

Edward Best, 'Alternative Methods of Regulation in an Enlarging Union'  
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# **Alternative Methods of Regulation in an Enlarging Union**

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***Work in Progress***

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## INTRODUCTION

The two decades between the mid-1980s and the mid-2000s have been a period of dramatic change for European integration in many respects. The Union has greatly broadened the scope of its coverage as well as the size and diversity of its membership, all against the background of radical political changes in Europe and the world. In the face of this increasing complexity, the Union has had to adapt its institutional system.

This has involved a 'deepening' of integration with respect to some policies and processes, in the sense of further strengthening the powers of EU-level authorities and reducing the margin of discretion left to national actors. Yet the adaptation of the system has also entailed the adoption of approaches which differ from traditional methods in some fundamental respects. This is not only a matter of 'soft law', as opposed to legally-binding measures. There has also been some redefinition of the nature of common goals, and revaluation of the ways in which non-state actors participate in policy processes.

These methods did not appear in an orderly way, far less follow some overarching grand design. The EU has thus come to pursue, as alternatives to 'hard regulation', 'self-regulation and co-regulation', market-based mechanisms, the Open Method of Coordination and more. By the end of the 1990s the need was felt to put some conceptual order into the situation. In the Euro-political world, this was reflected in the Commission's 2001 White Paper on Governance and programmes for Better Regulation, culminating in the 2003 Interinstitutional Agreement on Better Lawmaking. Yet these formulations have left many questions open as to the real value and relevance of concepts such as 'co-regulation' in the European context. Have we really reached agreement on these 'alternative methods' - and in ways in which both legislators and social and economic actors are interested in working? There has since been a 'settling down', coinciding with the run-up to, and digestion of, the 2004 enlargement.

This paper looks at the role of enlargement in these processes of adaptation, experimentation and reframing. It traces the emergence of non-legislative methods in EU adaptation to new pressures, arguing that two different dimensions are involved. Non-binding forms of cooperation between Member States have arisen largely as responses to increasing diversity. New forms of interaction between public and private actors have also emerged, responding to pressures to increase stakeholder participation in the interests of both legitimacy and effectiveness. These involve varying interactions between law and non-law, generically referred to as 'self-regulation' and 'co-regulation', but which may be better conceptualized as a continuum of forms of 'interactive regulatory practice'. The paper argues that the adaptation by the EU system to increased international diversity through new, non-binding forms of policy coordination has so far been successful in maintaining a minimum consensus and in promoting convergence. On the other hand, it suggests that this increased diversity may work against consolidation of some of the new forms of 'interactive regulatory practice' which have emerged.

## 1. DYNAMICS AND DIMENSIONS OF CHANGE

Why and how do new methods of cooperation emerge in the European Union (or within any regional system of deep integration)? The basic analytical framework adopted here draws on various strands of institutionalist thinking. Institutionalists argue, at a minimum, that one needs to look at the process as a moving picture rather than a series of snap-shots (Pierson 1996); and that one needs to broaden the understanding of institutions beyond formal organs of state or government, both to include other actors and to take into account the importance of embedded rules, norms and values. Beyond this, there are quite different approaches which can be classified as rational choice institutionalism, sociological institutionalism and historical institutionalism. They present rather different hypotheses about change, giving greater importance to institutional dysfunctionality as a result of exogenous shocks; shifts in the balance of power or resource ownership; the prominence of norms; or path dependency, unanticipated consequences, and the role of supranational actors (Stacey & Rittberger 2003; Pierson 1998). Each of these approaches offers valuable insights but, as empirical evidence seems to confirm, they may be of different relevance according to the particular area involved. Different institutions rest on different sets of ideational and material foundations, so that the processes of change are also likely to be different (Thelen 1999, Lindner 2003).

The approach adopted here draws on different elements from this range of institutionalist analysis, and aims to go beyond any opposition of change and stability, by adopting a simple general model drawn from theories of complex systems. It may be briefly summarized as follows. The EU constitutes a complex system in which the function of control is distributed among multiple actors. Such a system needs constantly to adapt in order to maintain a 'fit' with its environment. This adaptation is not a simple process, but works in two directions as a sort of co-evolution, and there is more than one possible state of stability. If there is a change in boundary conditions between the system and its environment, - that is, as with EU enlargement, the importation of elements which were previously outside, and which may cause perturbations to the stability of the system - the challenges become more severe (Best *et al* 2005; Geyer 2003). This model seems to offer an appropriate way of conceptualizing the evolution of the EU, if one accepts that there are not only divergent preferences but also multiple solutions to the challenge of maintaining stability and 'fit'. Adaptation, in this model, requires:

'minimizing deviations from a goal configuration by counteracting perturbations before they become large enough to endanger the essential organization. This means that they system must be able to: 1) produce a sufficient *variety* of actions to cope with each of the possible perturbations (Ashby's "law of requisite variety"); 2) *select* the most adequate counteraction for a given perturbation.' (Heylighen 2001: 15)

The notion of producing a 'sufficient variety of actions' to deal with new complexities seems to capture rather well the way in which the EU, seen as a system, has tried to generate a range of new approaches to cope with new pressures.

These pressures are of two basic sorts. There are endogenous factors generated by the integration process, whether more results-oriented ('functional spillover' by which developments in one area bring about changes in another, or perceptions of an instrumental dysfunctionality of existing arrangements in the face of shared concerns) or more to do with normative perceptions and interests (institutional interests, socialization of actors, politicization of debates). And there are exogenous factors, ranging from the natural international consequences of having a common commercial policy, including the expectations of others, through challenges of international competitiveness, to political crises and eventually such massive changes as the end of the Cold War.

Enlargements, as major 'boundary changes', are somewhere in between, representing the introduction of previously external factors into the system. They may contribute to internal pressures (in decision-making procedures, as a result of greater numbers, or in policy challenges, as a result of increased diversities). They may also cause shifts in the balance of perceptions and interests regarding the nature of the integration process and the most appropriate way of responding to internal and external pressures. In other words, enlargement may contribute to changes both in the nature of the challenge and in evaluations of possible responses.

### **Law and Non-Law**

How has the European system responded to such pressures? The Community Treaty laid down rules for achieving the stated objectives of a common market supported by a number of common policies. This would be done primarily through legislation. By the end of the first decade, both the customs union and 'normative supranationalism', as well as core common policies, had been consolidated, despite the crisis over 'decisional supranationalism' in the mid-1960s. The resulting 'Luxembourg compromise' can indeed be seen precisely as a forced adaptation of the rules to permit continuity in the overall legislative approach. Since then there has been an accelerating proliferation of methods, instruments and procedures over the decades as the Community, and later the Union, has responded to new ambitions, new pressures and new members.

In Commission documents on governance and better regulation, there is little fundamental discrimination between alternative methods. These tend to be presented as a set of options, along a single implicit dimension of 'hardness', which are open to the Commission when making proposals concerning a possible Community 'intervention'. The Commission's 2002 Action Plan on Simplifying and Improving the Regulatory Environment thus talked of establishing mechanisms which will make it easier:

*'to choose the most appropriate instrument or combination of instruments (of both a legislative and non-legislative nature) from the wide range of options available (regulation, directive, recommendation, coregulation, self-regulation, voluntary sectoral agreements, open coordination method, financial assistance, information campaign)'. (EC 2002a p.7)*

This partly reflects an obvious institutional interest in keeping as much of a role as possible and in tying new approaches to a 'reinvigorated' Community method.

In a different way, however, academic approaches have also tended to lump things together on a single dimension of 'new governance'. Scott and Trubek (2002) distinguish between methods which have been adopted as means to improve the effectiveness and legitimacy of the 'classic Community method' (the use of framework directives, comitology, improved consultation and participation by civil society); and forms of New Governance which are essentially different. However, they do not disaggregate further. Knill and Lenschow (2004) place, for example, both self-regulation and the Open Method of Coordination (OMC) in a single category of 'steering mechanisms' which are classified according to their respective levels of obligation and precision. Treib et al (2005) go further towards distinguishing different basic conceptions, and recognize the importance of the relationship between 'state intervention' and 'societal autonomy'. However, they conclude with a typology based on four modes of governance (coercion, voluntarism, targeting and framework regulation) which relate primarily to the nature of the relationship between states. The 'hybridity thesis' about law and 'new governance' (de Burca & Scott 2006) likewise understates the importance of the relationship between public and private actors.

The framework proposed here suggests that the emergence of alternative methods should be seen against two fundamental dimensions – namely the nature of the relationship between the Member States on the one hand, and the participation of private actors, on the other. The two dimensions are put together in the matrix in annex.<sup>1</sup> These reflect the peculiar nature of the EU as both a system of international cooperation and an emerging political system in its own right. They are also the two basic dimensions in the consolidation of any deep regional system, namely the interaction between governments, on the one hand, and the interdependence and solidarity between societies, on the other.

The first dimension concerns the nature of the goals which are pursued between countries. At the 'hard' end, we have legally-enforceable compliance with uniform common rules, and at the extreme, total harmonization. Moving towards the 'softer' end, we would place (roughly)

- framework directives (EC)
- framework decisions and decisions (EU)
- coordination of economic and employment policies
- other open methods of coordination and cooperative exchange

In the useful but incomplete terms proposed by Abbot et al (2000) concerning legalization of international agreements, the hard end here is the world of both maximum

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<sup>1</sup> This has some elements in common with the parameters of the Integrated Project 'New Modes of Governance' (NEWGOV) which, in the matrix cited in Treib et al (2005 Table 1 – see Annex).

'precision' and maximum 'obligation' in the commitments specified, as well as of high 'delegation' of powers to autonomous bodies in agenda-setting, decision-making and control. The 'softer' arrangements which emerged can be seen to take various forms according to these dimensions. Framework directives can be binding while affording greater flexibility. Commission Guidelines can be very precise but not legally binding.

Goals may also be cast in terms which are not directly reflected in the dimensions of legalization. European Political Cooperation and the Common Foreign and Security Policy have been very loose in formal terms (low obligation, low precision, no delegation) but have contributed to socialization and of cooperative reflexes.

Policy coordination provides another example. The provisions on coordination of economic policy in the Maastricht Treaty, the new chapter on employment introduced by the Amsterdam Treaty, the subsequent agreements to use some version of OMC in other policy areas, are not legally binding. Competence remains national (or regional). With the specific exception of the excessive deficit procedure and the Stability and Growth Pact, no sanctions are involved. Governments are expected to follow the guidelines, and then respond to specific Council Recommendations, peer pressure through benchmarking and the demands of their own national stakeholders and publics. The objectives include convergence and the achievement of common targets – with more or less precision according to the case - but the fundamental goal is better national policy performance in the spirit of mutual learning. The same range of goals can apply to private actors – from self-regulation in the sense of the definition and enforcement of common rules to transnational exchanges of good practice.

Harmonization is in some cases explicitly excluded. This is not just a matter of political preferences, although the particular constellation of governing parties at any time shapes when and how things are agreed (Schaefer 2004). Experience suggests that there is no necessary movement towards harder integration in all policy areas. In some cases, the degree of underlying diversity may make it inappropriate as well as unacceptable to adopt binding uniform measures, and enlargement may only strengthen this.

The enlargements have brought a constant increase in diversity between the Member States when it comes to models of the welfare state. Three basic models within the EC could be identified by the 1980s, based on Esping-Andersen's 'three worlds of welfare capitalism' (1990). These reflected structural differences which 'can be roughly equated with the social philosophies and the postwar dominance of 'liberal', "Christian democratic" and "social democratic" political parties.' (Scharpf 2002) They could be associated roughly with different sets of countries – Anglo-Saxon, continental and Scandinavian – even though in most countries a mixture of these models applies. Whereas the founding Six could all be characterised as having 'Bismarkian' continental models, the degree of national diversity has grown with each enlargement (Pochet 2005: 44-45). The 1973 enlargement added the Anglo-Saxon/liberal (UK and Ireland) and the

Scandinavian/ Social Democratic (Denmark). The Mediterranean enlargements brought in a distinct Southern model (although some see this as only a variant of the continental model). The 1995 round reinforced the presence of the Scandinavian model. The 2004 enlargement brought in what can be considered to be a post-socialist 'Eastern European model' (Eurofound 2006) and in all events introduced yet more diversity in labour and welfare institutions (Vaughan-Whitehead 2005).

Many thus believe that 'uniform European social policy is not politically feasible or even desirable ... [U]niform European solutions would mobilize fierce opposition in countries where they would require major changes in the structures and core functions of existing welfare state institutions'. (Scharpf 2002: 666, 651) Even if it is argued that some of these models require reform, it is still generally recognised that 'Europe cannot and should not have a strategy for reforming national labour market and social policies. It is up to each national government to devise its own strategy.' (Sapir 2005: 7) We may try to cooperate, to learn from each other, and to promote some general convergence. We could make use of framework directives to provide appropriate counterparts to market regulation. We will not adopt uniform policies at European level.

OMC has primarily responded to the challenges of this increasing diversity. Moreover, the enlargements have clearly had an influence on the balance of thinking as to how to respond to issues of common concern. This is not only a matter of the UK's role. If one looks, for example, at the origins of the employment strategy in the mid-1990s, one sees a shared perception of the need to do something (and to be seen to be doing something) about the problem of unemployment, but important differences between the Member States as to how to go about it. The way in which it was decided that the system should be adapted was shaped by enlargement (in this case the important influence exerted by incoming Sweden) as well as changes of government in the first half of 1997 in both France and the UK which brought in parties much more favourable to active public policies to address unemployment.

### ***Public- private interaction***

The second dimension concerns the interaction between public and private actors. The extreme of hard regulation in this perspective is thus the world of 'command-and-control' approaches, in which binding uniform rules are formulated, monitored and enforced by public authorities. Private actors should be consulted but in the end are simply obliged to comply. At the other extreme, the world of pure self-regulation, associations of private actors set and monitor their own rules with no public interference.

The texts adopted by the European institutions in the last few years make it sound as if we now have clear and agreed definitions, procedures and conditions regarding the possible policy instruments which may emerge on this axis. The climax was the

*Interinstitutional Agreement on Better Lawmaking*, published in December 2003.<sup>2</sup> Considerable space was devoted to 'alternative methods of regulation', including the following generic definitions:

Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).

Measures are to be taken to follow up application. The Commission is to keep the legislator informed and if necessary 'propose an amendment to the legislative act or any other appropriate legislative measure'. What is not at all clear, however, is who exactly would do what, and on what basis, in the first place. The agreement simply states:

'In the context defined by the basic legislative act, the parties affected by that act may conclude voluntary agreements for the purpose of determining practical arrangements.'

'Self-regulation', on the other hand, is presented as a bottom-up process:

'the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).

'As a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas which are not covered by the Treaties or in which the Union has not hitherto legislated.

These practices are, logically enough, subject to evaluation and monitoring by the Commission 'to verify that they comply with the provisions of the EC Treaty'. Beyond this, there is a rather unclear indication of what the Commission is expected to do. It is to notify the European Parliament and the Council of the practices which it regards as a) 'contributing to the attainment of the EC Treaty objectives and being compatible with its provisions'; and b) as being satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the commitments given'. The possibility is left open for the Commission to present a legislative proposal 'in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices'.

Yet these formulations prompt many questions. In the case of 'co-regulation', is the European legislator supposed to delegate *discretionary* responsibility to private European organizations for implementation of specified provisions of the act? Would this be legally possible? If the responsibility is limited to 'practical arrangements', does this really

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<sup>2</sup> OJ C 321 of 31 December 2003.

qualify as 'co-regulation' at all? Or is the reality more one of co-regulation at the national level, the 'parties affected' being the Member States?

Moreover, the reality is not so simple. In the sectors where such approaches have emerged, many different sets of actors and dynamics are involved. Arrangements are neither static nor uncontested. And in some cases, their further evolution is influenced by broader changes, including enlargement.

The following section therefore starts by clarifying terms and concepts. It then aims to identify, in the light of the basic analytical model indicated above, the specific circumstances in which the new approaches arose, the basic principles by which they operate, the pressures for further change which have emerged and the relevance of enlargement for this process. The three main areas have been standardization, environmental agreements and social dialogue.

## **2. ALTERNATIVE METHODS OF REGULATION**

### **Concepts and Terms**

The term 'co-regulation' has been misleading and misused in the European context. Self-regulation and co-regulation are not two discrete concepts or processes. Nor do they correspond mainly to particular kinds of *instrument*. It is more fruitful to think of a continuum of forms of *interaction* between public and private actors. At one end, we have pure self-regulation. Only private actors are involved in rule-making, implementation and enforcement; and the arrangements concern an area which is not susceptible to public regulation so long as there is no incompatibility with general rules on competition, non-discrimination, health and safety and so on. At the other end, we have prescriptive regulation, adopted, implemented and enforceable by public authorities. Transnational private arrangements may exist but are essentially means to organize technical compliance by the actors concerned.

In between is a zone of dynamic relation between law and non-law, in which one may distinguish three sections:

- the adoption of a voluntary commitment among private actors with the objective of pre-empting regulation;
- the formal endorsement by public authorities of a voluntary commitment, with some form of monitoring and the explicit possibility of regulation;
- the establishment by the state of a system to achieve public policy goals – possibly involving negotiation between public and private actors of the specific

targets and requirements – which leaves *discretionary* powers to a non-state-regulatory system for achieving the goals, subject to the overall responsibility of the state. (Hans-Bredow-Institut 2006)

This zone may better be denominated as one of '*interactive regulatory practice*'. In other words, these are not isolated options but steps in a set of escalating possibilities in public-private interaction. Although many possible benefits can result from leaving private actors to work out the best way of achieving goals, the evidence suggests that the 'shadow of the law' is usually necessary. A global study carried out by the OECD (2003) stresses the importance of the credibility of the threat of state intervention. This is borne out in studies of environmental policy (Gunningham *et al* 1998; de Clerq 2002; Börkey *et al* s.d.), consumer policy (Lex Fori 2001), and the media (Lievens *et al* 2006; Just & Latzer 2004). The relationship should, however, be as much about incentives as about threats – a 'pyramid' of regulation and enforcement, as in the concept of 'responsive regulation' proposed by Ayres & Braithwaite (1992).

## 2.1 The Internal Market and Standards

The first example of 'co-regulation' is usually held to be the New Approach. After the grand ambitions stated in 1969 and 1970, the 1970s turned out to be a period of frustration in various respects. Existing arrangements proved dysfunctional for the removal of technical barriers. The pursuit of detailed European harmonization of product specifications was all the more difficult to achieve in practice due to the requirement for unanimous decision-making in the Council. A first response of the system, so to speak, was the principle known as 'mutual recognition' as formulated by the Court of Justice in its 1979 *Cassis de Dijon* judgement: products which were lawfully marketed in one Member State could not be prevented from circulating in others. Where this entailed a conflict between legitimate restrictions under the terms of the treaty, some minimum harmonization was inevitable. On this basis, the *New Approach*, formulated in a 1985 Council Resolution,<sup>3</sup> recognized that this harmonization could in many cases be limited to the definition of essential requirements (usually of health and safety). Conformity with these requirements could be shown either by conforming to harmonized standards drawn up by standardization bodies<sup>4</sup> or by other means. Different conformity assessment procedures may be indicated in the directive. This kind of 'co-regulation' may be summed up as follows. Public authorities lay down 'essential requirements'. Private actors enjoy some flexibility over how they achieve and demonstrate conformity.

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<sup>3</sup> Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136 of 4 June 1985 pp.1-9.

<sup>4</sup> Harmonized standards were to be drawn up by consensus by national standards bodies meeting in the European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC), and European Telecommunications Standards Institute (ETSI), on a mandate from the European Commission.

Compliance itself is not optional, but there is some choice as to the means, which should encourage innovation on the part of industry in finding cost-effective responses.

A Commission Communication in 2004 sums up the essence of this approach as follows:

'the "New Approach" has proven to be a specific model of legislation by which both the public interest (i.e. protecting public health and safety, consumer and environmental protection) and the interest of private business to produce standards according to the relevant "state of the art", could be merged in an adequate way. It allows for more flexible and less stringent forms of legislation in areas where, otherwise, any detail would have to be determined by the legislative act itself.' (EC 2004c)

Already by the end of the 1990s, this approach was being openly promoted as a model which could be applied in new sectors.

### *Enlargement*

Enlargement, however, has not been a major factor in the emergence of this method, although there is a clear concern now to ensure that standards organizations across Europe have the capacity to operate effectively, as reflected in 2006 proposals by the Commission to expand Community financing for standardisation.

## **2.2 Self- and Co-Regulation in Environmental Policy**

The debate in the case of environmental policy focused on 'environmental agreements'.. However, the notion of environmental agreements reflects the idea of a dynamic interaction between public and private actors and interests in the formulation and implementation of rules and actions.

The end of the 1980s saw the first experiments, in the form of a Commission Recommendation for the labelling of detergents and cleaning products, and Recommendations regarding the reduction of chlorofluorocarbons (CFCs) and halons. These Recommendations were mild in their terms. Very general targets were indicated. Industry was recommended 'to seek' to limit and reduce consumption in order to achieve them. The 5th Environmental Action Programme of 1992 then proclaimed a general move from a top-down approach based on legislation to a more 'bottom-up' strategy involving a 'reinforcement of the dialogue with industry and the encouragement, in appropriate circumstances, of voluntary agreements'.

This shift was clearly shaped by overall trends in environmental policy thinking in many European countries, where environmental agreements had been increasing over the 1980s, and the world at large. This period coincided precisely with the road to Rio and the 1992 United Nations Conference on Environment and Development. It was also

partly a response to, in some respects even an anticipation of, dysfunctionality in the system. Although the environment was only introduced as a policy competence by the Single European Act (SEA), a considerable amount of legislation had already been adopted. The move to a new approach was strongly influenced by general concerns over *implementation*. With rates of non-transposition particularly high for environmental directives, it was hoped that new approaches would be more effective as a result of their greater flexibility to take account of local contexts as well specific incentives for industry and involvement of stakeholders (Knill & Lenschow 2000). Moreover, although the impact of qualified majority voting might make it easier to adopt decisions, this was also already seen to pose the danger that countries which were over-ruled might then ignore their obligations for implementation (Hildebrand 1993).

There was also an interaction with decision-making trends. Before 1987, legislation concerning the environment had been adopted mainly on the basis of Article 100 (now 94 - approximation of laws for the common market) and/or the catch-all Article 235 (now 308). After the SEA came into force, provisions were explicitly available for environmental legislation. However, the early version of subsidiarity which was built in to those provisions<sup>5</sup> could actually widen the possibilities for challenging EC environmental action (Lodge 1989; Hildebrand 1993). This was only strengthened in 1992 with the general change in the EU political climate following the post-Maastricht ratification problems, and the adoption of a more restrictive attitude towards legislation. Indeed, in some of the few cases which *were* pursued at EU level by recognition or negotiation of agreements in the 1990s, one can see the influence of specific blockages in decision-making. This factor works two ways, however, On the one hand, blockage in the Council could make seem easier to act through a voluntary or negotiated route. On the other hand, such a blockage meant that there was a reduced credibility of the 'shadow of the law' which would made it all the harder to obtain ambitious commitments from industry.

### *CO<sub>2</sub> emissions*

This was indeed part of the problem surrounding the most important EU-level environmental 'agreements' to date, namely the Commission Recommendations recognizing voluntary commitments of automobile manufacturers to reduce CO<sub>2</sub> emissions from passenger cars.

In 1991 and 1992, the Commission investigated different methods for regulating such emissions, notably a purchase tax and an annual circulation tax. The Commission was divided and the Council rejected both (Keay-Bright 2000). The Commission, evidently also having a broader interest in the success of voluntary agreements, then moved

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<sup>5</sup> Article 130r (4) 'The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.'

towards negotiated agreements in the context of a three-pillar strategy. This aims to achieve an average CO<sub>2</sub> emission figure of 120 g/km for all new cars by 2010, through fuel economy labelling of cars; the promotion of fuel efficiency by fiscal measures; and commitments of the automobile industry on fuel economy improvements. For the latter, negotiated agreements were reached in 1999 and 2000 first with the European Automobile Manufacturers Association (ACEA) and then with the Korea Automobile Manufacturers Association (KAMA) and the Japan Automobile Manufacturers Association (JAMA).<sup>6</sup> These take the form of Recommendations giving recognition to the commitments given by those bodies to achieve total new passenger car fleet average CO<sub>2</sub> emissions of 140g CO<sub>2</sub>/km by 2008 (ACEA) or 2009 (KAMA and JAMA).

The failure of the Commission to achieve consensus on a policy method to legislate CO<sub>2</sub> from passenger cars in the early nineties, not only set back the intention to tackle the issue by several years, but weakened the Commission's position with respect to the voluntary agreement negotiations as the Commission had no 'stick' with which to threaten industry.

The automobile industry knew that the Commission was very keen to ensure that the voluntary agreements would be a success and that there existed no alternative in the way of a binding legislative proposal. (Keay-Bright 2000: 6)

This was part of the reason why the negotiations produced an agreement which was low both in ambition and in strength, despite apparently favourable objective conditions.<sup>7</sup>

### *Energy efficiency*

The Commission's apparent political choice for the 'soft' approach was in part confirmed by the difficulties experienced during the first half of the 1990s in introducing some binding measures, as illustrated by the 'refrigerator directive'. The Proposal for this measure arose mainly from internal market considerations. Minimum efficiency performance standards (MEPs) were introduced by some Member States which had ambitious energy efficiency policies. Since energy efficiency was not considered a sufficient reason to justify barriers to trade, the logical outcome was to propose Europe-wide MEPs. The first case concerned refrigerators and freezers. Following the Dutch notification in 1992, the Commission prepared a proposal which was presented to the Parliament and the Council in December 1994 and only adopted in September 1996.<sup>8</sup> This long delay was due both to strong opposition from manufacturers and strong differences between Member States. In the course of the negotiations, a variety of

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<sup>6</sup> Respectively, Commission Recommendations on the reduction of CO<sub>2</sub> emissions from passenger cars of 5 February 1999 (1999/125/EC OJ L 40 of 13 February 1999).

<sup>7</sup> On the negotiation of these agreements see WWF sd; Pallemarts 1999; Keay-Bright 2000; Dalkmann et al 2005.

<sup>8</sup> Directive 96/57/EC of the European Parliament and of the Council of 3 September 1996 on energy efficiency requirements for household electric refrigerators, freezers and combinations thereof OJ L 236 of 18 September 1996 pp.36-43.

pressures and arguments were brought to bear in favour of negotiated agreements rather than regulation: greater flexibility to reach a target average efficiency, or greater speed to adapt than legislation requiring years of negotiation. (Bertoldi 1999)

### *The 1996 Communication*

In November 1996, the Commission presented a Communication on environmental agreements (EC 1996). This identified several advantages as well as risks of such methods. It also addressed the relationship between such agreements and legislation at European level. It was made clear that the Commission could, for the time being, only use non-binding agreements and that these should be based on objectives already endorsed by the Community institutions.

'Legislation will remain the necessary backbone of Community environmental policy, but it needs to be supplemented by market-based instruments and voluntary approaches. In that respect, Environmental Agreements are an *implementation* tool rather than a means of deregulation.'<sup>9</sup>

The Commission proceeded to recognize a number of voluntary commitments in the second half of the 1990s in addition to the Recommendations on CO<sub>2</sub> emissions. The main experiment concerned detergents. In 1996, the European association AISE adopted a Code of Good Environmental Practice for the Household Laundry Detergents. The Commission in 1998 adopted a Recommendation 'in order to enhance the effectiveness and to guarantee the transparency and credibility of this industry commitment'.<sup>10</sup>

Four agreements on energy efficiency were also endorsed by the Commission in the form of negative clearances/exemptions under competition policy.<sup>11</sup> These were a commitment by the European Association of Consumer Electronics Manufacturers (EACEM) for the reduction of stand-by losses of TVs and VCRs (1997), and commitments by the European Committee of Domestic Equipment Manufacturers (CECED) on the cessation of production and imports of low-energy efficiency washing machines (1997) household dishwashers (1999) and water heaters (1999). EACEM adopted a further commitment for the reduction of stand-by losses of audio products in standby mode in 2000.

These first experiences were held to show various positive elements. Yet it also remained clear that, since the Community environmental agreements could only take the form of unilateral non-binding commitments, 'there is a requirement to have a credible threat of legislation and to use these agreements together with other instruments' (Lefèvre 2000). The Commission's 2000 Action Plan to improve energy efficiency thus argued that,

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<sup>9</sup> *ibid.* pp.6-7 (emphasis added).

<sup>10</sup> Commission Recommendation of 22 July 1998 concerning good environmental practice for household laundry detergents. OJ L 215/73 1. 8. 98.

<sup>11</sup> Notices pursuant to Article 19(3) of Council Regulation No 17/62(1) in OJ C 12 of 16.01.1998; OJ C 382 of 9 December 1998; OJ C 250 of 8 September 2001.

although a large number of appliances could be subject to such agreements, a framework directive was still desirable (EC 2000a).

### ***Reactions and Rationalization***

The next step in the evolving relationship between law and non-law reflected reactions by the legislator, particularly the European Parliament, in the context of the broader efforts being made by (and within) the Commission to come to terms with these new methods. In the second half of the 1990s, the Parliament, enjoying its new powers of co-decision in legislative decision-making, was trying to get a hold on what was happening at the level of implementation, whether comitology or the use of agreements.

The Parliament successfully pressed for a strengthening of the monitoring procedures provided for in the agreements over CO<sub>2</sub> emissions from cars. The Parliament had been lukewarm in its 1997 resolution on the 1996 communication, indicating that it was 'concerned that the increasing shift of environmental protection tasks from parliamentary legislation, backed by democratic legitimacy, to self-regulation by industry, is leading to reduced legal certainty and may therefore trigger a crisis of confidence on the part of the public' (EP 1997). The crunch came over PVC in 2001. In the late 1990s, the Commission had begun to consider the environmental issues related to PVC, notably the use of certain additives and management of waste. In the context of consultations prior to a Green Paper, a 'Voluntary Commitment of the PVC Industry' was presented to the Commission in March 2000 under the name of *Vinyl 2010* with the aim of pre-empting legislative measures. This promised to carry out risk assessments on plasticizers; to replace lead stabilisers; to develop recycling schemes; and to provide the resources for management and monitoring. In July 2000, the Commission published the Green Paper. The response to the voluntary commitment was clear: 'while this can be seen as a first step there is still work to be done to ensure an effective participation by industry in achieving Community goals in this area' (EC 2000b). Despite the 'invitation' to participate in the Monitoring Committee, the Commission has never given any recognition to *Vinyl 2010*, which is judged, at least in DG Environment, to have too low a level of ambition (Schnabl 2005).

The Green Paper concluded by asking for responses as to the appropriate instruments to implement a horizontal Community strategy: voluntary approaches, legislative measures or a mix of both. The answer of the European Parliament, in April 2001, was strong. The Parliament considered that the commitments given by the PVC industry were not sufficient; called for the Commission to review good practices with regard to voluntary commitments and environmental agreements and then to propose 'legislation to encourage the attainment of ambitious objectives'; and argued that 'the task of defining precise objectives at Community level is a matter for the legislator, which cannot therefore left to the goodwill of industry, within the framework of the voluntary commitment'. The Parliament used the opportunity to request from the Commission:

'a proposal for a general legislative framework [which,] once defined in co-decision with the European Parliament, could establish once and for all the criteria that will have to be satisfied by future environmental agreements, in particular regarding the conditions, monitoring arrangements and penalties.' (EP 2001)

### ***The 2002 Communication on Environmental Agreements***

The response of the Commission was the July 2002 Communication on Environmental Agreements at European Level (EC 2002c). This suggests three categories of environmental agreement in which some action by the Commission may be necessary (as compared to purely spontaneous decisions of stakeholders in areas where the Commission has no intention of proposing legislation):

- self-regulation which is acknowledged at Community level by means of a Commission Recommendation of an exchange of letter;
- self-regulation which is acknowledged by a Commission Recommendation which is accompanied by a monitoring Decision;
- coregulation, in the sense of environmental agreements which are concluded in the framework of a legislative act in order to implement its 'essential aspects'.

It also puts forward both a number of basic legal conditions for environmental agreements and a set of 'assessment criteria'. These include the representativeness of the parties concerned; quantified and staged objectives; involvement of civil society; monitoring and reporting; sustainability; and incentive compatibility.

In the case of self-regulation, the Commission should evaluate a proposed agreement, may inform the Parliament and Council of its evaluation and conclusion, and may take the decision to recognize it. The Commission is to verify if the underlying environmental objective is actually reached. The monitoring results and the reports will be communicated to the Parliament and the Council, and will be made accessible to the public. If an agreement considered in a Commission Recommendation or exchange of letters fails to deliver the expected results, the Commission can make use of its right of initiative and propose appropriate binding legislation.

In the case of co-regulation, key elements – notably the environmental objective and monitoring requirements, and potentially also a follow-up mechanism in case of failure of an environmental agreement to deliver - are to be integrated into the legal act itself. The environmental agreement should be made public on the Commission's website. Monitoring results and associated reports should also be made available by electronic means. Under co-regulation, as for self-regulation, the Commission can always make use of its right of initiative and propose appropriate binding legislation if the agreement fails to deliver the expected results.

### ***Results and Perspectives***

Since the 2002 Communication, almost nothing has happened. There is no prospect of co-regulation as defined, or as would be meaningful in the sense of an agreement which is binding but which conditionally leaves discretionary rights to private actors. There has been no change regarding the possibility for the institutions to use voluntary agreements as formal instruments, or to enter into binding agreements with European private actors.

Unilateral commitments and codes of conduct will continue to be developed. Some of them may receive the Commission's informal blessing but there is unlikely to be much formal recognition of unilateral commitments as in the 1990s.

This is partly because results in the main cases of formal recognition so far have not impressed. In the case of detergents, the Commission's final report in 2004 to the Parliament and the Council was mixed: consumption of detergents and packaging is still less than half way towards the target. As for CO<sub>2</sub> emissions from cars at the end of August 2006 the Commissioners for Enterprise and Environment made a joint declaration stressing that, if industry did not honour its commitments, the Commission would have to consider taking measures, including legislative ones, to ensure that the necessary CO<sub>2</sub> reductions were achieved.<sup>12</sup> In several cases, provisions have already been superseded by legislation. The 2004 Directive on Detergents, for example, makes binding the provisions of the 1989 Recommendation on labelling.<sup>13</sup>

Yet there is still a dynamic interaction with the possibility of legislation. Unilateral commitments are consciously made as means to pre-empt legislation – or to ensure that it does not come to seem necessary. A good example of this is the European Declaration on Paper Recovery originally adopted in November 2000. In the early 2000s further commitments were also made for energy efficiency. These appear to have been viewed positively by the Commission but have not received formal recognition. CECED has agreed a second voluntary commitment on reducing energy consumption of domestic washing machines (2002), and a voluntary commitment on reducing energy consumption of household refrigerators, freezers and their combinations (2002). These were cleared by DG Competition in 2003. Reports are sent to the Commission, which seems to give informal encouragement to CECED's initiatives as a 'campaign associate' in the context of the Sustainable Energy Europe programme.<sup>14</sup> The European Information, Communications and Consumer Electronics Technology Industry Association (EICTA) also adopted a voluntary commitment to improve the energy performance of household consumer electronic products (2003).

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<sup>12</sup> Press release IP/06/1134, 29 August 2006.

<sup>13</sup> The Recommendation concerning the code of practice remains in force but, since the code no longer operates and the targets refer to 2002, its significance is rather theoretical.

<sup>14</sup> See for example the June 2006 Newsletter on <http://www.sustenergy.net>.

If self-regulation can provide a solution, then, subject to monitoring by stakeholders and the authorities, so be it. Formal recognition is not needed. On the other hand, the two recent cases in which there *is* some form of Commission recognition do not fall into previous patterns (and do not constitute co-regulation). These concern Biodegradable and Compostable Polymers – which is more a question of standards and competition – and the storage of surplus mercury which is more a practical problem .

*The Eco-Design model – a way forward for ‘co-regulation’?*

Probably the most promising line of development in co-regulatory activity – understood as an explicit, conditional granting by public authorities of discretionary faculties to private actors to achieve specific results – is in the field of energy.

The 2005 Eco-design Directive<sup>15</sup> brings together elements of standardization, comitology and self-regulation. It is a framework directive which does not address any particular product, and which broadens the scope of legislation to look not only at the reduction of energy but also other environmental considerations, taking into account the whole product life cycle. If an ‘EuP’ (energy-using product) is sold in volumes exceeding 200,000 units per year and has a significant environmental impact, then the Commission should adopt an implementing measure laying down Eco-design requirements, after the draft is approved by a ‘comitology’ committee. Products which conform to the requirements of the implementing measure can bear the CE marking and enjoy free movement. A Consultation Forum representing ‘a balanced participation of Member States’ representatives and all interested parties concerned’ is to be involved in each case.

As an alternative to implementing measures, however, ‘voluntary agreements or other self-regulation measures’ should be encouraged ‘where such action is likely to deliver the policy objectives faster or in a less costly manner than mandatory requirements’. These measures are to be assessed by the Consultation Forum.

This could prove to be a path-breaking initiative –one of the first coherent attempts to implement ‘responsive regulation’ (Ayres and Braithwaite 1992) at the EU level. Yet some important questions are raised. One of the problems in the conceptualization of environmental agreements at European level was the nature of the mechanism which would trigger a shift from self-regulation to binding measures. Will the Consultation Forum which is being set up in 2006 be able to perform this task credibly? Will it be possible to ensure adequate mechanisms for verification of self-regulatory measures?

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<sup>15</sup> Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC. *OJ L* 114 of 27 April 2006.

### *Enlargement*

Enlargement has not been a major factor in the origins or evolution of co-regulatory exploration in the environmental field. Nor is enlargement the major issue behind the current doubts and difficulties surrounding environmental agreements at European level.

### **2.3 The European Social Dialogue**

The European Social Dialogue is usually and rightly referred to as a 'special' case of co-regulation. It has had the basic aim of promoting industrial relations at European level. It is about the pursuit of agreement between European social partners and is thus different from other forms of functional participation in EU processes which aim at giving organized social and economic interests a formal input into the definition of European norms: the European Economic and Social Committee; consultation by the European Commission in the elaboration of its initiatives; and tripartite concertations).

The treaty-based procedure may be summed up as follows. The Commission has the task of promoting dialogue between the European social partners and in providing support (for the trade-union side) in pursuit of balance.<sup>16</sup> The Commission must consult the social partners – whether cross-industry or sectoral - before submitting proposals in the social policy field, first on 'the possible direction of Community action' and a second time on 'the content of the envisaged proposal'.<sup>17</sup> The social partners may then choose to negotiate between themselves and, normally within nine months, establish 'contractual relations, including agreements'. If the negotiations result in an agreement, two options are available for implementation: by the procedures and practices specific to management and labour and the Member States or by a Council decision on a proposal from the Commission. The European Parliament was given no formal role at all in the whole process, although it has in practice been informed by the Commission at all stages of the procedures.

The key, then, was the direct involvement and responsibility of social partners in the *formulation* of European legislation, through what would be the equivalent of legal extension of collective bargaining at the European level, and possibly also in the *implementation* of European legislation.

The 'voluntary route' – now referred to as 'autonomous' agreements - was clearly distinguished from legislation at any level. A Declaration was adopted with regard to the ASP and reiterated in attachment to the Final Act of the Amsterdam IGC by which the

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<sup>16</sup> 'The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.' (Art.138(1) TEC).

<sup>17</sup> Art. 138 (2) and (3).

Member States emphasised that 'this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation.'<sup>18</sup> There are grounds to believe, moreover, that few actors involved really expected this to happen since it seemed unclear what this would actually mean in practice.

From the beginning, it must be added, the aim was not only the conclusion of 'contractual relations' but also the adoption of other sorts of texts

In order to appreciate the dynamics of change in the European social dialogue, one needs to look back briefly to see how it started. Its role has been seen as having both practical and political importance. It has been seen as a more effective means to achieve certain kinds of agreements. On the one hand, it was an example of using the 'shadow of the law' to press the social partners to reach agreements between themselves. On the other, it could constitute a means to advance where legislation was blocked in the Council. Social dialogue has also continued to be seen as one of the forms of functional participation which complement the mechanisms of representative democracy (Smijmans 2004, 2006). The emergence of the European process was also directly shaped by the broader interests and values of supranational actors. It was a 'dream' of Jacques Delors to build the social partners into European governance. Although European social dialogue at sectoral level had started in the 1960s, the cross-sectoral process only started with the so-called 'Val Duchesse' initiative of Delors in 1985, involving the three main 'cross-industry' or 'inter-professional' organisations: the Union of Industrial and Employers' Confederations of Europe (UNICE); the European Centre of Enterprises with Public Participation (CEEP); and the European Trade Union Confederation (ETUC).

This initiative must be seen in the context of the broader initiatives taking place in the mid-1980s to push ahead with European social policy. Here again, the Single European Act marked a first turning point. A new Article 118a provided that measures concerning workers' health and safety at work could be adopted by qualified majority, thus greatly increasing the prospects of law. A new Article 118b was also included, stating that 'The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.' Some talks did take place, but did not produce much beyond a few joint opinions on economic policy and training.

The second major step was the 1989 'Community Charter of the Fundamental Social Rights of Workers'. The Commission's Action Programme for implementation of this charter presented 47 new initiatives, and reflected the Commission's ideas on social dialogue: 'With the two sides of industry the Commission will also examine the extent to which and under what terms the former could agree to participate, in the framework of

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<sup>18</sup> Declaration 27 annexed to the Final Act adopted by the Conference on Article 118b(2) of the Treaty establishing the European Community.

the social dialogue, in preparing certain legal instruments which the Commission would subsequently submit to the Community bodies concerned.' (EC 1989: 29) In this context, a second initiative was taken in January 1989, including the creation of a social dialogue *Ad hoc* Group and working parties on the labour market and education and training. Yet there was still no change in the fundamental difference between the employers, who believed that the EC should be involved in social matters only where the single market could not function without it, and the ETUC - and the Commission - who favoured the conclusion of European, and preferably binding, agreements more widely.

UNICE's position began to change in 1991 in the course of the IGC:

'The ETUC favoured the Commission's original 'negotiate or we'll legislate' idea in which the Commission would signal its intention to legislate and then the social partners could bargain collectively to pre-empt legislation... The ETUC was a weak organization that depended more on the Commission for support than on its national union constituents. Bargaining results in Brussels could make ETUC vastly more important...What UNICE feared was a great extension of legislation in the social area, and the Commission's ideas were a lesser evil.'

As Dutch proposals in the autumn maintained the prospect of an increase of legislation, the social partners wrote a joint letter to Prime Minister Lubbers on 31 October 1991 urging that a version of the Commission proposal be incorporated in the Dutch treaty proposals (Ross 1995a; Branch and Greenwood 2001).

The procedure was established in Articles 3 and 4 of the Agreement on Social Policy (ASP), which were introduced without change into the Treaty as new Articles 138 and 139 at Amsterdam in 1997, following the election of the Labour Government in the UK.

### ***Results of the First Period***

Between 1978 and 2002, 230 results were reached in the sectoral social dialogue. The most significant dynamics, however, concerned the cross-industry agreements.

Almost immediately after the entry into force of the ASP in November 1993, the Commission presented a revised proposal concerning European *works councils*. Informal talks held between the social partners failed quite quickly, however, and the measure went down the 'normal' legislative route.

The next topic was *parental leave*, which was comparatively easy. Only minimum standards were being proposed. No internal ideological cleavages in ETUC, UNICE or CEEP were at stake (Falkner 2003). Again, the perspective of treaty change was influential. 'With the 1996-7 IGC approaching and with the threat of a sceptical, if not hostile Parliament, the social partners feared that another failure might mean the end of

their co-legislation powers.' (Dølvik and Visser 2001: 26) An agreement was fairly quickly reached on 14 December 1995, and a Directive adopted on 3 June 1996.

After this came '*atypical work*'. With a proposal being repeatedly blocked in the Council, the Commission took up the issue under in 1995, initiating consultations on 'flexibility in working time and security for employees'. UNICE preferred to distinguish between part-time work, fixed-term work and temporary work. The strategy eventually adopted by ETUC agreed to concentrate the initial negotiations on part-time work. Negotiations started in October 1996, and seemed deadlocked until June 1997 when agreement was suddenly reached within the space of one week. There was strong criticism of the results among trade unions, as well as in the European Parliament. Very modest results had been accepted by ETUC, it seemed, mainly out of institutional self-interest. The decisive factor was again 'the ongoing IGC and the shared interest of protecting the social partners' 'co-regulatory role in EU social policy' (Dølvik 1997).

In the case of fixed-term work, UNICE took a leading role, actually initiating the negotiations in order to pre-empt possible legislation. This seemed all the more urgent given the impending entry into force of the Amsterdam Treaty in May 1999, after which any legislation would be adopted under the co-decision procedure and Parliament would use its enhanced powers to make the measure more stringent (Branch and Greenwood 2001: 62-63). The negotiations proved even more sensitive but an Agreement was reached and an implementing Directive adopted in June 1999.

In two cases, consultations in 1996 and 1997 did not lead to negotiations - the prevention of *sexual harassment* and the right to *information and consultation of employees*. In both cases, UNICE argued that these were not appropriate matters for European regulation. At least in the case of sexual harassment, a majority in UNICE 'felt sufficiently confident that a potential legislative measure on this subject would be blocked in the Council'. Negotiations were turned down (Branch & Greenwood 2001: 60-61).

### ***Pressures for change in the run-up to enlargement***

Well before the 2004 enlargement, pressures for change began to be felt. In 1999 both sides of the European social partnership were clearly dissatisfied. The results of the cross-industry agreements were considered pretty meagre by many in the trade unions. In 1999 the ETUC therefore agreed to evaluate the experience with the social dialogue, the conditions under which negotiations are to be preferred to legislation, and how they can be improved. It was 'a signal that the ETUC [was] no longer willing to negotiate at any price' (Dølvik and Visser 2001: 29).

It was against this background that the first major failure of negotiations occurred. The Commission had been asking the social partners since 1995 to consider negotiations on *temporary agency work*. The ETUC was strongly in favour of reaching a European

agreement on this, the third of the 'atypical work' dossiers, and in the spring of 2000 tried to increase the pressure on UNICE. In April the Secretary-General of the ETUC openly stated that 'If we do not hear a positive response by the end of the month, the ETUC will ask the Commission to engage a binding legislative initiative on this matter'.<sup>19</sup> UNICE agreed in May 2000 to start negotiations but these broke down in May 2001.

In this context, an interaction took place between developments in the evolution of the goals of cooperation and developments in the relationship between public and private actors. UNICE, never really convinced of the benefits of binding European agreements of any sort, now discovered OMC. A September 1999 Report thus called for a 'more general approach to social dialogue' involving exchanges of experience and benchmarking, rather than one 'restricted only to the negotiation of agreements at European level' (UNICE 1999: 11-12). Responding to the Commission's first-stage consultation on modernising and improving employment relations in October 2000, UNICE argued that:

'For European employers, the starting point of any process for modernising employment relations should be based on national evaluations of the rules governing the functioning of labour markets. At European level, UNICE considers that the method which should be retained is that of **open coordination** advocated by the Lisbon European Council.'

This approach seemed to be encouraged by the High-Level Group on Industrial Relations and Change in the European Union set up by the Prodi Commission, which reported in 2002. The Report (EC 2002d) stressed that 'New approaches on regulation also underline the fact that regulation can be based not only on a normative approach leading to binding rules (legal provisions or social agreements), but also on a learning process based on guidelines and benchmarks designed to improve actual behaviour. It is critical to strike the right balance between these two approaches.' It proposed, among other things, 'the development of an open method of co-ordination by the social partners'. Given the observable problems in negotiating agreements which are implemented by law, it was also suggested that social partners should 'fully explore the possibility of entering into voluntary framework agreements to be implemented through their own national procedures', although the Group did also draw attention to the difficult challenge of effective implementation of European agreements.

### *Towards 'a More Autonomous Social Dialogue'*

The joint contribution by the social partners to the Laeken European Council in December 2001 stated their 'wish to develop a work programme for a more autonomous social dialogue'. They urged that a distinction should be made between three different processes: '*tripartite concertation...consultation of the social partners* to designate the activities of advisory committees and official consultations in the spirit of Article 137 of the Treaty; and *social dialogue* to designate bipartite work by the social partners, whether or not prompted by the Commission's official consultations based on Articles 137 and

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<sup>19</sup> ETUC Press release, Brussels, 18 April 2000.

138 of the Treaty.' (emphasis added) Since 2002 there have been various manifestations of this tendency to come out from under the 'shadow of the law'.

The first has been that, in some respects, the lead seemed to be taken over by the social partners. In November 2002, the Social Partners adopted a Work Programme for 2003-2005 in which they indicated a series of autonomous initiatives for the coming years. A Work Programme for 2006-2008 was signed in March 2006.

In this context, moreover the Social Partners started to implement cross-sectoral framework agreements by the 'voluntary route' rather than a Council Directive. This was first the case of the agreement signed in July 2002 on *telework*. Whereas the ETUC had preferred a Directive or an agreement incorporated into a Directive, UNICE argued that 'Telework is a way of working, not a legal status. It is not a theme for regulation at EU level but we think that voluntary negotiations could help develop telework in Europe.'<sup>20</sup> A second 'autonomous agreement', on stress at work, was agreed in 2004. Negotiations for a third such agreement, on harassment and violence at work, started in early 2006. These agreements raise major questions about coverage, implementation and monitoring (Clauwaert & Deinert 2003). Above all – especially for the present discussion – implementation depends absolutely on the existence of social partners at national level who are capable of adopting and overseeing collective agreements.

The Commission responded to these developments in the 2003 Mid-Term Review of the Social Agenda, indicating that the Commission would adopt a 'Communication on the implementation of negotiated agreements through voluntary instruments (2004)' and a 'report on the implementation of the social partners' autonomous working programme (2005)' (CEC 2003: 16). UNICE was 'strongly opposed' to these and some other initiatives in the Review. The Commission's position is summed up in the Communication adopted in August 2004 (CEC 2004).

Upon the expiry of the implementation and monitoring period, while giving precedence to the monitoring undertaken by the social partners themselves, the Commission will undertake its own monitoring of the agreement, to assess the extent to which the agreement has contributed to the achievement of the Community's objectives.

Should the Commission decide that the agreement does not succeed in meeting the Community's objectives, it will consider the possibility of putting forward, if necessary, a proposal for a legislative act. The Commission may also exercise its right of initiative at any point, including during the implementation period, should it conclude that either management or labour are delaying the pursuit of Community objectives.

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<sup>20</sup> UNICE, Press release, 'UNICE offers negotiations on telework, 8 March 2001.

### *Perspectives*

The European Social Dialogue, like 'self- and co-regulation' in the environmental sector, was established in the early 1990s as a new approach to EU governance in particular historical circumstances. It went through a first phase of experimentation; it encountered a number of problems and was influenced by other factors; and it is now settling down and going through a process of rationalization and re-conceptualization.

For the time being, it appears that the original 'co-regulatory' dynamics – whether the threat of 'you negotiate or we legislate' or the hope that 'you negotiate because we can't legislate' – have been superseded by rather different processes. There is no longer much of a legislative agenda anyway in the relevant areas – and it may become even harder in the future to adopt some of the proposals which are on the table. The social partners, and especially UNICE, have opted for purely bilateral negotiations without any pressure from the Commission, and for 'autonomous' forms of implementation, rather than using Community law. Moreover, the nature of the agreements is changing, away from rules towards the idea of common approaches such as a Framework of Actions ('process-oriented texts', in the terminology of the Commission) which are characterized more by the spirit of exchanges of good practice. Two such Frameworks have been signed, on lifelong learning (2002) and gender equality (2005). In the terms of the basic model of analysis proposed here, the process seems to have moved mainly into the south-eastern quadrant of the matrix, in which the interaction is purely between private actors and the goals are more of mutual learning than of binding commitments

Yet there are many uncertainties as the nature of the arrangements proposed and the future. Monitoring the implementation of the telework agreement and, in particular, the stress agreement will be crucial over the next couple of years in shaping the future of the social dialogue. The Commission is promoting the elaboration of a mutually-agreed typology of the different instruments which makes clear the nature of the rights and obligations which may be created, as well as the forms of monitoring and reporting. In this process, the enlargement of the EU will have an important impact.

Most new Member States have much weaker structures for bipartite social dialogue, as opposed to tripartite structures also involving the government, which function relatively well (Vaughan-Whitehead 2005). Although Malta and Cyprus are comparable to many older Member States in this respect, the social partners had a weak membership basis in the Central and Eastern European (CEE) 8 on the eve of accession. Levels of trade unionisation had declined to strikingly low levels (the average density figure in Poland being only 14.1% in 2001) as a result of a trend towards more services, privatization and the growth in small and medium enterprises. Employers' organizations had low affiliation rates and often lacked the authorization of their affiliates to undertake binding commitments.

The vast majority of workers in the CEE 8 were not covered by collective agreements – whereas in 2000-2002 coverage rates were as high as 100% in Belgium and Austria, over 90% in Sweden, Finland and France, and more than two-thirds in Denmark, Spain, Netherlands and Germany. Except in Slovenia, bargaining was single-level, with no tradition of central bilateral bargaining which might lead to binding agreements. Sectoral bargaining was particularly weak, largely due to 'the institutional and structural weaknesses, or simply lack, of social partners.' (Lado & Vaughan-Whitehead 2003)

Assistance has been offered by the ILO, the IMF and the World Bank. The European Economic and Social Committee tried to involve economic and social actors in joint consultative committees. The Commission has provided support through the European Social Fund, the PHARE programme, TAIEX and other mechanisms. The social partners themselves began to implement joint initiatives, often with the support of the Commission (Tanasescu & Bédoyan 2004). And the social partners implemented an integrated programme between December 2004 to May 2006, building.<sup>21</sup> Yet there may be limits to what can be expected in the short term: 'The social dialogue in the CEE countries has been conducted and rapidly redeveloped though a top-down process, whereas the same development in the West was gradual and dominated by bottom-up processes.' (Mailand & Due 2004)

Another, more indirect, change concerns the balance in opinion among EU governments about social and economic policy. Since the new Member States generally tend more towards the 'modernizing' view favoured most notably by the UK, the result is that there is no longer any inbuilt majority in favour of the traditional 'European Social Model'. Decisions in the Council may tend rather to be blocked by an absence of a qualified majority one way or the other. Legislative options of any sort may therefore also be less viable – and the 'shadow of the law' thereby all the less credible.

Taking into account the pre-existing pressures and tensions over the European Social Dialogue three hypotheses suggest themselves regarding the impact of enlargement. First, the fact that social partners in so many Member States are not strongly organized and deeply rooted, in addition to the increased number of actors in itself, may weaken the ability of the European social partners to negotiate effectively. Second, the weakness of social dialogue structures in the new Member States may undermine the credibility of European autonomous agreements. And third, increased diversity in working conditions, combined with blockage in the Council, may make even less possible the pursuit of uniform approaches through legislation. If these three are correct, then it is possible that a transformation in the European Social Dialogue may occur in the medium term, probably in the direction of paralysis pending a renewed rethinking of the whole arrangements.

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<sup>21</sup> See [http://europa.eu.int/comm/employment\\_social/social\\_dialogue/enlarge\\_en.htm](http://europa.eu.int/comm/employment_social/social_dialogue/enlarge_en.htm)

## CONCLUSIONS

This paper has looked at the evolution and perspectives of EU approaches to cooperation which differ from the classic Community method but are not mere intergovernmentalism. These should not be lumped together either as alternative policy instruments to be proposed by the European Commission, or simply as variants of 'new governance'. They should be differentiated in the light of two basic dimensions of integration: the varying goals of international cooperation, and the varying kinds of interaction involved between public and private actors. The goals of cooperation now include not only a broad spectrum of rule-making approaches ranging from the hardest to softest law, but also other goals such as policy learning and the creation of shared values. In addition, new forms of public-private interaction have been explored in various ways in several areas.

These approaches have emerged more or less autonomously in the years either side of the Maastricht Treaty as sub-systemic adaptations. They reflected the need to respond to new matters of common concern, or to find new means to achieve existing objectives, in the context of increasing diversity and complexity. They have not been adopted as part of an overall design, however, nor have they represented purely rational choices as to functional needs. The specific outcome of the interplay between the actors involved in each case has been shaped by existing institutional structures and norms, as well as by trends in the broader political climate and policy context.

The result was a decade or so of experimentation and contestation, as well as cross-fertilization between new methods, and the emergence of hybrids between law and 'new governance' (Scott & Holder 2006). This led to an attempt to agree on a common conceptualization and rationalization of the situation, starting with the White Paper on Governance and culminating in the 2003 Interinstitutional Agreement on Better Lawmaking. Yet the definitions which have been formulated do not adequately reflect the continuing uncertainties and reality.

The paper has focused on the dimension of public-private interaction, in which the main cases are standardization, environmental policy, and the European social dialogue. It has suggested that the terms of self- and co-regulation are not the most appropriate. It is more fruitful to think of a zone of 'interactive regulatory practice', ranging from areas of pure self-regulation in which public authorities have no role, and pure prescriptive public regulation, in which collective private action is merely a means of assuring practical implementation. This kind of interaction, however, has proved difficult at EU level.

The New Approach and standardization have been one of the main reference points in discussions of 'co-regulation'. This does not in fact involve much real discretion in rule-making, but provides for significant degrees of flexibility and innovation in means of compliance.

The pursuit of 'environmental agreements' at European level has been problematic. 'Co-regulation' at EU level as defined in the Commission's 2002 Communication remains elusive, if not actually impossible. While the idea of 'shared responsibility' is unquestioned in principle, the modalities for putting it into practice at European level are not evident. Moreover, the balance of opinion in terms of the results which have been achieved by agreements so far is not entirely favourable.

In the case of the Social Dialogue, there has been a notable evolution away from the original dynamic of public-private options over rule-making towards purely private arrangements in exchanging good practice. Yet the precise nature and legal consequences of these arrangements remains unclear, while the framework for the future will also be shaped by the evaluation which is made of their implementation.

The period since 2004 may thus be seen as one of a continuing 'settling down' of the system. A process of readjustment and renegotiation of the new methods and their relationship to legislative approaches has been taking place. This process, in turn, is shaped by further changes in the institutional and international environment, such as the change in the European Commission - and EU enlargement.

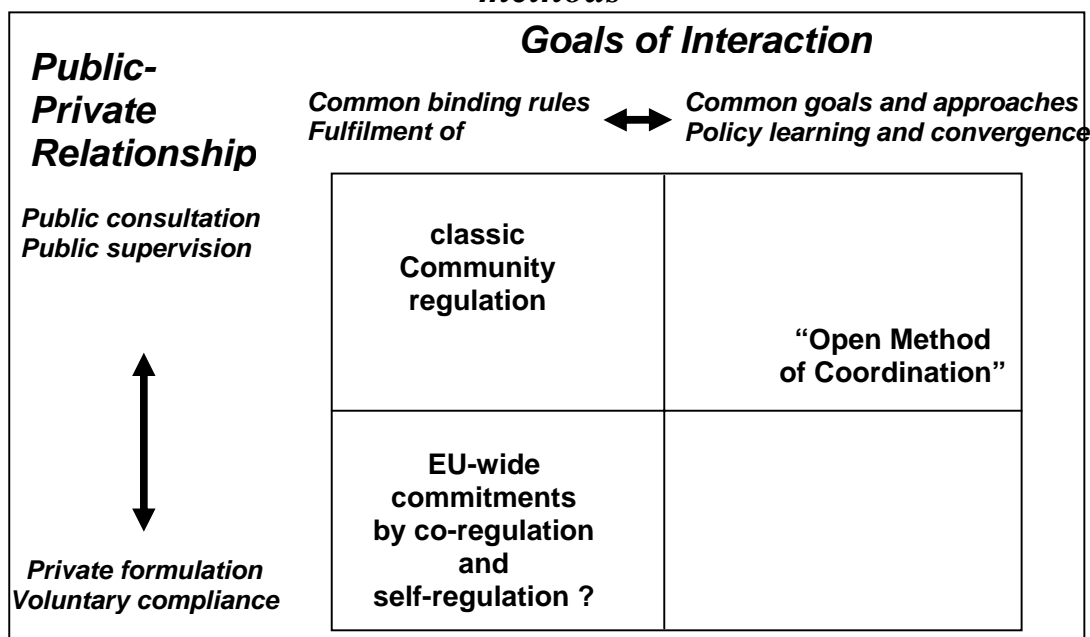
While it is still too early to give any definitive assessment of the impact of enlargement, it may already be suggested that the impact will not be the same for all of the new methods. The increasing diversity between Member States was already an influence in shaping the emergence of the Open Method of Coordination in the 1990s. The 2004 and further enlargements will continue to favour the development of this more flexible approach in many areas when it comes to public policy.

On the other hand, the implications for the further evolution of EU 'interactive regulatory practice' are more problematic. The weakness of the social partners in many of the new Member States is likely to make it all the more difficult to make 'autonomous agreements' under the European social dialogue work in practice.

As the EU system continues its co-evolutionary path amid further enlargements, the exploration of regulatory alternatives is certainly going to continue. The results remain to be seen.

ANNEX

*The two dimensions of alternative methods*



Treib / Bähr / Falkner: Modes of Governance

Table 1: Modes of Governance According to NEWGOV's "Description of Work"

Steering Modes		Actors Involved		
		Public Actors Only	Public and Private Actors	Private Actors Only
	Hierarchical Top-down/ Legal Sanctions	Traditional Nation-state, Supranational Institutions		
	Non-hierarchical Bargaining/ Positive Incentives	Intergovernmental Bargaining	Delegation of public functions to private actors; Neo-corporatism	Private-interest government
	Non-hierarchical Non-manipulative; Persuasion; Learning and Arguing; Diffusion	Institutional Problem-solving across levels; European Agencies	Public-private networks; Benchmarking	Private-private partnership (NGOs)

Source: NEWGOV (2004)

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