). They continue to exist and generate wide policy input, and with their broad and inclusive membership serve as a tool of participatory governance. Networks with limited participation holding a clear policy mandate such as ENTSO play a central role in governance of governance, relying on a dedicated associational structure (ETSO) which brings together national TSOs at the level of first order governance (see Table 2).

Finally, soft governance serves as a governance device to link internal market issues to the wider energy policy agenda. A veritable governance architecture (Borrás & Radaelli 2011) has emerged with the various horizontal strategies such as '20 20 by 2020', 'Energy 2020' and 'Europe 2020'. Soft modes of coordination should, however, not be seen as a new phenomenon: back in 1956, the Spaak report suggested a number of measures in this regard (The Intergovernmental Committee established by the Messina Conference 1956: 127-129), and the Commission's first General Report stated that energy problems could 'be resolved only by the perfect coordination of the activities of the Executives of the three European Communities and of the Governments of the Member States' (EEC 1958: 49). In 1986, national governments stressed the need for flexibility in this policy area and encouraged the Commission to take measures to enhance the convergence and coherence of member state policies, informed by annual reports to be submitted by the latter, and resulting in

Commission assessment and reporting on a biannual basis (Council of the European Communities 1986, sections 7-10).

In today's energy policy, non-hierarchical coordination is an important device to integrate the various policy goals around markets, sustainability and security of supply (see Table 2). Soft governance not only facilitates coordination between member states, it is also conducive to an integrative approach within the European Commission, where several DGs work on energy related issues. In terms of policy output, such coordination takes the form of horizontal strategies such as those on '20 20 by 2020' or 'Energy 2020'. These strategies do rely on different policy modes and governance configurations. Taking renewables as an example, the 20 per cent goal was first envisaged by the '20 20 by 2020' strategy, and it became binding at the national level with the 2009 directive imposing individual national targets for the share of renewables in the energy mix (governance of governance through secondary law). With the new strategy adopted for the period until 2030 (European Council 2014), the policy regime is purely coordinative, where the aggregate target set at the European level is not complemented by binding national targets. Similarly, the Commission has sought to persuade member states to cooperate more closely in their management of capacity and renewables schemes (European Commission 2013). Such soft governance is, however, promoted in the shadow of hierarchy, namely the threat of competition law cases brought under an emerging energy policy state aid regime (Buchan 2015: 355.). Soft governance thus complements the other policy modes such as competition policy, agency governance, joint decision-making or private governance.

Table 2: European Governance in Energy Policy

Governance Order Policy Mode	Second Order	First Order
<b><i>Hierarchical, public actors involved</i></b>		
<b>Competition policy</b>	European Competition Network	DG Competition, national competition authorities / energy regulators
<b>Joint decision-making</b>	COM initiative, Council and EP co-legislate	National authorities and energy industry
<b>Agency governance</b>	CEER, ERGEG/ACER	National energy regulators
<b><i>Non-hierarchical / private actors involved</i></b>		
<b>Private governance</b>	Florence, Madrid fora ENTSO-E, ENTSO-G	ENTSO, national TSOs
<b>Soft governance</b>	Coordination between COM DGs and member states under Energy 2020, Energy 2030 etc.	National authorities

Overall, the room for manoeuvre at lower levels of governance and for private actors in European energy policy is striking (see Table 2). Network governance plays an eminent role at the level of second order governance, while first order governance is mostly left to member states and firms. Non-hierarchical modes of governance may prove effective in areas such as competition policy where

these operate in the 'shadow of hierarchy' (Héritier & Lehmkuhl 2008; Héritier & Rhodes 2010), but the governance capacity generated in other areas risks being insufficient to achieve the envisaged policy goals.

## CONCLUSION

65 years of European energy policy provide for valuable insights into the dynamics of multilevel governance. A foundational phase (1951-1957) laid the groundwork for a European energy policy with the ECSC and Euratom, but integration proved limited. During the following three decades (1958-1986), policy initiatives ran short of gaining support, but prepared the ground for future developments through the establishment of a triangle of policy goals around markets, security of supply and sustainability. Governance capacity was eventually built up between 1987-2002 with the realisation of the internal energy market and the rising salience of issues related to security of energy supply and sustainability. Finally, since 2003, a phase of consolidation has seen two more rounds of market legislation, and the emergence of a governance framework for Europe's broader policy agenda. In response to the research question posed initially, it can be stated that European policymakers have succeeded in building up governance capacity where second order governance is concerned. By contrast, first order governance very much remains the remit of national and private actors. The facilitating and impeding factors that have shaped the emerging governance mix amount to functional reasons in terms of limited governance resources, as much as to power-based motives in a setting where national governments are not keen to cede policymaking competencies to higher levels.

To substantiate the argument about governance capacity, as well as about facilitating and impeding factors shaping the governance mix, five governance modes were studied in depth: namely competition policy, the joint decision mode, agency governance, private governance and soft governance. Governance networks boost the Commission's governance capacity in the area of competition policy and agency governance, and they also bring on board the policy expertise of private actors. Self-regulation by industry constitutes a fall-back option in the absence of sufficient governance capacity on cross-border issues. Finally, soft governance serves as a device to bridge multiple policy areas and levels of governance. Structured mechanisms of coordination and cooperation are supposed to bring about the realisation of overarching policy goals such as the 20-20-20 targets. Governance of governance may, however, fail to overcome the policy trade-offs between contradictory goals, and national reservations about establishing a common European policy. The extent to which the European governance framework in energy policy is adequate to tackle persisting problems of implementation, compliance and policy coherence is beyond the scope of this article, but related challenges will ensure that those interested in governance issues will continue to study this field of policy.

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Research Article

## The EU Governance System of External Relations

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## Abstract

The goal of this article is to explain six decades of EU external relations by adopting the modes of governance approach in order to a) detect the dynamic relationships among different actors involved in this policy domain; and b) explain the historical and changing institutional arrangements to address international crises, build institutions and embrace norms. Based on these premises, this article argues that member states and EU institutions interact in different ways to respond to the increasing demands for integration, producing at least three modes of governance based on Tömmel's theoretical premises (this issue). After explaining the theoretical underpinnings and historical development of the cohabitation of three modes of governance in the EU system of external relations, the article concludes that the dominant patterns of policymaking vary from the empowerment of EU institutions (trade) to cautious approaches based on horizontal coordination (security) and to a mix of hierarchical and non-hierarchical instruments of cooperation (political-diplomatic).

## Keywords

EU external relations; Modes of governance; Integration; Horizontal cooperation; Empowerment of institutions

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The participation of states and EU institutions in the system of EU external relations has produced different styles or modes of governance over the past six decades. In contrast to other areas of the European integration process, the governance of EU external relations has been characterised by 'spurts of growth, periods of backpedalling, and moments of pause, inaction, or stagnation' (Ginsberg and Penska 2012: xxi). This evolution of EU external relations has produced an incremental, albeit non-linear, historical insertion of this policy domain within the overarching integration process as well as a cohabitation of three modes of governance under the umbrella of the relations between the EU and the world.

In order to explain six decades of EU external relations, this article argues that member states and EU institutions interact in different ways to respond to the increasing demands for integration, producing at least three modes of governance based on the theoretical premises Tömmel lays out in this issue (2016). The pertinence of the modes of governance approach to studying the external relations of the EU allows us to a) detect the dynamic relationships among different actors involved in this policy domain; and b) explain the historical and changing institutional arrangements to address international crises, build institutions and embrace norms. Based on these premises, the argument develops in four parts. The first identifies the main concepts that explain the theoretical underpinnings of the cohabitation of three modes of governance in the EU system of external relations. The second, third and fourth parts review the evolution of the three main areas of external relations (trade, security, political-diplomatic) and trace back the empowerment of EU institutions and their instruments from the economic competences given to the Commission in the Treaty of Rome (1957) and the creation of European Political Cooperation in the early 1970s to the Treaties of Maastricht (1993), Amsterdam (1997), Nice (2003) and Lisbon (2009). The conclusion argues that the governance of the EU system of external relations is explained by the cohabitation of three modes of governance based on dominant patterns of policymaking that vary from the empowerment of EU

institutions (trade) to cautious approaches based on horizontal coordination (security) and to a mix of hierarchical and non-hierarchical instruments of cooperation (political-diplomatic).

## **GOVERNANCE AND THE EU FOREIGN POLICY SYSTEM**

The EU is a system that undergoes steady changes and operates under a variety of modes of governance responding to the interest of the actors and the characteristics of each policy domain. The EU system of external relations is characterised by the creation of the European space as a system of governance where EU member states and EU institutions and other agencies participate in debating, designing, deciding and implementing policies directed beyond the borders of the EU (Furness 2013; Kostanyan 2014).

The conceptualisation of EU external relations as a system of governance is not new in the scholarly literature. Based on different angles of analysis, the literature on EU external relations has been centred on three groups. The first group focuses on the characteristics of EU external relations. This group has evolved from studying EU actorness (Sjöstedt 1977) to explaining its presence (Allen and Smith 1990) and describing its process (Smith 1996). The second group has focused the debate on the type of power emerging from the EU, with some concepts already becoming part of the common language in European studies: the EU as a civilian (Duchêne 1973), normative (Manners 2000), small (Toje 2010) or market (Damro 2015) power. The third group, in which the analysis of this article falls, conceives EU external relations as a system of governance. Toje (2010) argues that the EU is a system of governance with overlapping policy functions driven by integration that functions as an effective tool for defusing historic grievances and fostering a community of values. Cardwell (2009) has advanced this line of research and argues that the complex EU system of governance dealing with the outside world has developed institutions and operational mechanisms that are unique, complex and materially different from a nation state.

In order to contribute to the research direction posed by Cardwell, this article approaches the EU system of external relations from its dynamic and evolving forms of governance. Based on the current literature on governance and external relations (Lavenex 2011; 2014), this article addresses the emerging tensions derived from the intersection of three elements: increasing regional integration, the transformation of EU member state competences and the empowerment of EU institutions. The integration process has been a mechanism to ameliorate the most significant challenges that Europe has faced since the mid-twentieth century, as corroborated by the growing number of policy domains falling under the EU agenda. However, the deepening and widening of the integration process has also been a source of tensions regarding the allocation of responsibilities and resources between state and regional actors. These frictions in the complex relationship between integration, states and EU institutions have paved the way for innovative scholarly debate about modes of governance (Börzel 2010; Héritier and Rhodes 2011; Tömmel and Verdun 2009), which aims at explaining the combinations of hierarchical and non-hierarchical means of political steering based on voluntary cooperation among public, private or non-governmental actors (Tömmel 2016).

For more than six decades, the evolution of the integration process, including the area of external relations, has produced numerous deadlocks in areas where European action is clearly needed or expected, but member states or EU institutions, or both, fail to act quickly. Tömmel (2016) argues that such deadlocks arise due to a variety of causes, such as member states refusing to transfer competences to the European level, the inability of the member states to implement European policies duly, incoherent or infeasible design of European policies, or from other obstacles to policymaking, for example changes in the policy environment. While the emergence of deadlocks is an inherent part of the integration process, the challenge is to overcome them through institutional

mechanisms in which a system of governance is produced as 'a system of co-production of norms and public goods where the co-producers are different kinds of actors' (Bartolini 2011: 8).

The study of EU external relations encompasses a variety of subsystems of co-production of norms and public goods and, hence, flexible analytical frameworks are needed to provide comprehensive explanations. As opposed to grand theories applied to EU policies where there is a dominant subsystem of co-production of norms (trade or security), governance approaches support an understanding of the cohabitation of different practices within one single policy domain where a variety of governance practices are interrelated within a broader policy domain: external relations in the case of this article. The added value of governance approaches lies in the fact that this cohabitation of practices has been identified and theorised. More precisely, based on Tömmel's historical and theoretical review of the integration process (2012), there are at least four overarching modes of governance to overcome deadlocks. While these four general modes of governance have emerged chronologically in the six decades comprising the integration process, rather than one succeeding the other, the four currently coexist in different combinations in the policymaking process in the European Union. The first is the linear transfer of powers from states to the European level in a limited set of policy domains, which was dominant in the initial stages of the integration process. The second mode experiments with more indirect forms of political steering and the involvement of a broader range of actors, moving from a simple interventionist policy model to a more sophisticated mode of governance that increasingly refrained from setting uniform norms or standards at European level. The third is based on a mix of hierarchical and non-hierarchical modes of political steering and adopts various approaches that serve to frame or coordinate the policies of the member states. The fourth mode is marked by the establishment of new procedures to harmonise national policies and increase the transfer of European policy approaches to third states, particularly to neighbouring states. As the main focus of this article is to examine the evolution of EU governance of external relations, two delimitations of the object of study are pertinent. The first is that the explanation of the articulation of institutions and states in the making of EU external relations benefits from the categorisation of the first three modes of governance Tömmel suggests, while the fourth mode of governance focuses more on the domestic impact of EU policies on third states, an area of research beyond the main goal of this article. The second is that while Tömmel's model includes public and private actors, the evolution of EU external relations has mostly centred on the relationship between member states and supranational institutions, which is the focus of this article.

The governance system of EU external relations is an overarching framework that interconnects different policy domains ranging from international trade to military/civilian missions beyond the borders of Europe. Each policy domain involves different actors acting under different rationales. At the one end of the spectrum, trade policies have followed the pattern of the first mode of governance where actors have been inclined to allow the transfer of power to European institutions based on the assumption of a non-zero sum game; emblematic of this mode of governance is the Commission's influence on trade negotiations since the early stages of the integration process (see Cini 2016 for a study of institutional change in the Commission). The opposite case is that of military-security cooperation that responds to the premises of the second mode of governance, in which, due to a zero sum game rationale, the dominant pattern of action is that the European level established certain basic rules of cooperation, while member states were expected to implement policies within this framework. In between these two modes, the development of political-diplomatic instruments follows the rationale of the third mode of governance by combining hierarchical and non-hierarchical modes of political steering and adopts various approaches that serve to frame or coordinate the policies of the member states.

This article selects three policies in the area of external relations that are emblematic of these three modes of governance and lead EU foreign policymaking: trade, defence and political-diplomatic. A

significant number of EU policies has developed external components (monetary, competition or transport, for example) that influence global governance or are affected by extra-EU factors, but the main focus of those policies remain within the EU territory and the external component is peripheral. By contrast, the European Union has created an international legal personality in the area of trade, developed numerous institutions in the political-diplomatic arena and adopted policies to respond to international security crises, particularly after the conflicts in the former Yugoslavia in the early 1990s. This complexity is reflected in the steady development not only of permanent communication, practices and informal institutions among foreign affairs ministries, but also the creation of institutions such as the High Representative of the Union for Foreign Affairs or the European External Action Service. While some other EU policies are also focused on external relations (European Neighbourhood Policy, Enlargement Negotiations or International Cooperation and Development), they largely fall under the coordination of the political dimension of the High Representative. The following sections will focus on reviewing sixty years of external relations by exploring the modes of governance in three of its areas: trade, security and political-diplomatic.

### **GOVERNANCE OF EU FOREIGN TRADE POLICY**

EU external trade policy has been a solid pillar of the EU system of external relations and comes closest to the metaphor of the European external 'single voice.' Conceived as an extension of the common market created for coal and steel, EU external trade policy was founded on the decision of the member states to empower legally the European Commission with a leading role in the early stages of European integration, a policy decision that is emblematic of the first mode of governance.

Commercial policy has been one of the most important and powerful instruments of the EU's external relations. As a customs union, there are common rules for imports into the EU, and hence the European Commission represents the interests of the EU as a whole in international negotiations, enabling the 28 member states to speak with one voice in trade policy in international forums such as the World Trade Organization (WTO). The Commission is also empowered with the 'right of initiative' by proposing legislation, policies and programmes of action and is responsible for overseeing the enforcement (implementation remains the responsibility of member states) of the decisions of the Parliament and the Council in the area of trade.

From its inception, the European Community (EC) assumed four specific external relations functions. The first was to develop and implement the Common Commercial Policy (CCP). It should not be ignored that the Treaty of Rome envisioned the creation of the common market by the end of a twelve year period. The Common External Tariff was established in July 1968, 18 months ahead of schedule. The second function was fostered by French insistence on the recognition of the member states' historical ties with their ex-colonies: the extensive institutionalisation of links between the EC and the African, Caribbean and Pacific countries in the four Lomé Treaties (1975, 1979, 1984 and 1989) and the Cotonou Agreement (2000). The third responsibility allocated to the European Commission was the power to negotiate association and preferential trade agreements with third states and international organisations. A fourth component with external relations implications was contained in Article 237 of the Treaty of Rome, which entitled the European Commission to negotiate the accession of potential new members (Siles-Brügge 2014).

The period between 1958 and 1968 was characterised by the learning process of member states and the European Commission to agree on terms of trade. From legal and institutional standpoints, two elements were crucial to the consolidation of the European Commission in the area of external trade. The first is Article 113 of the Treaty of Rome, which laid the foundations for the emergence of the Community as an important international actor; the second was the role of GATT (General Agreement on Tariffs and Trade) negotiations, which was fairly relevant for the development of an

international presence in the integration process. As Hazel Smith (1995) argues, the Kennedy Round (1963-1967) of the GATT was important for three reasons. First, it legally compelled EC member states to produce common policies and contributed to shaping common positions towards third parties in policies such as the Common Agricultural Policy (CAP). Second, as a result of the embryonic regional cohesion, the negotiations of the Kennedy Round also helped the Commission, acting on behalf of the Community, to become a more visible actor in international trade. A significant example of this visibility was the 1966 formation of a Nordic trade delegation within the GATT, which was designed to defend Nordic interests with respect to their trading relationship with the Community. Third, the Kennedy Round enabled the incipient definition of the emergent European Community as an international actor in opposition to the United States (Smith 1996).

EU external trade policy has evolved by broadening the scope of the common commercial policy itself in order to respond to the transformations of the international trade structure. When the EEC Treaty was negotiated, international trade was primarily comprised of goods. By the time GATT members were negotiating the Uruguay Round (1986-1994), the agenda had expanded to include trade in services, intellectual property, and investment. In this regard, the Amsterdam Treaty provided that the Council could decide unanimously whether the Commission could negotiate international agreements on services and intellectual property. The Treaty of Nice extended the scope of the common commercial policy to encompass all trade in services, with a few notable exceptions, as well as all trade-related aspects of intellectual property rights. Audiovisual, education, health care and social services were a number of particularly sensitive service sectors explicitly identified as being of mixed competence, whereas foreign direct investment in non-service sectors was not incorporated in the revised common commercial policy (Smith 2003).

The Lisbon Treaty has reinforced the system of governance of trade by introducing three main changes (Niemann 2013). The first is increasing the role of the European Parliament as a co-legislator on trade matters (e.g. anti-dumping actions must pass through the Parliament, the 'ordinary legislative procedure' and more scrutiny on trade negotiations). The second is the EU's power to adopt autonomous acts on trade in services and commercial aspects of intellectual property and the fact that Foreign Direct Investment is now an EU power under trade policy. The third is that QMV (qualified majority voting) becomes the general rule in Council for all aspects of trade policy, leaving unanimity required only in limited, specific circumstances: cultural/audiovisual services that risk undermining the EU's cultural and linguistic diversity, or social, educational or health services that risk seriously disturbing the national organisation of these services.

All in all, five characteristics may be identified with regard to the mode of governance in EU external trade policy. First, the EU provides a highly developed institutional framework at the regional level. Second, it has the capacity to perform a variety of economic functions and is underpinned by a well-developed set of policy instruments. Third, EU policymaking influences member states' foreign economic policies through the internalisation of major areas of activity and provides incentives to economic agents to shape their actions within the European context. Fourth, there is recognition from other international actors that the EU is a capable and valid strategic partner (Smith 2003: 80-3). Fifth, beyond global trade negotiations, the EU's capacity to shape the international trade agenda varies depending on the particular characteristics of preferential trade agreements (Woolcock 2014).

## **GOVERNANCE AND EU DEFENCE POLICY**

The institutional responses of the EU in the area of defence and security policy have followed the premises of the second mode of governance. Even before the Treaty of Rome came into force, there were expectations that the founding members of the EU would provide credible and collective responses to deal with regional security. The preferred mechanisms of governance to address the

security challenges or deadlocks have been cautious actions to establish certain basic rules of cooperation with limited transfer of competences to European institutions. It was only after the mid-1990s that there was a more structured debate over the EU as a security provider and the creation of EU level mechanisms of coordination to enhance cooperation.

From the 1950s to the late 1970s, several converging factors shaped the rationale of European actors in opting for a mode of governance sceptical of further transfer of power to EU institutions: questions of German rearmament, the role of the United States as a security provider, competition between regional security projects, and the remnants of distrust in the domestic politics of several European countries. Two projects of regional defence cooperation, conceived outside of the integration process, aimed at addressing the deadlocks that the European reconstruction and international crises posed to European countries: the European Defence Community (EDC) and the Fouchet Plan. With regard to the EDC, Ralph Dietl has argued that in the context of the Korean War, 'Great Britain and the United States deemed a German defence contribution indispensable to bolster Western European defences..., which ... led France to produce the so-called Pleven Plan for the EDC in 1950' (Dietl 2002: 29) in order to control West Germany's rearmament within a supranational European army. In August 1954, however, the French National Assembly voted against the EDC Treaty. After France's rejection, the United Kingdom proposed an intergovernmental alternative to the EDC, under the Western European Union (WEU). At the end of September 1954, the UK secured the consent of all ex-EDC powers, plus Canada and the United States, for supporting the WEU as an alternative to the EDC (Ruane 2000).

The second attempt to create a European security foreign policy was the Fouchet Plan, which was proposed in the context of the Suez crisis that made clear the diplomatic divide between European countries and the United States. In 1961, the French Ambassador to Denmark, Christian Fouchet, presented a plan to deepen security cooperation between the six European Community members based on three major topics: the relationship of the emerging political union within the European Communities, the participation of the United Kingdom in the political union; and the union's links with the Atlantic Alliance (Vanhoonacker 2001: 267). The debate did not lead to a consensus, and the Dutch vetoed the Fouchet proposal for a political union in June 1962 (Vanke 2001).

The idea of common military capabilities essentially remained frozen for more than two decades. In 1986, Article 30.6 of the Single European Act (SEA) included political and economic aspects of security (economic sanctions, for instance) as a subject for European Political Cooperation (EPC) consideration. However, with regard to hard security, the article was clear when it stated that closer cooperation within NATO or the WEU would not be implemented by the EPC (Alonso Terme 1992). Ireland, as a neutral country, was one of the strongest voices seeking to ensure that neither WEU nor NATO-related matters would be included within the EPC framework.

The end of the Cold War and the instability in the Balkans contributed to a reconsideration of the security and military role of the EU. Article J.4 (1) of the 1993 Maastricht Treaty stated that the Common Foreign and Security Policy (CFSP) 'shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence' (European Commission 1992: 126). The implementation of the 'eventual framing' and the creation of mechanisms to overcome the deadlock or EU incapacity to act in the Balkans remained pending during the 1990s. It was not until 1998 that EU ministers addressed the issue of military security at the St. Malo summit. The United Kingdom, a key actor in this initiative, decided to move forward with constructing EU military capabilities, even if this institutional innovation had to take place within the context of NATO (Deighton 2002). In this background, the European Security and Defence Policy (ESDP) emerged as a substantive move forward in the development of military affairs based on four main factors: a) the three major Western European powers agreed on the need for ESDP; b) the unresolved deadlock or inaction of the 1990s forged the acceptance that a security

and defence policy should be included in the EU agenda; c) the United States supported the 'autonomous capacity project' and was committed to exploring means whereby it could function effectively with NATO; and d) the EU had shown more flexibility in collaborating with non-EU European NATO allies (Moens, Cohen and Allen 2003).

The mode of governance in the area of security demonstrates a reluctance to transfer powers to the EU level, but some new trends indicate a possible transit to a more complex mode of governance, particularly after 2000 (Shepherd 2015). More precisely, the creation of new mechanisms of security cooperation have paved the way to develop a *horizontal nexus*, in which the new institutional setting facilitates horizontal policy cooperation among the member states in order to implement EU policy concepts at the national level without relinquishing sovereignty or transferring power to the EU level (Tömmel 2016). This parallels the horizontal relations between countries in the area of Justice and Home Affairs (Caviedes 2016) or citizenship (Maas 2016). As part of a new setting to promote a horizontal nexus, the Nice European Council in 2000 approved the creation of three new permanent political and military bodies: the Political and Security Committee (PSC) is the body of the Council that deals with crisis situations and examines all the options that might be considered as the Union's response within the single institutional framework; the European Union Military Committee (EUMC) is the highest military body established within the Council and is composed of the Chiefs of Defence represented by their military representatives in Brussels; and the European Union Military Staff provides military expertise and support to the ESDP, including the conduct of EU-led military crisis operations (Missiroli and Quille 2004). Along the same lines of strengthening the horizontal nexus of cooperation on security, in 2001 the Council transferred two agencies from the WEU to EU structures, namely the Satellite Centre and the Institute of Security Studies. The EU also created the European Capabilities Action Plan (ECAP) in November 2001 and, following the adoption of the European Security Strategy (ESS) in December 2003, the Headline Goal 2010 was approved, underlining the development of the EU Battle Groups. The creation of the European Defence Agency (EDA) in 2004 is also of the utmost relevance. Under the Lisbon Treaty, the Common Security and Defence Policy (CSDP) replaced the ESDP and the EDA became a strategic cornerstone with the goal of bringing more value for investments and improving security at a reasonable cost.

While the EU has finally created specific governance mechanisms in the EU military sector in order to initiate a process of military convergence, some tangible steps have been taken with regard to military-civilian operations, which are the most important outcomes in providing effective security cooperation in cases of crisis. Certainly, the first operations were quite modest, but they constitute concrete actions, which would have been unthinkable a few years ago. As of early 2015, the EU had initiated ten military operations, and five of them have been completed: Concordia (Macedonia) and Artemis (DR Congo) were launched and concluded in 2003, Support to AMIS II (Sudan-Darfur) between 2005 and 2006, EUFOR DR Congo in 2006, and EUFOR Chad-Central African Republic in 2008-2009. The current five operations have deployed more than 3,000 soldiers in the field in the operations EUFOR Althea (since 2004), EUNAVFOR-Atalanta (2008), EUTM Somalia (2010), EUTM Mali (2013) and EUFOR Central African Republic (2014).

While the second mode of governance dominates the rationale of the security and defence external EU policies, the mechanisms of horizontal cooperation have opened more avenues to resolve and overcome periodic deadlocks in the area of security, particularly the gap between expectations and the incapacity to act in crisis situations. In spite of the progress made in the past two decades in this policy domain, there is still a long list of challenges where more instruments are required to face several security challenges collectively, including the need to: revisit the security exemption under Article 346 of the Lisbon Treaty and the fact that the armament policy does not fall under EU competence (Chang 2011); improve the EU-NATO coordination of policies and resources (Ginsberg and Penska 2012); strengthen the policies orientated toward building an armaments market, which is

currently fragmented, in order to reduce costs of defence goods in areas such as air-to-air re-fuelling, drones, satellite communication, and cyber security (Biscop 2015).

### **POLITICAL-DIPLOMATIC GOVERNANCE OF EU FOREIGN POLICY**

The area of external political-diplomatic relations has followed a path of steady institutionalisation of governance. In contrast to the dominant modes of governance in the areas of trade and security of the EU system of external relations, the institutional development of political-diplomatic instruments has followed the rationale of the third mode of governance by combining hierarchical and non-hierarchical modes of political steering and adopting various approaches that serve to frame or coordinate the policies of the member states. The cohabitation of 28 national foreign policies, the Commission's agenda on external relations and the creation of the European External Action Service (EEAS) in 2010 results in a complex grid of horizontal and vertical forms of interaction that has emerged as a result of practices developed over time and often in reaction to deadlocks over assuming an active role in cases of international or regional crisis (Henökl 2015).

In the initial stages, the six founding members of the EC did not perceive the need to act together in order to face international crises or emerging regional instabilities. For example, when the United Nations Security Council imposed sanctions against Southern Rhodesia (1966-1968), member states simply assumed the position that their implementation was a matter to be decided by each EC country (Nutall 1992). Subsequent international events were gradually approached by the EC members with pragmatism, and the EPC mechanism, which was introduced as an informal process of consultation in 1970, came to represent the appropriate response to the international crises of the late 1960s. The Luxembourg Report (1970), the Copenhagen Report (1973), the London Report (1981) and the Stuttgart Declaration (1983) provided a political acknowledgement of the EPC and some ground rules for what Lak calls 'a morally binding non-legal foundation' for EPC (1992: 42).

The EPC was an informal mechanism that did not evolve beyond an incipient or weak second mode of governance. However, it provided the background for building trust and shaping the pillars for further institutionalisation after the early 1990s. The launch of the EPC coincided with the emergence of West Germany's policy of *Ostpolitik* in 1969, which many European countries initially regarded with distrust. The EPC process reduced the level of suspicion and helped prove that West Germany was a reliable and safe ally through regular exchanges of information and consultations, and promoting the coordination of EC member's positions, as the Luxembourg or Davignon Report (1970) recommended (Hill and Smith 2000).

The weaknesses of the EPC were evident in the aftermath of the Soviet military intervention in Afghanistan in 1979 when it took the EC over two years to agree a common position and to impose limited sanctions against the Soviet Union. The delayed EC decision to act produced a deadlock and opened the possibility of exploring alternative modes of governance to overcome it. Thus, the EC members approved the London Report in October 1981, which gave the European Commission full access to the EPC, established a consultation role for the Commission, and empowered it to enact trade sanctions. Among the new mechanisms established by the London Report, the introduction of Crisis Procedures had particular significance because it meant the Commission would convene a ministerial meeting within 48 hours at the request of three member states in order to improve the EU's response capacity. Likewise, it set up an embryonic EPC secretariat in the form of a small team of officials from the preceding and succeeding presidencies to help the incumbent foreign ministry (Hill and Smith 2000). The SEA provided a legal status for the EPC in 1987 and formally created the EPC secretariat in Brussels to assist the country that temporarily held the Presidency of the Council of the European Communities. Despite ambitious references to foreign policy in the SEA, the only commitment the member states made was to consult with one another prior to the adoption of a

national position on 'any foreign policy matters of general interest' (Article 30.2a). In that regard, the SEA maintained the strategy of pragmatism practised and articulated in the previous documents on foreign policy.

The 1993 Maastricht Treaty established the intergovernmental second pillar of the CFSP and marked a turning point in the modes of governance practised in the EU. This Treaty included the objective of a 'foreign policy' and brought it into legal existence in its Title V. As a result of this legal innovation, the Commission enhanced its role in policy deliberations, though the role of the European Parliament in the field of CFSP remained marginal and based upon its supervision over the CFSP budget. The combination of the path that the TEU inaugurated for further diplomatic action, together with the recurrent international crises where the voice of the EU was absent, provided incentives and pressures for more institutional innovations and for a more decisive mode of governance. The Treaty of Amsterdam created the post of High Representative (HR) in order to contribute to the formulation, preparation and implementation of policy decisions in the area of external relations. The ninth NATO Secretary-General, Javier Solana, was appointed as the first HR and held this position for a decade (1999-2009). During his tenure and despite limited resources, Solana built an institutional space within the EU system of external relations and actively engaged in numerous international negotiations ranging from different types of mediation in the former Yugoslav Republic of Macedonia, Ukraine and the Middle East, to forging consensus among EU members to raise the voice of the EU as an international actor. Another significant institutional innovation was the adoption of 'constructive abstention', which allows a decision to proceed even when not all EU members want to be involved, thereby diluting the inefficiencies surrounding the unanimity rule (Larive 2014).

While the Constitutional Treaty failed to be ratified, most of its innovations relating to foreign policy remained as part of the Lisbon Treaty. The title of Minister of Foreign Affairs was changed to the less controversial High Representative of the Union for Foreign Affairs and Security Policy, but the job description remained unaffected. This post currently merges the position of High Representative for the CFSP with that of the Commissioner for External Relations and was held by Catherine Ashton from 2009 to 2014 and by Federica Mogherini since 2014. The incorporation of supranational and intergovernmental elements into the position of the High Representative aims at increasing the horizontal coherence of the European foreign policy (Koehler 2010). On the other hand, the creation of the EEAS has reinforced a socialisation process among the different national foreign affairs ministries whose daily contacts produce a trend towards increasing information sharing in order to strengthen the EU as a more effective and influential actor in world affairs (Vanhoonacker and Reslow 2010). All in all, one of the most significant challenges of the EEAS is to develop a solid and coherent strategy based on the variety of foreign policy traditions (Duke 2012). Analysing the mode of governance also demonstrates that the European Commission has developed a very extensive formal and organisational agenda dealing with external relations: the Barroso II Commission (2009-14) relied mostly on a group of five Commissioners having an explicit external relations role (Furness 2012) and the Juncker Commission has focused on the project 'A Stronger Global Actor' in order to combine the tools available within the Commission in a more effective manner under the leadership of HR/VP Mogherini (European Commission 2014). In sum, the dominant third mode of governance in the political-diplomatic relations of the EU system has been constructed incrementally from the informal EPC mechanisms to the multiple institutional instruments of hierarchical and non-hierarchical institutional instruments created in the past two decades.

## CONCLUSIONS

This analysis of three sectors of EU foreign policy reveals that each has developed different modes of governance based on the type of interactions among their actors and the dimension of the

deadlocks they have faced in six decades of European integration. Three out of the four modes of governance that Tömmel (2016) identifies in the EU integration process describe the three subsystems of the EU system of external relations explored in this article. However, these modes of governance are heuristic devices to explain processes that are in constant transformation and hence some new institutional innovations may open the door for new modes of governance or for combinations of the existing ones.

The dominant first mode of governance in the area of trade has historically been linear and marked by the empowerment of the European Commission since the early stages of integration, which catalysed the international presence of the EU in global trade negotiations. The creation of the customs union was a period in which the Commission and the member states became accustomed to the commitments made as a result of the external representation of the EC. Once the Commission reached the status of being the 'external voice' of the EC, it also accumulated power through several areas indirectly connected with the single market and the jurisprudence of the European Court of Justice. In recent years, the trade agenda of the EU has been consolidated with the addition of areas such as services or the more active role of the European Parliament in monitoring the role of the EU international negotiations.

In the area of security cooperation, on the other hand, the dominant second mode of governance has experienced some institutional transformations particularly focused on developing horizontal mechanisms of cooperation rather than transferring power to EU institutions. While some of these transformations strengthen the capacity of the EU to overcome deadlocks, member states are inherently cautious and sensitive to cooperating in the area of security. In the European case, in an environment of distrust derived from the experience of two wars in less than half a century, and with the presence of the United States and NATO, there were no incentives to pursue the creation of a European army. As a result of the instability in the Balkans and the hesitance of the United States to intervene in the area, demands for the creation of EU military capabilities heightened, and the military theme became part of the EU foreign policy agenda. Transformations at the state level are already taking place and numerous political and military bodies have been created within the Council, which has stepped up the development of military capabilities at the European level. The best example of this is the modest though increasingly regular military operations that have taken place since 2002.

The political-diplomatic third mode of governance is quite diverse and combines hierarchical and non-hierarchical mechanisms. In comparison with the two previous policy domains, this area has experienced a significant transformation from a traditional approach of informal dialogue in the 1970s to the current configuration with multiple institutional mechanisms at the state and European level. The diversity of areas that include external relations in the Commission, the increasing political role of the European Parliament in international affairs, the creation of new posts such as the High Representative or institutions such as the EEAS provide a diversity of actors and capacities where there is no single dominant mode of governance but a combination of institutional arrangements.

The three dimensions of governance cohabitating in the policymaking of EU external relations facilitate cooperation to address common problems and establish institutional arrangements at the European level. However, the voice of the EU is still projected at different tones in international fora such as United Nations. The combination of domestic, regional and international variables explains this variation, rather than a functional spillover. Unlike trade policies where national perspectives have all developed along the lines of a few diverse models, the security and diplomatic aspects of foreign policy still differentiate themselves immensely for each individual country. Against this background of different traditions and perspectives of national foreign policies, the EU has provided incentives and mechanisms to develop institutions and legal frameworks of common external practices at the regional level. The combination of diverse domestic practices and regional

arrangements produces a cohabitation of modes of governance in the area of external relations. As Keohane (2012) has indicated, there is a general trend in international relations to increase the legalisation of global activities, but the coherence of institutions remains challenging due to the absence of an overarching organisational framework. In addition, the global environment will continue testing the capacity of the European Union to manage crises and buttress a more stable international system. Investment and trade relations with the United States and China (trade governance), the re-emergence of geopolitical calculations with Russia (political-diplomatic governance) and the contributions to post-conflict situations in Africa (security governance) are emblematic challenges that the governance of external relations will face in the coming years. Based on the trends of more than six decades of European integration, it is likely that the EU governance of external relations will continue increasing proactive mechanisms to address crises and deepen the three logics of modes of governance in a kaleidoscope of patterns of policymaking that vary from the empowerment of EU institutions (trade) to cautious approaches based on horizontal coordination (security) to a mix of hierarchical and non-hierarchical instruments of cooperation (political-diplomatic).

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Research Article

## European Governance of Citizenship and Nationality

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## Abstract

The ability of a state to determine who its citizens are is a core element of sovereignty, yet even in this area coordination in the European Union has arisen as member states adjust their policies regarding citizenship acquisition and loss to take into account the European project. Furthermore, EU citizenship grants extensive rights that member states must respect, though the only way to become an EU citizen and acquire these rights remains through citizenship of a member state. This article sketches the development of EU citizenship from the 1950s to the present, mapping its evolution onto the phases of European governance utilised in this special issue. The search for closer coordination and common guidelines concerning citizenship flows from functional needs inevitably generated by superimposing a new supranational political community over existing national ones, resulting in shared governance within the framework of member state autonomy. Though welfare states and social systems in Europe remain national and jurisprudence safeguards the ability of member states to exclude individuals despite shared EU citizenship, legal judgments emphasise that member state competence concerning citizenship must be exercised in accordance with the Treaties and that member state decisions about naturalisation and denaturalisation are amenable to judicial review carried out in the light of EU law.

## Keywords

EU citizenship; Free movement; Rights; Multilevel citizenship; Governance

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Citizenship is a special case of European governance because of its location at the heart of state sovereignty. More than perhaps is true for any other policy area, states are reluctant to abdicate or transfer competence over the attribution of citizenship, because the competence to determine citizenship is the power to decide who is a member of the polity (Maas 2013a; Weber 1964). It is a classic tenet of international relations that states relinquish sovereignty to the extent they abrogate or infringe upon their power to determine nationality (Maas 2013b). Yet the development of supranational governance in the European Union is characterised by increased power sharing and coordination between the European and the national levels (see especially the contributions by Caviedes, Guth and Tömmel, this issue), and this is true also for citizenship. Over time, coordination on issues of citizenship acquisition and loss has arisen. Furthermore, European Union citizenship now grants extensive rights that member states must respect, but the only way to become an EU citizen and acquire these rights remains through citizenship of a member state. Policymaking regarding citizenship follows the general pattern by which European governance evolved to its current form in response to conflicts between the European and the national government levels (Tömmel 2016), despite the centrality of citizenship to state sovereignty. After tracing this process from its beginnings, the article next considers the constitutionalisation of EU citizenship after the Maastricht Treaty, focusing on court interpretation and member state responses. The article next analyses how governance in a multilevel system impacts questions of citizenship and nationality, illustrated with European debates about electoral rights, diplomatic and consular protection, naturalisation, denaturalisation, and the search for closer coordination and common guidelines. The final section reconsiders free movement within Europe as the central element of shared citizenship.

The key closing point is to query the limits of the principles of equality and non-discrimination and thereby to question the effectiveness of common European rights encapsulated in EU citizenship.

## CITIZENSHIP AND FREE MOVEMENT

In order to overcome deadlocks, European policymaking continuously oscillates between hierarchical and non-hierarchical modes of governance, often mixing the two, as the Union strives to create the procedural and institutional framework for balancing the diverging policy objectives of the European and the national government levels and to promote convergence among those of the member states (Tömmel 2016). The evolution and expansion of EU policymaking can be broken down into four phases. The first, in the 1950s and 1960s, was the attempt to implement at the European level direct forms of hierarchical intervention based on the traditional policy model of nation-states. Except for the customs union, a deregulatory exercise in 'negative' integration, this failed because of the hesitance of the European institutions to exercise their competences fully, combined with strong resistance from the member states against intervention from above. The relative ease of negative integration ('measures increasing market integration by eliminating national restraints on trade and distortions of competition' (Scharpf 2010: 91)) over positive integration ('common European policies to shape the conditions under which markets operate' (ibid.)) reflects a mode of governance in which national policy is severely restrained in its problem-solving capacity while European policy is constrained by the lack of intergovernmental agreement (ibid.). In a second phase beginning in the late 1960s, the Commission pushed for common norms and standards that were legally binding, but met enormous resistance from national governments and ended with only some fairly rudimentary principles (Tömmel 2016). In the 1970s and early 1980s, European legislation increasingly took the form of framework regulations or directives that defined only the objectives to be achieved, leaving implementation to the discretion of the member states.<sup>1</sup> In a third phase epitomised by the single market project of the Delors Commission, European authorities relied on market mechanisms for inducing policy innovation in the member states – the result was a mix of hierarchical and non-hierarchical governance modes, in which the single market and related policy areas (such as monetary union) were subject to clearly defined rules, while coordination of national policies was the preferred governance approach in new policy areas. In a fourth phase beginning in the mid-1990s, new procedures and institutional arrangements (such as the Open Method of Coordination) aimed at shared governance, with the member states retaining their autonomy. These new governance approaches sometimes even decentralised competences to national governments in policy areas that had earlier been the exclusive domain of European authorities (Tömmel 2016).

The impact of this evolution in European decision-making and policymaking processes on citizenship has in the first analysis been limited, because citizenship acquisition and loss is explicitly identified in the treaties as a matter of exclusive member state competence. At first sight, it thus makes no sense to speak of European governance of citizenship, because citizenship remains an area reserved to member state competence, unlike almost all other policy areas. Whereas most policy areas have at least some European dimension, decisions on the attribution or withdrawal of member state nationality at first sight admit no role for European governance because these decisions are carried out solely by the member states, with no input from European institutions. This situation also appeared unchanged by the introduction of EU citizenship into the treaties at Maastricht, because the only way to acquire EU citizenship is through citizenship of a member state, and the Amsterdam Treaty explicitly added that '[c]itizenship of the Union shall complement and not replace national citizenship'.<sup>2</sup> Indeed, subsequent efforts to give EU citizenship an independent status have so far failed to be adopted in the treaties. Thus, for example, the first comprehensive draft of the 2003 constitutional treaty specified that each EU citizen 'enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses; with the rights and duties

attaching to each', but this was dropped in subsequent drafts because of the objections of some of the larger member states (Maas 2007: 85). Some have argued that the Lisbon Treaty's new formulation (replacing the Amsterdam Treaty's 'complement and not replace' phrasing with a new formulation that now specifies that 'Citizenship of the Union shall be additional to national citizenship') is meaningful, intentional, and far from cosmetic (Waele 2010: 322). Yet it remains far from certain that changing the description of EU citizenship from complementary to additional has had any impact on its legal status.

Member states have always asserted their monopoly on defining who is a citizen for the purposes of EU law. For example, already in the postwar origins of European integration in the Paris (1951) and Rome (1957) Treaties, West Germany declared that '[a]ll Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals of the Federal Republic of Germany' and thus covered under Community law in areas of Community competence.<sup>3</sup> This meant that the benefits of Community law extended to individuals residing in East Germany, but not corporations and other entities which would otherwise be considered legal persons (Bleckmann 1978). Similarly, upon joining the Community, the United Kingdom attached a declaration to its 1972 Accession Treaty, updated in 1982 following revisions to its nationality legislation, specifying that British citizens, British subjects with the right of abode in the UK, and British Dependent Territories citizens with a connection to Gibraltar all qualified as UK citizens for the purposes of Community law (United Kingdom 1983). The ECJ specified in the *Kaur* case that this declaration was an 'instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*', thus confirming the UK's authority to determine by itself who should be considered a British citizen for EU purposes (Case C-192/99 *Kaur* [2001] para 24). More broadly, the European Court had established in the *Micheletti* case that, under international law, 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality' (Case C-369/90 *Micheletti* [1992] para 10).

The qualification that member states could lay down the conditions for acquiring or losing nationality only while 'having due regard to Community law' appeared to open up a role for European institutions. Indeed, during the Maastricht negotiations, the European Parliament resolved that the 'Union may establish certain uniform conditions governing the acquisition or loss of the citizenship of the Member States, by virtue of the procedures laid down for the revision of the Treaty' (European Parliament 1991). But the member states did not take up this idea, and at the Edinburgh Summit following the Maastricht Treaty (discussed below), the member states attached a declaration that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the nationality law of the Member State concerned' (Maas 2014a: 415).

That formulation disappointed those who had been hoping for an independent status for EU citizenship. As far back as its 1975 report *Towards European Citizenship* (European Commission 1975), the Commission had noted that the

Community does not at present have jurisdiction over the rights of persons, with the exception of economic and social rights, and that European citizenship, which does not exist at present, will take the first step towards becoming a reality only with the election of the European Parliament on the basis of universal suffrage and the implementation of point 11 concerning special rights

a reference to the 1974 agreement of the member state leaders to 'study the conditions and the timing under which the citizens of the nine Member States could be given special rights as members of the Community'.<sup>4</sup>

Furthermore, there had long been suggestions that naturalisation policies should be harmonised. For example, a 1985 European Parliament resolution on a common migration policy, besides advocating giving citizens of other member states the right to vote in local and European elections, also suggested that member states should reorganise their naturalisation policies: 'In order to permit the integration of migrants, [the European Parliament] asks that measures to assist the naturalization of migrants who opt for naturalization on a voluntary basis should be implemented by national legislation' (European Parliament 1985: 467).<sup>5</sup> Indeed, in legal circles the dominant view was that free movement legislation would ultimately mean concurrent jurisdiction over nationality; one author wrote that 'the free movement of persons implies that Member States should not be left entirely free unilaterally to define their nationality for Community law purposes' (Evans 1991: 190). Despite the fact that the *Micheletti* case specified that member states must exhibit 'due regard to Community law' (Case C-369/90 *Micheletti* [1992] para 10) in their policies regarding citizenship acquisition and loss, it is difficult to find practical limitations on member state competence in the area of nationality.

### MAASTRICHT'S CONSTITUTIONALISATION OF EU CITIZENSHIP

European law as interpreted by the European Court in Luxembourg is correctly identified as 'one of the main motors of governance in Europe' (Cichowski 2007: 242), which explains why inserting the concept of 'Union citizenship' into the treaties is so important. Without the concept of 'citizenship' in the treaties, the Court needed to rely on other concepts such as the aim of promoting the free movement of persons; the insertion of 'citizenship' meant the Court could invoke a new and firmer basis for promoting the 'ever closer union among the peoples of Europe' promised since the 1957 Treaty and the 'broader and deeper community' promised in the 1951 Treaty (Maas 2005). Following years of inconclusive efforts to translate lofty rhetoric into concrete rights – from postwar discussions of common citizenship through proposals such as that to introduce 'a European citizenship, which would be in addition to the citizenship which the inhabitants of our countries now possess' (Italian Prime Minister Giulio Andreotti at the First Summit Conference of the Enlarged Community in October 1972, discussed in Maas (2007: 31)) – the Maastricht Treaty finally achieved what many leaders had long advocated. The European Parliament had made several recommendations concerning citizenship in its 1984 Draft Treaty establishing the European Union (DTEU), which announced that:

citizens of the Member States shall *ipso facto* be citizens of the Union. Citizenship of the Union shall be dependent upon citizenship of a Member State; it may not be independently acquired or forfeited. Citizens of the Union shall take part in the political life of the Union in the forms laid down by the Treaty, enjoy the rights granted to them by the legal system of the Union and be subject to its laws (DTEU Article 3)

but this idea was not included in the 1985 Single European Act, which made little reference to citizenship.

The Maastricht Treaty declared that 'Citizenship of the Union is hereby established', that '[e]very person holding the nationality of a Member State shall be a citizen of the Union', and that EU citizenship included a range of rights: the right to move and reside freely within EU territory, the right to vote and to stand as a candidate in municipal and European elections in the member state of residence, the right to protection by the diplomatic or consular authorities of any member state, the right to petition the European Parliament, and the right to apply to a new European Ombudsman (article 8 of the Treaty, discussed in Maas (2007)).

Given the lack of significant new rights, the reception among scholars was initially tepid. One 1995 textbook concluded that ‘Union citizenship is best seen as a *sui generis* status entitling a Member State national to enjoy, qua Union citizen, certain rights and obligations in certain areas covered by the EC Treaty’ (Handoll 1995: 310). Others suggested that EU citizenship was simply a ‘cynical public relations exercise’, ‘fancy words on a piece of paper’, and ‘nearly exclusively a symbolic plaything without substantive content’ (Guild 1996: 30; Jessurun d’Oliveira 1995: 82; Weiler 1998: 13 respectively). However, as in many other policy fields, functional needs over time place limits on national sovereignty; in this case, the free movement rights at the core of EU citizenship limit member states’ exclusive competence over citizenship law. Legal scholars now recognise that, if

there is one lesson to be learnt from Union citizenship, it is that the law develops, and if there is a second lesson it is that the underlying logic of Union citizenship is what largely determines the path of that development (Davies 2011: 8).

Similarly, political scientists now argue that ‘citizenship rights have had an astonishing career from being a rather meaningless Treaty addition to being a central tenet of EU law’ – and that prohibiting restrictions on free movement, coupled with the injunction against nationality-based discrimination, has ‘led to a significant broadening of rights of EU citizens, and resulting difficulties of member states to restrict social benefits, and increasingly even of shaping their national citizenship law’ (Schmidt 2011: 20, 21).

An analysis based on European rights is necessarily formalistic, because it is about hierarchical or regulatory governance: EU law determining what member states can and cannot do. Yet beyond the formal adaptation of member state policies there is also the ‘governance of governance’ approach, in which member states themselves adapt their policies, influenced by developments at European level. One example of European integration shaping national citizenship is the *Chen* case. As part of the Good Friday Agreement, a 1999 amendment to the Irish constitution specified that Irish citizenship was the ‘birthright of every person born in the island of Ireland’, including Northern Ireland.<sup>6</sup> Following legal advice and seeking to evade China’s ‘one-child policy’, Man Lavette Chen, a wealthy Chinese businesswoman working in the UK for a firm owned by her husband, travelled to Belfast to give birth to her daughter, Kunqian Catherine Zhu, following which she sought a UK residence permit on the basis of the baby’s EU (Irish) citizenship (Kochenov and Lindeboom 2016). Though the baby’s Irish citizenship was never in question, UK authorities initially refused to extend a residence permit and the case was referred to the European Court. The Advocate General in the case explained that when a future parent decides that the future child’s welfare

requires the acquisition of Community nationality in order to allow him to enjoy the rights associated with that status, and in particular the right of establishment under Article 18 EC, there is nothing ‘abusive’ about taking action, in compliance with the law, to ensure that the child, when born, satisfies the conditions for acquiring the nationality of a Member State’ (Case C-200/02 *Chen and Zhu* [2004] Opinion of Advocate General Tizzano, para 120).

He continued that the ‘fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the *ius soli*, which lends itself to the emergence of situations like the one at issue in this case’ (ibid, para 124), and that Irish nationality law could have included further conditions to avoid *ius soli*, but ‘there is no such additional condition in Irish legislation, or in any event no such condition was applicable to Catherine’ (ibid, para 125).

The *Chen* case was still undecided when the Irish government proposed the Twenty-Seventh Amendment of the Constitution of Ireland in March 2004 to remedy what the Justice Minister called an ‘abuse of citizenship, by which it is conferred on persons with no tangible link to the nation or the State whether of parentage, upbringing or of long-term residence’; this ‘devalues the concept of

citizenship' because any child born on the island of Ireland is entitled to Irish citizenship and, as 'an Irish citizen, the person is also an EU citizen with all the rights of free movement and other treaty rights that go with that status'.<sup>7</sup> The amendment proposed to specify that a baby born in Ireland 'who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality'. Despite parliamentary opposition, the government proceeded to put the amendment to referendum, which passed on 11 June 2004 – the same day as EU and local elections – with a turnout of almost 60 per cent and a majority of 79 per cent of valid votes in favour of the amendment.<sup>8</sup> By the time the *Chen* case was decided in October, then, the Irish 'loophole' had closed.<sup>9</sup> *Chen* reaffirmed the *Micheletti* formulation:

Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality and it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (Case C-200/02 *Zhu and Chen* [2004] para 37).<sup>10</sup>

Member states could not question other member states' decisions about nationality (in this case baby Catherine's Irish citizenship by virtue of her birth in Belfast). This underscored the desirability of coordinated governance.

## COORDINATED GOVERNANCE OF CITIZENSHIP

Increased cross-border migration and family formation leads to functional needs for basing access to citizenship rights on residence rather than nationality. These functional needs are independent of any appeal to the 'European idea'; instead, they reflect coordination difficulties inevitably generated by superimposing a new supranational political community over existing national ones.<sup>11</sup> There has been sporadic political support for increasing the role of EU institutions in the governance of citizenship. For example, as discussed above, even before the Maastricht Treaty was passed, the European Parliament passed a resolution stating that '[t]he Union may establish certain uniform conditions governing the acquisition or loss of the citizenship of the Member States, by virtue of the procedures laid down for the revision of the Treaty' (European Parliament 1991). Despite the rejection of a greater EU role in determining citizenship in the Maastricht and Amsterdam Treaties, coordination is necessary, as illustrated below with the examples of electoral rights, diplomatic and consular protection, naturalisation, and denaturalisation.

### *Electoral Rights*

A hallmark of democratic citizenship is the right to participate in politics, both passively (helping to select officeholders, for example through the right to vote) and actively (participating in governing by running for or actually serving in political office). Since the introduction of EU citizenship into the treaties at Maastricht, EU citizens have the right to vote and run for office at the municipal and European level regardless of their state of residence. This motivated several member states to change their legislation regarding elections. In France, for example, the introduction of EU citizenship prompted several changes to the constitution to permit voting by EU citizens who were not citizens of France, and voting rights proved contentious. Alain Juppé, secretary general of the Gaullist RPR party (later foreign minister, then Prime Minister) said it was 'completely out of the question to give foreigners the possibility of having municipal councillors, who could then endorse a candidate for the presidency, elect senators or become mayor' (Davidson 1992). Much of this

concern was addressed by the later clarification that a member state may stipulate that the office of elected head of the executive body of a local government unit (such as mayor) can be held only by its own nationals; thus, France does not permit mayors who are not citizens of France, although several other member states do (European Council 1994). The Commission works ‘in close cooperation with the Member States in order to monitor the correct transposition and implementation’ of EU electoral rights, and provides regular updates about its efforts.<sup>12</sup> Similarly, the Commission also monitors the implementation of electoral rights for European Parliament elections and regularly issues recommendations to the member states.<sup>13</sup>

For municipal and European elections, there are thus clear European rules, which member states must apply equally to all EU citizens, without distinction between their ‘own’ citizens and those of other member states. Even in the area of national elections, however, there are pressures for adapting national legislation. Thus the Commission has highlighted how citizens of certain member states lose the right to vote in national elections if they reside abroad for a certain period of time, including when they reside elsewhere in the EU; this means ‘these citizens are not able to participate in any national elections, whether in the home Member State or in the Member State of residence’ (European Commission 2014a). While it is for member states alone to decide on their internal electoral rules, the Commission notes that ‘national policies which lead to disenfranchising citizens may be considered as limiting the enjoyment of rights attached to EU citizenship, such as the right to move and reside freely within the EU’, and comes with several proposals to address such disenfranchisement, including enfranchisement in the country of residence (*ibid*). This kind of ‘soft harmonisation’ does not constitute specifically top-down governance (because EU institutions lack jurisdiction in this area) but it does reflect pressures for increased coordination in an area key to citizenship. Public opinion surveys also reveal that Europeans support extending electoral rights to citizens of other EU member states in national elections – not simply local and EU elections – which would add democratic legitimacy to EU citizenship (Eurostat 2013; Gerhards, Lengfeld and Schubert 2015; Welge 2014).

### ***Diplomatic and Consular Protection***

Alongside electoral rights, EU citizenship also gives citizens of the member states reciprocal access to consular and diplomatic protection while travelling outside the EU. In 2015, the member states adopted a new Directive on consular protection for European citizens living or travelling outside the EU, which is due to be transposed into national laws and regulations by 2018; the Directive provides that EU member states’ embassies or consulates shall provide consular protection to unrepresented citizens on the same conditions as their own nationals (European Council 2015). Yet the transposition will likely face several barriers, including the proliferation of agreements between certain member states and third countries, such as the agreement between Portugal and Brazil or that between the United Kingdom and Canada for sharing consular facilities and duties (Blockmans and Carrera 2012). Curiously, diplomatic and consular rights have been relatively little studied. One review notes that consular affairs are ‘sensitive at national political level’ and ‘of great importance for the relationship (and the reputational image) of a State vis-à-vis its citizens’ (Wouters, Duquet and Meuwissen 2014: 576), yet ‘the specific content of the ‘right to consular protection’ is unclear and results in a diverging and ad hoc implementation of this Union citizens’ right by Member States’ (*ibid.*). The political dynamic appears to be one in which the Commission and the European Parliament favour a more prominent role for EU actors, while most member states and the European External Action Service (the EU’s diplomatic service, which is responsible for EU delegations worldwide) prefers consular protection to be provided by member state representatives rather than EU delegations. Common consular services thus remain undeveloped. Despite provisions in the 2015 Directive for a role for EU delegations in providing consular protection to EU citizens, the

emphasis is on horizontal rather than vertical transfer of competence: from one member state to another, rather than to EU authorities. This can thus be seen as part of the fourth phase of EU governance discussed above: shared governance, with the member states retaining their autonomy.

### ***Governance of Naturalisation: Investor Citizenship***

Moves towards shared European governance of nationality acquisition can be seen in the response to the government of Malta's announcement that it would give citizenship to non-citizens who donated money to Malta.<sup>14</sup> This was far from the first investor citizenship scheme within the EU. Similar schemes in France, the Netherlands, and the UK required a 'genuine link' (demonstrated by periods of residence) before naturalisation, but those in Austria, Bulgaria, Cyprus and Ireland had no residence requirement.<sup>15</sup> The original Maltese plan also had no residence requirement, and the concession to market Maltese citizenship was put to tender and awarded to a private company, Henley & Partners ('The Global Leaders in Residence and Citizenship Planning'<sup>16</sup>), under the supervision of a new government agency, Identity Malta (Malta 2013). The plan was controversial, domestically (the opposition party proposed significant amendments, though it had itself initiated the process when in government), amongst the academic community (most contributors to a scholarly symposium on selling citizenship (Shachar and Bauböck 2014) focused on negative aspects of such sales), and at the European level.

EU Justice Commissioner, Viviane Reding, blasted the programme in January 2014, preceding and during a debate in the European Parliament, saying that 'Citizenship must not be up for sale'; she added that

Member States should use their prerogatives to award citizenship in the spirit of sincere cooperation with the other Member States, as stipulated by the EU Treaties. In compliance with the criterion used under public international law, Member States should only award citizenship to persons where there is a 'genuine link' or 'genuine connection' to the country in question (European Parliament 2014a: intervention by Viviane Reding).

The next day, the European Parliament resolution specified that 'outright sale of EU citizenship undermines the mutual trust upon which the Union is built'; Parliament acknowledged that citizenship remains for member states to decide but called on member states 'to be careful when exercising their competences in this area and to take possible side-effects into account' (European Parliament 2014b). The resolution further asked the Commission to assess citizenship schemes in light of European values and EU law, find ways to prevent such schemes from undermining EU values, and develop 'guidelines for access to EU citizenship via national schemes' (ibid.). Parliament further called 'on the Member States that have adopted national schemes which allow the direct or indirect sale of EU citizenship to third-country nationals to bring them into line with the EU's values' (ibid.). Even the representative of the Council at the EP debate stated that although EU citizenship depends on member state citizenship, 'it also has an autonomous character stemming from the character of the European legal order. This means that the competence of Member States to enact laws concerning national citizenship has to be exercised in accordance with the Treaties'. The Council representative underlined that the member states 'must have sufficient trust in each other to recognise mutually different national provisions governing naturalisation' (European Parliament 2014a: intervention by Dimitrios Kourkoulas).

Two weeks after the EP debate and resolution, representatives of Malta met with Commission officials and announced revisions to the programme (Dali 2014). The press release about the meeting specified that Malta's representatives 'presented their intentions' and 'informed' the

Commission, concluding that the Commission ‘welcomed the announced amendments concerning the residence requirement – done in good faith and in a spirit of sincere cooperation and both parties express satisfaction about the understanding reached on this issue’ (European Commission 2014b). The meeting is presented as a unilateral discussion, with the Commission simply receiving information from Malta. Malta’s Prime Minister crowed that it was made amply clear during the meeting that ‘citizenship was a competent matter of the member state’ and called on the leader of the opposition to withdraw the judicial protest and the motion tabled in parliament to repeal the investor scheme.<sup>17</sup>

The Commission’s follow-up report concluded that ‘naturalisation decisions taken by one Member State are not neutral with regard to other Member States and to the EU as a whole’ and that ‘Member States should, when awarding citizenship, ensure that there is a ‘genuine link’ or ‘genuine connection’ between the applicant and the country or its citizens’ (European Commission 2014c). Some argue that this idea means that European and international legal principles are ‘transcending the national realms of competence and affecting nation-states’ discretionary power in the field of citizenship’ (Carrera 2014: 408). To the extent this is true, EU citizenship will indeed start to displace member state citizenship as the ‘fundamental status’ of nationals of the member states, as discussed in the section on ‘ever closer union’ below. Curiously, however, no other member state that was already doing what Malta was simply planning to do – selling citizenship without requiring residence – has (as of this writing) had its investor citizenship regime investigated by the Commission. Although the Commission noted that it was ‘analysing Investor schemes in other Member States in order to see if any further action is required’ (European Commission 2014c), no further action has yet been taken, despite the persistence in several member states of investor citizenship schemes similar to that first proposed by Malta. Thus, one interpretation of the case of Malta, the EU’s smallest member state and hence possibly a relatively easy target for Commission attention, is that naturalisation policies remain within the legal competence of each member state acting autonomously, despite the Commission’s admonishment that ‘Member States should use their prerogatives to award citizenship in a spirit of sincere cooperation with the other Member States and the EU as stipulated by the EU Treaties’ (ibid.).

### ***Denaturalisation: Member States Subject to EU Law***

Like naturalisation, states guard decisions about denaturalisation (by which individuals give up or are stripped of their previous nationality) as a central element of nationality law. But here, too, European integration has created situations in which member state nationality law must adapt to the growth of EU citizenship. One paradigmatic example is the *Rottman* case, in which an Austrian citizen who was charged with financial crime fled to Germany and was naturalised. By becoming a German citizen, he lost his Austrian citizenship under Austrian nationality law. When Austrian authorities later asked Germany to extradite Mr Rottmann, German authorities decided that he had obtained German citizenship fraudulently and moved to revoke his German citizenship. But doing so could render him stateless, and thus also result in loss of EU citizenship (which had originally provided him the right to reside in Germany). The Advocate General’s opinion noted that EU citizenship is a ‘legal and political status conferred on the nationals of a State beyond their State body politic’ in which EU citizenship is ‘a citizenship beyond the State’; it is based on the member states’ ‘mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale’ (Case C-135/08 [2010] *Rottmann*, Opinion of Advocate General Poiares Maduro, 30 September 2009, paras 16, 23). Thus, although decisions about the acquisition or loss of member state (and thereby EU) citizenship are not in themselves governed by EU law, ‘the conditions for the acquisition and loss of nationality must be compatible with the Community rules and respect the rights of the European citizen’ (ibid,

para 23). The judgment concluded that it is not contrary to EU law for a member state to denaturalise its citizen 'when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality' (Case C-135/08 *Rottmann* [2010] para 59). The idea that member state nationality law must be compatible with EU citizenship and respect the rights of the EU citizen leads in the judgment to the conclusion that, for EU citizens, member state decisions about naturalisation and denaturalisation are 'amenable to judicial review carried out in the light of European Union law' (*ibid*, para 48).<sup>18</sup>

Quite clearly, then, the *Rottmann* case places limits on member state autonomy in the field of citizenship (Kochenov 2010a; Shaw 2011), as do subsequent cases such as *Ruiz Zambrano*, *McCarthy* and *Dereci*. The European Parliament resolved in 2014 that, while naturalisation and denaturalisation decisions are regulated by member state law, there should be 'closer coordination and a more structured exchange of best practices between Member States with respect to their citizenship laws in order to ensure fundamental rights and particularly legal certainty for citizens', and also called for 'comprehensive common guidelines clarifying the relation between national and European citizenship' (European Parliament 2014c). Though not forced by any EU law to take into account EU citizenship status in their general naturalisation and denaturalisation policies, increasing numbers of member states do distinguish between EU citizens and citizens of third countries – for example concerning the length of residence periods required before naturalisation, even though naturalisation is far less important for citizens of other member states (because they already enjoy almost all the same rights as domestic citizens) than citizens of third countries (Kochenov 2010b: 3). This fits with the idea that discrimination between citizens of member states and those of third countries has developed gradually over time: the strict separation between EU citizens and third country nationals observable today is at least partly judge-made (Maas 2008; Kochenov 2016). Member state autonomy can thus be limited by the general principles of EU law even in areas of member state competence, such as decisions regarding the acquisition and loss of member state (and hence EU) citizenship.

### ***Closer Coordination and Common Guidelines***

In the historical development of nation-states, the introduction of central rights that took primacy over local ones empowered individuals and redrew the relationship between the governments of the centre and those of the units. Similarly, EU citizenship limits the power of member states to treat their own nationals worse than nationals of other member states, and most of the recent free movement of persons and explicitly citizenship cases at the Court of Justice of the European Union can be seen as attempts to grapple with the new constitutional status of EU citizenship (Carens 2013; Longo 2013; Staver 2013), despite transition periods for the full implementation of all rights (such as free movement) for citizens of new member states (Caviedes 2014; Johns 2013; Riemsdijk 2013). Whichever future direction these debates take, it is clear that the introduction and growth of a common legal status for EU citizens has profoundly altered the nature of Europe and the meaning of European integration for its citizens, which forces even notionally sovereign EU member states to coordinate their citizenship and nationality policies.

Coordination does not, of course, mean harmonisation, as the legal basis of EU oversight of member state citizenship and nationality policies remains weak. Aside from the obligation of member states to adhere to the general principles of EU law, and the specific role of judicial oversight to ensure that naturalisation and denaturalisation policies are compatible with EU citizenship, member states remain free to determine the particularities of their citizenship and nationality policies – a wide scope of action for member states that the European Court will likely continue to safeguard in forthcoming decisions such as *Rendón Marín* (expected in early 2016). But the closer coordination

and common guidelines called for by the European Parliament resolution can also occur informally, fitting with the idea of ‘governance of governance’ explored in this special issue; instead of top-down policymaking, governance is shared across multiple levels, with the European level mostly involved in developing guidelines or norms to which the member states generally conform (Caviedes and Maas, this issue). This type of dynamic can be identified in the way in which the naturalisation laws of the member states seem to have converged so that the length of residence required for naturalisation is quite close in all the member states. Similarly, the Long-Term Residence Directive (European Council 2003) has ensured that third-country nationals enjoy permanent rights after five years, and are ready to naturalise – thus the Directive arguably creates a ‘subsidiary form of EU citizenship’ escaping direct control of the member states and providing a kind of civic status for its recipients (Acosta Arcarazo 2015: 217). In this way, the Parliament’s 1985 proposal, discussed above, that member states should reorganise their naturalisation policies in order to permit the integration of migrants has in fact been implemented in most member states – though this implementation reflects informal coordination and alternative means of enforcement rather than direct EU regulation of citizenship and nationality policies.

### CITIZENSHIP AND ‘EVER CLOSER UNION’ REVISITED

Returning now to the core rights of EU citizenship – the freedom of EU citizens to live, work, study, and access public resources anywhere within the common territory – it is clear that the evolution of EU citizenship is far from finished. The extension of rights has been bumpy and disjointed but, to date, there have never been reversals in the extension of rights to free movement, as would be the case if a certain category of citizens gained free movement rights but later lost them. Rights that could be extended further include cross-border recognition for same-sex couples, to ensure family relationships recognised in one member state are accorded equal treatment across the EU. More important than the expansion of rights is ensuring they are respected; the existence of a legal right does not necessarily mean individuals can exercise that right effectively. Even today there is significant discrimination against the least well-off EU citizens, those who are perceived to pose a threat to or constitute a burden on the host member state. Such forms of discrimination against ‘undesirable’ migrants commonly occur in jurisdictions where different levels of government are responsible for social welfare provision, and the EU is no exception (Maas 2013c). British Prime Minister David Cameron’s proposal to ‘exert greater control on arrivals from inside the EU [...by] addressing ECJ judgments that have widened the scope of free movement in a way that has made it more difficult to tackle this kind of abuse’ (Cameron 2015) should be understood in this comparative light.

One driver of dissatisfaction with free movement by governments such as those of Austria, Germany, the Netherlands, and the UK flows from the fact that a common European citizenship has not resulted in common social rights. As Olsen states, free movement has ‘made national borders less firm, but the boundaries of welfare states and social systems are still at work in contemporary Europe’ (Olsen 2015: 99). European law broadens EU citizens’ opportunities to claim social benefits in other member states, while narrowing the ability of member states to regulate and restrict access to national welfare systems (Blauberger and Schmidt 2014). Indeed, Directive 2004/38, which codifies European jurisprudence on free movement, states in its preamble, that ‘Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free movement’ (European Parliament/Council 2004). But welfare states and social systems in Europe remain national, and jurisprudence sometimes underscores the ability of member states to exclude individuals despite shared EU citizenship, as judgments such as *Dano* (Case C-333/13 [2014] *Dano*) and *Alimanovic* (Case C-67/14 [2015] *Alimanovic*) emphasise (even though Mrs Dano still ended up receiving the childcare allowance).<sup>19</sup> Indeed, the most vulnerable citizens who would benefit most

from the protections of EU citizenship often do not receive any significant protection, as the example of the Roma deported from France, Italy, Spain and other member states illustrates (Gehring 2013; Gould 2015). European law continues to allow member states 'a significant margin to make judgements with respect to the 'desirability' or propriety of non-national EU citizens seeking to reside on their territory' (Parker and López Catalán 2014: 393).

In the final analysis, the most significant right of EU citizenship remains the right to live and work anywhere within the common territory – a right that goes much deeper than the Schengen system of border checks or even the insertion of the term 'citizenship' into the EU treaties at Maastricht, because it is grounded in the principles of equality and non-discrimination on the basis of nationality that were agreed in the Paris and Rome Treaties in the 1950s. Gradually expanding from these origins, free movement today continues to epitomise the EU in the minds of Europeans (Recchi 2015). Yet perhaps analysing the impact of European 'governance of governance' in the field of citizenship should move beyond a formalistic, rights-based approach towards a more sociological approach that views citizenship as a mode of being in society with others; despite its strict legal definition in international law, the lived experience of 'citizenship' has different meanings in different societies, and those meanings may now be converging or otherwise being transformed as a result of Europeanisation and common governance.<sup>20</sup> Even in the narrower field of citizenship rights, the impact of EU law on member state policies is stronger than often assumed in the political science literature (Schmidt 2014), and Europeanization can be seen not only regarding EU law but also in terms of international norms (Džankić, Kacarska, Pantić and Shaw 2015). Despite the importance of law and common principles for driving integration, however, legal commentators generally acknowledge that the EU Court has generally preferred to leave room for member state discretion in areas of citizenship and nationality (Nic Shuibhne 2012; Nic Shuibhne 2015; Wollenschläger 2012), underscoring the continuing contingent nature of European rights (Maas 2009), despite the Court's oft-cited claim that EU citizenship is 'destined to be the fundamental status of nationals of the member states' (Case C-184/99 [2001] *Grzelczyk*).

## CONCLUSION: EUROPEAN GOVERNANCE OF CITIZENSHIP

The goal of creating European citizens has arguably always been an essential element of the European project (Maas 2014b). Yet throughout the long evolution of EU citizenship, member states have steadfastly refused to accede to pressures – from the European Parliament, Commission, and sometimes the Court – to harmonise or communitarise citizenship legislation, and the treaties specify that policies regarding the acquisition and loss of nationality remain the sole competence of the member states. Yet as the range of examples discussed in this article illustrate, there is nevertheless an emerging European governance even in this area so central to state sovereignty. European governance of citizenship at first sight seems impossible because, unlike almost all other policy areas, citizenship remains reserved to exclusive member state competence. But functional needs driven by free movement of individuals are coupled with the growing realisation that EU citizenship creates a new political sphere that is 'above' that of the member states and whose subjects, EU citizens, have rights and a status that similarly transcends the member states. In this sense, Europe is the home of the most advanced form of multilevel citizenship in the world today, anticipating possibly similar developments in other venues of regional integration (Maas 2013b; Maas 2015; Schönberger 2005).

The emergence of European governance of citizenship would not be surprising to early integration theorists such as Deutsch (1957: 53-54), who argued that '[f]ull-scale mobility of persons has followed every successful amalgamated security-community in modern times immediately upon its establishment' and that 'the importance of the mobility of persons suggests that in this field of politics persons may be more important than either goods or money'. In terms of the four phases of

European governance identified in this special issue, hierarchical intervention based on the traditional policy model of nation-states cannot be tried (because member states retain sovereignty over citizenship), and the search for common norms and standards (which characterised the second phase) indeed only results in fairly rudimentary principles, with implementation left to the discretion of the member states. The third phase also does not work in the area of citizenship, again because of the impossibility of hierarchical governance. That leaves the fourth phase, characterised by shared governance with the member states retaining their autonomy. As the examples above illustrate, shared governance within the framework of member state autonomy describes the form of European governance that is emerging in the field of citizenship and nationality.

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<sup>1</sup> In this regard, Tömmel cites the case of gender equality directives, for which MacRae (2010: 158) argues that many measures ‘developed not out of a concern for women’s rights, but through competition policy and the need to harmonize social provisions in the face of the free movement of goods, services and people [...] gender equality has often been a side effect of other European policy initiatives’.

<sup>2</sup> This phrasing was influenced by the 1992 Edinburgh Summit declaration following Denmark’s initial rejection of the Maastricht Treaty, discussed in Maas (2007: 53).

<sup>3</sup> Declaration of the Government of the Federal Republic of Germany on the definition of the expression ‘German national’.

<sup>4</sup> Point 10 of the summit communiqué proposed a passport union, the ‘stage-by-stage harmonization of legislation affecting aliens and for the abolition of passport control within the Community’ (European Council 1974: 8).

<sup>5</sup> The same resolution also called for ‘stricter controls to ensure that the Member States do not adopt immigration policy provisions that conflict with the principles of the Treaty of Rome, particularly the principle of freedom of movement and freedom of establishment’ (ibid. 465).

<sup>6</sup> Nineteenth Amendment of the Constitution of Ireland, revisions to article 2.

<sup>7</sup> See Dáil Debates, vol 583 no 6 (21 April 2004), col 1186.

<sup>8</sup> 1,427,520 votes in favour, 375,695 votes against, and 20,219 invalid or blank votes. Available online <http://www.environ.ie/en/LocalGovernment/Voting/Referenda/PublicationsDocuments/FileDownload,1894,en.pdf> [accessed 1 February 2016].

<sup>9</sup> Technically it was not closed until the entry into force of the *Irish Nationality and Citizenship Act* 2004 on 1 January 2005.

<sup>10</sup> The Advocate General’s opinion was delivered on ‘Chen and Zhu’ but the judgement was made on ‘Zhu and Chen’ as noted in the reference list.

<sup>11</sup> See the discussion of early integration theory in the conclusion.

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<sup>12</sup> See, for example, COM(2012) 99, *On the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals*.

<sup>13</sup> See, for example, COM(2014) 196, *Towards more democratic European Parliament elections. Report on the implementation of the Commission's recommendations of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament*.

<sup>14</sup> Initially the amount required was 650,000 EUR plus 25,000 EUR for spouses and children under 18 plus 55,000 EUR for dependent parents aged 55 or older or unmarried children aged 18-25. After amendments, the amount was raised to 1.15 million EUR (Carrera 2014: 409).

<sup>15</sup> The idea of a 'genuine link' was enunciated in the *Nottebohm* case, which remains controversial. See Audrey Macklin, 'Nottebohm Turns Sixty: Time to Retire?' keynote address, 2015 EUDO Dissemination Conference, 26 November 2015. *Nottebohm case (Liechtenstein v. Guatemala)* [1955] ICJ 1.

<sup>16</sup> See <https://www.henleyglobal.com/>

<sup>17</sup> Dali 2014. Prime Minister Muscat continued: 'Simon Busuttil [leader of the opposition] wanted to scrap this programme. All that was scrapped were his arguments'.

<sup>18</sup> '[I]n respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law'.

<sup>19</sup> Mrs. Dano was still entitled to childcare allowance, on the basis of her EU citizenship – the same outcome as in the paradigmatic *Martínez Sala* and *Grzelczyk* cases, in which the Court upheld the right to equal access to social benefits on the basis of EU citizenship (Case C-85/96 [1998] *Martínez Sala*; Case C-184/99 [2001] *Grzelczyk*; Maas 2007: 65).

<sup>20</sup> For example, Neveu argues that we should consider citizenship as not just a status with which individuals are endowed by states but as a constant construction fed by a diversity of sites, agents, and practices. Instead of one and only one level of belonging and loyalty, citizenship in this wider anthropological/sociological sense means that the rights and duties of citizenship do not emanate from a transcendent power (the state) but from social conventions based on social relations. This horizontal view of citizenship, 'stresses that the relationship between citizens is at least as important as the more traditional 'vertical' view of citizenship as the relationship between the state and the individual' (Neveu 2013: 205).

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Research Article

## European Integration and the Governance of Migration

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## Abstract

This article traces the development of EU governance of migration, with an emphasis upon key moments of institutional reform such as the creation of the pillar of Justice and Home Affairs within 1992's Treaty on European Union. The article identifies three periods with different governance patterns since the Maastricht Treaty, with increasing involvement of institutions such as the Court of Justice and the European Parliament. Together with the increased relevance of EU agencies such as Frontex, this has produced a style of governance that is neither predominantly intergovernmental nor supranational, though multilevel and experimental governance are not prominent either. The article also examines what modes of governance are present within the primary migration policy domains. Member states still enjoy considerable discretion in labour migration and family reunion, and the EU institutions have respected this. However, there has been greater supranational involvement in the areas of irregular migration and specifically asylum, whether through the involvement of EU agencies, or through legislation and court rulings that genuinely oblige countries to change their domestic rules. Institutional changes have continued to empower the Commission, with the potential for substantially greater participation and authority for the EU institutions.

## Keywords

Migration; Asylum; Governance; Justice and Home Affairs; European Commission

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International migration has been a European concern since the establishment of the European Coal and Steel Community in 1951. At that time, 'migration' consisted of the movement of nationals from the six member states within an international labour market. What is now generally referred to as the European Union's (EU) migration policy regards the movement from outside of non-EU citizens, or third-country nationals (TCNs) (Boswell and Geddes 2011: 3). This article traces the development of EU governance of migration, with an emphasis upon key moments of institutional reform such as the creation of the pillar of Justice and Home Affairs within 1992's Treaty on European Union. It also breaks down migration to illustrate how the balance of governance modes varies by policy domain.

In line with the special issue's motivation, two primary concerns guide this survey of governance. The first involves identifying discernable historical phases in the development of migration, with an eye to whether governance has altered incrementally as the result of the assertiveness of the supranational institutions, as historical institutionalism argues, or through punctuated moments of transformation by which the member states have stewarded such changes through intergovernmental treaty reforms. Second, migration is analysed in terms of what modes of governance are present within the primary policy domains of legal migration, irregular migration, and asylum.

The first section reviews the analytical framework advanced by Tömmel in this issue, before surveying further literature on modes of governance, in particular the governance of migration. As in the cases of Foreign Policy (Dominguez, this issue) or Monetary Union (Chang, this issue), the migration of TCNs was not an original European competence. Thus, rather than expecting the governance of migration to have developed in step chronologically with the four phases delineated

by Tömmel, the second section delves into whether the characteristics of each distinct phase are nonetheless identifiable within the governance of migration, and if so, whether these developments can be readily periodised. This is answered through an examination of the development of institutional competences over migration policy that evolved principally after the 1993 founding of the EU. The third section provides analyses of different government modes within five separate sub-areas of migration: labour migration, family reunion, irregular migration, asylum, and long-term TCNs. Here, we see diverse balances of governance modes where the positioning of the line between hierarchical versus decentralised policymaking shifts by issue area.

## THE HISTORICAL PROGRESSION OF EUROPEAN GOVERNANCE

Sandra Lavenex (2015: 368) has labelled the mode of governance in Justice and Home Affairs matters, including migration, as transgovernmentalism. This indicates the combination of elements of traditional 'communitarisation' - where the European Commission takes the lead role in proposing legislation to be approved by the Council and European Parliament - with more intergovernmental practices resting upon loose cooperation rather than concrete hierarchically prescribed standards. Instead of focusing on an ultimate goal of legal harmonisation, governance rests primarily upon defining the more operational aspects of intrastate cooperation, which frequently occurs through independent regulatory agencies. This general characterisation is merited, but to trace better the development of governance over time and to explore the balance of different modes of governance, I first provide a general theoretical framework to conceptualise governance.

Tömmel's (2016) examination of EU governance and the analyses of several of the articles in this special issue are guided by Kooiman's typology of three orders of governance (2003). Within the first order, governing actors engage in managing matters on a 'day-to-day' basis. Second order governance foresees greater delegation to establish and maintain the institutional settings within which first order governance takes place. This requires the transfer of governance authority to other organisations, or at least setting up a framework of behaviour through procedures and regulations. Finally, third order governance, or meta-governance, anticipates that governance requires putting in place a normative framework that political actors (namely the states) will follow.

Tömmel posits four distinctive phases in the development of governance within the EU. Phase one emphasised intervention by the supranational institutions performing state functions, most prominently production controls. The second phase in the 1960s was characterised by attempts to harmonise policy. Member state resistance resulted in the setting of concrete standards being delegated to private transnational bodies, with EU legislation being limited to passing framework legislation setting goals whose implementation was left largely in the hands of the member states. The third phase, beginning in the mid-1980s, imposed the principle of mutual recognition in a hierarchical fashion. If market liberalisation proved unattainable through common standards, states were obligated to recognise the standards of each of their neighbours, even if those imposed less stringent obligations. Phase four, beginning in the 1990s, was characterised by the introduction of more sophisticated procedures and institutions of EU governance to refrain from directly intervening in the member states. As in the second phase, this implies second order governance, where regulatory frameworks and transnational networks are designed to guide states operating within a decentralised system of multilevel governance in which subnational and non-state actors provide input on policy formulation and implementation.

This article applies Tömmel's chronological framework on the emphasis of governance strategies over time to review the overall development of EU migration policy. However, there are further common explanations as to what motivates greater supranational assertiveness and the willingness of member states to relinquish control, in contrast to pronounced preferences for retaining national

competences with limited supranational intervention. The historical institutional approach, exemplified by Stone Sweet and Sandholtz's work (1997), places subnational policy entrepreneurs at the centre of its examination of how supranational institutions incrementally accrue authority. Conversely, the archetypal explanation for why some policies are resistant to hierarchical supranational governance traces back to Hoffman's concept of intergovernmentalism (1966), where policy areas closely aligned to traditional conceptions of sovereignty are less likely to be subjected to the EU's hierarchical governance than more technical 'low politics' areas where efficiency concerns predominate. The supposed dichotomy between supranationalism and intergovernmentalism has also been critiqued through the concept of multilevel governance, which elevates a focus on subnational and non-state actors in describing and explaining less hierarchical EU governance (Marks and Hooghe 1996). A final relevant theoretical explanation as to where EU governance resides and why is that of venue shopping, which developed explicitly within the study of immigration. As originally laid out by Guiraudon (2000), venue shopping contemplated the idea that restriction-minded governments willingly transfer authority over certain policies to the European level to evade the demands of domestic interests seeking to circumscribe government autonomy in the name of safeguarding individual rights. However, recent research indicating that states sometimes embrace EU rulemaking to escape the constraints of domestic populists clamouring for greater restriction (Kauert and Léonard 2012) suggests that venue shopping may serve both liberalising and restrictive intentions.

Synthesising this literature, the following concepts and hypotheses guide the analysis. It seems unlikely that EU governance in migration would progress along Tömmel's timeline, for hers is not solely an evolutionary model, but rather sees that the different phases occurred in response to a larger context of changing attitudes toward integration. With EU migration policy essentially developing at the time of Tömmel's fourth phase, we would expect governance that eschews intervention, settling instead for second order governance where institutions and guidelines operate within dynamic, non-hierarchical, and perhaps experimental modes of governance. As for differentiation by policy area, the different theories offer competing outcomes. Viewing legal migration, particularly labour migration, as low politics, we might expect multilevel governance, paralleling the strong role that non-state actors such as the social partners frequently play in this area domestically (Caviedes 2010; Freeman 1995). Conversely, irregular migration and asylum are highly visible and politicised issues that awaken sovereignty concerns, so the expectation is for a limited surrender over policy authority. If there were venue shopping in these areas of high politics, states would only transfer policy authority to the European level if the resulting standards were as restrictive, or more so, than those already in place.

The analysis of governance modes in the third section therefore seeks to establish whether supranational, intergovernmental, or multilevel governance is common in each of the policy sub-areas. While this does involve the straightforward identification of the level at which competence is accorded through the institutional framework of the EU treaties, it extends beyond this to consider: 1) the degree to which new standards impinge on the sovereignty of the member states in terms of being able to keep existing rules in place; and 2) the pattern of involvement of the EU's supranational institutions. The empirical examination of governance across the five different policy sub-areas endorses no clear single explanation but rather demonstrates a mix of governance modes, thereby challenging the predictive power of the high/low politics distinction.

## **THE DEVELOPMENT OF MIGRATION GOVERNANCE**

Though this piece distinguishes freedom of movement from TCN migration, the discussion of EU migration policy briefly surveys freedom of movement, as integration in this area created some of the conditions and momentum advancing the inclusion of immigration and asylum in the Treaty of

European Union. (For a deeper discussion of freedom of movement and its relationship to the concept of EU citizenship, see Maas elsewhere in this issue.)

### *Freedom of Movement*

The Coal and Steel Treaty of 1951 itself reflected a concern with freedom of movement, forbidding discrimination versus coal and steel workers who were nationals of the other member states, providing the general model on free movement adopted in the 1957 Treaty of Rome. These provisions established the freedom of movement for workers (read employees) by giving them the right to accept employment offers and move freely and stay within the territory of another member state for employment purposes. Directives passed in the 1960s guaranteed workers additional procedural rights (Maas 2005), yet workers were still required to apply for work and residence permits in the same manner as TCNs. This 'common area of occupational mobility' (Quintin 2000: 10) reached a turning point in terms of governance in 1968, through a directive giving workers the right to enter, leave, and live in member states, and a regulation abolished nationality-based discrimination between EC workers with regard to work conditions, salary, and unemployment, social, and tax benefits, rendering freedom of movement no 'mere network of intergovernmental relations' (Favell and Recchi 2009: 8).

The Single European Act of 1986 set the stage for a flurry of directives in 1990 on the rights of students, residence for persons of sufficient means, and employees and the self-employed who had ceased their occupational activity. Coupled with the 2004 directive consolidating older directives and regulations, freedom of movement has been transformed from being limited to economic activity to simply preventing welfare tourism by EU citizens (Barnard 2010), even if member state implementation has been described as 'disappointing' by the Commission (European Commission 2009).

### *Immigration and Asylum*

Compared to freedom of movement where EU rules essentially prescribe mobility rights, with migration, states still wield primary control over the conditions of entry and stay, partly because this area became subject to EU governance more recently. Freedom of movement was initially intended as a substitute for the need to open labour markets to TCNs, yet the extensive realisation of freedom of movement actually increased the pressures on states to relax border controls, highlighting the complexities of drawing an invisible line between EU and non-EU nationals in terms of internal mobility (Maas 2007: 34). The Commission's success in advancing freedom of movement arguably had an intentional third order governance impact in normalising the mobility of foreigners.

Migration of TCNs was not addressed within the foundational treaties of the 1950s, and this remained the case until the 1992 creation of the EU. Until then, the Commission contented itself with steering member states toward a common approach, but this falls short of third order governance, since the Commission was largely agnostic as to policy content to avoid member state backlash (Papademetriou 1996). Nevertheless, the issue of mobility of TCNs was addressed through the 1985 Schengen Agreement, under which the initial signatories Belgium, France, Luxemburg, the Netherlands, and West Germany dismantled their border controls toward the other treaty members, effectively opening themselves to EU and non-EU nationals alike. Though legally outside of the EEC, this freedom of circulation within several member states introduced a further dynamic normalising TCN migration within part of the Community.

The Treaty of European Union finally placed immigration and asylum issues within the competence of the newly established EU, and though changes in modes of governance have advanced incrementally and subtly since then, it is possible to delineate three periods of governance, the first extending from 1994-1999. The Maastricht Treaty's architecture reflects the ambivalence of several member states, foremost Denmark, France, Greece, Ireland and the UK, toward the communitarisation of migration. Thus, together with other nominally high politics areas such as police and justice affairs, migration issues were placed into the third pillar of Justice and Home Affairs, where member states alone had the right of legislative initiative and veto, the EP was limited to consultation and the ECJ lacked jurisdiction. In terms of the subject matters that were now under the EU's purview – immigration (family reunion and employment-related), irregular migration, asylum, and external borders – this was a considerable advancement, but during this initial period, they were governed in an intergovernmental fashion, manifested by the 'closed and restrictive manner' that JHA Councils operated in before the signing of the Amsterdam Treaty (Boswell and Geddes 2011: 64), when the input and cooperation from the remaining EU institutions became more commonplace. This governance configuration was a far cry from the first phase delineated by Tömmel (2016), for supranational institutions lacked authority to intervene directly.

In identifying periods within the development of migration governance, the key transition point is the 1997 Treaty of Amsterdam, when structural and procedural changes created an immigration regime that has incrementally approximated ever greater elements of supranational governance, beginning with the second period in 1999. The Treaty oversaw the transfer of immigration and asylum matters from the third pillar into the first pillar's 'Area of Freedom, Security, and Justice', but this transition was less dramatic than it might appear, since during the first five years (1999-2004), the Commission was only to share the right of initiative with the member states, while the co-decision process empowering the EP was not applied. With consensus still being required, this lacked most of the elements of communitarisation, particularly since the ECJ could only issue preliminary decisions upon the request of national high courts, rather than all courts (Luedtke 2006: 424). Thus, the subnational actors who were crucial in expanding freedom of movement rights lacked the critical institutional partners to bring about substantial change. Of more immediate impact was the incorporation of Schengen into Title IV of the EC Treaty. This did not automatically include all EU countries, since countries had the choice to join if they could demonstrate effective external border control systems, but it meant that the Commission and Court would now be involved in implementing Schengen obligations.

Upon evaluation, during this second period, governance still only resembled Tömmel's second phase, if anything. Supranational institutions had little authority to intervene directly, but framework legislation was introduced in 2003 with regard to long-term residents, family reunion, and asylum, with additional directives on asylum in the following couple of years. Unlike in Tömmel's second phase, harmonisation here was limited to that accomplished through EU legislation; international bodies were not enlisted to self-regulate as they had been beginning in the 1960s with regard to product standards. Non-hierarchical, experimental governance that is characteristic of Tömmel's fourth phase was attempted through the Commission's proposal of a non-binding soft-law system of governance employing the Open Method of Coordination in 2001, but the Council did not advance past giving the proposal a first reading, in large part due to its design, which ceded initiative to the Commission and intended to introduce non-state and subnational actors into the policymaking process (Caviedes 2004). Thus, this second period also does not strongly resemble Tömmel's fourth phase either, though Denmark's opt-out and Ireland and the UK's opt-in represent the multispeed governance that is a characteristic of the fourth phase in areas such as Economic and Monetary Union and the Common Foreign and Security Policy.

The post-Amsterdam transition period actually lasted a full six years, thus 2005 marks the beginning of the third and current identifiable period of governance. There have been subsequent changes, as

the Lisbon Treaty brought about the end of the three pillar structure in 2009, but with migration already relocated to the first pillar in 1999, it was subject to supranational governance since the mid 2000s. As of 2005, the co-decision procedure, rather than unanimity with mere EP consultation, covered asylum, illegal migration, and some facets of visa and residence permits, while Lisbon added the remaining immigration issue areas other than those regarding passports, residence permits, and emergency decisions regarding asylum (De Zwaan 2012: 16).

The current institutional framework appears supranational in form, particularly considering the expanded role of the Commission, EP, and Court. The Commission's sole possession of the right of initiative sets the stage for it to assume leadership, and indeed, internal reconfigurations have mirrored its burgeoning competence. With the JHA Council ceding its sole prerogative to introduce legislation in 1999, and then losing the ability to propose legislation entirely in 2006, the Commission adapted by creating a separate Directorate General in 1999 to deal with Justice and Home Affairs, which was renamed DG Justice, Liberty and Security, and which, in 2010, was split into a further DG of Migration and Home Affairs, separate from the newly formed DG Justice and Consumers (Boswell and Geddes 2011: 62).

In the third period, the European Parliament won in relevance due to its partnership role in co-decision, even if its pro-migrant rights stance in opposition to the Council's imputed restrictiveness has lapsed into one of collusion (Lopatin 2013). Further, the Court of Justice of the European Union's role after Lisbon expanded since it can now hear cases referred from all national courts. This had already been the case with asylum, where the court has ruled on issues such as limiting member state discretion on the Dublin Regulation, and that homosexuality is a justifiable grounds for asylum, and this trend promises to continue to an accelerated degree if a common system can be put into place (Boswell and Geddes 2011: 63). In 2014, five years after the Lisbon Treaty went into effect, the Commission also assumed oversight capacity, and thus can threaten member states with court action in the case of infringement, as has already been the case with asylum (Nielsen 2015), opening a further avenue for Court intervention.

Another emerging aspect of governance in the third period has been the heightened role of EU agencies such as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), created in 2004, and the European Asylum Support Office, established in 2010. The direct cooperation of these agencies with member states harks back to the decentralisation of multilevel governance, but the involvement of non-state and sub-state actors that Tömmel identifies within the fourth phase is still lacking. As a whole, governance in the third period is characterised by greater participation of the supranational institutions in the drafting and implementation of framework legislation, together with non-hierarchical voluntary coordination between EU agencies and member states. This is understandable for a newer policy competence that initially followed intergovernmental governance patterns, but this less developed supranational aspect has not resulted in the resort to new governance instruments or divestment of governance authority to non-state actors that Tömmel posits as characteristic for European governance since Maastricht. Migration policy has developed essentially during what Tömmel considers the fourth phase in EU governance, but it followed its own path during this period of time, only exhibiting certain representative traits of that phase.

#### **VARYING GOVERNANCE TRANSFER BY MIGRATION ISSUE AREA**

Unlike freedom of movement, where certain provisions were codified in the founding Treaties, substantive migration and asylum rules developed through secondary legislation. If EU governance is viewed as simply the competence to draft and pass legislation, the different areas can be said to share a similar governance structure, although legal migration only became subject to co-decision

after 2009. This section's analysis of governance looks beyond merely the competence accorded and instead compares both: 1) the extent to which new rules genuinely challenge member states' existing rules; and 2) the involvement of the EU's supranational institutions. Here, we can identify several different modes of governance operating within the separate policy sub-areas of legal migration, irregular migration, and asylum over the past quarter century.

### ***Labour Migration***

Eager to demonstrate its business-enhancing credentials, the Commission sought to advance labour migration in its proposal for an Open Method of Coordination in Immigration (European Commission 2001) and a 2005 Green Paper (European Commission 2005), but the only legislation establishing a discrete worker visa is the 2009 'Blue Card' Directive. Modelled after the sectoral labour migration policies of the member states in the early 2000s (Caviedes 2010), the Blue Card offers highly skilled TCNs who are already working in one member state the possibility to move to other member states after 18 months, together with a long-term perspective for permanent residence. High earning prerequisites, together with provisions allowing countries to declare that their labour market is unprepared to absorb further high-skilled migration or simply opt out of the Blue Card entirely, provide member states with great flexibility in transposition such that few successful applicants are likely (Cerna 2013). Migration of the highly skilled is the type of circumscribed low politics area where a transfer of competences is supposedly less problematic, but even France, Germany and the UK – where client politics historically assured businesses access to foreign specialists – shied away from relinquishing greater control over the entry of third-country nationals, claiming that their existing programmes already attracted sufficient talent (Caviedes 2008).

Initial drafts of the Blue Card Directive also featured an unskilled labour dimension, but this is only partially reflected through the 2014 Seasonal Workers Directive imposing common minimum standards for workers' entry and stay, without creating a distinct visa. Similarly, a 2004 directive established common conditions of admission for students, trainees and volunteers, a 2005 directive promoted the intra-EU mobility of scientific researchers, and a 2014 directive created common streamlined procedures for intra-corporate transfers of the highly skilled, but they are limited to articulating a common set of expectations and guarantees for countries that *already* have such policies on the books. Further harmonisation was achieved through the 2011 directive mandating that member states establish one single application process and permit granting both residence and employment authorisation. In terms of governance, together these 'economic' policies produce some procedural harmonisation and constitute a measure of third order governance through which the Commission can parade business-friendly measures enhancing the mobility of the highly skilled, but they impose few obligations, instead leaving discretion and ultimate control in the countries' hands, with the EP and ECJ staking out few prerogatives or initiatives.

### ***Long Term Residents***

Under the 2003 Long Term Residents Directive countries must accord freedom of movement to TCNs and their family members who have resided elsewhere in the EU for five years and grant treatment equal to that of their own nationals with regard to welfare benefits, social assistance, and social benefits. This approximates the benefits accorded through freedom of movement to EU citizens themselves, but it should only be viewed as selective supranationalisation (Luedtke 2006: 437), for countries may still privilege EU nationals with regard to employment and education, and they are free to require TCNs to fulfil integration requirements such as language or civics classes.

With Germany, Greece, Italy, Luxembourg, Portugal and Spain critical of the Commission's initial drafts (Luedtke 2011: 8), the language was amended such that many of the provisions are voluntary rather than mandatory. Despite this relaxation of obligation, most member states were tardy in transposing the directive, resulting in 20 infringement actions and three ECJ judgments. A 2011 Commission report on the implementation of the directive registered dissatisfaction with its impact and the transposition of provisions in spirit with its intentions (European Commission 2011). Nevertheless, as predicted by Luedtke (2006), the Court has begun to limit member states' discretion, as exemplified by a 2015 opinion from the Advocate General that Dutch requirements for long term residents (LTRs) to take integration tests exceeded the necessary and proportional integration measures envisioned by the directive. Thus, while the uneven level of obligation and inadequate operation of the directive still suggest intergovernmentalism, enhanced Court powers have begun to curtail member states' prerogatives, and this has the capacity to shift governance in a more supranational direction. Furthermore, if one compares the LTR Directive to the free movement rights accorded to EU citizens, member state compliance with those rights, as highlighted by France's expulsion of the Roma, is also deficient (Gehring 2013), so this is an area where advances are attained incrementally and imperfectly.

### **Family Reunion**

Roughly one third of legal migration to the EU occurs via family reunion (Huddleston 2012), and already in 2003, the Council passed a Directive on the Right to Family Reunion. Though establishing some minimum standards in allowing TCNs to bring family, it actually permitted many states to become more restrictive in terms of age limits for children and maximum processing times (Schibel 2005). Throughout a three-year process passing through three drafts, the Commission received support from key member states such as Belgium and France whose standards were already higher (Luedtke 2011), whereas Austria, Germany and the Netherlands were granted discretion to preserve mandatory integration measures and lower age limits. The initial intentions of the Commission to provide integrative support through guarantees of access to training or education gave way to an emphasis on integration requiring applicants to demonstrate certain levels of cultural proximity or linguistic proficiency. Opposition from Greece, Portugal and Spain toward granting reunion rights to unmarried couples resulted in the directive only mandating rights for spouses and children, giving member states the discretion to include further qualifying family members (Menz 2010: 448). The EP's attempt to challenge certain provisions, such as allowing for up to a two-year waiting period, for violating the European Convention on Human Rights was dismissed by the ECJ in 2006, signalling that this agreement is to be read with great deference to member state discretion (Boswell and Geddes 2011: 115-16). As Article 1 explains, the directive simply determines the conditions under which the right to family reunion may be exercised, but it creates no right of family reunion.

Countries were slow in transposing the directive, leading the Commission to open 19 infringement cases, and by 2008, only Luxembourg had not transposed the Directive. The Commission's Report on the directive's implementation pointed out that despite its 'low level binding character', member state implementation was incomplete or incorrect in various areas (European Commission 2008: 14). However, rather than proceeding with non-compliance proceedings, the Commission's approach has been cautious, providing guidance toward better compliance through a 2011 Green Paper and a 2014 Communication to the EP and Council. Instead, the Court has become more assertive through a series of decisions since 2010, striking down national provisions that are too demanding in terms of demonstrating adequate or stable resources and considering whether spouses under 21 may enter provided there is no hint of forced marriage.

To the extent that a few countries (and future accession candidates) with lower standards changed their national statutes, the Directive can be viewed as a supranational imposition, but the low – as

evidenced by the large number of countries that already offered higher protection (European Commission 2008) – and often non-compulsory standards suggest that member states' prerogatives were also being shielded. In generating the aforementioned documents providing guidance, the Commission has adopted an inclusive approach that solicits the opinions of member states and non-governmental organisations alike, but until such input generates a revised directive with binding requirements forcing countries to revise their domestic rules, the current family reunion regime reflects intergovernmental, rather than multilevel, governance.

### *Asylum*

The EU has been relatively successful in generating common standards and effectively reducing member state discretion in the realm of asylum (Kaunert and Léonard 2012). The EU was already active in this area prior to Maastricht, with the 1990 Dublin Convention establishing a system through which countries could send asylum seekers back to their first EU country of arrival. Regulation in this issue area reflects countries' desires to limit their exposure to potential applicants, while the Commission aspires to a streamlined single process, but currently, EU rules only provide minimum guarantees and obligations on certain issues. The 2003 directive established minimum standards for the reception of asylum seekers, while in 2004, separate directives set minimum standards for qualifying as a refugee and standards on asylum procedures.

In contrast to the Directive on Family Reunion, the practical effect of this harmonisation is viewed as having loosened restrictions in several countries that could scapegoat the EU directives when passing more liberal standards (Boswell and Geddes 2011: 155). All three directives have been revised as of 2013, with some scholars pointing to expanded EP involvement in these recast versions as producing higher protection levels (Ripoll Servent and Trauner 2014) such as the right to an in-person interview, greater protections for unaccompanied minors, and limiting the recourse to detention, while others argue that the EP abandoned Commission efforts to expand the circle of qualifying family members or to raise the minimum age for such individuals (Lopatin 2013: 747). Still, one can argue that EU Asylum Policy imposes genuine obligations upon states that previously had more stringent acceptance standards, slow procedures, or offered limited financial support. Governance has been impacted in terms of the number and level of obligations that have been introduced in the area of asylum, however, the impact has not been uniform. Insistent countries like Germany have effectively uploaded their preferences on expanding the list of perceived 'safe' third countries to which one can return applicants, allowing for a broader definition of refugee that circumscribes the ability to exclude particular applicants (Post and Niemann 2007), while Germany, Italy and Poland successfully lobbied for countries to decide the extent to which successful applicants can access public assistance (Menz 2010: 450).

In addition, since 2011, the European Asylum Support Office exercises first order governance, providing information and aid in preparing national reception facilities. However, claims that genuinely higher standards, effective advocacy from the EP, and an increasing caseload for the ECJ (Groenendijk 2014) amount to a supranational Common European Asylum System have surely been tempered by the migrant crisis of 2015, which reminds us of the lack of consensus concerning burden sharing. While the Commission managed to secure a one-off agreement to distribute 120,000 refugees, in the end it was pleas and threats from overwhelmed individual countries such as Greece, Hungary, Italy or Malta, together with exhortations for a comprehensive system of solidarity under the leadership of the French and Germans, which ensured even these results, with under 1000 refugees actually having been relocated by mid-December of 2015.

### ***Irregular Migration***

Countries have shown great concern regarding irregular migration, where the EU's operative piece of legislation is the 2008 'Returns' Directive dealing with deportation. Passed via the co-decision procedure, the directive is commonly referenced as an example of active and concrete EP influence (Baldaccini 2009; Ripoll Servent 2011). Establishing minimum deportation standards regarding the setting of age requirements, and limiting temporary custody and processing times, the directive came under heavy criticism from the EP, which sought to decrease member state discretion and expand rights to voluntary departure and legal remedies. The EP eventually settled for fewer revisions than it initially demanded (Acosta 2009), so while governance was impacted - evidenced by escalated inter-institutional wrangling - the final result only modestly infringed upon member state discretion, since many already offered protections rights at the minimum level, or subsequently reduced their protection. Indeed, Italy promptly demonstrated the benefits of venue shopping, increasing maximum detention times from two to eighteen months in 2008, as permitted by the directive (Baldaccini 2009). However, the ECJ also sanctioned Italy three years later for imposing harsher detention conditions than permitted, signalling that the directive may provide member states with the ability to act more restrictively, but it can also be wielded to hold them in check.

Governance has expanded in a new direction as borders are pushed outward and sending countries are included within this process. Cooperation with third countries, by assisting them in monitoring borders, coordinating the return of irregular migrants, and caring for refugees otherwise bound for the EU, was allocated over EUR 3 billion in funding for the 2008-13 period (Geddes 2008: 182). The 2004 establishment of the EU's external border agency, Frontex, further attests to the prioritisation of border control. Though countries have not ceded decision-making authority to an EU institution through the creation of Frontex, this represents a change in policy implementation in individual and communal border control (Neal 2009). The establishment of rapid border intervention teams, and a number of missions in the Mediterranean where FRONTEX's role was less passive, demonstrate an independent and occasionally lead role (Carrera, den Hertog and Parkin 2013), exemplifying first order governance, even if not hierarchically imposed. However, a 2012 ECJ decision striking down a sea borders operation rule that passed without EP approval indicates the intention of these two EU institutions to remain relevant within the governance structure. The decision to increase Frontex's budget by 50 per cent from one year to the next (Mathiason, Parsons and Jeory 2015) justifies critiques concerning the privileging of security within EU migration policy (Huysmans 2000), but it also makes a point about when high politics areas may still be amenable to integration. Here, the member states have granted the EU authority even in an immensely salient high politics area, but in terms of setting the agenda, governance remains in the hands of the member states in the area of irregular migration.

### **CONCLUSION**

Gauging the impact of EU migration policy is complicated. Unlike regional funds or monetary union, migration is not an entirely new programme existing only at the European level. Each member state already had a national regime in place before it was agreed that EU competence should be introduced in this area. Furthermore, immigration and asylum were not initially situated in the first pillar where supranational institutions wielded the authority to drive policy and its implementation. As a result, governance over these issues is subject to constant negotiation and renegotiation, leading to a fairly incremental process of integration where the member states still enjoy substantial discretion in determining the specifics of policy and how to implement it locally.

That said, this piece has argued that since the EU assumed authority over this issue with the signing of the Maastricht Treaty, one can identify three periods with different governance patterns. The first

period, from 1994 to 1999, exhibited intergovernmental governance, with the Commission limited to floating ideas and plans, the ECJ and EP essentially outside the process, and the JHA Council fostering coordination and setting long term goals. The second period began following an institutional change that transferred several migration-related policy areas into the first pillar where the Commission shared agenda-setting powers with the member states. This second period from 1999-2005 witnessed a cautious Commission pushing forward legislation in a hit or miss fashion, with the EP limited to consultation at best and the ECJ still effectively marginalised. During the third period, since 2005, the Commission has increased its assertiveness, buttressed at times by an assertive EP. Since 2009, essentially all areas of migration have been subject to EU regulation, with the EP co-deciding on legislation, while the Court develops a body of cases generally limiting member state discretion. Together with the increased relevance of EU agencies, this has produced a style of governance that is neither predominantly intergovernmental nor supranational, yet where multilevel and experimental governance are not prominent either.

In areas such as labour migration and family reunion, the legislation issued has left considerable discretion to the member states, and the EU institutions have respected this. However, in the areas of irregular migration and specifically asylum, there has been greater supranational involvement, whether through the insertion of EU agencies, or through legislation and court rulings that genuinely oblige countries to change their domestic rules. In any case, traditional distinctions between high and low politics prove of limited analytical value unless one moves beyond the mere question of whether integration occurred to examine whether governance affords the member states continued policy discretion or not, and even in such cases, there has been greater surrender of sovereignty in supposedly high politics areas such as asylum than in areas such as high skilled migration with reputedly low salience.

Moving forward, with the Commission now empowered not only to monitor compliance but also to enforce it in tandem with the Court, the question is how quickly it becomes more assertive. Part of that answer may rest upon the impact of the 2015 refugee crisis, in which the Commission achieved an agreement on burden sharing that was reached over the objections of several countries. Some member states, such as Hungary and Slovakia, have vowed to ignore the obligations that have been imposed on them. It remains to be seen whether this moment engenders greater communitarisation, such that it becomes customary to make decisions via qualified majority voting, or whether countries respond by refraining from extending the governance opportunities of the supranational actors or passing legislation that is arrived at without consensus.

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Research Article

## Fifty Years of Public (Dis)Satisfaction with European Governance: Preferences, Europeanization and Support for the EU

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## Abstract

Since its beginnings in the 1950s, the policymaking scope and authority of the European Union have dramatically expanded across a wide range of issue areas. Yet much remains unknown about the interaction between public preferences for EU-level governance, changes in such governance and overall support for European integration. This article analyses surveys ranging from 1962 to 2010 to show that while support for integration in different policy areas has fluctuated over time, it has been surprisingly stable overall; moreover, the relative preference ordering across issue areas has been even more consistent. In addition, this consistency is not affected by changes in Europeanization, nor do such changes appear to be driven by the relative strength of preferences. Finally, issue-specific support for EU-level governance has an impact on overall EU support that becomes stronger as Europeanization in that issue area increases, an effect that increases further with greater political knowledge. These findings call into question understandings of rising Euroscepticism as a reaction to Europeanization taking place primarily in areas where publics oppose it. In addition, they indicate that public awareness of European integration is far greater than political knowledge tests appear to indicate.

## Keywords

Public opinion; Governance; Europeanization; Euroscepticism; Political knowledge

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European leaders have been interested in public attitudes regarding European integration since the very beginning of those efforts, with systematic surveys dating back to the early 1960s. Since then, an extensive literature has developed investigating patterns and trends in public support for European integration. Surprisingly, this literature has largely ignored both preferences for and actual European governance in specific policy areas. This is puzzling, since 1) the activities of the European Union (EU) have changed dramatically over time; and 2) actual or perceived EU-level governance activities in specific issue areas may well affect public attitudes towards the EU as a whole.

Indeed, the European Union today is a vastly different institution from the European Community (EC) or Common Market of the 1950s and 1960s: not only membership, but also policymaking scope and authority have dramatically expanded. Someone whose preferences for European governance have remained constant over the course of several decades might well have strongly supported the EU at one point only to become a fierce Eurosceptic years later. The opposite is possible too: someone interested only in monetary integration might have not thought much of the European Community in the 1960s, while supporting it wholeheartedly today.

This article investigates the connections between 1) preferences for European governance in particular issue areas; 2) Europeanization in those issue areas; and 3) overall support for European integration: asking whether preferences for European integration in specific areas have changed over time. Are those preferences affected by changes in EU-level governance, or, conversely, are changes in EU-level governance driven by those preferences? And, perhaps most importantly in an era of rising Euroscepticism, does the interaction between Europeanization in an issue area and

preferences regarding such Europeanization (for or against) have an impact on overall support for the European Union?

I provide evidence from surveys ranging from 1962 to 2010, showing that while support for integration in different policy areas has fluctuated over time, it has been surprisingly stable overall; moreover, the relative preference ordering across issue areas has been even more consistent. In addition, this consistency is not affected by changes in Europeanization, nor do such changes appear to be driven by the relative strength of preferences. Finally, issue-specific support for (or opposition to) EU-level governance has an impact on overall EU support that becomes stronger as Europeanization in that issue area increases, an effect that increases further with greater political knowledge.

These findings challenge the conventional wisdom in two areas. First, arguments about Euroscepticism (especially ‘soft Euroscepticism’<sup>1</sup>) often invoke the notion that publics have grown increasingly sceptical of further integration, even though they supported initial integration efforts (e.g. Eichenberg and Dalton 2007). However, this claim is compatible only with integration taking place primarily in areas where issue-specific preferences tend to run against (further) Europeanization. In fact, that is not how integration has evolved over time: integration takes place just as often in policy areas where publics are supportive.

Second, scholars have long been concerned about low levels of knowledge about the European Union among EU citizens, and the implications thereof for voter competence (Clark 2014; de Vries, van der Brug, van Egmond and van der Eijk 2011; Hobolt 2007). However, if Europeanization in an area affects the influence of issue-specific preferences on overall EU support, this implies that voters are somehow aware of Europeanization, even if they score poorly on tests of political knowledge. The findings here thus call into question the value of such tests for gauging awareness of important policies, while simultaneously offering a more positive picture of public awareness of European integration.

The article proceeds in four steps. The first section briefly reviews the literature on issue-specific governance preferences of EU citizens. The second section introduces the data used: measures of issue-specific integration and of popular support for issue-specific and overall European integration from the early 1960s to 2010. The third section analyses the connection between changes over time in issue-specific integration and issue-specific governance preferences. Finally, the fourth section links those two factors to overall support for European integration.

## **THEORISING PREFERENCES FOR ISSUE-SPECIFIC EU GOVERNANCE**

The determinants of public support for European integration are the subject of an extensive literature which has produced a number of important findings. Among others, support for the EU has been shown to be affected by demographic variables such as age and gender, by socio-economic variables such as education level and type of employment, by nationality and identification with or attachment to Europe, and by contextual factors such as the current (and expected) economic outlook (see e.g. Boomgaarden, Schuck, Elenbaas and de Vreese 2011; Eichenberg and Dalton 1993; Gabel 1998; Hooghe and Marks 2005; Wessels 1995). Moreover, notwithstanding many changes in its governance over the decades, overall attitudes towards the European Union have remained surprisingly stable over time (Franklin and Wlezien 1997), and the original six member states have tended to be the most consistently supportive of integration (Anderson and Kaltenthaler 1996).

Preferences for integration in specific issue areas have received less attention in the literature. Eichenberg and Dalton, considering the time period 1989-2002, found preferences to be consistent over time, with ‘the rank order of preferences remain[ing] very much the same from year to year’

and high support, in particular, for foreign policy (including development cooperation). In contrast, citizens seem less interested in EU governance over 'policies for maintaining and distributing standards of living' (Eichenberg and Dalton 2007: 142; cf. also Green 2001). Hooghe, similarly, noted that European publics as well as elites are 'least enthusiastic about Europeanizing high-spending policies' (Hooghe 2003: 281), while Ahrens, Meurers and Renner (2007) identify the least popular areas for European integration as those that 'represent issues of national identity' or 'can clearly be regarded most efficient when decentralised decisions are taken' (Ahrens, Meurers and Renner 2007: 460).

Finally, Clark and Hellwig found that in the vast majority of EU member states, and for nearly all issue areas, a lack of knowledge reduces support for issue-specific integration. They found this effect to be greatest in issue areas involving cross-border political issues, where European publics may be less aware of EU initiatives than is the case for more 'traditional' economic issue areas in integration (Clark and Hellwig 2012).

The present study advances the literature by investigating for the first time the connections between issue-specific European governance, preferences for such governance, and overall support for European integration, and by covering a longer period of time than preceding studies. This makes it possible to investigate further the stability of public preferences over time and, more importantly, to see whether such preferences have any impact on integration or, conversely, integration has an impact on those preferences. In addition, the study examines whether issue-specific integration has an impact, mediated through preferences for such integration, on overall public support for the EU. In other words: publics may not be enthusiastic about the Europeanization of high-spending issue areas, but does an increase in the Europeanization of such areas reduce their overall support for the EU? Or, conversely, if citizens do support Europeanization of an issue area, does their support of the EU increase with greater EU-level governance in that area? As I shall show, the answer to both questions is 'yes'.

The preceding discussion gives rise to five hypotheses about the relationships between preferences, integration, and support. First, I aim to verify the same consistency of preferences that other scholars have found, even over the longer time period examined here. In addition, the stability of preferences suggests that they are not measurably affected by changes in European integration. Second, and conversely, changes in issue-specific governance are unlikely to be driven by public preferences. The logic of democratic representation suggests that governments should be responsive to public preferences (e.g. Ahrens, Meurers and Renner 2007). However, integration was long supported by a 'permissive consensus' which placed few pressures or constraints on governments in this respect (cf. Hooghe and Marks 2008), and while this consensus has eroded in recent years, European integration has not been a salient driver of national electoral outcomes (de Vries 2007).

- H1 — Preferences for issue-specific EU governance are stable over time and are not affected by changes in such governance
- H2 — Changes in issue-specific EU governance are not shaped by public preferences for such governance

The next hypothesis addresses the impact of the interaction between preferences and governance on generalised support for European integration. First, and most straightforwardly, I expect that support for issue-specific Europeanization should have an impact on support for integration overall (cf. Cerniglia and Pagani 2009). In fact, the opposite ought to be true too: opposition to EU-level governance in an issue area ought to reduce overall support.<sup>2</sup> Second, Europeanization in an issue area ought to strengthen this effect: someone who supports European governance in a particular issue area ought to like the EU more overall if such governance is (or becomes) a fact. Finally, this

relationship clearly depends on a respondent's awareness of Europeanization; therefore, the effect ought to be stronger among respondents with greater political knowledge.

- H3 — Issue-specific support for (opposition to) EU-level governance has a positive (negative) effect on overall EU support
- H4 — The size of this effect increases with the extent of European integration in that issue area
- H5 — The size of this effect increases with an individual's knowledge about European integration.

## DATA

As the other contributors to this special issue show, it is not easy to delineate precisely the competences of the European Union at any particular moment, let alone their development over time. Lindberg and Scheingold introduced a classification of competences in terms of scope (policy areas) and locus (EU-level vs. national-level decision-making). However, it was often hard to identify 'the relative importance of Community decision-making processes as compared with national processes' (Lindberg and Scheingold 1970: 68). Their solution was to focus on the formal, legal competences of the EC institutions, but those are often somewhat ambiguous as well.<sup>3</sup>

Schmitter improved on this model by focusing on level rather than locus of integration, with the level ranging from exclusive national competence to exclusive EU competence (1996). This makes it a bit easier to take into account that the EU's 'governance of governance' takes many different forms, hierarchical and non-hierarchical as well as more or less formal (Tömmel, this issue).<sup>4</sup> Limitations notwithstanding, the legal treaty texts do represent the best single source of information about the scope and extent of EU-level governance. Everything else — directives, regulations, expenditures, and even non-hierarchical and informal policies and agreements — builds on these basic foundations.

Moreover, the treaty texts have the advantage of permitting judgments as to the importance of EU-level decision-making relative to the national level. Accordingly, I use the two-part measure of EU-level competence produced by Börzel (2005) based on Schmitter's categorisation: level of authority (whether or not the EU has exclusive competence or shares it with the national level); and scope of authority (how decisions are made at the EU level).<sup>5</sup> Börzel's measure of level of EU authority ranges from exclusive national competence (1) to exclusive EU competence (5), while the measure of scope of EU authority ranges from no coordination (0) to unilateral decision-making by the Commission (or the European Central Bank) (5). In order to obtain a single value for each issue area, I add the values for scope and level, giving a range of 1-10. Table 1 displays the data, covering 18 different issue areas.

In most of these, EU governance has expanded considerably over time; the only area where no change has taken place is taxation. Exactly half of the issue areas were at the minimum possible level in 1957; just one issue — monetary policy — is at the maximum possible level as of the 1997 Treaty of Amsterdam;<sup>6</sup> occupational health and safety comes close. More importantly, the data are largely congruent with the overall impressions that emerge from this issue's articles, including those on external relations (Dominguez) and energy policy (Eckert).

Table 1. Data about EU-Level Governance Authority (Börzel 2005: 222-223).

Nr	Treaty Issue	1957 Rome	1986 SEA	1992 Maastricht	1997 Amsterdam	2001 Nice	2007 Lisbon
1	Foreign political relations	1 (1,0)	2 (1.5,0.5)	4 (2.5,1.5)	4.5 (3,1.5)	5 (3,2)	5 (3,2)
2	Foreign economic relations	3.5 (2,1.5)	3.5 (2,1.5)	7 (3.5,3.5)	8 (4.5,3.5)	8 (4.5,3.5)	8 (4.5,3.5)
3	Crime / domestic security	1 (1,0)	1 (1,0)	3 (2,1)	4.5 (2.5,2)	5.5 (2.5,3)	6.5 (2.5,4)
4	Civil affairs	1 (1,0)	1 (1,0)	5.5 (2.5,3)	6.5 (3,3.5)	7 (3,4)	7.5 (3.5,4)
5	Environment/ consumer protection	1 (1,0)	6 (3,3)	7.75 (4,3-4.5)	7.75 (4,3-4.5)	7.75 (4,3-4.5)	7.75 (4,3-4.5)
6	Occupational health & safety	1 (1,0)	7 (3,4)	7 (3,4)	9 (4.5,4.5)	9 (4.5,4.5)	9 (4.5,4.5)
7	Labour affairs	2 (1,1)	2 (1,1)	5.5 (2,3.5)	6 (2,4)	6 (2,4)	6 (2,4)
8	Culture	1 (1,0)	1 (1,0)	2 (1,1)	2 (1,1)	2 (1,1)	6.5 (2,4.5)
9	Welfare	1 (1,0)	1 (1,0)	4.5 (1.5,3)	5.5 (1.5,4)	5.5 (1.5,4)	5.5 (1.5,4)
10	R&D	1 (1,0)	5 (1.5,3-4)	5 (1.5,3-4)	5.5 (1.5,3.5-4.5)	5.5 (1.5,3.5-4.5)	5.5 (1.5,3.5-4.5)
11	Economic freedoms	4 (2,2)	5 (2.5,2.5)	8 (4.5,3.5)	8 (4.5,3.5)	8 (4.5,3.5)	8 (4.5,3.5)
12	Competition	4.5 (2.5,2)	5 (3,2)	6 (3,3)	6 (3,3)	7 (3,4)	7 (3,4)
13	Energy & transport	3.5 (1.5,2)	3.5 (1.5,2)	3.5 (1.5,2)	3.5 (1.5,2)	3.5 (1.5,2)	7.5 (3.5,4)

Table 1. Data about EU-Level Governance Authority (Börzel 2005: 222-223).

Nr	Treaty Issue	1957 Rome	1986 SEA	1992 Maastricht	1997 Amsterdam	2001 Nice	2007 Lisbon
14	Macro-economic policy & jobs	3 (1.5,1.5)	3 (1.5,1.5)	3 (1.5,1.5)	5.5 (2,3.5)	5.5 (2,3.5)	5.5 (2,3.5)
15	Agriculture	7 (4,3)	7 (4,3)	7 (4,3)	7 (4,3)	7 (4,3)	8.5 (4,4.5)
16	Regional cohesion	3.5 (2,1-2)	5 (2,3)	7.25 (4,3-3.5)	7.75 (4,3-4.5)	8 (4,3.5-4.5)	8 (4,3.5-4.5)
17	Monetary policy	1 (1,0)	2.5 (1.5,1)	8 (4,4)	10 (5,5)	10 (5,5)	10 (5,5)
18	Tax	3 (1.5,1.5)	3 (1.5,1.5)	3 (1.5,1.5)	3 (1.5,1.5)	3 (1.5,1.5)	3 (1.5,1.5)

The figures in parentheses are Börzel's *level* and *scope* measures, respectively; the first number in each cell is their sum. For the Lisbon Treaty data, I use Börzel's figures for the Constitutional Treaty

The articles in this issue on migration (Caviedes) and citizenship (Maas) represent sub-issues of the larger headings identified by Börzel. These articles illustrate the difficulty of measuring and quantifying Europeanization when every major issue area can be subdivided into sub-areas, some policy initiatives cross major areas, and all have their own unique governance story to tell. Although it is important to be aware of such limitations, the data in Table 1 provide a key starting point for comparing those governance stories across issue areas, and hence for investigating the connections between governance and public preferences.

Data about those preferences can be found in public opinion surveys going back more than half a century. In this article, I focus on five surveys: the first in-depth, cross-national survey on European integration available, from 1962, plus four Eurobarometer (EB) surveys. I include the first Eurobarometer survey for which the raw data remain available, from the autumn of 1974; two surveys held a few years before and after the ratification of the Treaty on European Union, in the autumn of 1989 and the autumn of 1994 respectively; and one conducted in the autumn of 2010, after the ratification of the Treaty of Lisbon in 2009 and the beginning of the global financial crisis. This set of surveys offers an unparalleled view of patterns over time in the EU governance preferences of European publics, and makes it possible to evaluate these preferences against treaty-driven changes in governance.

In 1962, Gallup International conducted a survey of member state publics on behalf of the European Communities (Press- and Information Service of the European Communities 2011). Largely overlooked in the literature, this survey included numerous questions foreshadowing those in the Eurobarometer surveys.<sup>7</sup> In particular, question Q21a asked about support for issue-specific EC-level governance in areas such as tariff abolition and labour mobility. Moreover, a follow-up question (Q21b) asked respondents 'for each policy alternative, whether it already has been provided for in the European Common Market or not' (Q21b).<sup>8</sup>

The Eurobarometer survey series began in 1974, with annual spring and autumn surveys. The first survey for which the raw data remain available today is EB 2, conducted in the autumn of 1974 (European Commission 2012a). This survey came shortly after the first enlargement of the EC, offering a snapshot of the attitudes towards European governance held by citizens of the original as well as the newer member states. Respondents were asked, for each entry on a list of problems, to ‘tell me if, in your opinion, it would be better to deal with to [sic] by combined action through the Common Market or rather by an action of our own Government independently of other countries?’ (Q24).<sup>9</sup> The policy areas on the list differed from those in 1962: inflation and energy supplies were added, while the abolition of tariffs and labour mobility disappeared.

In the autumn of 1989, EB 32 featured a slightly different question (Q24), reading: ‘Which of the following areas of policy do you think should be decided by the <national> government, and which should be decided jointly within the European Community?’ (European Commission 2012b). Apart from changing the last word to ‘Union’, the question has remained the same since. The list of possible issue areas also became increasingly standardised while varying in length. The 1989 survey queried respondents about 12 issue areas; five years later, in EB 42.0 (Q30) the list had expanded to 18 issues (European Commission 2012c).

Finally, EB 74.2, from autumn 2010, listed 20 policy areas, split across two questions (QA22 and QA23) (European Commission 2013). In addition, this survey included a question testing political knowledge. Respondents were asked three fairly easy, factual questions about the EU (QA18). One in three respondents answered all three questions correctly.<sup>10</sup> Along with the 1962 survey question about planned EC action in particular issue areas, this general political knowledge question makes it possible to test the impact of knowledge on the link between issue-specific governance preferences and general support for the EU.

Each survey used here has one or more questions about overall support for European integration, although the particular question has varied over time. In the 1962 survey, the question that captured overall support was ‘To what extent are you in favour of or against efforts to unify Europe?’ (Q8). For the 1989 and 1994 surveys, I use a very similar question inquiring whether respondents are very much for, somewhat for, somewhat against, or very against European unification. I recode these two questions to range from -2 (very against) to +2 (very much for), with those who do not express a preference at 0. Unfortunately, this question was not asked in 1974 or 2010. For 1974 I use a question about whether one’s country’s membership of the EC is a good thing; in 2010, neither the ‘support for unification’ nor the ‘membership is good’ questions were asked; instead, I use the respondent’s judgment about his/her country having benefited from membership.<sup>11</sup> Each of these is recoded from -1 to +1, as the questions do not allow respondents to indicate degree of support.

## PREFERENCES FOR ISSUE-SPECIFIC EUROPEAN GOVERNANCE

Table 2 compares respondent answers about their preferences for and beliefs about plans for integration in particular issue areas to the legal status of integration in those issue areas in the Treaty of Rome. Support levels are quite high overall, with the notable exception of taxation for redistribution to other EC countries or to Africa. To arrive at a single measure of support, I subtract the proportion of respondents opposed from that in favour; support level is thus negative when more respondents oppose EU-level decision-making than support it. For perceptions — belief that an issue area was already ‘provided for’ in the Treaty — I simply take the proportion of respondents that answered that question in the affirmative.

Table 2. *Integration of Governance, Preferences, and Perceptions in 1962 (N=4774)*

Policy Area	Nr	Support	Belief	Actual
Abolition of tariffs	11	0.77	0.62	4
Labour mobility	11	0.46	0.41	4
Harmonising educational qualifications	7/8	0.72	0.23	1.5
Joint foreign policy	1	0.56	0.37	1
Joint scientific research	10	0.78	0.44	1
Joint agricultural policy	15	0.64	0.52	7
Equivalent social benefits	9	0.76	0.26	1
Taxes for redistribution to poor European regions	16	0.19	0.24	3.5
Taxes for redistribution to African countries	2	-0.07	0.31	3.5

**Nr** — Issue number from Börzel's coding scheme (Table 1).

**Support** — Mean support levels for EU governance in particular issue areas

**Belief** — Belief that an issue area is already 'provided for' in the Treaty.

**Actual** — Governance score as of 1957 Treaty, according to Börzel.

Source: Press- and Information Service of the European Communities 2011: Q21a&b; Börzel 2005

The two policy areas most respondents believed were already provided for in the EC Treaty, tariff abolition and agricultural policy, accurately represent the focus of European integration efforts at the time. The overall correlation between the final two columns is 0.50, which is just significant at the 0.1 level (one-tailed). This suggests that even though (or perhaps precisely because) the European Community was quite new the public was reasonably well-informed about its efforts.

Table 3 provides a side-by-side comparison of net support levels for issue-specific integration across all five surveys, including citizens of all member states at that time.<sup>12</sup> Table 4 provides the same information, but limited to citizens of the original six member states. The issue areas are listed in the order of the category from Börzel's classification they most closely fit (shown in the left column).<sup>13</sup> The many blank entries in the table reflect the fact that different issue areas were included from one survey to the next. Nonetheless, respondents were queried sufficiently often about the same issue area at different points in time to make it possible to draw some conclusions.

Table 3. *Mean Support Levels for EU Governance in Particular Issues, 1962-2010*

Börzel	Survey Issue Area	1962	1974	1989	1994	2010
1	Foreign policy / international influence	0.56	0.51	0.38	0.42	
1	Security against external threats / defence			-0.08	-0.03	

Table 3. Mean Support Levels for EU Governance in Particular Issues, 1962-2010

Börzel	Survey Issue Area	1962	1974	1989	1994	2010
1	Defence & foreign affairs					0.37
1 & 3	Fight against (international) terrorism					0.71
2	Humanitarian aid / helping countries in the Third World	-0.07		0.58	0.55	
3	Protection of computer-based information on individuals			-0.17		
3	Fighting crime					0.33
3	Fight against drugs				0.44	
4	Media (broadcasting and press)			-0.02	-0.11	
4	Workers' reps. on company boards			-0.23	-0.26	
4	Immigration policy				0.04	0.24
4	Political asylum				0.11	
5	Environment / pollution		0.40	0.30	0.23	0.42
5	Consumer protection					0.07
6	Occupational health and safety				-0.23	
7 & 8	Education	0.72		-0.34	-0.42	-0.29
8	Cultural policy				-0.31	
9	Health and social welfare	0.76		-0.24	-0.41	-0.21
9	Challenges of aging population / pensions					-0.43
10	Scientific research	0.78		0.63	0.50	0.53
11	Abolition of tariffs	0.77				
11	Labour mobility	0.46				
11 & 14	Economic growth					0.19
13	Energy (supplies)		0.57			0.37

Table 3. Mean Support Levels for EU Governance in Particular Issues, 1962-2010

Börzel	Survey Issue Area	1962	1974	1989	1994	2010
13	Transport					0.08
14	Rising prices / inflation		0.46			0.17
14 & 18	Tackling public debt					-0.10
14 & 12	Reform/supervision of financial sector					0.23
14	Unemployment				-0.04	-0.09
14	Industrial policy				0.05	
15	Agricultural policy / fishing policy	0.64	0.20			0.02
16	Reducing regional econ. diffs. In EU	0.19	0.18			
16	Supporting regions in econ. Difficulties					0.37
17	Currency			0.19	0.06	
18	Rates of VAT			0.16	-0.01	
18	Taxation					-0.4
<i>N</i>		<i>4774</i>	<i>9060</i>	<i>9885</i>	<i>14063</i>	<i>26723</i>
<i>#states</i>		<i>5</i>	<i>9</i>	<i>12</i>	<i>15</i>	<i>27</i>

Source: author's calculations from (Press- and Information Service of the European Communities 2011: Q21a&b) and Eurobarometer, various years (see text).

Table 4. Mean Support Levels for EU Governance in Particular Issue, EC-6 Only

Börzel	Survey Issue Area	1962	1974	1989	1994	2010
1	Foreign policy / international influence	0.56	0.63	0.56	0.59	
1	Security against external threats / defence			0.21	0.28	
1	Defence & foreign affairs					0.51
1 & 3	Fight against (international) terrorism					0.76
2	Humanitarian aid / helping countries in the Third World	-0.07		0.67	0.66	

Table 4. Mean Support Levels for EU Governance in Particular Issue, EC-6 Only

Börzel	Survey Issue Area	1962	1974	1989	1994	2010
3	Protection of computer-based information on individuals			-0.04		
3	Fighting crime					0.38
3	Fight against drugs				0.56	
4	Media (broadcasting and press)			0.14	0.01	
4	Workers' reps. on company boards			-0.18	-0.18	
4	Immigration policy				0.27	0.38
4	Political asylum				0.29	
5	Environment / pollution		0.54	0.50	0.38	0.61
5	Consumer protection					0.17
6	Occupational health and safety				-0.13	
7 & 8	Education	0.72		-0.27	-0.32	-0.33
8	Cultural policy				-0.18	
9	Health and social welfare	0.76		-0.20	-0.33	-0.19
9	Challenges of aging population / pensions					-0.53
10	Scientific research	0.78		0.72	0.58	0.58
11	Abolition of tariffs	0.77				
11	Labour mobility	0.46				
11 & 14	Economic growth					0.31
13	Energy (supplies)		0.68			0.53
13	Transport					0.22
14	Rising prices / inflation		0.59			0.36
14	Unemployment				0.07	-0.14

Table 4. Mean Support Levels for EU Governance in Particular Issue, EC-6 Only

Börzel	Survey Issue Area	1962	1974	1989	1994	2010
14 & 18	Tackling public debt					-0.08
14 & 12	Reform/supervision of financial sector					0.39
14	Industrial policy				0.21	
15	Agricultural policy / fishing policy	0.64	0.31			0.29
16	Reducing regional econ. diffs. In EU	0.19	0.17			
16	Supporting regions in econ. difficulties					0.36
17	Currency			0.36	0.23	
18	Rates of VAT			0.36	0.24	
18	Taxation					-0.42
<i>N</i>		4774	5921	4829	5670	5663

(Italy not included in 1962)

Both tables generally support hypothesis 1: for most issues, preferences remain relatively stable over time: preferences for foreign policy and scientific research, for example, have remained strongly pro-Europeanization since the very beginning; meanwhile, Eurobarometer respondents have been opposed, overall, to Europeanization in education and health/social welfare. The 1962 survey is strikingly different on those issues, however, with strong support for Europeanization in those areas. This difference is likely due to the much narrower question wording in 1962 ('harmonisation of educational qualifications' vs. 'education' and 'equivalent social benefits' vs. 'health and social welfare'). Note also that the original six member states, the only states polled in 1962, are systematically more positive than later joiners, as a comparison between Tables 3 and 4 shows. In fact, this comparison suggests that apparent declines in support for Europeanization across issue areas are driven more by the addition of sceptical national publics than by changing preferences among the publics of existing member states.<sup>14</sup>

Both tables also support the second part of hypothesis 1, as well as hypothesis 2: changes in European governance appear neither to be driven by nor to have much of an impact on issue-specific preferences. Table 1 shows that Europeanization of foreign policy went from 1 to 5 from 1957 to 2007, while research and development went from 1 to 5.5. Yet, despite such similar and fairly extensive changes in Europeanization, the two issue areas represent both some of the most stable issue-preferences over time and some of the most contrasting ones (strongly supportive vs. strongly opposed). Similarly, education, where respondents have been consistently opposed to Europeanization since the 1980s, has seen a large jump in European-level governance over that time. Meanwhile, environmental policy, where respondents have been systematically supportive since the 1970s, saw large jumps in 1986 and 1992 with no changes in preference, but no changes in

governance since then, despite continued support for European governance (and even as further integration occurred in other issue areas).

By way of further illustrations, consider energy, cohesion and employment policies, studied in this issue by Eckert and Tömmel. Citizens strongly supported a common European energy policy in 1974, but as Eckert (2016) discusses there was little or no progress on the energy front during the years after that survey. In the case of cohesion policy, support levels for EU-level policies to reduce regional economic differences in 1962 and 1974 are mildly positive but clearly lower than support for most other issues. However, as Tömmel (2016) notes, cohesion policy was set up in 1975, after the first enlargement, while other issue areas remained unaddressed for many years. Employment policy, finally, was the 'birthplace' of the Open Method of Coordination (OMC) in the late 1990s, even though it is another area where public opinion cannot have been the driver, having been nearly neutral since the mid-1990s.

### ISSUE-SPECIFIC GOVERNANCE AND OVERALL EU SUPPORT

Finally, I turn to the impact of the interaction between issue-specific governance and preferences for such governance on overall support for European integration. Since question wording about issue-specific preferences varies across surveys ('joint' policy, 'combined action', 'acting together') and since issue areas vary as well, I conduct separate analyses for each survey. In order to test hypotheses 3-5, I run an ordered logistic regression (logit), with overall EU support as the dependent variable. Ordered logit is particularly well-suited to handle a small number of discrete, ordered outcomes, such as opposed, neutral, and in favour, as is the case here. Logit coefficients can be converted to odds ratios, which have a more straightforward interpretation than the coefficient estimates themselves. Odds ratios are expressed relative to a value of 1 (representing no change in the odds of a higher outcome): 1.25 means a 25 per cent greater likelihood of a higher outcome, whereas 0.75 means 25 per cent lower odds of a higher outcome. The regression results presented below are all expressed as odds ratios.

In order to adjust for the dramatically different sizes of national populations, the model is set up with individual countries identified as survey strata and with weights to correct for different sampling rates across states.<sup>15</sup> All issue areas queried in a particular survey are included in a single model to reduce the risk of omitted variable bias (preferences for Europeanization in different issue areas may well be correlated). In addition, since it is well established that support for European integration systematically differs across member states, each analysis features dummy variables for individual member states.<sup>16</sup> Finally, I add controls for three standard demographic variables that are known to be causally related to general EU support and are also causally prior to support for Europeanization in particular issue areas: gender, age and education level. In order to conserve space and to keep the focus on the issue areas, the tables do not list the estimates for these additional variables.<sup>17</sup>

The hypotheses can effectively be split into two separate hypotheses, depending on whether a respondent supports or opposes joint European action. However, those two options will generally be highly correlated, as a respondent can choose only support or opposition, or else indicate no preference. Rather than ignoring the no preference category (generally expressed as a 'don't know' answer), it makes more sense to run the analyses separately. Accordingly, each of the subsequent analyses separately displays coefficient estimates for the impact of supporting Europeanization and for opposing it (or rather, preferring national action).

Table 5 reports the analysis of the 1962 'Attitudes toward Europe' survey. This survey not only offers the earliest systematic evidence available about citizen preferences for Europeanization, but also queried respondent beliefs about whether Europeanization in particular issue areas was already

'foreseen' in the EC Treaties (beliefs that were fairly accurate, as seen above). This makes it possible to ascertain whether those beliefs have an impact on generalised support for European integration. The table shows the odds ratio estimates for supporting (or opposing) Europeanization, as well as for an interaction term between the former and the belief that Europeanization is foreseen in that issue area.

Table 5. Analysis for Attitudes towards Europe 1962 (EC-6, N = 4736)

Issue Area	Level	For		Against	
Abolition of tariffs (support)	4	1.50	***	0.32	***
Labour mobility (support)	4	1.19	***	0.78	***
Harmonising educational qualifications (support)	1.5	1.26	***	0.87	***
Foreign policy (support)	1	1.52	***	0.82	***
Scientific research (support)	1	1.14	***	0.52	***
Agricultural policy (support)	7	1.47	***	0.64	***
Social benefits (support)	1	1.15	+	0.85	+
Taxes for cross-regional redistribution (support)	3.5	1.54	***	0.89	***
Taxes for Africa (support)	3.5	0.80	**	2.22	**
Abolition of tariffs (support & expect)	4	1.46	**	0.68	**
Labour mobility (support & expect)	4	0.97	***	1.11	***
Harmonising qualifications (support & expect)	1.5	1.12	***	2.60	***
Foreign policy (support & expect)	1	1.03	***	0.42	***
Scientific research (support & expect)	1	1.18		0.72	
Agricultural policy (support & expect)	7	1.22	***	0.53	***
Social benefits (support & expect)	1	1.17		0.67	
Taxes for redistribution (support & expect)	3.5	0.79	***	1.25	***
Taxes for Africa (support & expect)	3.5	1.77		1.82	

Ordered logistic regression, reporting odds ratios, weighted to adjust for country population size. Statistical significance: \*\*\* 0.001, \*\* 0.01, \* 0.05, + 0.1.

First, the link between issue-specific support and general support for European integration is both statistically significant and in the direction predicted by H3 for most issues (with the exception of taxes for Africa): the odds ratios for the 'for' regression are greater than 1 (issue-specific support makes overall support more likely), while those for the 'against' regression are smaller than one (opposition makes overall support less likely). Moreover, the estimated size of the effects varies considerably, in line with the prediction of H4. On the 'for' side, the average effect size for the five issue areas where real Europeanization is taking place (level of 3.5 or higher) is 38 per cent, whereas the average estimate for the other four issue areas is much lower at 27 per cent. Indeed, the two lowest estimates occur where no integration is taking place. On the negative side, the picture is similar (52 per cent for the five Europeanizing areas; 24 per cent for the others).

The estimate for 'taxes for Africa' is surprising, as the 'for' column should contain positive effects: if a respondent supports Europeanization in an issue area, s/he ought also to support the EC overall. However, on this question, supporting Europeanization makes the respondent less likely to support the EC; conversely, opposing it makes her/him more supportive of the EC. This suggests that respondents associate the EC with policies that are at odds with direct taxation for redistribution to Africa, perhaps because the EC is seen primarily as a market- (not government-) focused, non-redistributive organisation. This possibility is given additional support by the interaction effects in the bottom half of the table, where the other redistributive policy (across regions within Europe) also has an effect in the opposite direction, reducing the non-interacted effect size.

The interaction effects also support the final hypothesis, H5. Coefficient estimates are not statistically significant in two issue areas without integration (along with the taxation for Africa issue). Meanwhile, the largest significant estimate on the 'for' side is on tariff abolition, where real Europeanization was indeed taking place at the time.<sup>18</sup> Most significantly, combining the estimated effect sizes that are statistically significant (since respondents who expect and support Europeanization also simply support it) the two largest positive effects on the 'for' side are on tariff abolition ( $1.50 \times 1.46 = 2.20$ ) and agricultural policy ( $1.47 \times 1.22 = 1.79$ ), and the two largest negative effects on the 'against' side are for those same two policies. In other words, and exactly as predicted, the greatest impact, in the positive as well as the negative direction, comes among those who are aware of actual Europeanization and occurs in the two issue areas representing the most visible and salient EC initiatives at the time: abolition of tariffs and agricultural support.

Table 6 shows the results of the analysis for 1974 (EB 2), which are again in accordance with the general prediction: issue-specific preferences are associated with an effect on overall support. Moreover, the single weakest estimate (neither statistically significant nor an estimated odds ratio that is far from 1) is for environmental protection, an issue area without any real Europeanization at the time. However, the other area with little real Europeanization, diplomacy, musters a large and significant estimated effect. This was evident in 1962 as well: strong supporters of a joint European foreign policy also tend to support European integration overall, regardless of how much actual joint foreign policy takes place. Still, even with this outlier included, there is a positive (albeit weakened) correlation between the level of Europeanization in an issue area and the estimated effect of support for such Europeanization on general support for European integration, as H4 predicts.<sup>19</sup>

Table 6. Analysis for EB 2, 1974 (EC-9, N = 8234)

Issue Area	Level	For	Against		
Regional redistribution	3.5	1.55	***	0.68	***
Fight inflation	3	1.47	***	0.62	***
Energy policy	3.5	1.75	***	0.50	***
Agriculture	7	1.40	***	0.82	**
Environmental protection	1	1.01		0.94	
Diplomacy	1	1.70	***	0.64	***

Ordered logit, reporting odds ratios. Weighted to adjust for country population size. Statistical significance: \*\*\* 0.001, \*\* 0.01, \* 0.05.

Table 7 shows, side by side, the results for surveys in 1989 and 1994. The Maastricht Treaty came into effect in the interim, so European governance levels were considerably higher in 1994. Nevertheless, results for both surveys support H3 as well as H4. Indeed, the correlation between European governance level and estimated odds ratios is positive for those who support Europeanization and negative for those who oppose it.<sup>20</sup> Lack of statistical significance is more likely to occur in issue areas with little or no Europeanization (in 1989) or, after the Maastricht Treaty, with comparatively less Europeanization. More substantively, in 1994, monetary integration ('currency') has the largest estimated effect size; this was also the area that had seen the largest (and most visible) increase in Europeanization. Similarly, the area of security/defence, where the Maastricht Treaty had also brought highly visible Europeanization in the form of a Common Foreign and Security Policy, had the second largest effect sizes in 1994.<sup>21</sup>

Table 7. Analysis for EB 32 (1989, EU-12) and EB 42.0 (1994, EU-15)

Issue Area	1989			1994		
	Level	For	Against	Level	For	Against
Security and Defence	2	1.35 ***	0.75 ***	4	1.44 ***	0.73 ***
Protection of the environment	6	1.27 ***	0.80 ***	8	1.17 **	0.86 ***
Currency	2.5	1.73 ***	0.63 ***	8	2.04 ***	0.50 ***
Co-operation with LDCs, Third World	3.5	1.42 ***	0.71 ***	7	1.10	0.88 +

Table 7. Analysis for EB 32 (1989, EU-12) and EB 42.0 (1994, EU-15)

Issue Area	1989			1994		
Health and social welfare	1	1.20 **	0.83 ***	4.5	1.16 *	0.94
Education	1.5	1.03	0.98	3.75	1.08	0.96
Basic rules for media	1	1.20 ***	0.91 +	5.5	1.15 *	0.93
Scientific research	5	1.08	0.93	5	1.03	0.90
Rates of VAT	3	1.05	1.03	3	1.28 ***	0.87 **
Foreign policy outside the European Community	2	1.32 ***	0.89 +	4	1.41 ***	0.72 ***
Workers' representatives on company boards	1	1.16 *	1.04	5.5	1.05	1.04
Computer privacy	1	1.03	1.14 *			
Industrial policy				3	1.20 ***	0.85 **
Cultural policy				2	0.91	1.21 ***
Immigration policy				5.5	1.14 *	0.84 **
Rules for political asylum				5.5	1.33 ***	0.78 ***
Health and safety of workers				7	1.12 +	0.91
The fight against unemployment				3	1.16 **	0.83 ***
The fight against drugs				3	1.03	0.94
<i>N</i>		11492	11492		13030	13043

Ordered logistic regression, weighted to adjust for country population size. Reporting odds ratios; statistical significance: \*\*\* 0.001, \*\* 0.01, \* 0.05, + 0.1.

EB 74.2 (2010) is the final survey considered here. It was conducted after the Lisbon Treaty had come into effect, and well into the global financial crisis. The results of the analysis are displayed in the columns labeled 'for' and 'against' of Table 8. The correlation between governance level and effect size is once again statistically significant in both models (at the 0.001 level) and estimates that are not statistically significant disproportionately occur in issue areas where there is comparatively less Europeanization. The two most Europeanized issue areas, agriculture/fisheries and support for troubled regions, also boast two of the five highest effects in the 'for' column. The other issues among those five, immigration, inflation and financial reform, not only boast above-average levels of Europeanized governance, they are also all made more salient by the ongoing economic crisis.

Table 8 also offers another test of hypothesis H5, in the final two columns. These report the results of the same analysis, but conducted only on the subset of the population that correctly answered all three political knowledge questions. Here every statistically significant effect size is greater (or, in two cases, equal) when the sample is limited to the most knowledgeable respondents, as predicted. In most cases, however, the difference is comparatively small. This is almost certainly reflective of the fact that the political knowledge questions were not issue-specific; it seems likely that those with more general political knowledge will also have more issue-specific knowledge of Europeanization, but the difference on the latter front may be quite small.

Table 8. Analysis for EB 74.2, 2010, EU-27

Issue Area	Level	For	Against	For*	Against*
Fighting crime	5	0.98	1.01	1.01	1.00
Taxation	3	0.88 *	1.17 **	1.02	0.92
Fighting unemployment	5.5	1.03	0.97	0.99	1.04
Fighting terrorism	6.5	0.95	0.97	1.03	0.93
Defence and foreign affairs	5	1.17 **	0.85 **	1.21 *	0.85 +
Immigration	7.5	1.32 ***	0.75 ***	1.34 ***	0.74 ***
The education system	6.25	1.09	0.93	1.18 +	0.90
Pensions	5.5	0.92	1.08	0.81 *	1.18

Table 8. Analysis for EB 74.2, 2010, EU-27

Issue Area	Level	For	Against	For*	Against*
Protecting the environment	8	1.16 **	0.85 **	1.37 ***	0.73 ***
Health	5.5	0.86 **	1.13 *	0.82 *	1.18 +
Agriculture and fishery	8.5	1.20 ***	0.84 ***	1.44 ***	0.68 ***
Consumer protection	8	1.08	0.91 +	1.08	0.90
Scient. & technol. research	5.5	0.98	1.07	0.88	1.17
Support for troubled regions	8.5	1.29 ***	0.78 ***	1.33 ***	0.74 ***
Energy	7.5	1.23 ***	0.80 ***	1.29 **	0.77 **
Transport	7.5	1.08	0.96	0.97	1.03
Fighting inflation	5.5	1.17 **	0.86 **	1.14	0.90
Economic growth	6.75	1.02	0.94	1.06	0.94
Tackling public debt	4.25	0.80 ***	1.27 ***	0.80 *	1.30 **
Reform the financial sector	6.25	1.27 ***	0.83 ***	1.33 **	0.79 *
<i>N</i>		26723		10019	

Ordered logistic regression, weighted, reporting odds ratios. Statistical significance: \*\*\* 0.001, \*\* 0.01, \* 0.05, + 0.1.

## CONCLUSION

Over the course of half a century, as citizens of EU member states have been asked about their preferences for national versus European-level governance in specific issue areas, a few key patterns have emerged. First, preferences remain fairly consistent from one survey to the next, especially in terms of their relative rank ordering. Second, the apparent decline over time in support for Europeanization in many issue areas appears driven more by the addition of new member state publics than by significant changes in the preferences of citizens of long-time member states. The analyses presented here confirm these patterns. In addition, they also illustrate that changes in issue-specific European governance are not driven by public preferences for Europeanization in those issue areas (nor, conversely, are such preferences affected by those changes).

More importantly, this article demonstrated that the interaction between preferences for issue-specific European governance and Europeanization in those issue areas has a significant effect on overall support for the EU. It is perhaps not surprising that issue-specific support for EU-level governance has a positive effect on overall EU support. However, the fact that the size of this effect increases with the degree of Europeanization in the issue area in question had not previously been demonstrated, nor had the role of political knowledge in strengthening the effect.

The data show that higher levels of issue-specific Europeanization are systematically associated with an estimated impact on overall EU support that is both larger and more statistically significant. The fact that this finding emerges despite the serious data limitations constraining the analysis — an inevitably imperfect measure of Europeanization, a frequently poor match between that measure and the issue areas polled, and a limited question instrument in those surveys (offering no gradation) — suggests that the actual pattern is likely stronger than that found here. In addition, the significance of the finding is further strengthened by the time period covered by the surveys analysed here, from as early as 1962 to as recently as 2010.<sup>22</sup>

The first and last surveys analysed also underscored the role of political knowledge in the observed patterns. When respondents in 1962 were queried as to which issue areas were likely to see Europeanization in the near future, their belief that European-level governance in particular issue areas was ‘foreseen’ in the Treaties further strengthened their support for Europeanization overall. Similarly, in 2010, the effect of the interaction between Europeanization and issue-specific preferences on overall EU support was greater for the subset of the population that scored highest on political knowledge.<sup>23</sup>

Overall, these findings underscore the importance of taking into account issue-specific preferences in any discussion of support for European integration. The evidence presented here indicates that issue-specific preferences have a strong impact on overall support, especially when governance has been Europeanized in the issue areas in question. This has significant implications too for European policy-makers who until now have focused more on overall support for European integration than on issue-specific preferences. After all, European governance is much more likely to be successful if it enjoys public support.

The analyses in this article also challenge one common interpretation of (soft) Euroscepticism as resulting from an ever-expanding EU matched against publics with fairly constant preferences. While greater Europeanization in issue areas where respondents are opposed to such integration does reduce overall support for the EU, the opposite is the case as well: Europeanization can also increase overall support. For further integration to drive Euroscepticism, one of two scenarios must hold. First, integration might take place primarily in issue areas where publics are inclined to oppose Europeanization. The analyses here show this not to be the case. Second, Euroscepticism might be on the rise primarily in countries where citizens are inclined to oppose Europeanization. This, too, is at odds with the evidence: the analyses here show publics in the original member states to be

comparatively pro-Europeanization, yet Euroscepticism has risen dramatically in original member states such as France and the Netherlands in recent years.

Finally, the findings here call into question widespread scepticism about the awareness of European integration among European citizens. The fact that actual Europeanization levels have a significant effect on the relationship between issue-specific preferences and overall support implicitly indicates that Europeans must be somehow aware of those Europeanization levels; the fact that political knowledge strengthens the relationship explicitly confirms it. Although citizens tend to perform poorly on specific knowledge 'trivia' questions, a general awareness of political initiatives is arguably more significant to their competence as voters. Whether this awareness is conveyed in the media (Schuck, Xezonakis, Elenbaas, Banducci, and De Vreese 2011) or through party cues (Hobolt 2007), the evidence suggests that, where it matters, voters are more informed than is widely believed.

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<sup>1</sup> In contrast to 'hard euroscepticism', which 'implies outright rejection of the entire project of European political and economic integration', 'soft euroscepticism' is 'contingent or qualified opposition to European integration ... expressed in terms of opposition to specific extensions of EU competencies' (Taggart and Szczerbiak 2004: 4).

<sup>2</sup> To some degree, the causal arrow works both ways: someone who supports European integration overall is more likely to support European governance in a given issue area (e.g. Ray 2004). However, the interaction of this effect with actual Europeanization (H4) is unlikely to be driven by overall support, unless an individual is simply rationalising. Moreover, the impact of overall support on issue-specific preferences ought to be constant across issues; in fact, however, the observed effect is variable, suggesting that the causal arrow is primarily in the direction posited here.

<sup>3</sup> In fact, despite occasional attempts by the member states legally to proscribe ‘creeping competence’ (Pollack 1995) such as the principle of ‘conferred powers’ in the Treaty of Maastricht, key Treaty provisions permit the EU to adopt measures in line with general Treaty objectives even without specific legal basis (cf. Conway 2010).

<sup>4</sup> In fact, the output of the European Union in terms of directives, regulations, and expenditures also represents an imperfect measure of the impact or pervasiveness of EU governance across different issue areas (Pollack 1995, 2000). Moreover, to get any sense of the importance of EU-level relative to national-level governance, comparable information about national directives, expenditures, etc. would be required.

<sup>5</sup> Treaty data do not shed any light on whether or not the EU is actually *using* its competences, a point made by several scholars who prefer the regulation-counting approach (e.g. Alesina, Angeloni and Schuknecht 2002). Fortunately, Börzel’s codes are largely congruent with assessments produced by other approaches, including those focusing on legislative & financial output (Alesina et al. 2002; Pollack 2000; Schmitter 1996).

<sup>6</sup> For countries not in the Eurozone, the correct figure will be lower. Still, even they are constrained in their ability to implement an independent monetary policy; accordingly, I do not adjust the code for respondents from those countries.

<sup>7</sup> Individual-level data for the Italian sample is unavailable for this survey, so the analysis here covers only the other five original member states.

<sup>8</sup> In the Dutch questionnaire, this question better translates as ‘being considered’ (overwogen) rather than ‘provided for’. The German (vorgesehen) and French (prévu) versions — both of which literally translate as ‘foreseen’ — are more in accordance with the English ‘provided for’. Short of excluding the Dutch sub-sample, there is no obvious way to correct for these linguistic differences.

<sup>9</sup> Across all surveys considered here, ‘don’t know’ answers generally accounted for 5-7 per cent of all responses. I ignore these answers in the calculation of mean support levels, and code them as the null category for the dummy variables reflecting support for or opposition to EU-level governance.

<sup>10</sup> The three true/false questions were: ‘The EU currently consists of 27 member states’ (true in 2010), ‘The members of the European Parliament are directly elected by the citizens of each Member State’ (true), and ‘Switzerland is a member of the EU’ (false).

<sup>11</sup> Answers to these various questions, when asked within the same survey, are strongly correlated.

<sup>12</sup> The autumn 1995 Eurobarometer (42.0) was conducted a month or two prior to the official accession of Austria, Finland, and Sweden, but respondents in those countries already knew their country would join the EU in 1995.

<sup>13</sup> As noted earlier, some issue areas queried in the surveys constitute only one small part of one of the broader issue areas in Börzel’s list. Meanwhile, others may cross issue-area boundaries, as indicated by listing two numbers in the first column of Tables 3 and 4.

<sup>14</sup> Actually, unlike other late joiners, the Central and East European (CEE) member states are about equally pro-Europeanization as the EC-6, on average. However, their issue-specific preferences do differ. For example, the CEEs are much less opposed to Europeanized anti-unemployment efforts, education policy, pension policy, and health policy, but much more opposed to Europeanized agricultural policy, anti-inflation policy and environmental protection.

<sup>15</sup> Using the Stata statistical package, the command is `svy: ologit`, with Eurobarometer’s ‘weight Europe’ as the `pweight` variable. For the 1962 survey, weights were calculated by the author, based on the size of each national sample and national population sizes in 1962.

<sup>16</sup> Germany, the largest member state, is the baseline case.

<sup>17</sup> Full regression results for all analyses reported and discussed here are available from the author.

<sup>18</sup> On the ‘against’ side, there is less of a clear pattern, apart from the non-significant estimates already noted. This is not all that surprising, as Table 2 showed that the proportion of respondents opposing Europeanization was low on average, producing just a small number of observations to work with.

<sup>19</sup> In the absence of information regarding respondents’ beliefs, it is impossible to derive further insights. For example, perhaps the estimated effect for agriculture is smaller than that for the first three issue areas listed because respondents see most actual agricultural policy being implemented at the national level, in the form of price supports.

<sup>20</sup> However, the correlation reaches statistical significance only for the 1994 survey, and then only at the 0.1 level, so the pattern is not as strong as for some of the other surveys.

<sup>21</sup> Foreign policy is nearly tied with security/defence in terms of effect size in 1994. Recall, however, that diplomacy/foreign policy already generated large and statistically significant odds ratio estimates in earlier surveys, so the same results here do not represent a change.

<sup>22</sup> Moreover, performing the same analysis on additional surveys within this time period produces substantively equivalent results, further supporting the hypotheses. For example, in 1984 (EB 22), there is a strong and significant correlation on both sides (0.73 for ‘for’ and -0.70 for ‘against’) between the estimated odds ratios and the level of Europeanization. Moreover, the two issue areas with no real Europeanization generate effect sizes that are not (or only barely) statistically significant. Similarly, in 1999 (EB 52.0) every issue area with a Europeanization level of 7 or higher has statistically significant estimates in both the ‘for’ and ‘against’ columns. Among the remaining 20 issue areas, only three meet this same standard.

<sup>23</sup> Here, again, the fact that this finding emerged despite the tenuous relationship between general (and fairly superficial) knowledge about the EU and specific knowledge about Europeanization in particular issue areas suggests that the real impact of such knowledge is likely greater than found in this analysis.

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