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## New Modes of Governance and Democratic Accountability<sup>1</sup>

THIS ARTICLE RAISES THE QUESTION OF THE LINK BETWEEN NEW MODES of governance and democratic accountability. Does the analysis of the link provide us with new insights into the ongoing debate on the European Union's democratic qualities or deficiencies? Do the new modes facilitate or hinder democratic accountability of policy-making in the EU? We define new modes of governance as modes of public policy-making which include private actors and/or public policy-making by public actors occurring outside legislative arenas, and which focus on delimited sectoral or functional areas. Democratic accountability is defined as a relationship between a democratically elected actor A and another (executive) actor B. Under a new mode of governance, specific tasks of A have been delegated to B. Under a relationship of democratic accountability, A must be able to control B's execution of the delegated task and, if necessary, to impose sanctions in case of lack of performance. Hence the question is: to what extent do new modes of governance as defined above allow for the exercise of democratic accountability?

In the following we will first briefly describe the concrete new modes of governance which have been empirically investigated in the context of our research,<sup>2</sup> that is, standard-setting by industry, the

<sup>1</sup> We thank Mel Marquis for his critical reading of the manuscript.

<sup>2</sup> The empirical evidence on which this chapter builds was collected in the different projects of Cluster 2 directed by Adrienne Héritier and Dirk Lehmkuhl of the Integrated Project NEWGOV funded by the European Union's 6th Framework Programme (contract no. CIT1-CT-2004-506392). Partners involved in the activities of NEWGOV's Cluster 2 were J. Almer (Swedish Institute of European Policy Research), D. Coen (University College London), S. Eckert (EUI), C. Halpern (Fondation Nationale des Sciences Politiques), A. Héritier (EUI), P. Le Galès (Fondation Nationale des Sciences Politiques), D. Lehmkuhl (St Gallen University), O. de Maissocq (Université Catholique de Louvain), L. Moral Soriano (Granada University), S. Smismans (Trento University/Cardiff University), J. Steffek (Bremen University), M. Thatcher (LSE),

open method of coordination, comitology,<sup>3</sup> independent regulatory agencies, tripartite decision-making and private dispute resolution, and the goals they serve. Then we will briefly sketch the main reasons why the new modes emerged in the first place. This background information is necessary in order to understand the function and efficiency of the new modes and the potential price to be paid as regards democratic accountability when assessing them according to different standards of democratic governance. We then proceed to identify elements of democratic governance typical for the new modes studied here, and finally we empirically assess how they hold up to the standard of democratic accountability as defined above.

#### A VARIETY OF NEW MODES OF GOVERNANCE: CREATING AND CORRECTING MARKETS

Based on our definition of new modes of governance as public policy-making that involves private actors, and/or as public policy-making outside the traditional democratic-representative governmental arenas, we empirically investigated different types of new modes of governance. They all extend to regulation in the sense of the creation of markets and the correction of negative market externalities. While the goals of market integration seek to abolish barriers to market access for new market entrants and secure a functioning market and the observance of market rules, the goals of correcting the negative external effects of market integration seek to alleviate the adverse consequences of productive and market activities for human health, the environment and other policies of national welfare.

More specifically, the new modes under investigation are: (1) the delegation of regulatory tasks to independent authorities, including the formation of networks of regulators; (2) the delegation of regulatory tasks to comitology, which is located outside the main European legislative arena; (3) the self-regulation by private actors; (4) the application of benchmarking or the model of best practice under

F. Varone (Université de Genève), C. de Visscher (Université Catholique de Louvain). For an overview and a list of individual publications, see [http://www.eu-newgov.org/datalists/cluster\\_detail.asp?Cluster\\_ID=2](http://www.eu-newgov.org/datalists/cluster_detail.asp?Cluster_ID=2).

<sup>3</sup> Comitology is an institutional procedure by which member states cooperate with and control the Commission when it exercises its implementation powers under secondary legislation.

the open method of coordination; (5) the application of arbitration as a mode of alternative dispute resolution by private actors; and (6) tripartite policy-making. The new modes have been applied in a variety of regulatory policies, reaching from financial regulation, energy regulation and telecommunications to environmental regulation, health and safety at work, competition enforcement and biotechnology policy. We briefly illustrate how important new modes of governance have been applied in the various areas.

The delegation of high-expertise regulatory tasks to independent regulatory authorities is a new mode of governance that has spread rapidly across countries and policy areas at the European level, too. Regulatory networks at the European level,<sup>4</sup> the object of our research, emerged in highly complex areas of market integration such as energy, telecommunications and financial markets in order to facilitate the exchange of information among national regulators and to render national regulations mutually compatible. Thus, in the energy sector, a forum of stakeholders met in the Florence Energy Forum for Electricity, created in 1998, followed by the Madrid Forum for Gas in 1999. The Commission created the Committee of European Energy Regulators (CEER), a network of independent national regulators of electricity and gas in 2000, and established the European Regulators' Group (EREG) as an advisory group of independent national regulatory authorities in 2003.<sup>5</sup> Networks of regulators, such as the Forum of European Securities Commissions and the Independent Regulators' Group have been established in financial-market regulation as well.<sup>6</sup> We describe the broader impetus underlying these developments as a reshaping of the European regulatory space. Initiated in the late 1980s, the process developed in different stages, beginning with strengthened EU supervision of national implementation, leading to the formation of networks of mutual information among independent regulators and regulatory fora, and then – most recently – to the emergence of European regulatory networks.

<sup>4</sup> D. Coen and M. Thatcher, 'Network Governance and Delegation: European Networks of Regulatory Agencies', *Journal of Public Policy*, 28: 1 (2008), pp. 49–71.

<sup>5</sup> B. Eberlein, 'Regulation by Cooperation: The "Third Way" in Making Rules for the Internal Energy Market', in P. Cameron (ed.), *Legal Aspects of EU Energy Regulation*, Oxford, Oxford University Press, 2005, pp. 59–88.

<sup>6</sup> D. Coen and M. Thatcher, 'Reshaping European Regulatory space', *West European Politics*, 31: 4 (2008), pp. 806–36.

The delegation of specialized expertise-based decisions to comitology – the implementation powers of the Commission in cooperation with member state experts in various comitology procedures – constitutes another mode of governance. It shifts policy-making out of the main political arenas and moves it into functional, expertise-based areas. An example of this kind of governance is the Lamfalussy procedure, which is intended to speed up the process of integration of the financial markets.<sup>7</sup> It also includes the above-mentioned networks of regulators such as the Forum of European Securities Commissions and the Committee of European Securities Regulators. It is this close link between comitology as a form of secondary legislation and regulatory networks that justifies the classification of the Lamfalussy process as a new mode of governance.

The self-regulation of industry offers a third example of a new mode of governance. It builds on the expertise of industry actors when formulating public policy measures in environmental regulation and energy regulation. Thus, in the field of recycling industrial waste in the plastics and paper industries, industry associations committed themselves to develop the necessary technologies to achieve quite ambitious recycling targets.<sup>8</sup>

A fourth variety of new modes of governance are the non-binding forms of benchmarking or the introduction of best practices that are applied as a mode of voluntary coordination. In the course of deregulation, the latter have been increasingly applied as a soft mode of steering, such as in the attempt to prompt energy providers to observe public service goals.<sup>9</sup> The Commission developed a policy of Services of General Interest defining targets for member states such as security of supply, regularity and quality of supply, and so on, to be observed on a voluntary basis, but subject to public monitoring and an exposition of performance.

<sup>7</sup> C. de Visscher and F. Varone, 'Governance of the EU Securities Sector: Impacts of the Lamfalussy Reform.' *NEWGOV Policy Brief 1*, Florence, 2006.

<sup>8</sup> A. Héritier and S. Eckert, 'New Modes of Governance in the Shadow of Hierarchy: Self-regulation by Industry in Europe', *Journal of Public Policy*, 28: 1 (2008), pp. 113–38. A. Héritier and S. Eckert, 'Self-Regulation by Associations: Collective Action Problems in European Environmental Regulation', *Business and Politics*, 11: 1 (2009), art. 3.

<sup>9</sup> L. Moral Soriano, 'Integration of Energy Markets through Public Services Obligations', *NEWGOV Policy Brief 8*, Florence, 2008.

Another variety of new modes of governance has thus far received little attention. This mode can be seen in the increasingly frequent use by the business community in the arbitration of European competition law cases. Commercial arbitration presents an alternative to litigation in courts by offering the possibility of a private dispute resolution based on confidentiality, secrecy, expertise and speed. These features render arbitration attractive not only to the business community but also to the European Commission, which sees it as a mode of securing compliance with EU competition law in general and its decisions on mergers and acquisitions in particular.<sup>10</sup>

Finally, we investigated bipartite and tripartite policy-making: the social dialogue, as applied in social and employment policy. The European Social Dialogue provides for the signing of collective agreements between employers' associations and trade union organizations at the European level. This allows, among other things, for self-initiated and self-implemented collective agreements.<sup>11</sup>

What all these different types of new modes of governance have in common is that they imply policy-making outside the traditional governmental arena. A special case is arbitration in the realm of competition policy. It would be more precise to speak of arbitration as a policy tool that promotes compliance with the law or with decisions of the European Commission. While their primary objectives vary, they all shed light on the practical importance of these new modes of governance. They all mark a tendency not to choose the traditional political arenas for policy-making on complex new issues of market integration, but to entrust them to functionally specialized independent regulatory arenas, or to shift long-standing issues of policy-making from the traditional governmental political arenas into new functional governance arenas. They all pursue objectives that belong to the general realm of market integration, but many of them also pursue aims of market correction. Thus, the comitology

<sup>10</sup> D. Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy', *Journal of Public Policy*, 28: 1 (2008), pp. 139–59. D. Lehmkuhl, 'Cooperation and Hierarchy in the Governance of European Competition Policy', in I. Tömmel and A. Verdun (eds), *Innovative Governance in the European Union: The Politics of Multilevel Policymaking*, Boulder, CO, Lynne Rienner, 2009, pp. 103–19.

<sup>11</sup> S. Smismans, 'The European Social Dialogue in the Shadow of Hierarchy', *Journal of Public Policy*, 28: 1 (2008), pp. 161–80.

procedure under the Lamfalussy process seeks to advance market integration in the financial services markets. By so doing, it has made important steps towards the creation of a European securities market.<sup>12</sup> Similarly, the regulatory networks providing for the cooperation of national regulatory bodies in telecommunications and energy regulation pursue objectives of market integration. The same holds for the new modes in competition policy. With the objective of sanctioning anticompetitive market behaviour, the Commission has not only encouraged private enforcement through market actors as a means of improving the detection of alleged violations of EU competition rules. It has also allowed for the use of arbitration in order to sanction certain violations, thereby facilitating fast, confidential and binding procedures.<sup>13</sup>

By contrast, other new modes focus on market correction and seek to suppress the negative external effects of market transactions. One instance is the benchmarking process to which energy providers are subject in the provision of public services. This process seeks to ensure customers access to services at affordable prices as well as the continuity and security of service provision.<sup>14</sup> Another example is self-regulation by industry, aimed at reducing the negative external effects of production and marketing processes. By committing themselves, through their associations, to environmental self-regulation, firms contribute to the recycling of waste in the plastics and paper industries.<sup>15</sup>

#### WHY DID THEY EMERGE?

The broader context for the changes in the patterns of policy-making in Europe is generally referred to as the 'rise of the regulatory state'.<sup>16</sup>

<sup>12</sup> C. de Visscher, O. Maiscoq and F. Varone, 'The Lamfalussy Reform in the EU Securities Markets: Fiduciary Relationships, Policy Effectiveness and Balance of Power', *Journal of Public Policy*, 28: 1 (2008), pp. 19–47.

<sup>13</sup> Lehmkuhl, 'On Government, Governance and Judicial Review'.

<sup>14</sup> Moral Soriano, 'Integration of Energy Markets through Public Services Obligations'; L. Moral Soriano, 'New Modes of Governance in the Spanish Electricity and Gas Sectors', *Journal of Public Policy*, 28: 1 (2008), pp. 93–111.

<sup>15</sup> Héritier and Eckert, 'New Modes of Governance in the Shadow of Hierarchy'.

<sup>16</sup> G. Majone, *Regulating Europe*, New York, Routledge, 1996.

The notion refers to a shift from interventionist to regulatory policies. From this perspective, the goal was to dismantle state monopolies in the provision of network services of various kinds and the creation of markets by allowing new entrants to have access to the market. This development at the national level in some member states was actively promoted by European policies, with the single market programme signalling the Commission's general impulse to pursue a policy of liberalization, deregulation and (centralizing) re-regulation. Beyond the changes in the overall context that influenced a move towards regulatory policies, there are more specific factors that may account for the increasing use of new modes of governance in the EU. Based on our empirical information, we identified four key factors that help to explain new modes of governance, defined as public policy-making that includes private actors and/or occurs outside the formal legislative arena.

### *Need for Expertise*

The need for expertise is an eminently important factor when it comes to accounting for the emergence of the new modes in regulatory policies. In all our areas of investigation, the new modes of governance may be traced back to the fact that government deems itself unable to muster all the technical and scientific expertise necessary to regulate highly complex areas of market integration and market correction. Sometimes there are other factors, such as time or resource gaps or arbitration, that are additional reasons for reference to new modes of governance. Beyond their capacity to provide more expertise, the new functional modes of policy-making are considered to be more flexible and speedy in adjusting to new and complex challenges. Moreover, in the face of the changing political preferences of governments, the fact that sectoral governance is removed from the mainstream of legislative political decision-making is more likely to guarantee the credibility and stability of public policy-making in these highly complex areas.

Some examples may illustrate this. The need for expertise has been at the root of the institution of both regulatory networks in the energy sector and comitology procedures in the regulation of securities markets. In the case of the Lamfalussy procedure, the competences delegated to sectoral experts under comitology procedures

include both policy formulation and implementation.<sup>17</sup> The required expertise may reside in substantive information about market processes, such as risks involved in financial market transactions, or more technical aspects of environmental engineering or environmental chemistry (recycling).<sup>18</sup> Or it may consist of specific mediating competences combining economic and judicial expertise, as in the case of private settlement of competition law disputes.<sup>19</sup> In energy regulation, for technical and security reasons, the management of the electricity grids has been defined as a task of the transmission system operators. Setting the right rules for the technically complex area of network operation challenges the capacity of specialized national agencies that already operate at the national level. When it comes to cross-border issues, national regulators lack the mandate to intervene effectively, and the Commission lacks the technical expertise and the capacity to engage in regulatory details. Hence, the bulk of operational issues and regulatory cross-border issues is left to the transmission system operators.

### *Pre-Emptying Legislation*

A second factor giving rise to new modes of governance that was identified in our research is the effort of industry actors to thwart legislation. As a rule, firms shun public intervention in their economic activities. In the case of problems such as environmental or health hazards, industry prefers self-regulation to legislation. However, self-regulation is also costly to devise and implement. As a consequence, an industry is only likely to engage in collective action if it is threatened with the risk of losing market share due to a loss of reputation, or if there is a credible legislative threat or if the 'shadow of hierarchy' looms. Reputational threats relate to consumer choices, but legislative threats can only be exerted by governments. These two types of threat may exist independently or they may coincide; they both put pressure on industry and induce it to take steps towards

<sup>17</sup> De Visscher and Varone, 'Governance of the EU Securities Sector'. De Visscher, Maiscoq and Varone, 'The Lamfalussy Reform in the EU Securities Markets'.

<sup>18</sup> Hérítier and Eckert, 'New Modes of Governance in the Shadow of Hierarchy'; Hérítier and Eckert, 'Self-Regulation by Associations'.

<sup>19</sup> Lehmkuhl, 'On Government, Governance and Judicial Review'.



self-regulation. Industry behaviour in the plastics industry illustrates this: without the regulatory threat and a focused NGO campaign, the European PVC industry would not have engaged in the costly and demanding exercise of developing a recycling technology, nor would it have committed itself to demanding recycling targets and sustainable production standards.<sup>20</sup> In the case of regulatory networks in telecommunications, the Commission threatened to initiate legislation if the national regulators participating in the regulatory network failed to propose a decision on how to coordinate national regulatory provisions.<sup>21</sup> Or, to give yet another example from energy regulation, the shadow of hierarchy – the credible threat of legislation by the Commission – appears to have been a key factor in the willingness of the European Transmission Systems Operators to coordinate national activities of transmission systems and in the willingness of market operators to harmonize network access and use conditions, and to promote intra-community exchanges and free trading.

### *New Modes as a Default Option*

A third, closely linked, cause underlying the emergence of new modes of governance that may be identified from our findings is that – in the face of pressure to act over a particular problem both at the national and European level – member states prefer to use new modes as opposed to a formal transfer of national policy competences to the European level: ‘communitarization’. These soft modes of governing allow for some action without implying a formal loss of competence by member governments. From the viewpoint of the Commission, which, as a rule, is more eager to communitarize, new modes present a default option or second-best solution. The Commission would have preferred the community method, but it anticipates the opposition of member states to the Commission’s attempt to propose legislation in matters previously confined to domestic competence. Therefore, it settles for the second-best solution, the new modes, without excluding the possibility that in the future

<sup>20</sup> Hérítier and Eckert, ‘New Modes of Governance in the Shadow of Hierarchy’; Hérítier and Eckert, ‘Self-Regulation by Associations’.

<sup>21</sup> Coen and Thatcher, ‘Network Governance and Delegation’.

the soft modes of governance may be transformed into hard legislation.<sup>22</sup>

The case of policy-making under the European Social Dialogue offers an example of new modes as a second-best solution or default option. While the Commission has sought to introduce a community social and labour market policy, member states have been loath to yield competences to the European level.<sup>23</sup> Similarly, the regulatory networks in which national regulators exchange information were established in response to Commission pressure to establish a European sectoral regulator to coordinate national regulatory activities.<sup>24</sup> While the Commission was pressing for the establishment of a European regulator, member states flatly refused to follow suit and agreed to introduce mere regulatory networks where national regulators meet. Regulatory networks appear to be a compromise between actors pressing for greater European integration and those who fear it, especially national governments.<sup>25</sup> In the area of services of general interest, the use of the open method of coordination and benchmarking reflects member states' reluctance to yield legislative competences to the European level.<sup>26</sup>

### *Improving Implementation*

A final factor giving rise to new modes of governance is their use as a means of improving national compliance with EU legislation and compensating for a lack of implementation resources. It has been

<sup>22</sup> There may, however, be instances in which the Commission strategically prefers soft modes rather than pushing for an increased communitarization. A good case in point is the Commission's reference to legally non-binding instruments in competition policy. The strategic choice to keep its regulatory activities below the threshold of formal legislation increases the Commission's autonomous governance capacity (M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', *Journal of European Public Policy*, 8: 2 (2009), pp. 192–207; Lehmkuhl, 'Cooperation and Hierarchy in the Governance of European Competition Policy'.

<sup>23</sup> S. Smismans, 'The European Social Dialogue in the Shadow of Hierarchy', *Journal of Public Policy*, 28: 1 (2008), pp. 161–80.

<sup>24</sup> Eberlein, 'Regulation by Cooperation'.

<sup>25</sup> Coen and Thatcher, 'Network Governance and Delegation'.

<sup>26</sup> Moral Soriano, 'New Modes of Governance in the Spanish Electricity and Gas Sectors'.

shown that implementation, if not transposition,<sup>27</sup> leaves much to be desired, particularly in policy areas such as environmental, health and safety regulation and market integration.

In health and safety regulation, the attempt to improve implementation played an important role in motivating the introduction of the open method of coordination and benchmarking.<sup>28</sup> Similarly, during the 1990s, concerns emerged about the lack of coordination between national regulators, uneven implementation across member states and the need for more knowledge of policies by national officials. The introduction of networks of energy regulators at the European level was intended to establish better coordination of national policies and thus to improve implementation. This, in turn, would achieve more efficiency in energy regulation.<sup>29</sup> In the case of competition policy a new way to secure better implementation was sought through the inclusion of private actors in the enforcement of European competition law.<sup>30</sup>

Whichever factor may be most important in explaining the emergence of new modes, the expectation is that they will generate greater policy efficiency and effectiveness. Over time, however, this expectation has been questioned on empirical grounds. It was empirically borne out in some cases, but not in others. One important qualification refers to the finding that new modes frequently require a strong link to hard modes of government or hierarchy in order to achieve their aims. As mentioned above, examples are provided by corporate self-regulation, the coordination of social partners and the coordination of parties in the energy and electricity sector.<sup>31</sup> Only under the shadow of hierarchy, it appears, do these new modes of governance

<sup>27</sup> A number of compliance studies investigate the degree of satisfactory transposition of European law. See e.g. G. Falkner, O. Treib, M. Hartlapp and S. Leib, *Complying with Europe: EU Minimum Harmonisation and Soft Law in the Member States*, Cambridge, Cambridge University Press, 2005.

<sup>28</sup> Smismans, 'The European Social Dialogue in the Shadow of Hierarchy'; T. A. Börzel, 'Guarding the Treaty: The Compliance Strategies of the European Commission', in T. A. Börzel and R. Cischowski (eds), *The State of the European Union VI: Law, Politics, and Society*, Oxford, Oxford University Press, 2003, pp. 197–220.

<sup>29</sup> Coen and Thatcher, 'Reshaping European Regulatory Space'.

<sup>30</sup> Lehmkühl, 'Cooperation and Hierarchy in the Governance of European Competition Policy'.

<sup>31</sup> Héritier and Eckert, 'Self-Regulation by Associations'; Smismans, 'The European Social Dialogue in the Shadow of Hierarchy'.

fulfil the self-set policy objectives. Moreover, the effect of specific modes of governance, such as the open method of coordination, differs according to policy fields and countries.<sup>32</sup> Other findings point to necessary conditions for the success of the new modes, such as existing civil society structures.<sup>33</sup> This shows that the relationship between new modes of governance and their effectiveness is a complex one.

Given the variety of new modes of governance, their aims and their structure, as well as their conditions of effectiveness as they have emerged from our empirical research, how can we describe their relationship to democratic accountability?

#### NEW MODES OF GOVERNANCE: ELEMENTS OF DEMOCRATIC CONTROL

With regard to the question of the links of the new modes to democratic accountability, different strands of democratic control should be distinguished. The first and central one is the classic mode of the democratic accountability of governing actors to the constituency of an entire polity through democratically elected representatives and their control of governing functions. It includes the possibility of citizens' electoral control of governing functions mediated through political parties. If governmental policy performance is considered to be unsatisfactory it allows for the possibility of

<sup>32</sup> C. de la Porte and P. Pochet (eds), *Building Social Europe through the Open Method of Coordination*, Brussels, Peter Lang, 2002. European Commission, 'EU Governance by Self Co-Ordination? Towards a Collective "Gouvernement Economique"', *GOVECOR EU Research on Social Sciences and Humanities, Final Report*, Brussels, 2004, <http://cordis.europa.eu/documents/documentlibrary/100124131EN6.pdf>; C. M. Radaelli and U. S. Kraemer, 'Governance Arenas in EU Direct Taxation', *Journal of Common Market Studies*, 46 (2008), pp. 315–36. A. Héritier, 'New Modes of Governance in Europe: Policy-Making Without Legislating?', in A. Héritier (ed.), *Common Goods: Reinventing European and International Governance*, Lanham, MD, Rowman and Littlefield, 2002, pp. 185–206.

<sup>33</sup> S. Lavenex, D. Lehmkuhl and N. Wichmann, 'Die Externe Governance der Europäischen Union: neue Steuerungsmodi und differenzierte Integration mit assoziierten Nachbarstaaten', *Politische Vierteljahresschrift, Special Issue 'Die Europäische Union. Governance und Policy-Making'*, 40 (2007), pp. 367–88; T. G. Grosse and L. Kolarska-Bobinska, 'New Modes of Governance in the New Member States', *NEWGOV Policy Brief* 25, Florence, 2008.

voting the governing actors out of office. In the case of direct democratic rights, such as referenda, politicians' policy choices may be annulled. Democratic accountability in this classic sense can take an integrated perspective of the welfare of all citizens across the entire territory within its political boundaries. It also can resort to courts for adjudication in the case of conflict in the application of legislative decisions.

A second strand of democratic control may be conceived of as a functional mode of representation of stakeholders (affected societal actors) in the decision-making process in a particular policy area. Ideally, it offers the possibility of taking into account all affected interests in a well-balanced way and seeing them reflected in decision-making outcomes. Representatives of stakeholder organizations are responsible to only limited functional 'constituencies' (for example, members or donors). Their 'representative' function may be self-authorized.<sup>34</sup>

The third strand of democratic control may be seen in the link between new modes and the public sphere and civil society. The link is made up of the media-based critical public debate of the operation and outcomes of the new modes of governance which may function as a (diffuse) corrective of the new modes.

One central feature of the new modes, their functional specificity, raises particular problems and requirements for democratic control. This functional specialization of the new modes should be considered in light of their potential implications for the larger community. For, while these new modes may be efficiency enhancing in their immediate area of functional specialization, they may also simultaneously produce negative external effects for other policy areas. From an overall view of the entire polity and its political boundaries they look like a patchwork of segmented arenas, each of which is focusing on its particular public policy issues without taking into account how other policy arenas are affected. In order to deal with these negative external effects, a mechanism of democratic control would have to ensure that these negative external effects are internalized by the functionally specialized actors of the new modes of governance which have caused the external effects in the first place. However, the new modes in general operate in a way which

<sup>34</sup> N. Urbinati and M. E. Warren, 'The Concept of Representation in Contemporary Democratic Theory', *Annual Review of Political Science*, 11 (2008), pp. 387–412.

is detached from the main arena of democratically legitimate policy-making through representative government; they operate outside the classic 'democratic circuit'.<sup>35</sup>

The most obvious way to reduce these negative externalities is to link this new mode of governance to the first classic strand of democratic accountability: parliamentary representation. Making this link guarantees that the individual new mode with its negative external effects is connected to a confirmation in the central political arena of democratically elected parliamentarians and their government. The government may take an overall view of the policy effects of the segmented functional policy-making arenas in the light of the overall goals of a democratically elected government and has the potential to intervene in areas where functional regulation under the new modes of governance lead to negative external effects and seriously damage specific societal groups.<sup>36</sup>

By contrast, multi-stakeholder representation – a functional mode of representation of all stakeholders affected by a specific policy dealt with under a new mode – does not allow for this possibility. While stakeholders, ideally representing all affected interests in a balanced way, may be empowered to monitor and, in case of dissatisfaction, possibly remove or sanction the actors operating under the new mode, it is beyond their scope to consider all possible policy effects beyond the immediate functional area at stake.

Nor is a control through the public sphere and civil society at large, which in media-based public debates may take issue with the policy-making activities under the new modes, able to provide for an internalization of the negative external effects of the new modes. This type of democratic control lacks the ability to follow through with actions once a new mode of governance has been found to be deficient. Although this form of control is able to draw the public's attention to the damaging effects of the new modes, it does not itself allow for formal sanctioning. Of the three types of linkages, the control exerted by the public sphere or civil society is the weakest. Since, more often than not, the involvement of civil society is only weakly institutionalized, and since, in contrast to political processes,

<sup>35</sup> V. Schmidt, 'Procedural Democracy in the EU: The Europeanization of National and Sectoral Policy-Making Processes', *Journal of European Public Policy*, 13: 5 (2006), pp. 670–91.

<sup>36</sup> This statement holds with a view on decision-makers at the European level such as the European Parliament.

the attention span of the public is short, this means of democratic control may function as a useful additional (diffuse) complement to the first classic mode of control and stakeholder democracy. By itself, however, it is not sufficient to correct possible negative externalities caused by new modes of functional governance.

Some empirical research results presented in the context of our joint research may illustrate this argument. The empirical study of financial market regulation under the Lamfalussy process provides some insights into the dynamics of linking functionally specialized governance with representative governmental forms of control. In this way the Lamfalussy procedure has institutionalized features of a multi-stakeholder process, combining elements of traditional comitology with the consultation of market actors (intermediaries), end-users (issuers of securities) and consumers (investors).<sup>37</sup> In the first phase of the Lamfalussy process, the Commission presents a proposal that emerges from a consultation of market actors. This proposal may be adopted as a framework directive by the Council of Ministers and the European Parliament under the co-decision procedure. The Commission, under its implementation powers – in cooperation with member states under the comitology procedures – elaborates and adopts the implementation measures. It does so after consultation with the European Securities Committee (ESC), the relevant regulatory committee that consists of member state representatives, and the Committee of European Securities Regulators (CESR), an independent advisory group comprising national regulators. In the implementation phase, CESR ensures harmonized application in the member states. Moreover, it is the Commission that monitors for consistent national transposition and application.

This brief description of the complex structure of the Lamfalussy procedure shows that various stakeholders are involved in the designing and the implementation of securities regulation. Most important for our question of democratic accountability is that the European Parliament has successfully fought to gain some control over the process. Fearing that too many policy decisions would be adopted under comitology and consultation, it proposed and obtained most of its proposals to gain some control over the process. While the committees of the implementation phase are not answerable to

<sup>37</sup> De Visscher, Maiscoq and Varone, 'The Lamfalussy Reform in the EU Securities Markets'.

the Parliament, the Parliament can exert some control through its potential to react within three months to draft implementation measures from the ESC. The sunset clause to which the Lamfalussy procedure is subject gives the Parliament a lever by which it can gain more formal institutional control in the process. In combination with the right of rejection of Commission drafts of implementation measures under the new regulatory procedure,<sup>38</sup> these new formal possibilities reflect a substantially strengthened governmental control of functionally specific modes of governance by a democratically elected body.<sup>39</sup>

By contrast, another example from our empirical studies – the case of environmental self-regulation by industry – shows that, although stakeholder democracy has established some links to the European Parliament, this link has remained very weak. MEPs are able to participate in the monitoring of the implementation of the recycling agreements in the plastics and paper industries, but in practice they show very little interest in these technical matters. At the same time, the emergence of a multi-stakeholder representation indicates that the process is heavily biased towards stakeholders from industry. This is hardly surprising, given that many of these fora address very specific aspects of the policy process that are of interest to the industry itself but not to a broader public. This example also illustrates the weakness of the public sphere and civil society actors. While NGOs were very active in pressing for the adoption of the industry measures to recycle plastic products, they completely refrain from exerting some control over the implementation of these measures. However, it was found that this NGO pressure was closely linked to a credible threat of legislation. In other words, the credible legislative threat to which the industry was exposed, the link to democratically legitimated government,<sup>40</sup> was the most important factor in the industry's engagement in self-regulation.

Another empirical case, the World Trade Organization's biotechnology regulation, very clearly highlights the many possible limits of stakeholder participation. It shows that, on the one hand, Civil Society Organizations (CSOs) act as watchdogs that observe and

<sup>38</sup> This is not limited to securities regulation but may also be applied to the regulation of health and the environment.

<sup>39</sup> De Visscher, Maiscoq and Varone, 'The Lamfalussy Reform in the EU Securities Markets'.

<sup>40</sup> Héritier and Eckert, 'New Modes of Governance in the Shadow of Hierarchy'.



critically comment on the policy process. The expertise of the CSOs contributes to the quality of the decision-making process. As experts, CSO representatives directly participate in the policy process, acting as 'deliberators' and working closely with national governmental delegates, international civil servants, and experts. On the other hand, it appears that the different roles assigned to civil society organizations as watchdogs and deliberators are sometimes hard to reconcile.<sup>41</sup> In accordance with our argument, the watchdog function of CSOs appears to strengthen the public control of the regulatory body. These publicly significant campaigns strengthen the CSOs' support among their supporters. At the same time, this is at odds with the role of a reliable and trustworthy negotiation partner. The conflict appears to be more acute for CSOs at the international than at the European level. At the European level, with only a limited number of available seats around the table, it is frequently the European Commission which defines the criteria for participation. Given the shadow of future elections, the parties must have an interest in building up a reputation in order to keep their seat at the table. One of the expectations is that the Commission expects participants to have a mandate from their constituency, that they have coordinated themselves internally before they become involved in the European bargaining process. This shows that the current participation of CSOs fulfils the democratizing potential inherent in new forms of participatory governance, but that it has its limits in following this control through during the fleshing-out of decisions during an extended and complex bargaining process.

## CONCLUSION

This contribution elaborates on the modes of public policy-making which involve private actors and/or occur outside legislative arenas, and which focus on delimited sectoral or functional areas, specifically on their implications for the debate on the European Union's democratic qualities or deficiencies. Building on a number of the

<sup>41</sup> J. Steffek, 'Report Comparing Participation in EU and WTO from a Normative Perspective', *2007 NEWGOV Report*, Florence, 2007. J. Steffek, C. Kissling and P. Nanz, *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* Houndmills, Palgrave Macmillan, 2008.

illustrative insights from various empirical projects, we come up with a rather mixed result. In our cases, at least, new modes of governance did not have a negative impact on existing patterns of democratic accountability. At the same time, two of the three different strands of democratic control we identified reveal a rather shallow quality of democratic control. Neither multi-stakeholder policies nor the participation of civil society guarantee democratic accountability in the strict sense. We argued that if the new modes of governance are institutionally linked to democratically elected governmental bodies – meaning, in this context, the European Parliament – it is more likely that negative outcomes from public policy-making in functionally segmented arenas of the European Union’s multilevel polity will be dealt with in a more systematic way.

Two questions arise immediately from this finding. First, how likely is there to be a more favourable connection between new modes of governance and the control of democratically elected representatives? Second, how does the observation of a substantial number of cases which do not match this more favourable constellation affect the democratic quality of the Union? The questions are linked in several ways. To start at the negative end, one might argue that the Commission’s discretion to control access to stakeholder initiatives (in terms of the definition of reliable partners or respective mandates of these initiatives) risks a selection bias. Yet the Commission is also aware that the legitimacy of its actions is frequently closely linked to the inclusiveness of the process of policy formulation. Moreover, the Commission is a college of peers, which in some corrective mechanisms might rule out excessively biased proposals.

Certainly, these qualifications refer more to the actual empirics of the policy-making process rather than to formal properties of the procedure. In this regard, the expansion of the co-decision procedure to a broader range of issues which is foreseen in the Lisbon Treaty and which strengthens the role of the European Parliament may address the question of democratic control more seriously. In our examples, the Lamfalussy story provides ample evidence that the European Parliament might very well exercise substantial control over functionally specified realms with delegated competences. The prospects of expanded parliamentary control might be even more rosy if we take into consideration the recent wake-up call of the Federal Constitutional Court in Germany, which sent a reminder about enhanced control of European Union decision-making to the

German Parliament. If the parliaments of other member states take this call seriously, as they seem likely to do, we might see a significant movement along the lines of Weale's statement that new modes of governance are the more politically legitimate the more they are nested in institutions underwritten by the democratic authority of parliaments. As for the implications of expanded control by national parliaments for the overall policy-making process in the European Union's multilevel and multi-arena polity, that's a whole new argument.