

Enlarging Environment

Mapping new modes of governance in the adoption of and adaptation to EU environmental policies in Poland, Hungary and Romania

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1. Introduction

Accession appears to be both a blessing and a curse to transition 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, the 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* run into serious problems concerning both the effectiveness and the legitimacy of EU policies. Since these countries are “weak” states that often lack the absorption capacity (resources) rather than the willingness to effectively implement EU policies, accession problems cannot simply be solved in the “shadow of hierarchy” (command and control). Alternative modes of governance based on non-hierarchical steering that systematically involve private actors in policy-making could be more effective in helping to ensure the adaptation of and adoption to the *acquis*.

In this paper we focus on the Eastern Enlargement process in Poland, Hungary and Romania and seek to explore the relevance of the non-hierarchical involvement of private actor in policy-making for the effective implementation of the *acquis communautaire*. How important have non-hierarchical modes of governance really been in the accession process? Have voluntary agreements, financial assistance, benchmarking, naming and shaming, technology-transfers, information exchange, and processes of (public) persuasion resulted in more effective implementation than command and control regulations? Which role have public-private partnerships played between public authorities, on the one hand, and policy consultancies, companies and NGOs, on the other hand? Have there been attempts of economic and (transnational) societal actors to compensate weak state capacities by establishing private regimes, and have they been effective?

In the first step of our project¹, we developed a framework to conceptualize the role of new modes of governance in the accession of Southern, Central and Eastern European countries (Borzal, Guttenbrunner et al. 2005). More specifically, we sought to tackle the question to what extent new modes of governance can facilitate the implementation EU Law. We developed a governance typology to identify different modes of governance in the accession process and defined criteria to study the effectiveness of governance modes in facilitating the adoption of and adaptation to the *acquis communautaire*.

Then, in a second step, we applied this framework to the adoption of and adaptation to EU environmental policies in the accession process of Hungary, Poland as well as Romania, of which the first two joined in 2004 and the latter will join the EU in the years to come. Our case studies on the legal harmonization and implementation of four EU Environmental directives only partially support our initial assumptions. While we found evidence of some new modes of governance, these remain unstable and cannot necessarily be regarded as typical as the traditional command and control approach still prevails.

¹ The Research Project “Coping with Accession: New Modes of Governance and Enlargement” (COPA) is co-funded by the European Commission within the Sixth Framework Programme, Priority 7 – Citizens and Governance in the Knowledge-based Society, Project no. CITI-CT-2004-506392, for further information see <http://www.eu-newgov.org/>. The case studies on Poland, Hungary and Romania are coordinated by Tanja A. Börzel at the Freie Universität Berlin, while a team led by Nuria Font Borrás at the Universitat Autònoma de Barcelona is responsible for Spain and Portugal. The Greece case study is conducted by Charalampos Koutalakis at the University of Athens.

This paper summarizes the main findings of the empirical case studies and discussing them in light of our theoretical expectations. Most importantly, the paper seeks to find an explanation for the scarce emergence of new modes of governance in the accession process drawing on insights from the theoretical literature and the empirical cases of our study. The first part briefly outlines the theoretical and analytical framework on which the research project has been based. The second part explains the selection of our country cases countries and the four environmental directives and summarizes the empirical findings of the 12 case studies. The paper concludes with some considerations on why our theoretical expectations have not been fully met and discusses the implication for future research on new modes of governance in European enlargement.

2. New Modes of Governance – What Are They and Why Bother?

Towards an Operational Definition

There is a Babylonian variety of definitions and understandings of what new modes of governance are and what makes them really new as compared to traditional modes. Part of the confusion is related to the existence of a broad and a narrow understanding of governance, the latter of which is identical with what is usually understood as “new” modes of governance. This is not the place to rehearse the entire debate (for an overview see (Börzel 1998)². For the purpose of studying the role of new modes of governance in EU enlargement, we adopt the following definition. New modes of governance refer to the making and implementation of collectively binding decisions (based or not based on legislation) that:

1. are *not hierarchically* imposed, i.e. each actor involved has a formal or de facto veto in policy-making and voluntarily complies with the decisions made, **and**
2. systematically *involve private actors*, for profit (e.g. firms) and not for profit (e.g. non-governmental organizations) in policy formulation and/or implementation.

Non-hierarchical coordination is constitutive for new modes of governance. It is “governance without government” (Rosenau and Czempiel 1992), which refers to a mode of political steering that does not authoritatively impose policies but is based on voluntary cooperation.

We can distinguish between two forms of non-hierarchical steering or modes to *voluntarily* engage actors in a particular behaviour that is deemed necessary to address a policy problem:

- the setting of positive and negative incentives, e.g. through side-payments, issue-linkage or sanctions, which changes the cost-benefit calculations of actors in favour of the desired behaviour, without affecting their preferences over outcomes;
- non-manipulative persuasion and social learning through which actors are convinced to change their preferences over outcomes in a way that concurs to the desired behaviour.

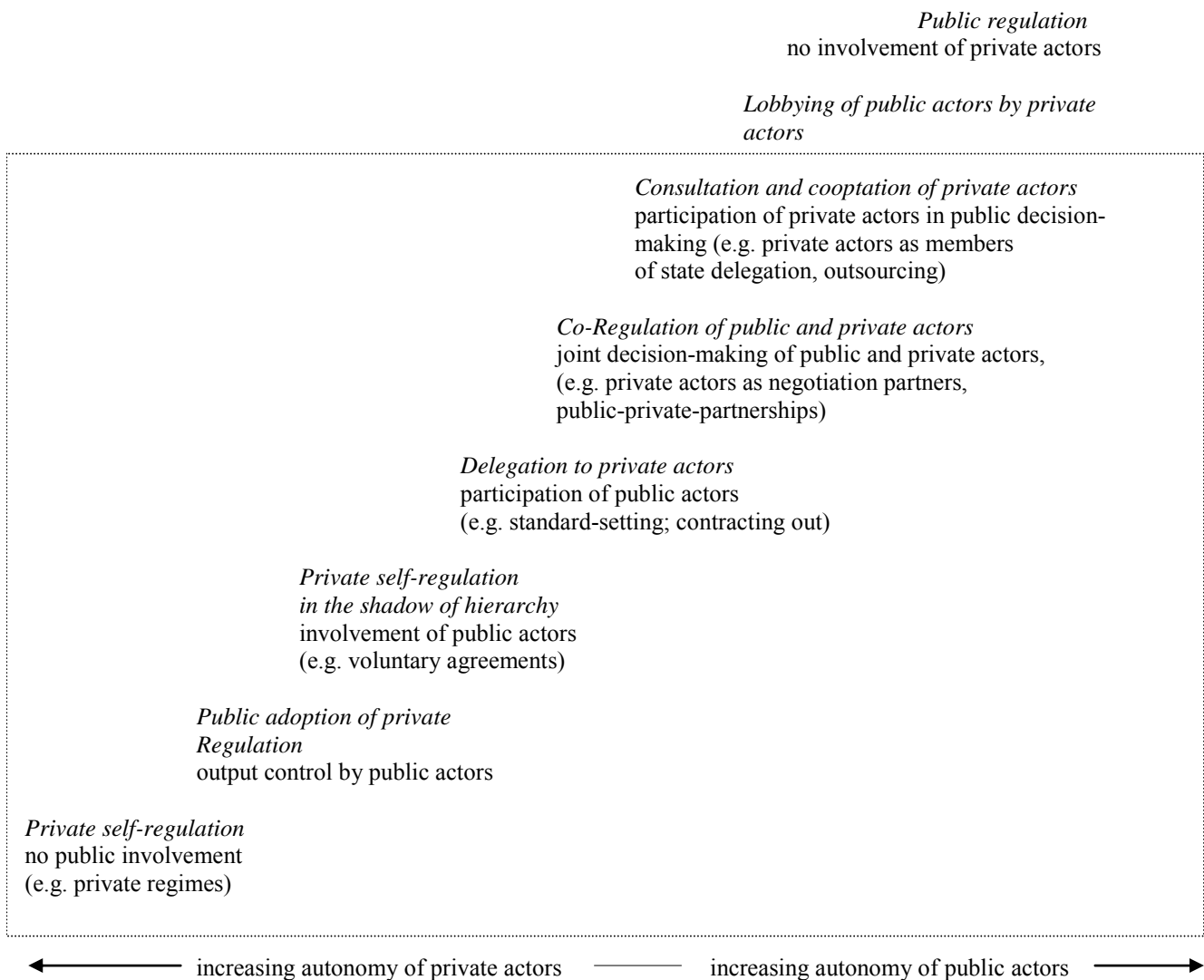
Understanding new modes of governance as the involvement of private actors in public policy-making through non-hierarchical coordination covers a wide range of potential arrangements. In order to avoid concept stretching, however, certain forms remain outside this definition (figure 1). We exclude the lobbying and mere advocacy activities of non-state actors aimed at governments as well as supranational and international organizations. Private actors who are not active participants in governance arrangements or negotiating systems pose few

² See also “Conceptualizing New Modes of Governance in EU Enlargement”, http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=12.

challenges to existing concepts and theories in political science and international relations. Also excluded are those arrangements among private actors that

- are based on self-coordination and do not aim at the provision of common goods and services (markets);
- produce public goods and services as unintended consequences (e.g., rating agencies) or provide public “bads” (mafia, drug cartels, transnational terrorism).

Figure 1: New Modes of Governance – the Non-hierarchical Involvement of Private Actors



Reasons for why state actors seek to involve non-state actors in public policy-making are usually derived from three different strands of theory. Transaction cost theory argues that state actors delegate public tasks because they want to reduce transaction costs imposed by lengthy decision-making processes in the parliament or within the government itself (Eppstein and O'Halloran 1999). Principle-agent theory emphasizes the lack of information, expertise and/or time of the state principal in dealing with complex problems. Delegation does not only help the state to compensate for its weak capacities. It also allows to lock-in policies and protect them from changing political majorities (Moe 1987). Network approaches emphasize the functional interdependence of public and private actors in policy-making (cf. (Mayntz 1997; Börzel 1998)). Governments become increasingly dependent upon the cooperation and joint resource mobilization of policy actors outside their hierarchical control. Involving non-state

actors in the policy process allows state actors to establish “webs of relatively stable and on-going relationships which mobilize and pool dispersed resources so that collective (or parallel) action can be orchestrated toward the solution of a common policy” (Kenis and Schneider 1991): 36). Next to tapping into the resources of non-state actors, their participation in the policy process helps 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 sum, New Modes of Governance can significantly strengthen the capacity of state actors in public policy-making (cf. (Héritier 2003). The main incentive for non-state actors to get involved in the public policy-making is the exchange of their resources for influence on the policies by which they are affected.

New Modes of Governance in Europe: Not New but Different

The non-hierarchical involvement of private actors in public policy-making is not new but a well known phenomenon of domestic politics that has been thoroughly studied by the research on corporatism (Lehmbruch 1996) ((Streeck and Schmitter 1985), policy networks (Rhodes 1997); (Börzel 1998), or the “negotiating state/administration” (Czada and Schmidt 1993); (Voigt 1995); (Dose 1993). Yet, while new modes of governance in Europe may not be necessarily new in *strictu sensu*, they are still different from both international and domestic politics.

Unlike an international organization, the EU has the capacity for hierarchical steering (cf. (Börzel 2005). It can adopt policies against the will of individual member states, e.g. when the Council decides by qualified majority voting. Unlike a state, however, the EU has no power to enforce its policies but ultimately has to rely on the voluntary compliance of the member states. This is even truer for the relationship between the EU and the accession countries. As long as the latter are not members, their relations with the EU fall in the realm of international diplomacy. The EU’s supranational institutions do not even cast a shadow of hierarchy, yet, 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. At the same time, the capacity of the accession countries for hierarchical steering is constrained, too. Not only are their resources limited, they also face the tremendous task of implementing more than 10.000 legal acts. New modes of governance could compensate for the weak hierarchical steering capacity of both the EU and the accession countries in the *implementation* of EU policies since private actors can provide the governments of the accession countries with important resources (money, information, expertise, support) that are necessary to make EU policies work.

3. Tracing the Role of New Modes of Governance in New Europe

Before they can join the European Union, the accession countries have to fulfil certain conditions defined by the Copenhagen criteria, which also include “the acceptance of the TEU prescriptions, the adoption of the *acquis* and the administrative and judicial capacity to apply it”. This so called *acquis* conditionality (Schimmelfennig and Sedelmeier 2002) forms the research focus of our project. We seek to explore the role of new modes of governance in facilitating:

- the transposition of the more than 10.000 pieces of EU legislation in force into national legislation, including the adaptation of existing national law to EU law;
- the building-up of the administrative and judicial institutions (norms, rules, procedures) to practically apply and enforce the *acquis*.

Due to the enormous policy load, which the implementation of the *acquis* places on the accession countries, on the one hand, and their limited absorption capacities, on the other, it appears to be likely that public actors seek the cooperation with private actors to share or shift the burden.

In the legal implementation of the *acquis*, we hardly expect to find co-regulation, delegation, and private self-regulation. The systematic consultation and cooptation of private actors in the policy formulation process is more conceivable. But the strongest impact of new modes of governance can be expected in the building-up of institutional structures to practically apply and enforce EU policies on the grounds. Given the limited regulatory capacities of the accession countries, co-regulation, delegation, and private self-regulation could provide ways to reduce the implementation burden by sharing it with private actors. But to what extent have the accession countries really resorted to voluntary agreements, the “contracting out” of public services, technical standardization, social dialogue, regulatory fora, and public-private partnerships in building-up the administrative and judicial capacity to effectively apply the *acquis communautaire* and to adapt existing structures to EU requirements?

In order to answer these questions, we looked at three accession countries in the field of environmental policy. We selected Poland and Hungary as two accession states that became members in 2004 and also included Romania, which is to join in the next years to come (for the design of the comparison see below).

Our empirical investigation focuses on environmental policy as an area of positive, market correcting integration that imposes significant costs in the implementation rather than in the decision-making stage. We look at two sets of policies:

- a) Traditional command-and-control policies, such as the Directives on Drinking Water and Large Combustion Plants (LCP). These policies impose considerable costs of domestic adaptation, especially on firms that have to internalize compliance costs to their production. Thus, both public and private actors may have an incentive to cooperate in order to share or shift the costs.
- b) New environmental instruments, such as the Directives on Fauna, Flora, Habitats (FFH) and the Environmental Impact Assessment (EIA). The application of these directives may stipulate the emergence of New Modes of Governance because their procedural regulations directly provide for private actors’ participation in the policy process.

In the following two sections, we will trace the emergence and effectiveness of New Modes of Governance in the implementation and application of the four environmental directives in the six countries under investigation.

New Modes of Governance in the East: Adopting EU Environmental Policy in Poland, Hungary, and Romania³

After the breakdown of the communist regime, most of the Central and Eastern European (CEE) countries immediately aspired to become members of the European Union. With their capacities already weak, the CEE countries had to stretch their limited resources managing their political, social and economic transition and implementing several hundred laws covering everything from milk quota, drinking water quality to equal treatment at work. Thus, the

³ For more details see Tanja A. Börzel, Aron Buzogany, and Sonja Guttenbrunner (2006) “Mapping the application of NMG to facilitate the implementation of environmental policy in Poland, Hungary, and Romania”, which can be obtained from the authors of this paper.

CEE countries seem to be “a most likely case” for the emergence of New Modes of Governance, also because the European Commission herself promoted the idea of involving non-state actors in the accession process in order to improve the effectiveness.

We selected three CEE accession countries to trace the emergence and effectiveness of New Modes of Governance in the implementation of the environmental *acquis*. Poland, Hungary, and Romania share a common heritage of state socialism but have chosen different paths of economic and political transformation and have diverging histories of civil society involvement, including environmental mobilization. Poland and Hungary took the fast track of economic transition. But unlike Hungary, Poland has been more reluctant to open its economy and has only done it step-by-step over the years (Bohle and Greskovits 2001). Industries of “strategic importance”, most notably energy, have remained protected from foreign investors. Also, due to partisan politics (high number of parties, uncertain coalitions), social policy was not as restrictive as the initial economic program of the “father of Polish economic miracle”, Balcerowicz, suggested. Hungary, in turn, swiftly opened its economy, particularly to EU companies. Both party blocs, which took turns in leading the government after every single election, followed policies of political austerity and economic liberalization. By the end of the 1990s, the country attracted most foreign direct investments in Central and Eastern Europe and had a serious part of its industry under foreign ownership. In a nutshell, Poland seems to follow more the French model while Hungary slightly leans toward the Anglo-Saxon model of economic governance.

Unlike Hungary and Poland, Romania has been more slow to liberalize its economy (Negoita 2006). Another structural difference concerns state-society relations: while Hungary and Poland have started their “negotiated” political transformation already back in the 1980s and had a rather politically influential “green” social movement, civil society in Romania is still in the process of development as political changes were delayed during the 1990s.

The CEE countries enrich the EU with vast areas of pristine wilderness, large spots of untouched nature and an impressively high biodiversity. At the same time, they suffer from the socialist legacy of forced and intensive industrialization that caused a significant number of environmental hotspots. After transition, most CEE countries witnessed a period of “natural clean-up” due to the breakdown of the state economy. With economic growth taking-up in the second half of the 1990s, however, they started to experience similar environmental problems as the old member states did decades before. While the political changes were at least partially brought by environmental movements, the first years of the emerging market economy promoted a relatively anti-environmentalist policy as in most of the cases environmental spending only reluctantly followed economic growth (Jancar-Webster 1993; Hajba 1994). As social concerns and “bread & butter” questions related to everyday life replaced high levels of political mobilization witnessed at the beginning of the transition period, green movements rapidly lost their influence and a comparatively low level of environmental engagement and the lack of public understanding and awareness for environmental issues has become a characteristic feature in CEE societies (Lee and Norris 2000; Gerhards and Lengfeld 2005). While some of the CEE countries had developed some pieces of environmental regulation that date back to the 1970s, their effectiveness remained limited and to a large extent did not meet the requirements of the environmental *acquis communautaire*. As a result, Hungary, Poland, and Romania have been confronted with the challenge of implementing some 80 environmental directives imposing heavy costs on their weakened capacities amounting to an average of three to five percent of their GDP (OECD countries spend on an average between one and two percent of their GDP on environmental policy).

3.1 Poland

Poland had to overcome two barriers to an efficient environmental policy: the inefficiency of the general system and inadequate policy principles. Environmental legislation existed during the communist regime, but “*the failure of environmental policies in centrally planned economies was quite commonly linked to an inadequate level of charges and to the lack of developed markets.*” (Zylicz and Holzinger 2000). The Polish law had different traditions and conceptual differences to the EU law, so the approximation process was difficult (Sommer and Rotko 1999; Sommer 2005). An obligatory check of the conformity of all drafts with European law is necessary since 1994. Each draft law must be accompanied by a report on its EU compatibility. The main problem was that Poland had a complex environmental legislation, meaning that the law includes mainly horizontal legislation whereas the legislation of the EU tends to be more sector specific. In general, Polish environmental policy-making is still predominantly characterized by a command and control approach.

At the same time, the Polish administration faces significant capacity problems. Beside financial constraints, it lacks skills concerning the technical and the administrative details of (EU) environmental regulation. Contrary to our expectations, we find that the more limited the expertise of Polish administrators is for a given policy sector/directive, the more likely they are to rely on a command and control approach. This is also true for the new environmental instruments built into the *FFH* and *EIA Directives*, which do not necessarily give rise to the emergence of non-hierarchical steering modes. In case of the *FFH Directive*, it was only the external pressure from the EU Commission that made the Polish administration cooperate with non-state actors. After environmental groups (WWF Poland, Polish Society for the Protection of Birds, Naturalist Club and Polish Society for Protection of Nature "Salamandra") had prepared a “shadow list”, the European Commission demanded a revision of the national Natura 2000 site list. As a consequence NGOs received some first contracts for preparing the inventory because the Ministry of the Environment recognized their superior expertise. Furthermore, in some policy areas, NGOs established a good communicational basis with the relevant state actors, whereas in other policy areas, particularly the older generation of administrators are still resistant to cooperate with non-state actors. The weak involvement of non-state actors in the application of the *EIA Directive* is largely explained by the resistance of public authorities to open-up the process to the public as required by the directive, on the one hand, and the high scepticism of the public towards the EIA fuelled by several corruption cases, in which NGOs accepted payments by companies for giving favourable assessments of environmentally harmful projects. Another important reason why the EIA procedure is still not fully incorporated in the Polish environmental legislation is the process of the environmental law-making in Poland itself. Due to changing government majorities, the legislation process witnessed great delays. The Environmental Legislation Act, the main document regulating the environment in Poland, only came into force in 2004. The EIA procedure, however, was quickly transposed in the late 1990s in order to secure EU funding. The hasty transposition, however, led to a rather “chaotic” implementation process.

The LCP Directive and the Drinking Water Directive are among the most costly EU policies to be implemented. In case of the *Drinking Water Directive*, the costs have to be born to a large extent by the municipalities, which were put in charge of water and waste water utilities in the early 1990s. The involvement of profit-oriented non-state actors could help local governments to cope with the necessary investments. While Polish law provides for the possibility of minority shareholding and joint ownership of water companies, many municipalities have retained 100% ownership even in those cases where companies operate under commer-

cial law. Despite the growing financial pressures, local decision-makers are not very inclined to cooperate with private companies. Their reluctance mirrors the general scepticism of the public towards private investments in the water sector. Yet, the privatization of the water sector has set it. It remains to be seen whether the new law on public-private partnerships in Poland will lead to an increase of these forms and in how far the involvement of NGOs might help to reduce scepticism on corporate investment in these areas. In case of the *LCP Directive*, public authorities are equally resistant to the involvement of non-state actors. Despite or rather because of their limited expertise on the technical details of the directive (e.g. concerning the Best Available Technology) and their weak monitoring capacities, civil servants are afraid of being “captured” by corporate interests. Public authorities have difficulties in finding “reliable partners” whom they can trust. Business and civil society actors are not well organized in Poland, which impedes their capacity to “speak with one voice”. Moreover, they often do not trust the state either given the cumbersome decision-making processes and the frequently changing political majorities weaken the capacity of state actors to deliver the policy results agreed upon with non-state actors.

3.2 Hungary

The basic tenets of Hungarian environmental policy emerged in the seventies and the eighties; this tradition of policy-making is still generally applied. This traditional, hierarchical approach in public policy-making resonated well both with the pre-war traditions reaching back to Hapsburg times as well as with paternalistic socialist governments. The predominant paradigm of policy is based on technological and end-of-pipe approaches and relies on traditional command and control regulations accompanied by fines for non-compliance (Caddy and Vari 2002). While the regime change in 1989 and the opening up of the political and economic life has provided space for an influx of new ideas, “there has been little borrowing for the ideas of new public management and policy implementation and little looking beyond the profession of law and the drafting of regulations to mobilize people and resources efficiently” (Toole 1997).

Hungary entered the accession countdown with ambivalent heritages. On the administrative side of things, a relatively integrated administrative structure was already in place and functioned quite effectively. Inspection capacity was considered adequate, with reasonable expertise and competence for the main requirements of the *acquis*. However, there was also a long list of shortcomings. This concerned among others coordination deficits and overlapping competencies between different levels of administration (mainly on the national/regional level), inflexibility of inspection procedures and non-compliance responses due to the ineffective legal system, as well as shortcomings in staffing and training, particularly at the local level (ECOTEC 2000).

The analysis of the four environmental directives provides a mixed picture. The main finding is that Hungarian environmental policy-making is still largely dominated by the classical, command and control approach of hierarchical steering. This can be attributed both to the institutional path-dependency as well as low administrative state capacities which, like in Poland, induces the harking back on traditional instruments in cases of institutional flux and new challenges posed by EU requirements. However, we have found some evidence for non-hierarchical steering methods. Basically, all four directives show some traces of non-traditional involvement of non-state actors, albeit at very different levels of intensity. The transposition of the *EIA Directive* was outsourced from the ministry to specialized non-state actors (Environmental Management and Law Association and Öko Inc.) holding high expertise in this domain. Non-state actors’ involvement is also high in the implementation of the *FFH Directive*, where environmental stakeholders participate at all levels of the process.

Thus, MME/BirdLife Hungary was actively involved in the designation of protected areas while local NGOs helped providing expertise and data. This has not led, however, to a more effective designation process, which can be attributed mainly to adjustment problems within the administration and the fact that certain societal interests, such as farmers, hunters, and fishermen, have been excluded (Mocsári 2004).

The *LCP Directive* witnessed several attempts to introduce non-hierarchical steering methods into pollution control, such as voluntary agreements, which stopped shortly before they could materialize, mostly because of a general lack of experience and concerns about legal uncertainty. However, intensive informal self-regulatory processes, e.g. concerning “best practice” for industry in saving energy, have been underway in close cooperation with the Hungarian administration and transnational NGOs, such as US-based Alliance to Save Energy. The *Drinking Water Directive* shows the clearest sign of non-state actor involvement as up to 30% of Hungarian drinking water is provided through private water companies, mostly international water multinationals, which received their concession already in the mid-1990s, when public utilities became the responsibility of local governments. Yet, this is part of the ongoing privatization rather than the emergence of New Modes of Governance.

3.3 Romania

Romania was the last candidate country to open negotiations on the Environment Chapter in March 2002 – when the country was still lacking any transposition plans – and lasted for a comparatively long period of time, the chapter being concluded among the last, in November 2004. Together with problems related to the functioning of the judiciary and the competition policy chapter, environmental issues still are the third major stumbling bloc for the Romanian accession process. Three main problems account for this. 1) the lack of administrative capacity and know-how to monitor and enforce legislation. 2) the lack of effective economic incentives and sanctions, and 3) the lack of finances earmarked for this very cost intensive chapter – environmental accession reaching estimated € 29, 3 billion, or half of Romania’s yearly GDP.

When entering the accession race, the Romanian environmental bureaucracy was not consolidated at all but started in a open ended “learning on the job” process, leading to several improvisations in juggling with issues it could not solve at the same time, giving the impression that everything is somehow ad-hoc and in flux (Krüger and Carius 2001; UNECE 2001; DANCEE 2003). Being under constant pressure from stronger ministries and struggling with high fragmentation of the environmental resort and mighty veto players in other ministries as well as under immense reform pressure due to the EU approximation it harks back to traditional policy making of legalism and the dominance of command and control instruments, which resonates well with traditional government action.

Like in Hungary and Poland, the accession process in Romania has been mainly carried out relying on hierarchical steering. Due to extremely weak state capacities, including staffing on the national, regional and local levels, constant institutional and legal re-shuffling processes and the tight deadlines dictated by the EU, the public administration has largely chosen to “muddle-through” the adaptation and implementation process. Systematically involving non-state actors is perceived mainly as time-consuming and non-rewarding. If pressure is exercised to include non-state actors, either from the EU or in accordance to the legislation in place, also by domestic actors, there are signs of a more inclusive involvement of non-state actors. However, public administration often merely pays lip-service to EU requirements for public participation. At the same time, we witness several notable differences between the directives under review. While the legal implementation of the *EIA Directive* happened under time pressure and by command and control measures, there seems to be more openness in

practical application since the EU exerts pressure to support the process. This might open doors to more systematic collaboration with non-state sector, as some of the NGOs already possess relevant knowledge and are involved in spreading the information on EIA. They are increasingly using EIA to oppose controversial projects. In case of the *FFH Directive*, which also entails strong elements of public participation, the collaboration between public administration and non-state actors is contractual, selective and ad-hoc. While public authorities have repeatedly consulted research institutions and NGOs for their expertise on biodiversity, civil society actors complain about not being systematically involved in the preparation of NATURA 2000. Part of the problem has to do with the weak capacities of NGOs. SOR/BirdLife Romania is the only NGO that has been able to formally participate in the designation process of NATURA 2000 sites under the framework of a partnership agreement signed with the Ministry of the Environment. In order to increase their political weight, some NGOs have started to organize themselves in the “NGO coalition on NATURA 2000”.

In case of the *LCP directive*, which is a classical example of regulative policy, non-hierarchical relations between public and private actors are prevented by the ownership structure of large combustion plants which are still largely state-owned. State actors are mostly concerned about protecting their interest vis-à-vis the requirements imposed by Brussels. Finally, the *Drinking Water Directive* is an example where the role of non-state actors has increased, without, however, giving necessarily rise to the emergence of New Modes of Governance. Like in Hungary, national and local governments have actively sought private investments particularly from foreign companies to fund the reconstruction and development of treatment and distribution facilities. Four water companies have been privatized so far under a concession agreement for 25 to 49 years. Moreover, the EU and other external actors, such as the World Bank, actively support the privatization of the water sector by providing funding to the Romanian government for privatizing public companies into. This tendency is likely to proliferate, since start-up funding through concessions has become instrumental to kick-start investments in applications for EU funding. At the same time, however, the service provision by private (transnational) companies, such as Vivendi or Suez-Lyonnaise des Eaux, has been increasingly criticized for the poor quality of the water and the dysfunctional sewage system. This negative experience⁴ with the privatization of the water utility sector could also impede the emergence of New Modes of Governance.

Summing up the case studies on the three Central and Eastern European countries, we can identify the following modes of governance (Figure 2, for a more detailed version see Annex 1):

⁴ The 2005 Commission Report on Romania warningly mentions “A number of cases in the past showed misuse of public-private partnership forms and a disregard of procurement rules: this must cease. Significant efforts are needed to strengthen administrative capacities both at central and operational levels in the relevant procuring entities” (EC, 2005).

Figure 2: New Modes of Governance in the East

	Poland	Hungary	Romania
FFH	public regulation consultation/ outsourcing	public regulation consultation/ outsourcing	public regulation consultation/ outsourcing
EIA	public regulation	public regulation consultation/ outsourcing	public regulation
Drinking Water	public regulation	public regulation	public regulation
LCP	public regulation	public regulation	public regulation

4. New Modes of Governance in Eastern Accession: Much Ado about Nothing?

The aim of the empirical analysis in the previous sections was to map the emergence and effectiveness of New Modes of Governance in the accession of three Central and Eastern European countries in the area of environmental policy. In light of the extraordinary financial and administrative burden imposed by the implementation of the environmental *acquis*, on the one hand, and the relatively limited state capacities of six transition countries, on the other, we expected to find a significant number of NMG to emerge. It would only be rational for state actors to seek the cooperation with non-state actors to share or shift the burden by pooling resources and delegating certain tasks, respectively. Therefore, the main research focus of our project was not the emergence but the effectiveness of NMG in enlargement; we initially set out to explore the extent to which NMG help improve the adoption of and adaptation to the *acquis communautaire*. Yet, the empirical evidence from our 24 case studies does not confirm our expectations. We have found only scattered evidence of NMG in the six countries. Where the non-hierarchical involvement of non-state actors emerged, it has remained unstable and cannot be regarded as an established mode of governance co-existing with – not to mention substituting for – the traditional command-and-control approach. Moreover, despite the differences between the six countries, the similarities with regard to the (non-) emergence of NMG are striking.

The *Fauna, Flora, Habitats Directive* is the only case in which our theoretical expectations were somehow met. Given their limited expertise, state actors have outsourced the drawing up of inventories of protected species or maps of protected sites, to universities, research institutes and environmental groups. Here we find state-driven processes of resource exchange where the government is outsourcing or contracting-out non-regulatory tasks to non-state actors. The involvement of relevant and highly specialized stake-holder organizations into the policy process does not only strengthen the capacity of the state to effectively implement the FFH Directive; the consultation of the scientific community and NGOs also fosters the legitimacy of government decisions, especially on such controversial issues such as the designation of protected areas that upset powerful interest groups, such as farmers, hunters, fisherman, and landowners.

The *Environmental Impact Assessment Directive* has been instrumental in challenging the traditional command-and-control approach to environmental regulation in the six countries since it systematically opens the policy process to non-state actors in its implementation. Yet, our countries have been reluctant to give civil society a voice in the authorization of projects. With the exception of Hungary, where the government outsourced the drafting of the national EIA law to an NGO and has continuously consulted environmental stake-holders in the revising the EIA process, consultation of non-state actors is less driven by their superior expertise but as a means to accommodate their concerns in order to prevent them from litigating. The differential empowerment of non-state actors has been less pronounced in Poland and Romania, however, which can be explained by the public scepticism against EIA and the weak organizational capacities of civil society, respectively.

The *Drinking Water Directive* is by far the most cost intensive policy in our sample since it requires heavy investments in the treatment facilities and distribution networks. While in all six states, the costs are mainly to be born by local governments, they have resorted to different strategies to cope with the costs. The three Central and Eastern European countries have sought to privatize their water sector rather than to establish NMG – well before the accession process started. Poland has been more reluctant to give up the state monopoly over the provision of drinking water due to the public scepticism against private investments in the water sector.

The *Large Combustion Plant Directive* shows no signs of NMG emerging – despite the high implementation costs. Again, privatization has been the dominant strategy with states seeking to stay in control by retaining a major share holder in the water companies. Only the Hungarian government has sought to introduce some elements of self-regulation in the area of pollution control, which has failed so far, however, due to legal uncertainties. The Polish government, by contrast, clings to its traditional approach of top-down regulation precisely because of its weak capacities and the related fears of agency capture by more powerful corporate interests.

To sum up, the adoption of and adaptation to our four EU environmental directives has been slowly improving. However, this is not so much due to the systematic emergence of New Modes of Governance through which state actors seek to involve non-state actors in the implementation process in order to pool resources and share costs. The FFH Directive demonstrates that if NMG are in place, they can contribute to a more effective adoption of and adaptation to EU environmental policies. Likewise, where state actors continue to rely on hierarchical steering, implementation often remains ineffective. Yet, the scope of NMG in all six countries is too limited to have a substantial impact on the overall effectiveness. Rather, our case studies find that improvements are mainly due to the increasing pressure from the European Commission and civil society. In a more indirect way, however, this combined pressure “from above and from below” has fostered the emergence of some New Modes of Governance. The legal requirement for public participation stipulated in the EIA and the FFH Directives have helped to open up traditionally closed policy process. Nevertheless, NMG are still scarce and only take weaker forms, such as consultation, cooptation, outsourcing and contracting out. Co-regulation or private self-regulation has been completely absent.

The results of our empirical case studies are in line with the general literature on Eastern enlargement, which has found little evidence of the role of New Modes of Governance.

“EU Governance in Central and Eastern Europe is dominated by bureaucratic actors, intergovernmental or inter-bureaucratic relations, and a top-down process of rule transfer (...).” (Schimmelfennig and Sedelmeier 2005: 21-22)

This has serious implications for our research on New Modes of Governance. Rather than finding out whether and under which conditions the non-hierarchical involvement of non-state actors has helped to make EU policies work in accession countries, we are faced with the puzzle of why NMG have been of so little relevance in the first place. Apparently, our theoretical assumptions about the emergence of NMG in state with weak capacities are somehow flawed.

5. Conclusion: Explaining the (Non-)Emergence of New Modes of Governance

Before revisiting our theoretical approach, we should have a look at the factors identified by our empirical case-studies that impaired the emergence of New Modes of Governance.

First, the accession process has been characterized by a top-down approach. The strong emphasis on conditionality by the European Commission, on the one hand, and the huge policy load and the time pressure, on the other, did not leave much time and place for the systematic involvement of non-state actors in the implementation process. On the contrary, some authors even argue that the implementation of the *acquis* has strengthened the state across the board and increased its autonomy from political and societal actors (Goetz 2005: 272).

Second, accession coincided with transition. On the one hand, managing the transition process requires a strong government to introduce and implement often costly political and economic reforms. On the other hand, the transition process entails high political and institutional uncertainties, which are reinforced by frequent changes in government and administration. This makes it difficult for non-state actors to establish stable relationships with state actors.

Third, the Central and Eastern European countries share an institutional legacy of an authoritarian state that heavily interfered with society and economy. The organization of societal and corporate interests used to be weak. Even after transition, structures of interest intermediation are still fragile. Thus, the approach of systematically involving non-state actors in the making and implementation of public policy does neither resonate with the traditional paradigm of a strong state nor can it build on stable state-society relations. Fourth, and related to the third point, non-state actors are not well organized. Societal and economic interests often lack the necessary resources (money, personnel) and/or the political willingness to organize and offer themselves as reliable partners to the state. In those cases, in which they did organize, it often took the help of transnational actors, such as environmental organizations, policy consultancies, companies, or EU-level confederations.

Fifth, state actors are reluctant to cooperate with non-state actors precisely because they lack resources which non-state actors may provide. Because of their weakness, state actors are afraid of being captured by powerful economic interests, who have superior expertise regarding the making of rules, and cannot be monitored in their compliance. In those cases in which NMG have emerged in a more systematic way, such as the implementation of the FFH Directive, the willingness of the state has mostly outsourced certain non-regulatory tasks to non-state actors while retaining the control over the policy process.

This first findings tend to show that at least in states in the midst of transition processes “new modes of governance” might not that easily fulfil the expectations connected to them as initially expected. First research results of including “soft steering” methods during the accession process from other policy fields than environment seem to confirm these findings (de la Rosa 2005). Focusing on social policy in some of the new member states, even shows that the inclusion of soft law based approaches have controversial effects and tend to be more successful, if this soft law tends to be “harder” (O'Hagan 2004). A very recent contribution⁵ finds that

due to the power imbalance in industrial relations of the new member states, soft law has effectively weakened working environment conditions (Woolfson 2006).

If we try to link these empirical insights back to the governance literature, we could summarize them under a dictum of Renate Mayntz, who argued that New Modes of Governance require both, *a strong state and a strong society* (Mayntz 1995). New modes of governance have been conceived as a functional equivalent to the traditional modes of the interventionist state. Yet, there are both theoretical reasons and empirical evidence indicating that new modes of governance need at least a “shadow of hierarchy” (Streeck and Schmitter 1985: 25); (Mayntz 1995: 163); (Scharpf 1993); (Héritier 2002; Héritier 2003). The threat of public actors to hierarchically impose policies provides a major incentive for non-state actors to engage themselves and their resources in voluntary cooperation with state actors or among themselves to produce collective goods and services. Likewise, the capacity of the state is crucial to discourage “shirking” of non-state actors; principal-agent theory points to the problem of informational asymmetries between the state principal and the non-state agents, which allows the latter to redefine the contracted policy in the implementation process. Therefore, the state must be able to control the performance of non-state actors. This would explain why state actors are reluctant to cooperate with non-state actors when they feel too weak to monitor and sanction. In case of co-regulation, an additional problem emerges since the state should not only be capable of enforcing an agreement negotiated with non-state actors but has to turn it into a public policy in the first place, e.g. by bringing it through the legislative process.

In sum, a weak shadow of hierarchy discourages both state and non-state actors from mutual cooperation. Thus, it is precisely the weakness of the CEE states that may explain why we have found so little evidence on the use of new modes of governance in the accession process.

While state capacity provides an important incentive for non-state actors to get involved with the state, non-state actors themselves also require capacity to become attractive partners to state actors. First, non-state actors need to possess resources (expertise, money, legitimacy), which they can exchange with state actors for access to the policy process. And second, they require the organizational capacity to participate and make their voice heard in the policy process. Finally, non-state actors require legitimacy. The public is not always inclined to accept policy outcomes that have been negotiated with non-state actors who do not possess a public mandate. This is particularly the case, if state actors seek to use the cooperation with interest groups and NGOs to circumvent the legislative process.

If Renate Mayntz is right that both state and non-state actors need at least a certain critical amount of capacities as a precondition for the emergence of New Modes of Governance, this may result in a major dilemma or even paradox for European enlargement: the lower the capacity of accession countries, the greater the need for New Modes of Governance to make EU policies work but the less likely they are to emerge.

Annex 1: Coping with Accession in Hungary, Poland, and Romania

	Hungary	Poland	Romania
Wild Birds / Habitats	<p>Effectiveness</p> <p>Due to lack of administrative capacity within the ministry the establishment of the Natura 2000 network lagged seriously behind. Intra-ministerial infightings delayed the designation process severely. Lack of public information on the process</p> <p>NMG</p> <p>Outsourcing of the inventory process to specialized ENGOs, but no systematic participation as state administration remains key actor; low trust between the actors. As the NATURA 2000 designation process runs into problems, the state commissions an NGO coalition with a public information campaign.</p> <p>EU</p> <p>EU pressure crucial.</p>	<p>Effectiveness</p> <p>Huge resentment against the establishment of Natura 2000 sites on the local level, the enlargement and establishment of new sites is very difficult→ negotiation processes take place at the moment</p> <p>NMG</p> <p>State administration as a key actor but increasing cooperation, outsourcing of the inventory process for habitat types as a result of increased EU pressure. The expertise of NGOs was only recognized by state actors after the revision of the inventory was demanded by the Commission. Good communication between administration and ENGOs</p> <p>EU</p> <p>EU pressure crucial.</p>	<p>Effectiveness</p> <p>Deficient transposition and “downloading” of the EU legislation, without securing financial and human resources for their enforcement. Designation process should be closed by January 2007. No allocations from the state budget for Natura 2000 were available until 2005, process was financed through EU funds.</p> <p>NMG</p> <p>State administration as a key actor, confrontation between ministry and ENGOs, partial local collaboration in the designation process.</p> <p>EU</p> <p>EU pressure crucial. Even more so EU funding.</p>
Drinking Water	<p>Effectiveness</p> <p>Accession criteria and EU funding were speeding up the modernization process which started already during state socialism. Perpetual administrative restructuring processes both on the intra-ministerial and the local level were hindering the consolidation of the sector.</p> <p>NMG</p> <p>The transfer of water utilities to the local level opened doors for the privatization of the water sector, resulting in the appearance of EU multinationals, accounting for about 30% of water provision. Rather low ENGO involvement.</p> <p>EU</p> <p>Moderate EU pressure, importance of EU funding</p>	<p>Effectiveness</p> <p>Implementation problems related to high costs and the transfer of administrative duties to the local level, as well as the requirement to transform the utilities into companies in commercial law.</p> <p>NMG</p> <p>Two models of non-state actor participation: minority shareholding and jointly owned operating companies. Not so much involvement of ENGOs</p> <p>EU</p> <p>Moderate EU pressure</p>	<p>Effectiveness</p> <p>Legislation effectively transposed but it is too early to judge on implementation. Transfer of administrative duties to the local level, massive reliance on EU funding and loans for the restructuring. Very long transition periods negotiated.</p> <p>NMG</p> <p>Process still mostly command and control, but high cost of the directive where pushing local administrations towards concession contracts the privatization in several cities.</p> <p>EU</p> <p>Moderate EU pressure, importance of EU funding</p>

	Hungary	Poland	Romania
Environmental Impact Assessment	<p>Effectiveness</p> <p>Legal transposition already before accession, process seen problematic since it overburdens local administration. Improvement and increase in using EIA during accession, that will be probably will be boosted after a reform of EIA in 2005, which simplifies the procedure.</p> <p>NMG</p> <p>Outsourcing of directive drafting to two specialized NGOs, representing the small EIA community, which has very good working relations with the administration.</p> <p>EU</p> <p>Moderate/low impact</p>	<p>Effectiveness</p> <p>Further administrative adaptations necessary. Quick legal transposition during the nineties to secure EU funding.</p> <p>NMG</p> <p>NMG not generalised. No NMG in the formulation of the law, a rather exclusive process. NMG further hindered due to corruption cases concerning the EIA in which NGOs were involved.</p> <p>EU</p> <p>EU pressure crucial and EU funding of infrastructures</p>	<p>Effectiveness</p> <p>While legal transposition was accomplished, implementation of the directive is not yet effective and the administrative structure still not clear.</p> <p>NMG</p> <p>Quick and top-down transposition due to time delay and high EU pressure without serious involvement of non-state actors. NGOs included in information campaign about the directive after transposition.</p> <p>EU</p> <p>Strong EU pressure</p>
Large Combustion Plants	<p>Effectiveness</p> <p>Implementation was seen as a success, with a short transition period until the end 2004, which the affected industry took with success. The approximation process started already in the mid-nineties.</p> <p>NMG</p> <p>Close collaboration between ministry and industry, which remained clearly personally interlinked despite the privatisation of the sector. Though several attempts were started to apply NMG, this haven't materialized, mainly due to fears of legal uncertainty of such a process.</p> <p>EU</p> <p>Definition of standards</p>	<p>Effectiveness</p> <p>High costs of implementation and high dependency of the Polish energy sector on brown and hard coal. High transition periods granted.</p> <p>NMG</p> <p>NMG hardly observed due to the technological approach of the directive coupled with weak administrative capacity.</p> <p>EU</p> <p>Definition of emission standards</p>	<p>Effectiveness</p> <p>High implementation costs. Extensive transition periods. Strengthening of control capacities. Lack of financial resources</p> <p>NMG</p> <p>Close cooperation between state administration and mostly still state-owned industry. Partial cooperation with NGOs and research institutes on technical matters.</p> <p>EU</p> <p>Definition of standards</p>

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