

MOVE CLOSER! NEW MODES OF GOVERNANCE AND ACCESSION TO THE EUROPEAN UNION¹

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Abstract

This paper explores the role of new modes of governance in the EU's attempts to impact upon states which are not (yet) members or which became members in the 1980s. More specifically, it summarizes the findings of comparative case studies on the involvement of non-state actors in the implementation of EU policies and EU primary Law in different types of states, "weak states" in particular, including Southern European member states, CEE candidate countries and associated states in the former Soviet Union and Northern Africa. The paper shows that new modes of governance can help bring countries closer to Europe. However, they do so only if both state and non-state actors have sufficient capacities and trust each other. Given that these conditions are often absent in accession and neighborhood countries, we should caution our expectations in new modes of governance and focus on less innovative means, such as capacity-building.

Keywords

New Modes of Governance, EU Accession, Eastern Enlargement, CEE Candidate Countries, European Neighborhood, Effectiveness

I. Introduction

Since the end of the Cold War, the EU has sought to stabilize the former communist countries by encouraging them to transform into fully-fledged Western-style democracies and consolidated market economies (Vachudova, 2005; Grabbe, 2006). The prospect of membership provided the EU with a powerful tool to shape the path of their political and economic transition. However, accession appears to have been both a blessing and a curse to countries aspiring to become members of the European Union. On the one hand, the implementation of the *acquis* supports their transformation from authoritarian regimes with state-controlled economies into liberal democracies with market economies. On the other hand, accession countries face great difficulties in restructuring their economic and political institutions in order to meet the conditions for EU membership. The adoption of, and adaptation to, the *acquis* runs into serious problems concerning both the effectiveness

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and the legitimacy of EU policies. Since these countries are “weak” states that often lack the absorption capacity rather than the willingness to effectively implement EU policies, accession problems cannot simply be solved in the “shadow of hierarchy”, i.e. by the threat of command and control legislation.

Accession countries in Central, Eastern and South Eastern Europe have to adopt the entire set of governance institutions enshrined in the Copenhagen criteria and *acquis communautaire*. But the EU also seeks to export respect for human rights, democracy and the rule of law to countries that have no membership expectations, at least not in the near future (Börzel, Pamuk, Stahn, 2007). Eastern enlargement has stretched the EU’s backyard considerably toward the East. Ukraine, and some of the other Newly Independent States have been admitted to the club of “close friends” (Magen, 2006; Tocci, 2007), which already included the EU’s neighbours in the Southern Mediterranean and the Middle East (Bicchi, 2006; Gomez, 2003). In order to turn the “ring of friends” into an area of security, stability, and prosperity, the EU seeks to foster the approximation of its Southern and Eastern neighbours with key parts of the *acquis* (Lavenex, 2004; Magen, Morlino, 2008). New modes of governance seem to be particularly appropriate for the study of the EU’s attempts to Europeanize accession and neighbourhood countries. On the one hand, the EU is unable to hierarchically impose the *acquis communautaire* on accession and neighbourhood countries. Before they join, their relationship with the EU remains in the realm of classic diplomacy and international negotiations. The EU’s supranational institutions do not cast a shadow of hierarchy, since the supremacy of EU law and its direct effect, which empower domestic courts to enforce EU Law without the consent of national governments, only take effect after accession. On the other hand, accession and neighbourhood countries have been limited in their capacity to hierarchically coordinate their approximation to the *acquis*. The adoption of, and adaptation to, the *acquis communautaire* has created an enormous policy load, which met with limited resources (expertise, money, personnel) that were already strained by managing the transition from authoritarian and socialist rule, respectively. Given the limited capacity of both the EU and the accession and neighbourhood countries, it would be only rational for public actors, both at the European and the national level, to seek cooperation with non-state actors to share or shift the burden by pooling resources and delegating certain tasks. Non-state actors, in turn, could exchange their resources for influence on policies which would significantly affect them. Finally, the European Commission has strongly encouraged accession countries to involve non-state actors in the adoption of, and adaptation to, the *acquis* to ensure both greater effectiveness and legitimacy of the accession process (Tulmets, 2005). In other words, the accession and approximation of Southern and Eastern neighbours to the EU appear to be most likely cases for the emergence of new modes of governance. This paper focuses on new modes of governance in the EU’s attempts to impact upon those states which are not (yet) members or which became members in the 1980s. More specifically, I seek to explore the role of new modes of governance for the implementation of EU policies and EU primary Law in different types of states, “weak states” in particular, including Southern European member states, CEE candidate countries and associated states in the former Soviet Union and Northern Africa. To what extent have new modes of governance helped weak states

that lack sufficient capacities to adopt and implement domestic reforms to comply with EU norms and rule cope with the challenge of accession and approximation to the EU? The paper will start with the definition of new modes of governance as they are employed by the EU to facilitate the adoption of, and adaptation to, EU policies and EU Law in countries with weak state capacities. The following sections will explore the emergence, evolution, execution, effectiveness and legitimacy of new modes of governance as well as their structural impact on accession and neighbourhood countries. The paper concludes with some policy implications regarding (new modes of) governance and accession. I will show that new modes of governance can help bring countries closer to Europe. Yet, they do so only if both state and non-state actors have sufficient capacities and trust each other. Given that these conditions are often absent in accession and neighbourhood countries, we should caution our expectations for new modes of governance and focus on less innovative means, such as capacity-building.

II. The Emergence of New Modes of Governance: Seek and Ye Shall Find?

Defining new modes of governance is not an easy task. What may be old in the EU 15 may appear rather new to accession and neighbourhood countries, which have only just regained their sovereignty and have never experienced supranational forms of governance, such as the Community Method.

In order not to limit our analytical focus too much, I adopt a broader understanding of new modes of governance. We define them as structures and processes of coordination that aim at adopting and implementing political decisions (governance) and that:

1. are *non-hierarchical*, i.e. each actor involved has a formal or de facto veto in decision-making and complies voluntarily, respectively, and/or
2. systematically *involve non-state actors*, for profit (e.g. firms) and/or not for profit (e.g. non-governmental organizations) in policy formulation and/or implementation.

While this definition may appear rather encompassing, it discriminates against modes of governance, which used to dominate our understanding of politics for many generations and against which the research on (new modes of) governance emerged to begin with: government, command-and-control, state regulation, i.e. the hierarchical adoption and enforcement of political decision by state actors (Rosenau, Czempiel, 1992; Rhodes, 1996; Pierre, Peters, 2000). It also excludes the lobbying and mere advocacy activities of non-state actors aimed at governments as well as supranational and international organizations. They do not fulfil the coordination requirement. Finally, international diplomacy and interstate negotiation systems only qualify as new modes of governance to the extent that state use means other than international law coordinates their actions.

Figure 1 The realm of new modes of governance

Actors involved	Decision-making/ Implementation		
	Non-state only	Non-state/state	State only
Non-hierarchical	Voluntary agreements	Public-private partnerships	Soft law (implementation)
Hierarchical	Professional associations	Tripartite negotiations (implementation)	—/—

There is only limited evidence for the emergence of new modes of governance in the efforts of accession and neighbourhood countries to move closer to the EU and in the EU's attempts to bring them closer to the *acquis*, respectively. This is even true if we further relax our definition and also consider modes in which non-state actors are not involved on an equal footing (consultation, contracting-out).

In Southern and Central Eastern European accession countries, traditional modes of governance have clearly dominated the approximation with the *acquis communautaire*. State actors have mostly relied on command and control regulation to adopt and adapt to EU policies. This is even true in the field of the environment, where the costs of accession has already imposed an extraordinary financial and administrative burden on the three Southern European countries that joined in the first half of the 1980s. Greece, Portugal and Spain had just completed their transition to democracy and seriously lagged behind in their socio-economic development. Given their limited capacities, they were unable to cope with the huge implementation load simply by hierarchically imposing the new environmental policies. About a decade later, the Central and Eastern European (CEE) countries found themselves in a similar situation when the EU opened accession negotiations. Yet, none of the Southern and CEE governments sought to enlist the help of non-state actors in coping with the challenge of accession. They did not try to share or shift the burden by, respectively, pooling resources and delegating certain policy tasks to non-state actors. Likewise, civil society organizations and business did not use their expertise or money to gain systematic access to the policy process and influence the implementation of policies by which they were significantly affected. Consultation, outsourcing, and to a lesser extent voluntary agreements have been the only forms by which non-state actors have become involved. Thus, environmental organizations and research institutes have helped their governments to draw up inventories of protected species or lists of conservation areas, as required under the Wild Bird and the Fauna-Flora-Habitats Directives. Likewise, business has participated in the preparation of national guidance documents on standards for the Best Available Technology under the Integrated Pollution Prevention and Control Directive. Yet, NGOs have been able to yield greater influence on the implementation of EU policies by social mobilization and litigation against state

authorities than by consulting or cooperating with them. Interestingly, such confrontational strategies may eventually lead to the greater involvement of the public, since state actors seek cooperation with civil society organizations in order to avoid litigation and/or to increase the legitimacy of unpopular political decisions (Koutalakis, 2009). Business seems to prefer hard regulation over more flexible modes of governance that would give them a greater role in implementation. State authorities, on their part, are equally reluctant to give non-state actors a role that goes beyond consultation or selective contracting-out, even if environmental directives explicitly prescribe the participation of non-state actors (Buzogany, 2009b; Guttenbrunner, 2009). In the Eastern neighbourhood countries, environmental non-profit organisations also often lack the tradition of acting as civil society actors and demand a more assertive hierarchical approach by the governments (Lavenex, 2008; Buzogany, Costa, 2009).

The findings on environmental policy are corroborated in the field of social policy. Concurring with the EU principle of social partnership, the CEE accession countries introduced tripartite negotiations between representatives of employers, employees and the government. Yet, attempts to institutionalize social dialogues have shown limited success. In Poland, the work of the Tripartite Commission has been repeatedly stalled by political conflict and was circumvented by ad hoc consultations launched by the Polish government. In Estonia, there has never been a permanent tripartite institution. Only the Lithuanian Tripartite Council appears to produce policy outcomes. The inclusion of social partners in the management of implementing agencies, e.g. in the distribution of EU agricultural subsidies, has been equally disappointing (Grosse, 2007b; 2008b).

In regional policy, by contrast, new modes of governance appear to play a more prominent role – although they are also firmly embedded in a hierarchical mode of governance. While the CEE central governments have been reluctant to share power with regional actors, the EU's insistence on the principle of partnership, combined with diverse pre-accession assistance programs empowering diverse sub-national non-state actors, spurred the emergence of more or less stable partnerships among the various sub-national authorities, firms, and civil society organizations in the design and implementation of regional development programs. Such development partnerships take different forms and do not conform to a particular national model. What they have in common, though, is their "layering" – they all form part of a predominantly hierarchical and centralized governance regime that is characteristic for regional development policy in CEE accession countries (Bruzst, forthcoming).

We also find new modes of governance in the field of Justice and Home Affairs, an area close to the traditional realm of statehood. Here, the limited competences of EU actors and the incapacity of the EU to tackle threats to internal security by hierarchical supranational means have spurred the emergence of horizontal forms of intensive transgovernmentalism or network governance that extends beyond the EU member states to associated countries in the EU's neighbourhood (Lavenex, Wichmann, 2009).

Finally, the emergence of new modes of governance in accession countries does not only vary across but also within policy sectors. Environmental organizations, which are a national chapter of a transnational NGO (e.g. World Wildlife Foundation, Friends of the

Earth) are much more inclined to cooperate with the state authorities and business than local grass roots groups. Likewise, in competitive and export-oriented companies, such as pharmaceuticals in Hungary or the construction industry in Romania, are more open to the exchange of their expertise for policy influence than structurally and financially weaker sectors, such as industrial farming, which not only have hardly any resources to offer but take no interest in improving the implementation of costly environmental regulation (Buzogany, 2009a, 2009b).

Such variations notwithstanding, there is limited evidence overall for new modes of governance at the national level of accession and neighbourhood countries. Accession countries have at best witnessed the emergence of nascent forms of cooperation between state and non-state actors that hardly go beyond consultation – with the exception of regional development policy. Moreover, there are some signs of an increasing role of new modes of governance in the EU's external relations.

III. Why do they (not) emerge? Factors fostering and hindering New Modes of Governance

There are several factors that have fostered and impaired the emergence of new modes of governance. They are located both at the European and the domestic level and impact upon the willingness and the capacity of state and non-state actors to engage in cooperation with each other.

At the domestic level, weak state capacities have provided an important incentive for both state and non-state actors to cooperate. Approximation with EU Law requires immense resources, a demand that can hardly be met by the weak governance capacities of the accession and neighbourhood countries. On the one hand, limited resources and problem-solving capacities may provide important incentives for state actors to resort to new modes of governance in an attempt to pool resources and share compliance costs. On the other hand, it is precisely this lack of resources that has impaired both the willingness and the capacity to cooperate of both state and non-state actors (cf. Börzel, 2009b). First, despite weak capacities, state actors still have an institutional self-interest in maintaining their political power. Thus, political parties in Poland impaired the introduction of new modes of governance aimed at increasing transparency, public participation and accountability of administrative agencies, since it would reduce their political influence on the administration (Grosse, 2007b, 2008b; Borrás, Koutalakis, Wendler, 2007). Similarly, in the field of regional policy making, central governments in the CEE countries were reluctant to involve non-state actors in decision-making, since it would reduce their control over the discretionary spending of EU moneys (Bruszt, forthcoming).

Second, the top-down nature of the accession process, in which accession countries had to download a vast number of EU laws in a relatively short time, has been counterproductive to the involvement of non-state actors, which is time-consuming and prone to deadlock or lowest common denominator solutions. Moreover, the strict application of conditionality by the Commission and its focus on the absorption capacity has increased the autonomy of central governments and further induced the use of hierarchical modes of coordination (Buzogany, 2009a, 2009b; Guttenbrunner, 2009; Bruszt, forthcoming).

Third, state actors have lacked the personnel, the level coordination between ministries and sub-national authorities, as well as the political skills to experiment with decentralized and inclusive modes of governance. The involvement of stake-holders in the implementation of environmental policies often failed because different parts of the administration haggled over competencies, particularly if a policy cuts across different portfolios, as in case of the Water Framework Directive or the social dialogue. Nor are state actors always capable of casting a credible shadow of hierarchy, which is a major incentive for non-state actors to get involved in public policy-making to avoid command-and-control regulation. Political instability and frequently changing governments further reduce their credibility as reliable negotiation partners, which was a major reason why civic dialogues failed in Poland (Grosse, 2006; Grosse, 2007a). Weak capacities do not only provide an incentive for state actors to seek the cooperation with non-state actors. They can also have the opposite effect. In the case of the Integrated Pollution Prevention and Control Directive, environmental authorities have often shied away from cooperating with companies since they were afraid of being captured, given the superior knowledge, human resources and funding of firms and business associations (Guttenbrunner, forthcoming; Koutalakis, 2008b) or have indeed, at times, been captured by powerful private interests, as in case of the agency administering EU agricultural subsidies in Poland (Grosse, 2007b, 2008b). Finally, the engaging capacities of state actors have been severely hampered since institutionalized arenas for interacting with non-state actors have been largely absent.

Fourth, non-state actors are not only reluctant to cooperate because they doubt that state actors are capable of translating mutual agreements into policy outcomes given weak enforcement powers, the still-unconsolidated regulatory framework, unstable majorities in parliaments and frequent government turn-over. Often, their capacities are equally wanting. Civil society organizations, in particular, do not have sufficient organizational capacities to offer themselves as reliable partners to state actors. Or they lack the resources to exchange to begin with. Social dialogue in Poland, Lithuania and Estonia suffers from the organizational weakness of trade unions, which are ridden by internal divisions and rivalry over dwindling members (Grosse, 2006). Business also appears to be rather weak, with regard to both their financial resources and organizational capacities.

Yet, there is significant variation between sectors. Highly productive industries, which are usually strongly export-oriented and attract foreign direct investments, tend to possess relevant capacities, which are often lacking, particularly for small and medium size enterprises. Thus, pharmaceutical companies in Hungary have had no difficulties in providing the technical expertise required to define Best Available Technology standards as demanded by the Integrated Pollution Prevention and Control Directive. Since the application of the directive is necessary to ensure market access for some sectors, they also take an interest in fostering the regulatory capacity of states while less competitive sectors continue to avoid compliance. Somewhat ironically, however, firms share the preference of state actors for command-and-control regulation precisely because the monitoring and enforcement capacities of public authorities are weak, as a result of which more flexible measures, such as voluntary agreements, could give rise to legal uncertainty. As a result, Hungary, Poland and Greece apply even stricter standards than are required by the EU

(Buzogany, 2009a; Guttenbrunner, 2009; Koutalakis, 2009). In Romania or Spain, by contrast, where the (full) privatization of industry in some sectors has lagged behind (e.g. power plants), state and business actors have worked together to avoid or at least postpone compliance with EU legislation (Buzogany, 2009b; Font, Fernández, 2009).

The impairing effect of weak governance capacities on the emergence of new modes of governance is reinforced by a state tradition which is hostile to the involvement of non-state actors in public policy-making. Not only are new modes of governance incompatible with the legacy of authoritarianism and socialism of most accession and neighbourhood countries. New modes of governance do not necessarily correspond to the newly-established institutions of representative democracies either. Thus, non-elected interest groups and civil society organizations are not always accepted as legitimate representatives of societal interests. Moreover, their involvement in the policy process outside majoritarian institutions is often considered as a continuation of traditional clientelistic networks. This perception has been reinforced by attempts of the Polish politicians to use civil dialogue in order to circumvent opposition and deadlock in parliamentary or party arenas (Grosse, 2006; Grosse, 2007a). Finally, the privatization of formerly public services, or their delegation to non-state actors, has met with strong opposition at the sub-national level, where local politicians and consumer groups have, for instance, resisted the involvement of private companies in the provision of drinking water (Guttenbrunner, 2009; Buzogany, 2009a). Likewise, the civil society tradition in the transition countries does not always resonate with new modes of governance either. Civil society largely emerged in opposition to the authoritarian state. Many civil society organizations still see themselves as “watchdogs” rather than partners of the state in public policy-making. Thus, environmental organizations often tend to pursue more confrontational strategies, using public campaigns and litigation to exert pressure on public authorities (Buzogany, 2009a; Koutalakis, 2009).

Domestic factors have largely impaired the emergence of new modes of governance in accession and neighbourhood countries. Europeanization, by contrast, has helped to overcome some of the obstacles. First, EU pressure induced state actors to resort to new modes of governance. On the one hand, the EU may legally require the involvement of private actors (e.g. the principle of partnership or participatory policy instruments in environmental directives). Thus, it may be rational for state actors to apply new modes of governance in order to gain access to EU funding or avoid negative consequences, such as delays in the accession process (accession conditionality) or infringement proceedings. This may largely explain why new modes of governance are more prevalent in regional policy than in other areas. EU requirements for new modes of governance are most explicit in the principle of partnership, which the Commission introduced in the 1980s to open-up bilateral relations between the national governments and their regions at the domestic level, seeking to turn structural policy into a process of multilevel co-operative policy-making (Ansell, Parsons, Darden, 1997; Bache, 1998; Heinelt, Smith, 1996; Hooghe, 1996). The emphasis of the Commission on the absorption capacity of accession countries may have strengthened the role of central government, rather than decentralized policy-making powers, to the regional and local levels. But, while the EU gave central states

the prerogative to control regional policy-making, its assistance programmes led to the creation of new actors that used the opportunities offered by the partnership principle and formed development partnerships, particularly after accession, when the Commission lapsed back to its original preference for more decentralized structures in structural policy. Moreover, societal actors and sub-national authorities could politicize issues of territorial decentralization and exert pressure on state reforms towards greater devolution of power (Bruszt, forthcoming). In a similar vein, the legal prescriptions for public involvement of the Fauna, Flora, Habitat or the Water Framework Directive empowered environmental organizations in the policy process. They could either exert pressure on public authorities by taking them to court and/or lodge a complaint to the European Commission, as Polish, Spanish and Greek NGOs successfully did (Guttenbrunner, 2009; Font, Fernández, 2009; Koutalakis, 2004). Or state actors seek to involve societal actors to avoid litigation and help avoid conflict with other stakeholders, respectively, as did Greek authorities to facilitate the implementation of the FFH Directive (Koutalakis, 2009).

Second, the EU not only provides incentives and governance paradigms that may favour NMG. It also helps strengthen the governance capacities of accession countries. The transfer of money and expertise through Community programs and twinning processes provides state as well as non-state actors with additional resources they can exchange. The participation in EU pre-accession programmes in the 1990s has strengthened the capacities of municipalities, firms, NGOs and universities to participate in national and regional development programmes after accession (Bruszt, Vedres, 2008). Likewise, transnational regulatory networks, such as Pan-European Regulatory Forum in pharmaceuticals, the “Seville Process” under the Integrated Pollution Prevention and Control Directive or the Network for the Implementation and Enforcement of Environmental Law, have fostered the building-up of technical knowledge, as well as trust among regulatory authorities, firms and consumer and health organizations from accession countries (Koutalakis, 2008b; Koutalakis, 2008a; Font, Fernández, 2009; Fernández, Font, 2009).

IV. Executing New Modes of Governance: Hierarchy in Disguise

The approximation of accession countries to EU Law appears to be largely governed by traditional modes of governance, in which central states predominantly use hierarchical coordination to adopt and adapt to the *acquis communautaire*. They legally oblige the rule targets to comply. Not surprisingly, new modes of governance play a more prominent role in the EU’s attempts to move accession and neighbourhood closer to European standards. Thus, in the EU’s relation with associated neighbourhood states, transgovernmental networks and networks of regulators have emerged, which are partly organized around European agencies. This is particularly the case in more technocratic and depoliticized policy areas, such as pharmaceutical and environmental regulation or research. Legal harmonization of pharmaceutical regulation in CEE accession countries with the EU could only be achieved with the help of two regulatory networks, the Pan-European Regulatory Forum and the Collaborative Agreement between Drug Regulatory Authorities in the European Union Associated Countries. Both initiatives were facilitated by the European Agency for the Evaluation of Medicinal Products. The transnational networks have brought toge-

ther national and European regulators with industry representatives, facilitating processes of “horizontal regulatory learning”, about which EU standards had to be uniformly implemented and which parts would allow for some flexibility (Koutalakis, Prange, 2006; Koutalakis, 2008b). We find similar examples of regulatory alignment through transgovernmental and transnational networks in the European Neighbourhood Policy, e.g. in the implementation of the EU Water Framework Directive at the regional level of transnational water basins, Israel’s full association to the EU’s Research Framework Programme, or the membership of Eastern neighbourhood countries in relevant regulatory for dealing with aviation security (Lavenex, Lehmkuhl, Wichmann, 2007; Lavenex, 2008; Lavenex, Lehmkuhl, Wichmann, 2009). Such transgovernmental networks have even emerged in more sensitive areas of Justice and Home Affairs cooperation between the EU and ENP countries, however not without hegemonic traits (Lavenex, Wichmann, 2009).

In the shadow of EU Treaty law on the free movement of goods and services and on state aid control, some new modes of governance emerged that are often overlooked. The principle of mutual recognition in services and state aid soft law have helped an increasingly heterogeneous EU to make its policies work in situations, in which old and new member states have not been able to agree upon further integration. In the field of EU state aid control, a major revision of regional aid became necessary due to enlargement and the increased disparities in the EU-27. Soft law facilitated the adaptations (Blauberger, 2008). Regarding the trade in services, the Bolkenstein Directive of 2004 is an attempt to use mutual recognition where the increasing wage differential between the old member states and the CEE accession countries created a major growth potential, but member states were unable to agree on a harmonization of service regulation. While political opposition reduced the scope of the service directive, service providers will be regulated in one member state, supplying their services in others (Schmidt, Nicolaidis, 2007). Allowing services trade in the absence of harmonized services regulation, mutual recognition relies on binding administrative cooperation. In this way, national administrations become responsible to transnational and European demands, which results in the harmonization of administrative cooperation (Schmidt, 2008b).

New modes of governance also combine with old modes of governance in the EU’s external relations, where transgovernmental networks often occur in conjunction with both hegemony and intergovernmental cooperation. In relation with neighbourhood countries, this is the case both when third countries lack the governance capacity to act as equal partners in EU-sponsored networks, such as in the case of environmental policy, and when EU actors try to mobilise more horizontal modes of governance as a means to compensate for the incapacity to act hierarchically, such as in Justice and Home Affairs (Lavenex, 2008; Lavenex, Lehmkuhl, Wichmann, 2009). The result is often a “layering” (Bruszt, forthcoming), where new modes of governance are introduced without basically challenging or altering the dominant features of the traditional structures and processes.

In summary, new modes of governance are not only scattered, unstable and cannot be regarded as typical for accession countries. They are also usually embedded in old modes. The shadow of hierarchy often looms in the background, giving rise to asymmetrical cooperation or “hierarchy in disguise” (Bruszt, forthcoming).

V. The Evolution of New Modes of Governance: Fostering New through Old Modes of Governance

While weak capacities of state and non-state actors have largely prevented the emergence of new modes of governance, old modes of governance have helped accession countries to escape the “low equilibrium trap” (Bruszt, forthcoming), both in the South and in the East of Europe (cf. Börzel, 2009a).

First, the adoption of the *acquis communautaire* opens the possibility of denouncing violations of EU law to the Commission, bringing legal cases before national courts and mobilizing the public (Börzel, 2006). At the same time, several EU policies explicitly prescribe public participation, access to information and transparency.

Second, when the accession process has started, EU-pre-accession funding schemes became available. The tailor-made assistance by PHARE, ISPA or SAPARD funding provided direct technical assistance and technological know-how for both state and non-state actors.

Third, the accession process has provided NGOs and business with connections to like-minded organizations in the old member states, as well as interest groups and transnational networks active at the EU-level.

It is too early to systematically trace the effects of the opportunity structure provided by old modes of governance (regulation, litigation, capacity-building) in the CEE countries. But we have observed some interesting changes in the three Southern European states, which joined in the 1980s. Spain and Portugal have seen some first inceptions of new modes of governance in the years after accession. Particularly in the areas of nature protection, water management and air pollution, where the EU increasingly relies on procedural framework legislation that seeks to integrate different media (water, air, soil, noise) and explicitly prescribes public involvement, environmental groups, scientific experts and business have started to play a more prominent role in the implementation process, which goes beyond consultation and contracting-out (Font, Fernández, 2009; Fernández, Font, 2009; Koutalakis, 2009).

However, the building of governance capacities has been unequal, favouring state over non-state actors. While state actors have become more open to the involvement of non-state actors, they have managed to stay in control of the policy process. The asymmetrical relationship explains why we find only weak forms of new modes of governance, which largely operate under the shadow of hierarchy or form “hierarchies in disguise” (see above).

VI. Evaluating New Modes of Governance

Handle with care: The (effect)iveness of new modes of governance

To make policies work, state actors become increasingly dependent upon the cooperation and joint resource mobilization of non-state actors, which are outside their hierarchical control. New modes of governance allow state actors to tap into the resources of non-state actors and facilitate their participation in the policy process, so as to ensure effective implementation. The more the actors affected by a policy have a say in decision-making,

the more likely they are to accept the policy outcome to be implemented, even if their interests may not have been fully accommodated. In short, new modes of governance can significantly strengthen the capacity of state actors in public policy-making (cf. Héritier, 2003). If they emerge, we may expect them to improve the effective approximation of accession and neighbourhood countries to the EU.

There are, however, reasons to doubt that there is necessarily a positive effect of new modes of governance on effectiveness. Non-state actors can certainly provide public actors with important resources to make public policies work. However, it is unclear whether the mutual resource dependency of state and non-state actors actually leads to a net increase in the problem-solving capacity of new modes of governance. If states are so weak that they have to share authority with non-state actors, this can easily result in problem-shifting or agency capture (Hellman, Jones, Kaufmann, 2000). In some cases, new modes of governance arrangements could simply be neoliberal solutions in disguise; that is, they amount to the privatization and de-regulation of formerly public services, rather than the adoption of effective public policies. This explains at least partly why attempts of accession countries to involve private companies in the provision of drinking water have met with fierce resistance at the local level. While private capital is badly needed, particularly by smaller municipalities, to meet the quality standards of the EU Drinking Water Directive, public pressure has prevented comprehensive privatization (see above).

Moreover, states with weak regulatory capacities may not have the ability to reassume responsibility for delegated tasks in the cases of private failures, as functions were delegated because they were not capable of delivering them in the first place. Likewise, weak state actors may not be able to resist the pressure of non-state actors to adopt policies that are serving the public interest, or, worse, are not able to judge what policies may be in the public interest, since they lack the necessary information and expertise. Finally, the inclusion of non-state actors as the primary rule-targets in the process of rule-making can certainly increase the problem-solving capacity by ensuring compliance. Yet, including non-state rule targets in public policy-making might simply lead to “lowest common denominator” solutions or even result in deadlock. If those who have to bear the costs of compliance are involved in the negotiating process, they may attempt to weaken rules and regulations or prevent them altogether (Héritier, 2003).

The empirical findings on the effect of new modes of governance on bringing accession and neighbourhood countries closer to the *acquis* are as mixed as the arguments found in the governance literature. New modes of governance may indeed promote the timely, complete and correct adoption of, and adaptation to, EU policies in accession and neighbourhood countries. Thus, the implementation of such complex regulations as the Water Framework, the Integrated Pollution Prevention and Control, or the Fauna, Flora, Habitats Directives greatly benefitted from the expertise provided by environmental organizations, scientific experts and business (Börzel, 2009a). They helped state actors reduce compliance costs and resolve conflicts among the actors involved. Likewise, the delegation of pre-accession preparations to the Pan-European Regulatory Forum proved more effective in “smoothing” the harmonization of pharmaceutical regulations in CEE ac-

cession countries with EU requirements than the traditional mode of bilateral negotiations between the Commission and central governments. The participatory regulatory network has significantly reduced the demand of CEE accession countries for derogations in the pharmaceutical area and has contributed to a smooth transition to the new regulatory regime. This is in sharp contrast to the environmental acquis, where no such NMG emerged (Koutalakis, Prange, 2006; Borrás, Koutalakis, Wendler, 2007).

In regional policy, development partnerships at the sub-national level have helped improve the absorption capacity of CEE countries by mobilizing information and resources otherwise not available, discovering new options, and improving local acceptance of governance policies. The cross-sectoral cooperation of state and non-state actors at the sub-national level encouraged the creation of encompassing and inclusive development programmes by institutionalizing multi-stakeholder deliberations on the goals of development and the best ways to achieve them. Typical examples would be local developmental associations among municipalities, firms and NGOs in Hungary that have helped micro-regions with weak and fragmented local state to mobilize resources for integrated developmental programs (Keller, 2008). Likewise, the inclusion of the social partners in the distribution of EU agricultural subsidies was instrumental in improving the absorption capacity of EU Funding in Poland by disseminating information and raising social acceptance of EU policies (Grosse, 2007b).

At the EU level, the principle of mutual recognition has achieved approximation without resorting to harmonization, which may be unfeasible since the member states are unable to agree on common rules and standards. In the case of services trade, it was the only way to advance integration without harmonizing the regulation of services in the old and new member states. Given the significant wage differences present in the enlarged EU, the services directive roused hitherto unknown protests. The compromise therefore deleted any references to home-country rule. Nevertheless, as Article 16 prohibits member states to neither require from service providers authorization, registration, identification, specific tools or materials, nor prescribe distinct contract relations if this hampers the provision of services, mutual recognition enters through the back door (Schmidt, 2008a). Likewise, soft law in state aid helped to improve the timeliness, legal certainty and transparency of Commission control, particularly in the CEE accession countries, which had to substantially adapt their state aid policies to EU law. Since accession, they have indeed effectively converged towards the EU-15 average (Blauberger, 2008). Overall, new modes of governance have helped to preserve the unity of European Law despite the increased heterogeneity of the member states, which might have required more flexible interpretations of European law to adapt it to a different environment.

All in all, new modes of governance do contribute to the effective approximation to the EU – if they emerge in the first place. However, they can also have the opposite effect, e.g. by delaying the implementation and application of EU policies. CEE governments have often circumvented social dialogue because the long lasting debates in the tripartite commissions threatened the timely adoption of EU social policies (Grosse, 2006). In a similar vein, the requirements for the introduction of new modes of governance, such as public involvement in water management, nature conservation or pollution prevention and

control, are often not easy to handle for state actors in accession countries, who lack both the administrative capacities and the experience to cooperate with multiple stakeholders and accommodate their conflicting interests. While helping to foster the effective adoption of, and adaptation to, EU environmental policies, new modes of governance have at times created additional problems (Börzel, 2009a). For instance, the selective inclusion of environmental organizations and consulting companies into the NATURA 2000 processes in Hungary has left other affected stakeholders, such as farmers or private forest owners outside the policy-cycle and diminished the overall legitimacy of the state's nature conservation efforts (Buzogany, 2009a).

Like their emergence, the effectiveness of new modes of governance may depend on certain scope conditions at least partly related to the governance capacities of state and non-state actors. The shadow of hierarchy provides important incentives to non-state actors not only to get, but also to stay involved in, regulatory networks and comply with their outcomes, e.g. by mitigating compliance costs and enforcing agreements. In stark contrast to the Polish case, Hungarian state actors were much more successful in mobilizing private cognitive resources towards pharmaceutical harmonization through the institutionalization of credible independent drug authorisation authorities that facilitated close contacts and continuous interactions with the industry (Koutalakis, 2008a). At the same time, non-state actors require sufficient capacities to make use of the opportunities offered by new modes of governance. The social partners in Estonia and Poland are too weak and divided to negotiate agreements (Grosse, 2007a; Grosse, 2006). Particularly, local NGOs suffer from similar problems in sustaining their participation in the management of nature protection areas (Koutalakis, forthcoming; Guttenbrunner, forthcoming). And sub-national actors lack the capacities to make effective demands on the central state for a broader participation in regional development programmes (Bruszt, 2002; Bruszt, forthcoming).

Finally, new modes of governance may improve effectiveness, but this may come at some costs with regard to legitimacy. While NMG may increase the acceptance of a policy by involving affected parties and mediating conflicts of interest, they can also generate opposition and resentment. Because of their non-majoritarian character, new modes of governance are often seen as clientelistic, untransparent, exclusive, and, thus, undemocratic. Social dialogue, for instance, has given some of the social partners the opportunity to establish informal relations with decision-makers and influence public policy in accordance with particularistic social interests (Grosse, 2006; Grosse, 2007a).

In the context of EU Treaty law, mutual recognition and state aid soft law have increased output-legitimacy in terms of overall European levels of trade and competition. This may, however, look different from the perspective of individual member states. In concrete cases, market freedoms and state aid control not only lead to overall efficiency gains, but also involve redistributive issues, thus creating winners and losers. From the latter's point of view, not only output-legitimacy is lacking – it is also not compensated for by means of input-oriented legitimization. In the case of mutual recognition, legitimacy problems arise as a result of the horizontal transfer of power. While mutual recognition may allow services trade despite the absence of harmonized services regulation, it deprives member states of the possibility of conducting controls of goods and services produced and provided by

another country. As a result, the government of the country of destination cannot be held accountable for the quality of the goods and the services because they are not subject to its regulations. Nor have consumers in the country of destination the possibility to hold the government of the country of origin accountable (Nicolaidis, 1997). Moreover, mutual recognition relies on binding administrative cooperation. In this way, national administrations become responsible also to transnational and European demands, and are partly detached from their exclusively national political responsibility (Schmidt, 2008b). At the same time, member states are much more flexible when regulating than under the Community Method, so one could argue that mutual recognition facilitates democratic self-determination and reduces the legitimacy deficit of national decision-making, which produces externalities for other member states, by forcing countries to take these interests into account (Schmidt, 2007). In state aid, problems of legitimacy mostly arise at the EU level, where the Commission takes decisions largely free from control by the Parliament or the Council, although they often involve important redistributive issues. Moreover, the progressive development of state aid soft law privileges certain potential state aid beneficiaries over others. As to the new member states, the constraints of European state aid control are sometimes characterized as being inadequately strict with regard to the restructuring of firms in critical sectors. In contrast, the Commission's reformulation of regional aid rules leads to a decreasing ability of the older Member states to assist their underdeveloped regions by means of state aid (Blauberger, 2008).

In sum, new modes of governance can help smoothen the approximation to the EU and render it socially more acceptable. However, they can also create additional problems of both effectiveness and legitimacy. We need to carefully study the scope conditions under which new modes of governance impact upon the working of public policies at the domestic and the European level. Governance capacities appear as key not only for the emergence but also for the effect(iveness) of new modes of governance.

Cui bono? The structural impact of new modes of governance

Tracing the structural impact of new modes of governance on power relations is difficult as it is hard to isolate their effect. Not only are new modes of governance limited in number, their emergence coincides with other changes induced by accession to and approximation with the EU. Moreover, for Southern, Central and Eastern European countries, accession to the EU has overlapped with their still ongoing political and socio-economic transition. The same is true for the neighbourhood countries of the Former Soviet Union.

Due to their inclusiveness, we might expect new modes of governance to strengthen civil society and the participation of a greater number and variety of state and non-state actors more generally speaking. However, there is little evidence that new modes of governance have changed the societal structures in accession and neighbourhood countries. Part of the reason certainly lies with their scarce emergence (see above). But even where they have emerged, the impact of new modes of governance on (domestic) power relations is at best differential. They may empower non-state actors and local authorities vis-à-vis their central governments by legally prescribing public involvement in the policy process and opening new legal and political venues to push their interests, e.g. by taking their case to

court and lodging complaints with the European Commission. But non-state actors have often been too weak to exploit these new opportunities. Thus, accession to the EU has provided environmental actors with opportunities to put pressure on their national governments by lodging complaints with the European Commission in cases of non-compliance with EU environmental law (mostly in Southern Europe) or EU institutional requirements during the accession period (in Central and Eastern Europe). However, in all six countries, non-state actors have initially been too weak to systematically exert pressure on their governments and to engage in stable and sustainable cooperation, respectively, to make EU policies work on the ground. Spanish and Hungarian environmental groups, often supported by transnational organizations, have been more successful in using the participatory prescriptions of the Environmental Impact Assessment, the Water Framework, and the Fauna, Flora, Habitats Directive (Buzogany, 2009a; Font, Fernández, 2009) than their Greek and Romanian counterparts, partly because environmental mobilization in Greece and Romania is much more localized (Koutalakis, 2009; Buzogany, 2009b). They were often not willing either (see emergence).

The role of civil society in CEE accession countries resembled the situation in the three Southern European countries during the pre- and immediate post-accession period in the 1980s (cf. Börzel, 2010). Next to capacity constraints, environmental groups still have to find their final place in public policy-making. Pooling resources with the state requires a cooperative attitude, which conflicts with the role of civil society as a major opposition against socialist repression. As in Southern Europe, many non-governmental organizations see themselves as independent watchdogs rather than partners of government (Börzel, Buzogany, 2010; Koutalakis, 2004).

In the field of regional policy, the partnership principle and EU conditionality have empowered sub-national actors and NGOs in accession countries to make effective demands for their inclusion in the preparation and implementation of regional development programmes. However, their structural impact has been limited, since they are embedded in predominantly hierarchical governance structures, as a result of which they do not offer sufficient incentives and resources to foster horizontal cooperation and power sharing in the distribution of structural funds. Rather, the shadow of hierarchy induces regional actors to build-up vertical relations. As a result, the “layering” of new modes of governance has only induced slow change on the margins and mostly contributes to the reinforcement of hierarchical modes of governance (Bruszt, forthcoming). Likewise, the introduction of social dialogue institutions in Poland, Estonia and Lithuania has done little to transform the socialist legacy of the administrative state towards a more “Western-type” network model. On the contrary, new modes of governance have reinforced some of the pathologies of these states by undermining “classical” modes of democratic legitimating, allowing state actors to circumvent majoritarian institutions by resorting to civil or social dialogue (Grosse, 2007a; Grosse, 2006).

Overall, new modes of governance have reinforced rather than changed existing domestic structures, particularly with regard to the dominance of executive actors at the national but also at the EU level (Grosse, 2007b). While new modes of governance may have helped to get accession countries out of the “low capacity trap” characterized by weak states and

weak societies (Sissenich, 2007), they have moved toward a situation of “stronger societies but much stronger states” (Bruszt, 2008a). These asymmetrical power constellations are hardly conducive to the full-fledged evolution of new modes of governance.

The structural impact of new modes of governance has not only been limited due to weak governance capacities, particularly of non-state actors, and the low resonance with the administrative and civic culture in the accession countries. The EU often does not exert sufficient pressure for adaptation, since its own institutions are too weak, as in case of social dialogue or the introduction of social and local partnership in executive agencies administering EU agricultural funds (Grosse, 2006; 2007b), or its policies are inconsistent, oscillating between encouraging the sharing and the concentration of central state powers, as they have done in structural policy (Bruszt, forthcoming). The EU has also started to turn away from attempts to directly interfere with the domestic institutions of its member states, emphasizing competition and subsidiary (Grosse, 2008a: chapter 5). Yet, the principle of mutual recognition is an interesting example for a new mode of governance having an indirect effect on the domestic (administrative) structures of accession countries. While not making any specific prescriptions, national administrations are obliged to cooperate in order to assist each other in implementing the Service Directive. This may result in a harmonization of administrative laws of member states. Moreover, it constitutes a significant break with the past principle that member states were to implement EU directives free from any interference from the EU and other member states (Schmidt, 2008b).

Finally, since new and old modes usually work in combination (see previous section), new modes complement old modes and (partly) compensate for their weaknesses. By increasing both the effectiveness and the legitimacy of hierarchical modes, they sustain, rather than change, traditional governance regimes, which severely limits the structural impact of new modes. So far, new modes of governance have done little to transform the state. On the contrary, they may have reinforced some of the pathologies of accession countries.

VII. Conclusion

New modes of governance have started to travel east. Both the EU and accession and neighbourhood countries have resorted to non-hierarchical forms of coordination and the involvement of non-state actors to foster approximation with the *acquis communautaire*. However, new modes of governance have not played the prominent role which the weak capacities of accession and neighbourhood countries would lead us to expect. Their emergence is scattered and varies significantly. Where they emerged, new modes of governance often hardly go beyond consultation and contracting-out and are only weakly institutionalized. If non-state actors are more directly involved in the policy process, their relations with state actors tend to be asymmetrical and at times merely disguise and legitimize hierarchical modes. While state actors may be weak, non-state actors are even weaker.

These findings have important implications for both the theory and practical application of (new modes of) governance. If it is correct that non-hierarchical modes of governance

require both a strong state and a strong society, this results in a serious dilemma or even paradox (cf. Börzel, 2009b): the lower the capacity of a state, the greater the need for new modes of governance to compensate for state weakness – but the less likely they are to emerge. This is particularly true if there is indeed a dialectical relationship between the evolution of a strong state and a strong society, as implicitly assumed or explicitly claimed by the governance literature (for an overview of the literature Börzel, 2007a).

However, there are ways out of the low capacity trap. First, EU pressure is a prominent factor in inducing state actors to resort to new modes of governance. On the one hand, the EU may legally require the involvement of private actors. On the other hand, there is a normative logic that may drive the emergence of new modes of governance – it is the “EU way of doing business”. Second, the EU also helps strengthen the governance capacities of accession and neighbourhood countries. The transfer of money and expertise through Community programs and twinning processes provides state as well as non-state actors with additional resources they can exchange. Given the asymmetrical power relations of weak states but even weaker societies, capacity-building by the EU should, however, focus much more on strengthening non-state actors. EU resource transfer also fosters policy learning and trust building. Finally, the monitoring and sanctioning system of the EU has empowered non-state actors by opening new opportunities for them to pursue their interests, e.g. by taking their governments to court. State actors may resort to new modes of governance in order to accommodate the interests of non-state actors and avoid complaints to the Commission or legal proceedings.

The EU’s governance mix of conditionality, assistance and political dialogue provides an opportunity structure for the emergence and evolution of new modes of governance. Still, we need to mute high-flying expectations regarding their role in drawing countries closer to the EU. Both the EU’s enlargement and neighbourhood policies have to deal with countries which typically have both weak states and weak societies. While capacity-building plays a prominent role in the EU’s governance export, it takes time, as the example of the Southern European countries clearly shows.

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