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

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

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Over the last two decades the European Union has deepened, widened and extended its scope to such an extent that it no longer makes much sense to speak of European integration as a unitary phenomenon. While decision-making may have become more supranational in some policy areas, enlargement to more member states and extension to new policy areas beyond the Single Market has made the system more diverse. To cope with enlargement and to address policy sectors where the states guard their competences more jealously, new arrangements and decision-making procedures have been developed. What Helen Wallace called the *Monnet method*, which entailed the Commission and Council of Ministers acting in partnership to make collective decisions and produce directives that would be implemented by the states, has not been deemed appropriate to a number of initiatives that fall outside the core areas of the Single Market.¹ Two broad instruments have duly been developed to deal with awkward partners and sensitive sectors: differentiated integration and flexible governance. The first challenges the assumption that all states participate equally in European integration, and consequently threatens to blur the boundaries between members and non-members, and the second permits integration to take other forms than common and binding legislation. Norway's participation in the Schengen arrangement combines both, and may allow some lessons to be drawn.

European integration is usually considered in dichotomous terms – a state is either in the EU, or it is not. Yet a series of opt-outs and the mechanisms for closer co-operation provided for in the Treaties and Constitution (let alone the prospect of the latter's non-ratification by some states) makes this assumption increasingly problematic. To be sure, all member states of the European Union participate in the EU's core activity – the Single Market. Moreover, the UK's 'opt-out' of the Social Chapter at Maastricht proved temporary, simply a matter of awaiting a Labour electoral victory. The new member states that do not participate fully in Schengen or Economic and Monetary Union hardly do so out of choice, but because they have yet to qualify. Nevertheless a limited but significant number of states have sought exemptions from various initiatives for political reasons. This group principally consists of Sweden, Denmark and the UK with respect to EMU; the UK, Denmark and Ireland with respect to Schengen; and the neutral countries (and Denmark again) with respect to the West European Union. Moreover, as far as Schengen is concerned, non-members Norway and Iceland (soon to be joined by Switzerland) are more deeply involved than Denmark, the UK, Ireland, and the new member states.

The extension of the scope of the EU into a number of policy areas that the states are more reluctant to submit to binding supranational decision-making, what Stanley

¹ H. Wallace, "The Institutions of the EU: Experience and Experiments", in Wallace H. & W. Wallace (eds), *Policy-Making in the European Union*, (Oxford, Oxford University Press, 1996). See also H. Wallace, "Introduction: Rethinking European Integration" in H. Wallace (ed.), *Interlocking Dimensions of European Integration*, (London, Palgrave Macmillan, 2001).

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 steering without hierarchical authority and suggests that in the EU the combination transcending the state, a multitude of actors, weak hierarchies and the importance of bargaining and problem solving through upgrading common interests amounts to a new form of governance.⁵ However, if the interpretation of the EU as *sui generis* (which characterises some of the literature in the second camp) is relaxed, there is considerable common ground. Drawing on Gerry Stoker’s review of the ‘new governance literature with respect to the UK’,⁶ five characteristics are central to the concept: i) it is a matter of innovative and flexible means of steering; ii) it involves coordination in multi-level political systems; iii) negotiation and expertise outweigh formal authority; iv) it is problem-oriented and involves cross-departmental coordination; and v) the boundaries between state and non-state actors are blurred. With respect to the EU the last point may be extended to include the blurring of boundaries between member and non-member states.

The EU’s Area of Freedom, Security and Justice, and more specifically its Schengen-relevant aspects that are linked to borderless travel, features both differentiated integration and efforts to establish more flexible governance. Three member states (the UK, Ireland and Denmark) have made reservations about full participation, ten new member states have yet to become full operational members of Schengen, but Norway and Iceland are deeply involved. Part of the AFSJ has been integrated into the EU’s first pillar, but much of it remains in the second. Decision-making is closer

² S. Hoffman, “Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe”, *Daedalus*, 95:3 (1966), 826-915

³ For a brief but broader review of the variety of definitions of governance, see R. A. W Rhodes, “Governance and Public Administration” in J. Pierre (ed.), *Debating Governance: Authority, Steering and Democracy*, (Oxford, Oxford University Press, 2000); for reviews with respect to the EU, see S. Hix, “The Study of the European Union II: The ‘New Governance’ Agenda and Its Rival”, *Journal of European Public Policy*, 5:1 (1998) 38-65; S. Bulmer, “New Institutionalism and the Governance of the Single European Market”, *Journal of European Public Policy*, 5:3 (1998) 365-38; and U. Sedelmeier, “Comparative Politics, Policy Analysis and Governance – A European Contribution to the Study of the European Union?” *West European Politics*, 24:3 (2001), 173-182.

⁴ S. Bulmer, “The Governance of the European Union: A New Institutional Approach”, *Journal of Public Policy*, 13:4 (1993) 351-380; A. Sbragia, “The European Union as Coxswain: Governance by Steering” in J. Pierre (ed.), *Debating Governance: Authority, Steering and Democracy*, (Oxford, Oxford University Press, 2000); M. Campanella & C. W. Eijffinger (eds), *EU Economic Governance and Globalisation*, (Cheltenham, Edward Elgar, 2003).

⁵ M. J. Jachtenfuchs, “Theoretical Perspectives on European Governance”, *European Law Journal*, 1:2 (1995) 115-133; G. Marks, F. W. Scharpf, P. C. Schmitter & W. Streeck (eds), *Governance in the European Union*, (London, Sage, 1996); W. Wessels, “An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes”, *Journal of Common Market Studies*, 35:2 (1997) 267-299; B. Kohler-Koch, & R. Eising (eds), *The Transformation of Governance in the European Union*, (London, Routledge, 1999).

⁶ G. Stoker, “Governance as Theory: Five Propositions”, *International Social Science Journal*, 155 (1998), 17-28.

to the models set out in the new governance literature than the classical Monnet method. This is even more the case as far as Norway and Iceland are concerned: they enjoy considerable access to decision making procedures, participating in the relevant Council of Ministers meetings and working groups, but have no formal voting power or right not to accept new legislation. Hence the suggestion that Norway's experience in this sector may provide a few lessons about governance in action, being less than a member but more than an outsider – or a quasi-member. The first section, below, elaborates on governance as flexible and differentiated integration that may be used where the Monnet method is inappropriate. The second section briefly reviews the ad hoc development of European integration leading up to the AFSJ, before proceeding to an assessment of Norway's experience with the Schengen system. The third section explores possible lessons from 'governance in action', but focusing on the decision-making rather than on successes and failures in terms of policy implementation.

Governance and Differentiated Integration – Five Themes and Five Questions

Although governance is sometimes presented as an alternative to more direct, formal and hierarchical modes of steering (whether New Public Management or the Monnet method), it may be more a case of making virtue out of necessity. Or a second best solution. At the domestic level, particularly with references to developments in the UK, governance is sometimes presented as an alternative to hierarchical government, as a "co-ordinating instrument in institutional systems where hierarchical control and command mechanisms have been relaxed or abolished."⁷ Janet Newman argues that it is explicitly invoked as part of Labour's effort to cast its policies in terms of 'renewal, transformation and innovation', i.e. that it is in no small part about presentation.⁸ At the EU level governance has been hailed as 'co-operative problem-solving', designed to minimise opposition and perhaps to enhance legitimacy, and defined as "target-oriented steering of societal processes by those in command of decision-making power."⁹ However, both as a contrast to classic EU decision making and when linked with differentiated integration, it may be more a matter of working out a second-best approach to decision making than elaborating a coherent alternative. Specific expressions of new EU governance, such as the Open Method of Coordination and the White Paper's effort to enhance the inclusiveness of decision making, have been criticised both in terms of their weak or inconsistent bases, ad hoc measures and limited effects.¹⁰

Likewise, turning to differentiated integration, most exemptions to the rule that all member states participate fully in all EU policy initiatives have been ad hoc second-best solutions that accommodate domestic pressure rather than a coherent strategy. To be sure, the threat that some states might embark on closer integration if others

⁷ J. Pierre & G. Stoker, "Towards Multi-Level Governance", in P. Dunleavy et al. (eds), *Developments in British Politics* 6, (Basingstoke, Palgrave, 2002), 31.

⁸ J. Newman, *Modernising Governance: New Labour, Policy and Society*, (London, Sage, 2001).

⁹ B. Kohler-Koch, "Catching up with Change: the Transformation of Governance in the European Union", *Journal of European Public Policy*, 3.3 (1996) 359-380, p.369; on the legitimacy question see also M. Jachtenfuchs, "Theoretical Perspectives on European Governance", *European Law Journal*, 1:2 (1995), 115-133.

¹⁰ D. Chalmers & M. Lodge, "the Open Method of Co-ordination and the European Welfare State", *CAR Discussion Paper no.11*, June 2003; L. Cram, "Governance 'to Go': Domestic Actors, Institutions and the Boundaries of the Possible", *Journal of Common Market Studies*, 39:4 (2001), 595-618.

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) ‘multi-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 than the classical Monnet method of EU decision making.¹⁵ The object of the present exercise is not to evaluate the operation of the AFSJ but to explore the lessons that may be learned from Norway’s effort to *participate in decision making*. The focus will therefore be on the dynamics of decision making and decision shaping, on the effects of and limits to deep access to the EU decision making machinery but without

¹¹ P. Taylor, “The New Dynamics of EC Integration in the 1980s”, in J. Lodge (ed.), *The European Community and the Challenge of the Future*, (London, Pinter, 1989); S. George, *An Awkward Partner: Britain in the European Community*, (Oxford, Oxford University Press, 1994); T. Pedersen, “Denmark and the European Union”, in L. Miles (ed.) *The European Union and the Nordic Countries*, (London, Routledge, 1996).

¹² A. Stubb, “A Categorization of Differentiated Integration”, *Journal of Common Market Studies*, 34:2 (1996), 283-295.

¹³ A. Kölliker, “Bringing Together of Driving Apart the Union? Toward a Theory of Differentiated Integration”, *West European Politics*, 24:4 (2001), 125-151.

¹⁴ E. Philippart & G. Edwards, “The Provisions on Closer Co-operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union”, *Journal of Common Market Studies*, 37:1 (1999), 87-108.

¹⁵ On the operation of AFJS, see e.g. N. Walker (ed.), *Europe’s Areas of Freedom, Security and Justice*, (Oxford, Oxford University Press, 2004); on earlier developments, see R. Bieber & J. Monar (eds), *Justice and Home Affairs in the European Union: The Development of the Third Pillar*, (Brussels, European Interuniversity Press, 1995).

voting power. Although the situation is somewhat peculiar, if not unique, and AFSJ perhaps not the ideal sector in which to explore the dynamics of governance, it is one of the few cases in which the effects of access without power may be explored. Before turning to this exploration, five core elements that can be extracted from the growing literature on governance warrant some further comments.

First, both the domestic and EU-level literature on governance emphasises its innovative and flexible nature. Whether laudatory or critical, most reviews concede that (whether in the UK or the EU) the initiatives that are discussed under the topic 'governance' are a matter of going beyond formal power and invoking a form of steering toward policy outcomes or objectives that involves more than formal hierarchical power. Whether it is because of globalisation, European integration or a greater role played by markets, political authorities' capacity to get things done does not rest on their formal powers of command and authority alone. Somewhat analogously to the idea that government intervention is a response to market failure, 'governance' may be considered a response to 'state failure' e.g. in terms of decreasing capacity to achieve goals or to excessive cost.¹⁶ However, this is hardly a matter of invoking a new and *sui generis* model of decision making. While the term is far from precise in the public policy literature, 'governance' is generally invoked in the context of public policy change to denote a shift from centralised hierarchical government to a more diffuse pursuit of policy goals through co-ordination and bargaining, often by actors with limited authority in a decentralised or multi-level system.¹⁷ Yet, particularly in the UK, this flexibility and decentralisation has been combined with considerable, if indirect, central control and coordination. The question, therefore, is who determines the parameters of the policy and participation? The Major government's initial enthusiasm for flexibility in the run-up to the Amsterdam negotiations cooled considerably once the potential implications (that they might not have a veto over it) became clearer.

Second, and more specifically to the EU context, governance is usually taken to include an element of multi-level politics. If this holds at the national level, even in unitary states such as the UK, it is of course even more important at the EU level inasmuch as it features a broader arena, with more players and power and resources divided across more levels. At the domestic level a combination of decentralisation and privatisation/liberalisation is often considered to have generated a broader set of more independent actors, which in turn means that negotiating goals and exchanging resources become increasingly important. For observers across the spectrum this means that the EU is particularly prone to governance as a means of policy making, because of its plural nature, with political authority and powers of agenda-setting, policy formulation, legislation, implementation and supervision dispersed not only between institutions but also different levels and uniting different bureaucratic

¹⁶ P. C. Schmitter, "What is there to Legitimize in the European Union... and how might this Be Accomplished?", Jean Monnet Working Paper 14/01, New York University Law School, 2001; F. Fukuyama, *State-Building: Governance and World Order in the 21st Century*, (Ithaca, NY, Cornell University Press, 2004).

¹⁷ See e.g. J. Pierre & B. G. Peters, *Governance, Politics and the State*, (Basingstoke, Macmillan, 2001); D. Richards & M. J. Smith, *Governance and Public Policy in the UK*, (Oxford, Oxford University Press, 2002); T. Bovaird & E. Löffler (eds), *Public Management and Governance*, (Lodon, Routledge, 2003).

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 affected 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

¹⁸ J. Richardson, “Policy-Making in the EU: Interests, Ideas and Garbage Cans of Primeval Soup”, in J. Richardson (ed.), *European Union: Power and Policy-Making*, (London, Routledge, 1996); P. C. Schmitter, “Imagining the Euro-Polity with the Help of New Concepts”, in G. Marks, F. W. Scharpf, P. C. Schmitter & W. Streeck (eds.), *Governance in the European Union*, (London, Sage, 1996); M. J. Gabel, “The Endurance of Supranational Governance: A Consociational Interpretation of the European Union”, *Comparative Politics*, July 1998, 463-475.

¹⁹ V. Schneider, G. Dang-Nguyen & R. Werle “Corporate Actor Networks in European Policy-Making: Harmonising Telecommunications Policy”, *Journal of Common Market Studies*, 32:4 (1994) 473-398; A. Héritier, *Policy-Making and Diversity in Europe: Escape from Deadlock*, (Cambridge, Cambridge University Press, 1999).

²⁰ B. Kohler-Koch, “The Evolution and Transformation of European Governance” in B. Kohler-Koch & R. Eising (eds.), *The Transformation of Governance in the European Union*, (London, Routledge, 1999)

²¹ U. Sedelmeier, “Comparative Politics, Policy Analysis and Governance – A European Contribution to the Study of the European Union?” *West European Politics*, 24:3 (2001), 173-182.

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 étatist 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,

²² L. Cram, "Governance 'to Go': Domestic Actors, Institutions and the Boundaries of the Possible", *Journal of Common Market Studies*, 39:4 (2001), 595-618.

²³ S. S. Andersen, "Norway: Insider AND Outsider", *Arena Working Papers* 00/4, University of Oslo, 2000.

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

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).

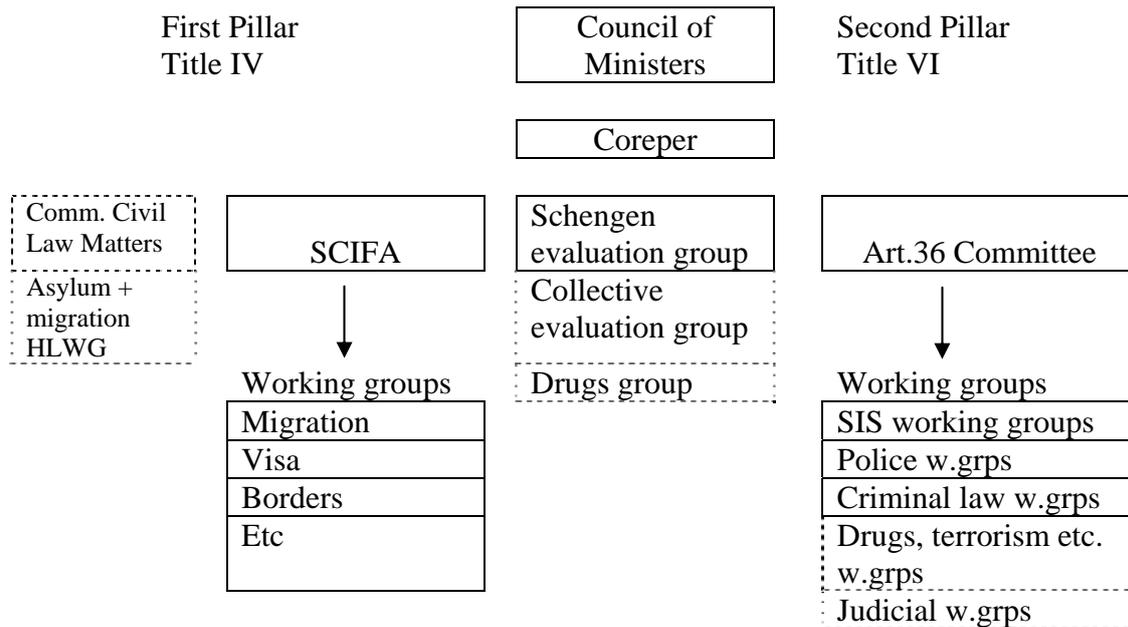
²⁵ W. Bruggeman, "Europol and the Europol Drugs unit: Their Problems and Potential or Development", in R. Bieber & J. Monar (eds), *Justice and Home Affairs in the European Union: The development of the Third Pillar*, (Brussels, European Interuniversity Press, 1995).

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 Institutional Approach", *Journal of Public Policy*, 13:4 (1993) 351-380; P. Pierson, "The Path to European Integration: A Historical Institutional 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.

third pillar was intergovernmental rather than anything resembling the *Monnet method*, and characterised by what den Boer & Wallace call loosely linked ‘islands of cooperation’ that evolved through a drawn out learning process and national agencies’ adaptation to EU-level initiatives.²⁹ The activities that sorted under the third pillar were divided among three Steering Groups, the first on asylum and immigration, the second on police cooperation and the third on judicial cooperation. The first of these three sets of issues was transferred to the first pillar at Amsterdam, under Title IV and what became the SCIFA working group (Strategic Committee on Immigration Frontiers and Asylum); the second and third remained intergovernmental under Title VI.



Full borders indicate bodies that deal with Schengen matters and allow permanent or ad hoc Norwegian participation; dotted lines indicate activities that fall outside ‘Schengen relevance’ (not all individual working groups are listed).

By the time the Schengen system was incorporated into the Treaty it was ‘extensive and untidy’ not only because it had developed out of cooperation among a sub-set of EU states, but also because some states chose not to participate fully while outside states had to be permitted full access. Denmark had earned its Maastricht opt-out, and would continue to cooperate on Title IV matters only on an intergovernmental basis (effectively meaning that it unilaterally opts-in as and when it chooses). The UK and Ireland chose not to take part in Schengen, but are permitted to participate in specific initiatives. The prospect of eastern enlargement opened for the possibility that some states might not be permitted to participate fully in the Schengen system, because of concerns about their police, judiciary or border control capacities. Moreover, Schengen was already linked to the Nordic Passport Union, which includes non-EU members Norway and Iceland. Both states were therefore accorded considerable access to part of the EU system through Schengen, including participation in discussions at all levels. This measure is far more intrusive into the EU system than those permitted under the EEA agreement, although it has received far less attention from the press, public or even academia.

²⁹ Den Boer & Wallace, “Justice and Home Affairs: Integration through Incrementalism”, p. 501.

The Schengen arrangement is perhaps the best example of the limited options that some non-member state face in their relationship with an expanding European Union. Denmark, Sweden and Finland's joining Schengen made it impossible to maintain the Nordic passport union unless Norway and Iceland signed up to Schengen too. The status quo was not an option, and Norway was unlikely to persuade her neighbours to refrain from joining Schengen. Events were clearly beyond Norwegian control, and opened for a debate on more extensive co-operation in the fields of justice and police, including the relationship with Europol. Although some of the Eurosceptic parties questioned the desirability of such cooperation, let alone the pursuit of even closer links, deeper cooperation in AFSJ appears to enjoy the support of the parliamentary majority. In the event, the Schengen Agreement was integrated into the EU framework at Amsterdam, thus rendering Norway's arrangement out-of-date before it could even enter into effect and paving the way for the current arrangement. In summary, this secures Norway a degree of access by permitting her representation in the Council of Ministers and its working groups, but without voting rights, and puts the same obligations on Norway as on the EU states that participate fully in Schengen. The same applies to Iceland, with Switzerland is in the process of joining too. The key caveat is that this applies only to the aspects of AFSJ that are considered 'Schengen relevant', a matter that is in effect largely determined by the Legal Services of the Council of Ministers' Secretariat. Whereas Norway and Iceland have been happy to argue for a liberal interpretation of Schengen relevance, the Swiss may turn put to favour the stricter approach usually adopted by the Council. Equally significantly, Schengen is more static than AFSJ as such, and the two quasi-members have found themselves somewhat marginalised on new initiatives to the extent that they are defined as falling outside Schengen. The following paragraphs explores the operation Norway's Schengen arrangement during the first few years of operation, a period in which both Norway and its partners explored the limits of this form of cooperation.³⁰

The Schengen arrangement has brought two EU non-members into closer contact with the EU decision making system than any other arrangement. It prescribes that the EU Council of Ministers meet as the Schengen Joint Committee when it discusses matters that it deems relevant to the agreement, and this system also applies to the working group level.³¹ However, this machinery was but into operation before practical procedures had been established, and these has to be developed during its first few years of operation. As the Council of Ministers makes the operational decisions, the practical operation of the system has varied considerably from one Presidency to another. At the ministerial level the Joint Committee means either i) that the Norwegian and Icelandic representatives leave the meeting when it has finished attending to Schengen-relevant matters and reverts to being the Council proper, or ii) that they are invited in to join the meeting once non-Schengen matters have been discussed. The former permits more or less full participation in discussions but

³⁰ The findings reported here are the results of a study commissioned by the Norwegian Ministry of Justice in 2003, based on interviews conducted in the first half of that year, and published in Nick Sitter & Kjell A. Eliassen's "Norges deltakelse i Schengen samarbeidet: vurderinger og anbefalinger" [Norway's participation in Schengen: assessment and recommendations], *CEAS Report 03/03*, The Norwegian School of Management BI, 2003.

³¹ For a summary, see e.g. The House of Common, *European Scrutiny – twenty-third report*, 23 June 1999, section 7.

exclusion from the votes at the end, whereas the latter procedure entails a greater danger that Schengen relevant matters might also be discussed before the two quasi-members are admitted to the meeting (effectively to be informed of the EU's decision). The procedural decisions of the Council Presidency may therefore be of considerable importance to the real impact of the two quasi-members on decisions.

Although Norway's experience at the Council of Ministers' level is generally reported as good, albeit with the above-cited proviso that access has varied with the Presidency's procedural choices, Norwegian participants are sometimes perceived as cautious by their EU counterparts. Central points raised repeatedly include the need for non-member states to elaborate clear agendas and strategies, and not to send mixed signals to the EU, their need to tailor their tactics to the rotating Presidency, and the importance of making full use of available procedural rules. The latter includes that Chair of the Joint Committee, which rotates between the EU on one hand and Norway/Iceland on the other. Even before enlargement, the number of actors waiting to be heard put considerable constraint on the influence of the two 'quasi-members'.

To be sure, it has been well documented that much of the negotiation that goes into a Council decision takes place at the committee or working group level, and that formal voting matters less the lower the level. Whereas COREPER decisions may be taken 'in the shadow of the vote', this is less likely to be the case in the working groups.³² Norway's experience with Schengen bears this out. Coreper-level meetings are more frequent, and this evidently makes non-member access easier. Some participants at lower levels have pointed out that not being able to speak in their native language is sometimes a mild problem. The smoothest cooperation is reported at the working group level, where nationality and voting rights seem irrelevant and expertise and judicious use of interventions count for more.

Yet AFSJ cooperation entails more than merely participation in the Council of Ministers and its working groups. Although the Commission and European Parliament's roles may be overshadowed by that of the Council, they represent under-used avenues for influence as far as Norwegian efforts to influence decision making in AFSJ are concerned. While this is of course in line with most of the literature on decision making in the EU and multi-level governance, several interviewees from the EU Member States emphasised the limited attention (neglect is perhaps too strong a word) paid by non-members to direct contact with political, ministerial and even academic legal milieus in the Member States.

On the domestic side, participation in Schengen has provided a considerable challenge in terms of what is often labelled joint-up governance, or coordination across departments. The main responsibility lies with the Ministry of Justice and Police and the Ministry of Local Government and Regional Development, in cooperation with the Ministry of Foreign Affairs. The MLGRD takes primary responsibility for Tile IV

³² F. Hayes-Renshaw & H. Wallace, *The Council of Ministers*, (New York, St. Martin's Press, 1997), see also G. Edwards, "National Sovereignty vs. Integration? The Council of Ministers", in J. Richardson (ed.) *European Union: Power and Policy-Making*, (London, Routledge, 1996), J. Lewis, "Is the 'Hard Bargaining' Image of the Council Misleading? The Committee of Permanent Representatives and the Local Elections Directive", *Journal of Common Market Studies*, 37:4 (1998) 479-504.

(or First Pillar) matters, while Title VI (or Third Pillar) matters fall to the MJF. Yet the working groups that sort under the EU's Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) cover matters which involve a range of MJF 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 *Acquis 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 least 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 integration, from the EU's standpoint as well as that of the Norwegian government and civil service. Norway has secured full access to the decision making machinery, but without voting rights. Yet there is some frustration on the Norwegian side over what is seen as the EU's narrow interpretation of the scope of Schengen. Yet EU officials sometimes expressed frustration that Norway neither recognises the full extent of the privilege it (and Iceland) has been granted, nor takes full advantage of it. Oslo is seen as sending mixed signals regarding policy preferences and willingness to extend cooperation, and as slow in taking advantage of other opportunities for influence outside the formal legal structure of the Schengen institutions. In short, Norway's experience with Schengen is a case of making the most of an ad hoc arrangement and of exploring and exploiting forms of informal influence. These are the core themes in the literature on governance, or at least the in-put-oriented aspects of that literature, which focuses on government beyond formal institutions and rules, and often emphasises access over power. The next section duly explores some tentative lessons from Norway's experience under the Schengen arrangement for influence under flexible governance.

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's institutional arrangements can become. Much of the literature on AFSJ refers to the problem of integrating new member states, some of it even touches on the British, Irish or Danish dimensions, but Norway's and Iceland's deep access to the EU system through Schengen remains a truly exceptional piece of differentiated integration. There was no getting around the Nordic Passport Union, and integration of Schengen into the EU system clearly warranted innovative measures. In line with much of the historical institutionalist literature, it is the product of a number of separate decisions and arrangements and efforts to render these compatible. Existing arrangements sometimes simply force second-best solutions. Differentiated integration can be seen as an adequate (and generally short- or medium-term-oriented) measure in the face of awkward challenges and inconvenient institutions. As Council officials regularly put it, there is absolutely no way in which Norway and Iceland could have negotiated such favourable outcomes in terms of access to the EU machinery had it not been for the *fait accompli* of a long-established passport union. Yet perhaps a key point related to governance is that it is very much a question of building on existing arrangements and working out adequate solutions. In any case, the situation with two states granted full access but without formal powers provides an opportunity to explore the 'non-power' aspects of the central themes in the governance literature. Each of the five themes/questions set out in the first part of the paper are addressed briefly below.

First, if governance is a more flexible and less formal type of steering, who determines its parameters and does it matter? Norway's experience with Schengen suggests that in spite of the evident importance of flexible and innovative integration, of using informal channels, of expertise and coordination and preparation, at the end of the day much comes down to power and formal rules. This holds not merely for the banal observation that non-members do not get to vote in the Council, but also for the more important point that therefore their opinions are accorded less weight (although this effect is diluted further 'down' into the system, at working group level). Perhaps the central lesson about power is driven home most forcefully by the question of 'Schengen relevance', and the Council Secretariat's role in defining what part of a new initiative is or is not relevant to Schengen and thus open to Norwegian and Icelandic influence. The decision making system may seem oriented towards upgrading the common interest and avoiding operating against any participant's major interest, but access to decision making procedures should be distinguished from access to agenda setting and determining the scope of the flexible arrangements.

Second, what does operating in a multi-level political system mean for the individual actors' influence? Inevitably, an open and pluralist system involves a trade off between opportunity and the resources required to take advantage of it. Much of the literature on new governance refers to the increasing importance of informal arrangements or tools over formal rules, and the openness of the EU multi-level system. The unsurprising finding is that Norway's perceived (by her own participants and those representing the EU) influence depends on appropriate behaviour on the

part of her experts and representatives at all levels. This is very much what the literature on governance would suggest. Perhaps less obviously, however, the Norwegian experience suggests that this is a double-edged sword. On the one hand it is easier for a quasi-member to influence informal decisions and agreements than formal directives *when and to the extent that* it has the required expertise; but on the other, it is easier to be marginalised from new initiatives. Whereas Norway enjoys good access when the system works, it suffers exclusion when its representatives fail fully to exploit the available opportunities. Limited operation outside the decision making machinery, in terms of working with the member state governments, the Commission or Parliament is a case in point.

Third, does expertise outweigh power? The obvious answer, again confirmed here, is that this depends on how expertise is put to use and that it is likely to vary with proximity to the level at which decisions are formally voted on. The literature on epistemic communities and network governance suggest that access, expertise and credibility might outweigh formal rules and voting power. Norway's Schengen experience support this, but mainly as far as the lower levels of the hierarchy is concerned. At the political level, formal rules outweigh informal actors, and at other upper levels the 'shadow of the vote' still carries some weight. The less obvious lesson is the considerable importance of procedures, and particularly the unwritten procedures that are left at the discretion of the Council Presidency. Evidently, the scope for influence on the part of Norway and Iceland is shaped by the Presidency, particularly in terms of whether Norway and Iceland's participation comes at the beginning or end of the Council meetings. Again there is evidence that power 'once removed', not voting power but control over scope, agenda and procedure, is central.

Fourth, does EU governance raise more severe 'joint-up governance' questions than at the domestic level? The unsurprising answer to this rather loaded question is of course positive. The governance literature emphasises the importance of cross-organisational coordination, or joint-up governance, and suggests that managing coordination and the flow of information is essential. As governing becomes more a matter of negotiating solutions than top-down command, information becomes ever more valuable. The surprise is not that this lesson appears to have been learned by the Norwegian ministries and agencies involved with the Schengen area, but rather that it took a few years. If there is a lesson here, it concerns the learning process. Deep access to the EU regime evidently exposed the limitations of inter-department (-agency) coordination, and these challenges appear to have been exacerbated by both the nature of the sector (which pertains to a number of departments) and by the reorganisation of Norwegian departments into a larger number of more autonomous bodies.

Fifth and finally, does flexible governance help blur the lines between the ins and outs? Again the simple answer is that it does, and that this effect is stronger further down the hierarchy. Nevertheless, the overall answer is that the central themes that run through Norway's participation in Schengen are asymmetry and satisfaction. The relationship between Norway and Iceland on one hand, and the EU members and institutions on the other may in many respects be characterised as 'network governance' as far as decision making and shaping is concerned. Nevertheless, at important points the asymmetry in the relationship is the central factor, and this is perhaps best captured not in tension over specific policy decisions but over the very scope and reach of the Schengen system and Norway's effort to extend the meaning

of Schengen relevance. In other words, the system works adequately, but its scope is more contentious.

Governance – Your Flexible Friend?

The two mechanisms that have been designed to cope with contentious policy areas and awkward states – flexible governance and differentiated integration – have worked remarkably well for all parties concerned. Perhaps better than anticipated, give some of the concerns initially held by both sides. In the Norway/Schengen case this hardly represented an ideal solution as far as the central EU actors were concerned, inasmuch as complete integration would have been a preferred solution, but rather constituted an adequate effort to integrate Schengen into the EU system. This ad hoc characteristic of the arrangement has shaped much of its working. Consequently, Norway and Iceland have achieved a remarkable quasi-member status, which in turn allows some exploration of the workings of ‘influence without power’. At one level, this confirms many of the themes put forward in the literature on governance (at both the domestic and EU level). Smaller EU members (and small potential members?) may be encouraged to find that even without power (and therefore also with limited formal voting weights) a state may carry considerable influence in the Council. Or at least be perceived to do so. The caveat is that this is predicated on preparation, resources and a coherent strategy – all of which has taken considerable time to marshal in the Norwegian case. As far as input into the policy making process is concerned, the central themes of more flexible forms of governance all make for good access. In making policy, access and expertise may therefore balance limited (or no) formal power. Even here, however, procedural power makes for considerable variation in the effect of access. More to the point, even if quasi-membership is relatively effective in terms of short-term policy, the scope of participation is circumscribed by the organisations or agent that hold formal power. In short, differentiated integration, and the flexible governance of which it is part, may be a necessary ad hoc solution. But, for the outsider, influence is hardly a substitute for power.