NORWEGIAN SCHOOL

The Centre for European and Asian Studies

When the Monnet Method is not an Option: Norway, Schengen and Flexible Governance

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A publication from:

Report prepared for:

For presentation at the EUSA Conference, Austin Texas, April 2005

Hoffmann called 'high politics',[2] has prompted the development of more flexible approaches to governance. It is therefore often argued that the EU is or is becoming a new, and perhaps unique, system of governance. Setting aside the 'good governance' literature focussing on civil society and development associated with the UN and the World Bank, the literature on governance in the EU may be divided into two camps that use the term to denote changes in public policy and a new method of policy making respectively.[3] The first draws on the literature on the modernisation of public policy and/or indirect 'steering', and links governance to regulatory politics and implicitly to liberalisation and New Public Management.[4] The second focuses on

blocked new treaties, or that a two-speed or two-tier EU might emerge, provided a powerful means of putting pressure on the UK and Denmark during the Single European Act and Maastricht negotiations.[11] But the alternatives were rarely elaborated, let alone agreed. A review of the pertinent debates identified three different bases for differentiated integration: i) 'mutli-speed' integration where exemptions constitute temporary derogations from agreed common goals; ii) 'variable geometry' where some states have their exemptions institutionalised; and iii) an 'a la carte' system where states opt in or out of specific policy initiatives.[12] In reality, however, the status of actual exemptions or derogations has tended to be ambiguous. The opt-outs may depend more on the nature of the policy in question than the states' preferences.[13] Despite the legal and symbolic differences between permanent opt-outs and temporary derogations, the boundary between the ad hoc policy deals and broader opt-outs depends on how institutionalised they become. Hence the case for approaching flexible integration in terms of policy areas and the mechanisms designed to sustain the exemptions. Eric Philippart & Geoffrey Edwards accordingly suggest that flexibility is most problematic in the European Community pillar, sometimes useful in the Common Foreign and Security pillar, and more necessary in the Police and Judicial Cooperation in Criminal Matters pillar.[14] In two of the three EMU cases the opt-outs are not a matter of government preferences for non-participation, but rather a matter of the government (and parliamentary majority) failing to secure popular support in referendums. The same holds for Norway: whereas the governments of Liechtenstein and Iceland chose not to join the EU, Norwegian governments have applied twice only to see their efforts defeated by referendum in 1972 and 1994.

The two mechanisms, flexible governance and differentiated integration, have been combined in the integration of Schengen into the EU system. Differentiated integration of the multi-speed, opt-out/-in and variable geometry kind is evident in the member (and non-member) states' different degrees and forms of participation; and much of the work on border controls, visa regimes, police and justice cooperation is characterised by exchanges of information, mutual learning and cooperation rather

traditions.[18] Applied to specific sectors, for example telecommunications, some therefore see a regulatory system shaped by a multitude of mutually dependent actors without clear hierarchical patterns of authority.[19] The central question for the participants in a multi-level government system, particularly that of a state without formal decision making *power*, is to identify and exploit the opportunities of influence and access.

Third, in the guise of 'new', 'network' or 'multi-level' governance the term is often used to denote a more specific method of EU and/or domestic policy making that is more inclusive and where access and expertise matter more than power. This is rooted in the literature on policy networks and epistemic communities, but a more rigorous definition is frequently associated with the Mannheim school's 'network governance'. Beate Kohler-Koch defines 'network governance' in terms of a combination of a polity based on pursuit of individual interest (rather than the common good) and featuring consociational politics (consensus-building, rather than majority rule). Her two-by-two typology contrasts this to pluralism (interest/majority rule), statism (common good/majority rule), and corporatism (common good/consociation).[20] However, although this entails a stricter theoretical focus on the EU as a *sui generis* political system, which is difficult to compare to member state systems, applying this to analysis of specific sectors has proven more difficult.[21] Leaving aside the question of how *sui generis* the EU system of governance actually is, the question that confronts the actors involved is how to exert maximum influence in such a network system, and therefore the extent to which it takes policy making beyond power politics and whether this varies across different levels of decision making.

The fourth theme, 'joint-up governance', has attracted more attention at the domestic level, but is pertinent to any discussion of EU governance. Much has been made of the need to avoid policy making in separate 'silos', where government department or agencies fail to communicate across their insulated 'silos'. As many of the EU policy initiatives subject to the governance debate involve more than one domestic agency, the challenge of cross-department coordination may be expected to be all the more significant in new EU policy areas such as AFSJ. In most EU states, the question of coordinating between the different domestic departments and agencies involved in an EU decision is at least not new. However, as the EU extends its activities into new sectors, hitherto less affects by integration, let alone if expertise turns out to outweigh formal power, the 'joint-up' question may turn out to be as significant with respect to the EU as it is for awkward (i.e. not single-department) domestic issues. The

confluence of further integration and a trend towards disaggregating domestic departments and agencies reinforces this potential problem.

Fifth, and finally, again drawing on the domestic politics literature, governance is often linked to a blurring of the boundaries between state and non-state actors. The term is usually invoked in the context of public policy change in a direction away from étatistm and centralised government, building on but going beyond New Public Management. Reflecting the UK experience in public sector reform, NPM entails a mixture of privatisation, liberalisation, regulation, more or less autonomous management, the use of market mechanisms etc., but governance is usually defined in somewhat wider terms that centre on non-hierarchical government, the blurring of public-private borderlines, 'arms-length' administration and oversight by independent regulatory authorities or agencies. It entails drawing on institutions both from government and beyond; on a blurring of the borders between the public and private sector; a degree of dependence between the organisations involved; elements of self-government; and its results depends more on the government's successful management and leadership than its authority or powers to command. Some of this has spilled over into the Commission's thinking on governance, although its practical effects in terms of involving civil society have been debated.[22] Given that the states, or rather their home affairs, police and judiciary bodies, are the central players in AFSJ, the pertinent questions related to this blurring of boundaries may related to the boundaries between member and non-member (or rather quasi-member) states.

In what follows the implications of differentiated integration and flexible governance are considered with respect to the area where it might be a necessity rather than a choice, the Area of Freedom Security and Justice, and in the light of the experiences of a country that has transformed flexible integration into the art of the possible to the extent that Norway is sometimes described as an EU 'insider *and* outsider'.[23] The next section therefore outlines the development of the EU's Area of Freedom Security and Justice and explores the dynamics of differentiated integration and flexible governance in the sector. It suggests that the path of European integration has been characterised by ad hoc arrangements that have subsequently become institutionalised, leading to a situation where non-member states have been granted unprecedented access to the EU system. Norway's experience with this system is duly assessed, with a view to exploring some of the implications of understanding informal access and influence in the EU system in terms of the governance literature.

Does Flexibility Matter? Norway and the Area of Freedom, Security and Justice

Although its roots can be traced back to early Twentieth Century efforts to combat anarchism and revolution, European cooperation on internal security, police and counter-terrorism has developed at a slower and less persistent pace than most other areas of EU policy. The core initiatives developed outside the EC/EU system proper, although they have since been integrated into the system. Interpol, the European organisation of police forces had developed into a global organisation by the 1970s,

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when new European initiatives were developed on an inter-governmental basis. The Pompidou Group to combat illegal drugs was set up under the aegis of the Council of Europe, and the Council of Ministers established the Trevi Group on broader law and order co-operation in 1975. Although born of the EC, Trevi was an informal intergovernmental European organisation with no permanent staff, part of an ad hoc approach to police and justice co-operation that had grown out of the Interpol system.[24] The 1985 Schengen agreement was the product of the Low Countries' decision to join a Franco-German initiative to abolish border controls. Again, it was a matter of establishing a European organisation 'within' the EC inasmuch as only member states (but not all of them) participated. However, both also envisaged and even entailed some cooperation with non-member states, including the EFTA countries. Bout developed from ad hoc arrangements to institutionalised cooperation to fully integrated aspects of the EU system: Trevi incorporated into the EU with the Maastricht Treaty, and Schengen at Amsterdam. During the run-up to the Maastricht negotiations ministers also decided to establish a system of European police co-operation, and Europol was written into the Treaty as a 'common interest'.[25] Its first manifestation, the Europol Drug Unit was established in 1993, Europol itself followed in 1998. Jorg Monar presents this as a classic example of the Council of Ministers' tendency to establish special, politically neutral, agencies outside the traditional EU structures.[26]

Co-operation in internal security thus evolved from ad hoc intergovernmental European organisations to an increasingly integral element of the EU system. Even if the EU's treaty negotiations may be understood primarily in terms of state interests, the emergence of overlapping competencies between the EU and other organisations and the incorporation of these into the EU system is more in line with historical institutionalist accounts that emphasise the 'path-dependent' nature of integration.[27] In Monica den Boer & William Wallace's analysis: "from then on [1985] until the ratification of the Treaty of Amsterdam, negotiations among the Schengen states and developments within Trevi and the third pillar overlapped, with a gradually expanding core group setting the pace for other EU governments to follow", and the pattern of cooperation in JHA as thus both "extensive and untidy."[28] Justice and Home Affairs became the third pillar of the EU at Maastricht, as the expanding Trevi arrangement (with a growing number of working groups covering a variety of areas from counter-terrorism to police cooperation, immigration, judicial cooperation and combating organised crime) was absorbed. In accordance with its intergovernmental logic, the

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[24] M. Anderson, M. Den Boer & G. Miller, "European Citizenship and Co-operation in Justice and Home Affairs", in A. Duff, J. Pinder & R. Pryce (eds), *Maastricht and Beyond: Building the European Union*, (London: Routledge, 1994); A. Guyomarch, "Co-operation in the Fields of Policing and Judicial Affairs", in S. Stavridis, E. Mossialos, R. Moran & H. Machin (eds), *New Challenges to the European Union: Policies and Policy-Making*, (Aldershot: Dartmouth, 1997).

[25] W. Bruggeman, "Europol and the Europol Drugs unit: Their Problems and Potential or Development", in R. Bieber & J. Monar (eds) *Justice and Home Affairs in the European Union: The development of the Third Pillar*, (Brussels, European Interuniversity Press, 1995).

[26] J. Monar, "Institutionalizing Freedom, Security, and Justice", in J. Peterson & M. Shakleton (eds), *The Institutions of the European Union*, (Oxford, Oxford University Press, 2002), p. 205-206.

[27] S. Bulmer, "The Governance of the European Union: A New Institutionalist Approach", *Journal of Public Policy*, 13:4 (1993) 351-380; P. Pierson, "The Path to European Integration: A Historical Institutionalist Analysis", *Comparative Political Studies*, 29:2 (1996)123-163.

[28] M. Den Boer & W. Wallace, "Justice and Home Affairs: Integration through Incrementalism?", in H. Wallace & W. Wallace (eds), *Policy-Making in the European Union*, (Oxford, Oxford University Press, 2000), p.498.

(or First Pillar) matters, while Title VI (or Third Pillar) matters fall to the MJP. Yet the working groups that sort under the EUs Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) cover matters which involve a range of MJP departments, particularly the Police Department where operational matters are concerned. As has been the case in the UK in the face of new cross-departmental challenges, informal and ad hoc preparatory meetings and channels of information were developed that have since been formalised and rendered more regular to improve the flow of information, coordination and preparation for meetings with the EU (where more than one directorate or ministry are normally present).

On the broader question of whether the system operates as desired, EU and Norwegian experiences and evaluations differ somewhat. This is partly a consequence of their different objectives. On the EU side, the central objectives were to maintain the Schengen system and extend it to Scandinavia, but to avoid 'pollution' of the EU system in the process in terms of diluting or violating the *Acuis Communautaire* or permitting non-members formal decision making power. Less formally, some EU actors also seek to encourage Norway to participate in the EU as and when appropriate. Unsurprisingly, the system is perceived to work well. From the Norwegian perspective, or at leas that of most of the government, parliament and relevant civil service, the objectives include maintaining the Nordic passport union and accessing Schengen, broadening Norway's participation in AFSJ, and even using this access to promote and pursue broader participation in European integration. In this light, it is hardly surprising that many involved on the Norwegian side express some frustration that the Schengen system is somewhat narrowly defined, particularly in terms of decisions on what is Schengen-relevant. Examples of this have multiplied with the increased focus on counter-terrorism since 2001, and include the European Arrest Warrant. However, from the EU side this is met with lack of understanding, inasmuch as Norway sometimes appears to pursue a less than fully coherent strategy for cooperation in the area of ASFJ (let alone the EU as such), signalling desire for wide participation but often listing practical objections or not appreciating the wider implications of new initiatives.

The development of the EU's JHA initiatives since Amsterdam thus illustrates the best and the worst of differentiated integrat

Differentiated Integration and Flexible Governance – Tentative Lessons

The core theme so far has been that if the ASFJ has proven a more difficult subject for European integration than the core elements of the EU such as the Single Market, the Schengen system has been downright exceptional. Yet the Schengen experience demonstrates just how ad hoc the EU'o Pi 0.2904 Ye2 9ylit ex