Efficiency and Effectiveness in European Decision-Making: Insights from Discourse Theory

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1. Efficient and Effective Governance in the EU?

Does the EU have the potential to provide public order in Europe without becoming a state? Most answers to this question are rather sceptical. Whilst some argue that public order is intrinsically connected to democracy, and that democracy is only conceivable in state-like structures (which again is argued to be a non-option for the EU), others point to more pragmatic reasons, such as the EU's supposedly weak capacity to conduct efficient and effective governance. Unfortunately, however, systematical investigations into the capacity of the EU for conducting efficient and effective governance are still hard to find. The literature available is mostly organized around the notion of the EU's "problem-solving capacity" without either properly operationalizing the term or collecting systematical empirical data. Most often, single case studies demonstrate that the EU is either efficient and/or effective, or that it is not. Furthermore, the theoretical focus employed most often is derived from either supranationalism or intergovernmentalism, and lacks the sophistication of theory-driven insights into the complexities of European governance, or it follows the paths of network analysis and falls short in leading to general results.

This paper works towards reducing this deficiency by employing a double strategy. Section 2 reviews some of the most crucial stumbling blocks that the EU faces in its efforts to conduct efficient and effective policy-making in the EU, contrasts them with available data on efficiency and effectiveness in EU policy making, and argues that neither supranationalism nor intergovernmentalism can convincingly explain the surprisingly good performance of the EU. Section 3 introduces a positive deliberative approach that is better equipped for explaining the observable degree of efficiency and effectiveness in European governance. The following argument leads along two lines of reflection. The first line distinguishes between three modes of interaction, voting, bargaining and arguing, and shows that arguing is functionally superior to its two alternatives when it comes to coping with the complexities of European Union politics. The second line of reasoning analyses the EU's institutional set up as seen from the perspective of a discourse analytical approach and interprets it as a response to a demand for deliberation. Some of the most crucial institutional features of the EU, such as its gradual opening for non-governmental participation, its highly legalistic character and its technocratic bias are accordingly interpreted as means for promoting argumentative interaction in the EU. In conclusion, the astonishingly good policy performance of the EU is explained as the product of an institutional design that overcomes a great number of the

difficulties associated with EU policy-making by systematically providing incentives to transform strategic interaction into deliberative problem-solving.

2. Analysing Output

2.1. Difficulties to Produce Good Output

There can be little doubt that conducting efficient and effective governance is anything but easy in the multi-level and joint-decision making system of the EU. It is well-known for its opaque structure, its bias to produce decisions that protect the status quo, to privilege certain vested interests, to encourage defensive bargaining and to produce deadlock where innovation is demanded (Scharpf, 1988). Among the most crucial reasons for these problems are:

- A lacking shared problem-solving philosophy: As opposed to politics in a domestic context, European politics is understood as being handicapped by its need to cope with highly divergent cultural backgrounds, normative dispositions, and socio-cultural backgrounds. Thus, negotiations among states cannot rely on a commonly shared normative background but must grapple with comparatively high costs of communication (Héritier 1996). Intriguing cases that highlight the practical implications of this fact can be found in a broad variety of policy areas, from regulating the safety requirements of foodstuffs to issues of legalizing abortion and providing equal access for woman and men to the armed forces.

- Maximizing relative utility: A second problem relates to the attitude that Member States bring to European negotiations. Under conditions of a non-hierarchical setting, any constructive approach to effective and efficient governance depends on the precondition that Member States show a rather technical attitude which is oriented at collective problem-solving (cf. Scharpf 1992: 21). However, even in the context of the EU, thinking in terms of relative gains has its place. As the dispute between France and Germany over the redistribution of voting rights in the context of the Nice summit has highlighted, Member States are anxious not to loose their relative power to influence political processes. Accordingly, maximizing the absolute well-being of the community of the Member States does not reign a supreme concern but is often trumped by relative utility maximizing (cf. Grieco 1995).

- Multi-level character of the EU: A third problem relates to the multi-level character of the EU. Negotiating governments must play „two-level-games" (Putnam 1988), which means that any agreement they reach must not only produce consent among the involved governments but also suffice affected domestic actors. Thus, decision-making processes in multi-level structures are feared to lead to a deadlock when quick decisions are needed, and to lowest-common-denominator policies when serious policy changes would be appropriate. The increasing pressure on the part of domestic actors to either actively participate in European policy-making or at least to control what their governmental representatives are doing adds to this problem. The higher the number of levels involved and the more significant the expected impact of an agreement will be, the more likely it becomes that governmental delegates act according to a "local rationality" (check term, Elster 1987: 37, Scharpf 1985, Benz 1992: 151). Therefore, it is feared that an increasingly open European political process may make the policy decision trap an even more virulent phenomenon and that European politics increasingly tend to produce „systematically inefficient and inappropriate decisions " (check, Scharpf 1985: 350).

- Anarchy: Finally, a major problem for the effectiveness of European law is the fact that the EU does not possess any powers to coerce Member States to comply with EU law. It is pointed out that the EU neither has a monopoly of coercion nor that it commands effective enforcement capacities. To be sure, the EU's potential for sanctioning non-compliance goes far beyond that of any other international organisation because it can impose administrative fines to enforce its law. This is, however, only possible after a dispute has been decided in the last instance by the ECJ and the accused Member State has not implemented the court decision. In this case the Commission – after giving the respective Member State the opportunity to state its case – is entitled to appeal to the court once again and to demand the imposition of an administrative fine. Although the Court's decisions are ultimately nearly always accepted as compulsory, it can take years until such a decision is adopted. The Art. 226 infringement procedure therefore is "not necessarily an ideal sanction",[1] since it is often too protracted to accomplish immediate improvements (COM (1998) 598 final, 5). Well aware of the EU's difficulties to impose fines on them, Member States,

1 Commissioner Fischler at the conference on the lessons to be drawn from the BSE crisis, jointly organised by the EP and the Commission, verbatim (European Parliament/European Commission 1999: 164).

therefore, are assumed to comply only with those rules that fit their individual preferences (cf. Downs et al., 1996).

2.2. Production of Output

Against this background, the EU seems to be rather poorly equipped to live up to the challenge of conducting effective and efficient governance. Surprisingly, however, the data available give reason to question the impact of the concerns listed above.

2.2.1. Efficiency

Good quantitative assessments of efficiency in European Union decision-making are still rare. Existing studies are mostly concerned with assessing the impact of different procedures, topics and legal instruments on the efficiency of EU decision-making and do not engage in systematical comparisons of the EU's decision-making efficiency with national decision-making efficiency. One such study is Golub's 1999 paper in IO. After reviewing all Commission proposals for directives that were made during the period 1974-95 (a total of 1262 proposals) and asking for the impact of different procedures on the time lag between proposal and adoption, he argues that the introduction of majority voting in 1987 has not significantly changed the efficiency of EU decision-making. Quite on the contrary, he argues that "decision-making in the 1970s was highly efficient rather than paralysed; there is no indication that the Luxembourg Compromise had significant lasting effects or prevented majority voting from actually being used; and decision making did not accelerate, backlog did not decline, and old proposals were not suddenly unblocked as a result of the 1987 (or 1992) institutional reforms". Golub finds one of the more important reasons for this astonishing finding in the "emergence of a veto culture" (759) that went hand in hand with the expansion of QMV. Unfortunately, the finding of Golub has been challenged by the study made by Schulz/König (2000). Like Golub, they too analyse the time lag between the formal introduction of a proposal by the Commission and its final adoption by the Council and the European Parliament. As opposed to Golub, however, they do not limit their set of cases to directives but include all legislative proposals that have entered the EU decision-making process between 1984 and 1994. Their findings are fourfold. According to Schulz and König, (1) the use of qualified majority rule decreases the proposal-decision time lag; (2)

participation of the Parliament increases the duration of the decision-making process; (3) measures pertaining to the functional core of the EU have shorter time lags than measures in other issue areas; and (4) Regulations and Decisions have shorter time lags than Directives. Both studies therefore are hard to harmonize: whereas Golub argues that the introduction of QMV did not increase efficiency, Schulz and König argue for quite the opposite. Even more unfortunate for the purpose of this paper is that both studies do not provide an answer to question of whether the EU's overall performance is good or bad. Is it an efficient decision-making machinery or not? None of the two studies provides a yardstick that would allow to qualify the findings apart from assessing the impact that different European procedures and legal instruments have on the time lag between proposal and adoption.

More helpful for assessing the policy performance of the EU in terms of its efficiency is the comparative approach adopted by Beisheim et al. (1999). By comparing the sum of all regulations, directives and decisions adopted by the EU to the legal output of Germany, France and the UK, the authors report that already in the 1960s the legal output of the EC had surpassed the combined legal output of the three Member States. Even more surprising is the fact that the EU reached its peak of legislative output before the formal re-introduction of majoritarian decision-making. In 1980, the EU produced 627 legal acts which was 2.8 times as much as the combined legal output of Germany, France and the UK (see table 1).

Table 1: Concluded legal acts in the EC, Germany, France and the UK

	Legal acts				Ratio
	(1) EC (Art. 189)	(2) Germany	(3) France	(4) UK	(1)/ [(2)+(3)+(4)]
1962	107	106	87	82	0,4
1970	347	111	97	73	1,2
1980	627	58	94	74	2,8
1990	618	92	115	54	2,4

Adapted from Beisheim et al., 1999: 328-329

Furthermore, as Maurer, Wessels and Mittag report, in the years 1993 to 1998, all the European institutions together adopted about 15,000 legal acts (Maurer, Wessels and Mittag, 2000: 3). According to estimates from the end of the 1980s, about 80 per cent of the economic law in the Member States is of European origin (Delors, 1992: 12). Against this background, one can hardly support the claim that the EU suffers from an inordinately slow decision-

making process. It seems more appropriate to compare its output with that of a "state, even a super state: an endless stream of laws in increasingly varied areas of public and private life" (Weiler et al. 1995: 4). And indeed, what has emerged in Europe is an unprecedented polity which not only covers most of European economic law but has also spilled over into formerly essential realms of national sovereignty such as monetary policy, foreign and security policy, and even human rights affairs. Therefore it is only slightly exaggerated to describe the EU as "a self-contained world of laws and rules and transnational negotiation and cooperation", as a "post-historical paradise of peace and relative prosperity, the realization of Kant's 'Perpetual Peace'" (Kagan 2002: 1). Against the background of the data reported above, the EU is an astonishingly efficient institution.

2.2.2. Effectiveness

Measuring the effectiveness (goal-attainment) of the EU is an undertaking just as delicate as measuring its efficiency. One way of doing so, however, is to ask for the degree to which the EU successfully copes with the difficulty to elicit compliance with its rules. For a comparative assessment of the EU's capacity to do so, we can draw from the insights of a recently concluded project on governmental compliance with inconvenient commitments (Neyer, 2003). In this project four sets of comparisons in human rights policy, trade policy, budget policy and redistributive policy were conducted. In each set, regulations that are located at different political levels but very similar in content and type have been compared. By thus keeping the policy type and the underlying interest constellations more or less constant, the project studied the effects of different political settings on rule compliance. Regulations on the control of excessive budget deficits and redistributive policies have been analysed in the case of Germany and the EU. Trade in foodstuffs is regulated by the WTO and the EU, and was analyzed with special attention given to the BSE and the hormone beef cases. The comparison in human rights policy focused on the absolute prohibition of torture and analyzed compliance in Turkey and Israel. In each pair of cases the project assessed the relative levels of compliance that the rule-authorizing institution could realize. The most striking result of the comparisons is that in each set the level of compliance with EU law is better or at least as good as compliance with regulations at other levels.

Table 1: Relatively Assessed Compliance Records

Policy	Compliance
Budget	EU ≅ FRG
Trade in Foodstuffs	EU > WTO
Interterritorial Redistribution	EU ≅ FRG
Human Rights	ECHR > UN Human Rights Treaties

These results are the more astonishing because the European Commission and analysts have argued more than once that the EU reveals significant deficits when it comes to the question of compliance (Commission of the European Communities 1990, 1999; Snyder 1993).[2] For instance, Christoph Knill and Andrea Lenschow (1999: 613) speak of EU regulations in the environmental field as a "prime example of ineffective implementation." In the same vein, Jonas Tallberg (2000: 19) identifies three prominent forms of compliance problems in the EU. The first, concerning non-compliance in the legal implementation of EU directives, is that Member States frequently do not respect the time limits set by the Council. In the 1990s, this resulted in the failure to comply with about 10 per cent of all Community directives (Tallberg 1999). Second, the application of EU rules also seems to be commonly plagued by non-compliance. The Commission's initiation of infringement proceedings against Member States under Art. 226 (ex-Art. 169) is usually taken as an indicator for this form of non-compliance. These infringement procedures have grown over time and exceeded 1000 cases a year in the 1990s. Third, as Tallberg (2000: 22) also points out, the "swift and diligent implementation of ECJ decisions has been anything but the rule" (emphasis added).

These studies of compliance in the EU are helpful in many respects. They underline that compliance in the EU is by no means a non-problem or self-enforcing. The insights provided by such studies, however, need to be put in context: First of all, compliance with most directives seems to be a matter of time, and data on the non-implementation of directives grossly overstates non-compliance. Given more time, the implementation records improve. With the exception of Greece, all EU members now have a transposition rate of over 96 per cent in implementing the internal market's legal framework. The average transposition deficit has been reduced from 6,3 per cent in November 1997 to 2,5 per cent in May 2001 (update!). Moreover, only a small proportion of initial infringement cases actually reaches a later stage in the enforcement process. Between 1978 and 1998, only about 1/3 of all cases reached the

2 The following section is adapted from Neyer/Zürn 2001.

stage of reasoned opinions, and only about 10 per cent were referred to the ECJ (see Jönsson/Tallberg 1998: 395). Similarly, measures of compliance in the EU must take into account that the body of legislation in force as well as the number of members have been growing in the last decades. If measured against a constantly growing body of legislation and the expansion of Member States, the level of non-compliance is modest and has remained stable or even declined (Börzel 2001: 804).

In general terms, however, data on the amount of activities of monitoring and adjudicating bodies seems to be a poor indicator for non-compliance, and must also be interpreted as an indicator for a well-functioning compliance enforcement system. Keohane et al. (2000: 474-475) point out, for instance, that the broader and less costly the access to an international court or tribunal, the greater the number of cases it will receive. According to data from Sands et al. (1999), the average annual number of cases processed at such institutions since their foundation is indeed the highest in those institutions that are most easily accessible: the ECJ leading with over 100 cases annually, the WTO following with 30.5 cases, clearly ahead of the old GATT with 4.4 cases and the ICJ with just 1.7 cases. In short, some of the figures provided as indications for compliance problems in the EU may instead be seen as an indication of a well-working compliance system. Thus, in order to assess the effectiveness of the EU it is important to put it in a comparative context. In such a perspective, the EU is not less effective in eliciting compliance than other settings when similar policies are compared. According to our findings, the EU is a most successful case, and one to learn from.

2.3. Explaining Output I: Insufficient Answers

How to explain the astonishingly good record of the EU? Unfortunately for the purpose of this article, the literature on the European Union "lacks a coherent, general theoretical framework for understanding EU policy-making" (Peterson 1995: 69). The two dominant approaches to analyzing European governance, intergovernmentalism (Moravcsik 1993; 1998) and supranationalism (Sandholtz and Stone Sweet, 1998) are not really focused on trying to account for its output. Both approaches aim at explaining the driving forces of integration without investing too much at reasoning about effectiveness and efficiency. Taking these caveats into account, one can nevertheless derive hypotheses from both perspectives concerning the conditions under which effective and efficient policy-making is to be expected.

Intergovernmentalism holds that governmental actors are the dominant players on the European stage, that their preferences closely mirror those of their most powerful domestic constituencies and that they use European policy making for either satisfying their domestic constituencies' demand for supranational regulations (Moravcsik 1993) or for increasing their own scope of freedom from domestic control (Moravcsik 1994). In both versions of the argument, governmental actors do not put primary emphasis on collective problem-solving but engage in strategic bargaining among one another for the sake of serving their individual interests. Neither a shared problem-solving philosophy nor a readiness to apply majoritarian decision-making can be expected. Quite the contrary, hard-ball power play, time-enduring negotiations, emphasizing national sovereignty and only little readiness to sacrifice national interests for the sake of the European Union is to be expected. Especially when also taking the assumptions of an anarchical environment and of relative utility maximizing actors into account, a highly pessimistic picture emerges (Grieco 1995, Mearsheimer 1990). The same applies to the question of effectiveness. If governments are conceptualized as the agents of dominant domestic interest groups, one has little reason to believe that they will implement European law if it is opposed by these groups (cf. Downs et al., 1996). Incomplete and delayed implementation or even open non-compliance will be the rule rather than the exception. For explaining the astonishingly high degree of efficiency and effectiveness reported above, liberal intergovernmentalism is clearly inadequate.

As opposed to intergovernmentalism, supranationalism holds that the idea of an intergovernmental Europe is hopelessly outdated. Wessels (1997), Sandholtz and Stone Sweet (1998), and others argue, that one must not overlook that it is the Commission which, together with the myriad of comitology and advisory committees, commands the primary expertise in the EU, dominates agenda-setting and is increasingly becoming a kind of government for Europe. Correspondingly, some see the emergence of a European "Mega-Bureaucracy" which melts together formerly independent national bureaucracies into one overarching new form of technocratic governance (Wessels, 1997; Bach, 1992). Furthermore, the bureaucrats involved in this new type of technocratic rule are portraied as becoming socialized by their European environment, as increasingly sharing the goals of the European integration project and of working towards problem-adequate solutions.

Although supranationalism looks more promising than liberal intergovernmentalism in so far as it adequately argues for a rather high degree of efficiency and effectiveness, its line of reasoning sharply contrasts with a great number of empirical case studies which highlight that

the EU is build on a dual structure that not only knows a vertical legal structure but also a horizontal political structure (Weiler, 1981). Thus, any effort at understanding European decision making that abstracts from one of the elements (as both intergovernmentalism and supranationalism do) is hopelessly reductionist. It is more appropriate, therefore, to understand European decision-making as following a "joint-decision mode" (Scharpf 2001, cf. Marks et al. 1996), in which the Commission, the Council, the European Parliament, and the Member States are all crucial actors. In this setting, none of the involved actors – neither the European institutions nor the Member States - can unilaterally pursue their goals without obtaining the approval of all the other actors. It is not only the Member States that must co-ordinate their preferences with each other in order to obtain sufficient votes for a qualified-majority; the need for co-ordination also applies to the European institutions. The Council cannot act without a proposal on the part of the Commission,[3] and also needs the Commission to manage its implementation (cf., Hayes-Renshaw and Wallace, 1995; Dogan, 1997). Similarly, the Commission must formulate its legislative proposals in a way that is likely to pass the scrutiny of both the Council and the Parliament, and must also secure Member State approval for a great number of its executive measures. Furthermore, because the Commission has only limited capacities to enforce European law, it dedicates a great deal of effort to the safeguarding of broad political support for its proposals, consults as many interest groups as possible, and prefers to postpone disputed issues rather than to vote on them. Successful political interaction in the First Pillar of the EU is thus strongly characterised by a demand (not necessarily a supply) for a shared and co-operative exercise of governance among the Member States and the European institutions.[4] With the introduction of a triple majority requirement by the Treaty of Nice, this demand has risen even further. In order to be valid, Council decisions require not only a qualified majority (slightly larger than before), but also an absolute majority and, at a Member State's request, a 62 per cent majority of the total population of EU countries. The results of the reforms are everything but promising: "Nice produced a legislative system with high viscosity...Instead of reaching a compromise that would guarantee the EU the capacity of legislative decision-making, the Member States piled up all three institutional constraints. As a result, as the core of the EU expands, it will be almost impossible to alter the legislative status quo" (Tsebelis/Yataganas 2002: 304). Thus, if

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3 To be sure, the Commission does not have gate-keeping power. It must make legislative proposals when requested to do so by the Council or the Parliament.

4 For a similar analysis, cf., Marks, Hooghe and Blank (1996). They describe the European institutions as being "locked in mutual dependence with other actors" (ibid.: 370).

one tries to understand the astonishingly high level of efficiency and effectiveness in European governance, one is well advised to look for more balanced analytical tools that do not shy away from the complexities of European governance for the sterile sake of formulating streamlined hypotheses.

3. Explaining Output II: Governance by Deliberation

One way of developing such a tool is to use a deliberative approach for the analysis of European governance. Although deliberative approaches have not yet been used extensively for explaining European politics, they are well equipped for being applied to the EU. First of all, deliberative theoretical approaches are distinctively oriented at analyzing non-coercive political order by pointing to the integrative potential of communicative processes. They therefore resonate well with descriptions of the EU that highlight the non-existence of a monopoly of power on the part of European institutions and its character as a system based on arguing and non-coercive bargaining (Kohler-Koch, 1996; Risse-Kappen, 1996; Scharpf, 1999). Such an approach also reflects the empirical insight that any meaningful understanding of the EU must take into account that the EU transcends the dichotomy of domestic vs. international governance and should be described as a third type of political order combining a vertical legal structure with a horizontal authority structure (Weiler, 1981). Fortunately, bringing discourse theory to European integration theory must neither remain highly abstract nor start from scratch. Discourse theory has already made some inroads into integration theory, especially, but not exclusively, in normative approaches to European multi-level governance (Eriksen and Fossum, 2002; Joerges and Neyer 1997; Schmalz-Bruns, 1999). The empirical observation of deliberative modes of interaction has also inspired a number of recent efforts to use discourse-based analytical instruments for taking account of deliberative "events" in EU policy-making such as persuasion and discourse in European negotiations.[5] Habermasian discourse theory, however, is neither only event-oriented nor restricted to normative reflection. It is much broader in scope insofar as it aims at providing a conceptual language for understanding the conditions of legitimate and non-coercive political order.

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5 See the contributions by Nanz/de la Porte, Gehring and Jacobsson to the workshop „The Forging of Deliberative Supranationalism", Florence, February 7-8, 2003.

Applying deliberative reasoning to the EU therefore is hardly sufficient if it is either limited to explaining events of deliberation or to normative critique. Its strongest analytical power lies in reinterpreting the EU as a structurally deliberative undertaking. One way of doing so is to start with approaching the EU as a means for facilitating social and political integration in Europe by filling those institutional gaps that the often-described incongruence (cf. Zürn, 2000) between socio-economic and political spaces ("globalization") has opened. Viewed as such, the EU neither aims at replicating the nation-state nor is it limited to regulating technical issues. In both its aspiration and its empirical practice, it is better understood as an institutional response to socio-economic interdependence that provides an opportunity for Member States to pool their sovereignties (Keohane and Hoffman, 1990) in those areas where their independent problem-solving capacities are insufficient. As opposed to a nation state, the EU must do so without having the option to rely on coercive means. More emphasis therefore is to be given to communicative processes and political efforts that make the addressees of rules comply voluntarily.

3.1. They Don't Vote... Why Don't They Vote?

The practical implications of this insight for understanding European Union politics can be illustrated by elaborating on the distinction between voting, arguing and bargaining. Following Elster, the distinction between these three modes of decision making constitutes an exhaustive list which encompasses all possible means for realizing common decisions if a group of equal individuals falls short of consensus (Elster, 1998a: 5). Even after the formal extension of majoritarian decision-making with the SEA, and the Treaties of Maastricht and Amsterdam, the EU is still dominated by a culture of consensus. According to Peterson (1995: 73): "Very few important policy-setting decisions are taken without the agreement of all twelve governments to a Commission proposal". Likewise, Hayes-Renshaw and Wallace (1995) report from their analysis of interaction in the Council an "instinctive recourse to behave consensually". Voting is "only one mechanism of collective action and it is rarely used" (Hayes-Renshaw/Wallace, 1995: 565). The process of arriving at common decisions is dominated by "efforts to pull as many members as possible into agreements and to accommodate the individual member which is isolated" (ibid, 566). Similarly, Lewis (1996) reports from his analysis of decision making in COREPER that representatives shy away from outvoting one another and prefer a technical approach that seeks common solutions to common problems. The very same picture is known from comitology committees: Even in

committees like the Standing Committee for Foodstuffs (StCF) which acts under qualified majority voting, proposals of the Commission do not only reflect the Commissions' interest but also what it assumes to be in the interest of more than only a qualified majority of the other parties involved. The proposals which the Commission presents to the StCF are in general the result of extensive consultations with individual national administrations and independent experts (cf. Joerges/Neyer, 1997).

The literature on decision making advances mainly two arguments for explaining this striking difference between the formal extension of QMV and the consensual style of policy making. A first argument runs along a constructivist line of reasoning and holds that Member State delegates develop over the course of time a close identification with the European political project. Lewis reports from COREPER that delegates "share a collective rationality based on the dual responsibility to deliver the goods both at home and collectively at the EU level" (Lewis 1998: 484, cf. Joerges/Neyer 1997). Likewise, Hayes-Renshaw and Wallace argue that "ministers and their officials meeting in the Council are both national and Community actors, carrying double affiliations and responding to prompts and pressures from both sides" (1995: 563). They "become locked into the collective process", "acknowledge themselves... as being part of a collective system of decision-making" and treat mutual trust as being "more pertinent than the formal weighting of Member States or the crude attribute of size" (1995: 563, 564). In order to understand these processes, one must take into account that the group of delegates negotiating sometimes remains unchanged for years, that delegates have frequent contacts outside their committee sessions, and that they have often previously met one another working on the preparation of a legislative proposal in negotiations about its adoption in Councils working groups. During the course of this collaboration, delegates not only learn to reduce differences between national legal provisions but also develop converging definitions of problems and problem-solving philosophies. They slowly proceed from being representatives of national interests to being representatives of a Europeanized interadministrative discourse that is characterized by mutual learning and by an understanding of each others' difficulties in the implementation of specific solutions. It is also telling that delegates often neither know nor seem to care about the formally applicable decision-making procedure (cf. Joerges/Neyer, 1997).

Whilst processes of socialization among delegates must not be underestimated, any complete picture would also have to take into account, that the EU's resources for law enforcement are severely limited. The effectiveness of any European measure depends on whether the Member

States transpose the measure adequately into their national legal systems without leaving too much opportunities for evasion (cf. Mendrinou 1996).[6] In an institutional environment without effective means of hierarchical enforcement, this is only likely to happen if delegates see their own legitimate concerns acknowledged and protected in decision-making. Weiler has made this point succinctly clear: „Constitutional actors in the Member States accept the European constitutional discipline not because as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos. They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination" (Weiler 2000: 13).

Both arguments - processes of socialization among delegates and the EU's structural weakness regarding law enforcement - militate strongly against the use of voting procedures and underline the importance of more discursive modes of interaction. Decision-making in the EU is sharply different from decision-making in a national parliament where voting and the formulation of conflicting positions is deemed to be appropriate behaviour. Efforts to harmonize preferences and to realize common understandings must be crucial elements of decision-making in the EU. Only against this background it is explicable that the EU successfully copes with political interdependence without having the means to enforce common rules. It follows quite logically, that not only voting is inappropriate but that arguing must be functionally superior to bargaining, too.

3.2. Bargaining, and the Functional Superiority of Deliberation

Generally speaking, arguing and bargaining can be understood as modes of communication, which consist of an exchange of speech acts which aims at convincing other actors to accept the preference of the speaker as a guideline for collective action.[7] One basic difference between the two types of interaction lies in their illocutionary content: while bargaining relies on the use of promises and threats (including threats of exit),[8] arguing rests on claims of

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6 For a recent article highlighting the problems of compliance in the European Union cf. Mendrinou (1996).

7 On the distinction between arguing and bargaining, cf., Elster (1998a/b) and Müller (1994).

8 According to Jönsson (2001: 218), "bargaining can be understood as the exchange of offers and counter-offers, concessions and retractions; as bazaar-like haggling in contrast to joint problem-solving".

factual truth and/or normative validity.[9] As opposed to modern democracy theory which has, by and large, accepted the distinction between the two modes of interaction, a number of arguments challenge its applicability to European politics. Is it not the case, one may argue, that deliberation describes a form of interaction which is largely restricted to expert communities with low political salience? And isn't arguing immediately trumped by bargaining whenever "real" concerns with significant cost implications are involved? Is deliberation among representatives not a contradiction in terms? Can we, indeed, expect a person who has been specifically appointed or elected to state or defend the case, views or interests of a particular group to be open to the arguments by others and to engage honestly in a reflexive truth-seeking process?

Any convincing response to these critical questions must take into account that it is indeed corporate actors, not individuals, who conduct European governance. Altruism, or only the freedom to be convinced, however, are not the kind of attributes that corporate actors are supposed to focus on. More appropriate than adopting a Habermasian understanding of deliberation therefore is to use a concept that is explicitly non-idealistic and, at the same time, resonates well with empirical observations. Following Elster, arguing can be understood as a mode of action that is "intrinsically connected to reason, in the sense that anyone who engages in argument must appeal to impartial values" (Elster 1998a: 6). Arguing then means the formulation of individual preferences by justifying them with regard to their contribution to promoting those norms which are accepted to be in the collective interest. Understood as such it is important to note that deliberation does not imply that speakers must indeed change their mind and adopt altruistic positions. It only presupposes that they adopt a particular reasoning style, in which actors abstain from using threats and promises and try to make their proposals plausible by referring to general principles and norms that are shared by those to whom they speak. Even such a "light version" of deliberation, however, has significant impacts on the efficiency and effectiveness of decision-making.

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9 By conceptualising both deliberation and bargaining as forms of communicative action, I do not follow proposals to treat only deliberation as a type of communicative interaction and bargaining as a non-communicative form of interaction. Elster (1991) and Schimmelfennig (2001) have convincingly argued that deliberation can also be of a strategic intention if it is chosen because it promises to provide better individual results than bargaining. It is likewise inappropriate to conceptualise bargaining as a non-communicative form of interaction because it is conducted by an exchange of speech acts.

3.2.1. Efficiency

The efficiency of bargaining crucially depends on the preconditions that either the number of participants is small or that power resources are highly asymmetrical. The perfect setting for a bargaining procedure consists of a group of only two actors, of which one is strong and rich and the other one is weak and poor. In such a setting, the group will have little difficulties to find a quick solution. The strong and rich actor will always be able to either threaten its partner with negative consequences in case it does not agree to a proposed solution or to successfully promise to compensate him for any damage that a proposed solution may imply (Keohane, 1984).

Efficiency becomes a highly problematic issue, however, as soon as the number of actors and the symmetries in individual power resources rise. Imagine a setting of fifteen (or even twenty-five) actors in which no single actor is able or ready to shoulder the costs of enforcing a deal by threatening others or by promising compensating side-payments. Under such conditions, any possible deal must satisfy the preferences of all fifteen actors and necessitate a time-enduring process of balancing individual preferences until one solutions has been identified which leaves no actor worse off than it had been before (Pareto-Optimum). As Scharpf notes, in a bargaining mode of interaction and under conditions of unanimity, even strong pressure on all governments to reach an agreement will hardly lead to consent because "uncompensated concessions are difficult to defend against opposition back home if European issues have political salience in national politics. Under such conditions, negotiations may break down or deteriorate into "bloody-minded" bargaining where outcomes can only be reached through cumbersome package deals or side payments" (Scharpf 2001: 6, what have we learned). To be sure, the practice of negotiations knows a number of ways to respond to problems of collective action such as coalition-building or issue linkage. None of the two, however, is without problems: coalition-building often entails the establishment of internally framed negotiation positions that are hard to adapt to external demands. Thus, the benefit of simplifying the negotiation process by reducing the number of actors, is only too easily counterbalanced by the intensification of conflicts among opposing coalitions (Hopmann, 1996: 261). Linking issues with the purpose of allowing for side-payments or compromise (Haas, 1980) is likewise an often used but sometimes costly technique: adding new issues to the set of problems already on the table increases the complexity of possible solutions and therefore tends to increase the amount of time needed for a successful negotiation process. It is little surprising therefore, that Treaty reforming intergovernmental conferences (IGCs) or

(even worse) the Ministerial Conferences of the WTO necessitate intense preparations, and are nevertheless often close to collapse, leaving all actors exhausted until a deal can finally be struck.

Whilst bargaining easily runs into serious functional problems if the number of actors and/or the symmetry of power distribution rises, deliberation as a mode of interaction is far better equipped to cope with both conditions. Under conditions of deliberation, any individual preference can be assessed in terms of its coherence with consented basic norms (such as reciprocity, the principle of non-discrimination or the precautionary principle). All those preferences, which fail to withstand such scrutiny, are easily rejected for their lack of normative coherence and will be taken out of the sample of possible solutions. This filtering mechanism consists of three elements (cf. Elster 1998b: 104-105). A first constraint is the 'imperfection constraint', which implies that proposals must show less than a perfect coincidence between private interests and impartial arguments for being perceived as good arguments. For withstanding claims that arguments are opportunistic, proposals must furthermore be in accordance with positions that have been formulated at an earlier point in time (consistency constraint). And they must finally abstain from claiming facts that can easily be proven to be incorrect (plausibility constraint). All three constraints together work as a filter against openly self-minded claims and reduce the set of negotiation positions on the table. To be sure, deliberation does not necessarily lead to only one solution for a problem. It rather often happens that different and mutually incompatible proposals are justified as being in accordance with consented basic norms. Deliberative interaction therefore does not necessarily lead to consensus. In any case, however, deliberative procedures provide a filter that at least narrows the set of possible solutions and therefore makes political compromise more likely.

3.2.2. Effectiveness

A similar logic applies to the relative effectiveness of policy outcomes under a deliberative and a bargaining procedure. As opposed to policy outcomes that can be justified as implications of consented norms, bargains do have no independent compliance-pull (Franck, 1990) apart from satisfying temporary preferences. If bargains are the product of threats, all actors on whom an outcome has been enforced have a strong incentive to defect as soon as possible. Bargaining can thus hardly satisfy the need for effective norm application if either

no individual actor exists who has the capacity and the readiness to safeguard adherence to the outcome of a bargain (by shouldering the costs of monitoring and enforcement), or if the number of actors is too high to allow for effective monitoring on the part of a single actor (Downs, Rocke and Barsoom, 1996). Furthermore, at least among democracies, any intergovernmental exchange of promises and threats quickly reaches its limits of effectiveness as soon as those governments on which a deal has been enforced try to implement it domestically. In most democratic settings, governments will face serious difficulties to implement international rules if these rules do not find any social acceptance, or if they even contradict established normative concerns (cf. Neyer and Zürn, 2001). Enforced deals therefore are most likely to arouse public protest and make it highly difficult for governments to comply with them.

As opposed to policy outcomes conducted by means of bargaining, deliberative norms are part of an overarching normative framework. Any specific rule is embedded in a context or more general rules and is justified by its intention to give specific meaning to them. By implication, non-compliance with a specific rule equals non-acceptance of the implications of basic rules. Non-compliance with the outcome of a deliberative procedure therefore not only rejects the outcome itself but implicitly opposes the whole idea of a coherent body of norms. Due to the linkages between specific norms and more general ones, non-compliance with a specific norms becomes a far more serious issue as under conditions of mere ad hoc norms, may trigger broader implications for the defecting party, and will thus be considered more thoroughly. Furthermore, if a government can sell an unwelcome and costly international outcome by referring to broadly accepted norms, it will find itself in a much easier position and will most probably have to face much less domestic political costs when complying with it.

And finally, bargaining is notorious for its weakness in safeguarding a high quality of policy outcomes. As a decision-making procedure, it offers no safeguards for normative concerns beyond those of the preferences of the individual actors. In a bargaining mode of interaction, the set of possible solutions to a bargain is defined by the congruence of the solution with the preferences of all the powerful actors that have de facto veto power (cf., Putnam, 1988). Because the size of the win-win set tends to correlate negatively with the number of actors involved, any increase in the number of participants makes it less likely that the concerns which are not represented by the actors with de facto veto power will be taken seriously. Bargaining is already hard enough and win-win sets are already sufficiently small in order to

prohibit any further complication of the process. By implication, the greater the number of actors involved, the more dependent the policy output will be on their political calculations, rather than on substantive concerns such as the problem-solving capacity of the outcome.

Thus, a bargaining mode often frustrates all those concerned with the problem-solving capacity of governance. The efforts to achieve a sound international environmental policy or to harmonise capital taxation in the EU are both telling examples. In both cases, it was the veto of individual players (the US with regard to international environmental policy, and Luxembourg with regard to taxation), which condemned everyone to an outcome that did not satisfy anyone. In contrast, any policy outcome under a deliberative procedure must comply with consented basic objectives and can be legally challenged if it fails to do so. Thus, deliberative procedures also have the chance of leading to policy outputs that would be out of reach in a purely strategic mode of interaction.

3.3. Reinterpreting European Institutions

Assessing a demand for deliberation and theorizing its beneficial impact on European governance is one thing; explaining how deliberation becomes part of European governance, of course, is something very different. One way of doing so is to start with the assumption that the institutional development of the EC/EU follows to some extent the logic of institutional experimentalism, driven by an effort to produce governance mechanisms that are both effective and efficient. At first glance, such an assumption may sound heroic because it seems to abstract from efforts by the Member States to hedge their sovereignty against an expansion of supranational assertiveness. Even intergovernmentalists, however, routinely argue that supranational institution-building is in the interest of Member States if it solves problems of credibility, and therefore maximizes efficiency and effectiveness (Pollack, 1997). Ever since its beginning, the EU (then: the three Communities) has engaged in an effort of designing new governance mechanisms that at the same time only cautiously encroach on national sovereignties as they establish effective and efficient governance. The establishment of the first comitology committees in the 1960s and their increasing relevance ever since can be listed as an early example. Likewise, the more recent experimentalism with independent agencies and the most recent project called the "Open Method of Coordination" can be added in this line. Not all attempts at innovative institutional engineering produced the expected outcome. Some projects like the Committee of the Regions and the Economic and Social

Committee have been relegated to a rather marginal role in the political process. Others, like comitology and COREPER, have become of primary importance for the everyday conduct of European politics. Likewise, is it plausible to assume that the strong role of the ECJ in the European political process is only the product of runaway jurisdiction? Should one not give enough credit to Member State politicians to believe that they would have had at least tried to intervene had European law contradicted their fundamental interests? In sum, the argument that European institutions flourish and perish according to their functional strengths is surely not absurd. And indeed, if viewed from this perspective, some of the most crucial institutional phenomena of the EU, such as the gradual opening up of the EU's decision-making machinery for public supervision and parliamentarian participation, its highly legalistic character and its emphasis on technocratic procedures can be explained as means for promoting policy deliberation and can be viewed as responses to the challenge of conducting efficient and effective governance in a non-state polity.

3.3.1. Increasing Publicity

One of the most striking features of the EU is the gradual opening up of its decision-making machinery for public supervision and parliamentarian participation. To be sure, as opposed to politics in a national democracy, decision-making is still generally conducted behind closed doors and non-governmental actors are only included in the process of preparing and adopting proposals if and when it fits the Commission's and the Member States' interests. It is worth underlining, however, that the EU has opened its legal machinery especially in the preparation phase for a great number of advisory bodies and provides numerous opportunities to non-governmental actors for voicing their concerns (Green books, etc). Likewise, the expansion of the competencies of the EP is everything but insignificant.

Whilst normative approaches have little difficulties with interpreting the gradual opening of the EU as a necessary step towards making the EU more legitimate, positive approaches are rather silent about explaining it. One way of making sense of the EU's very special approach to publicity is to ask for the impact of publicity on the decision-making style of the EU. Such an explanation starts with the insight that increased participation is not only a cost in terms of efficient decision-making but an important factor for making legal output more effective. Affected non-governmental parties will only accept the rules of the game, engage in constructive discourse, and abstain from illegal or extra-legal opposition if they find open

channels for voicing their concerns. Broadening participation also promises to upgrade the responsiveness of intergovernmental discourse. Due to their dependence on voluntary funding and the corresponding need to listen closely to the perceptions of public problems, most Non-Governmental Organizations keep a close eye on public opinion. Likewise, MPs must have at least some responsiveness to their constituencies concerns for not facing the danger of being dismissed at the ballot box. Thus, they have the potential to facilitate discourse between governmental and societal rationality and to help avoid situations in which the output of governance fails to satisfy the concerns of the European public. The effect of broad participation to generate publicity may, however, be even more important on the structural side. As Jon Elster observes, the effect of publicity is "to replace the language of interest by the language of reason" (Elster 1998b: 111). If proposals are conducted in front of an audience, speakers not only have to try to persuade their opponents, they also have to show that they take impartial concerns seriously. Otherwise, their proposals will easily be rejected as being incompatible with collective goals. Clearly, this does not imply that speakers must replace self-minded base motives "but only forces or induces speakers to hide them" (Elster 1998b: 111). Hiding base motives, however, requires proposals to be subject to a number of constraints which may modify them quite substantially and make them subject to the "civilizing force of hypocrisy" (Elster 1998b: 104-105).

3.3.2. Legalization

Unfortunately, in European politics, the positive effects of publicity are sometimes hard to mobilize. In its most general meaning, publicity refers to the supervision of delegates by the people who have elected or appointed them. It lends its constructive effect to interaction by providing incentives for delegates to act as if they were motivated by the collective well-being of their constituency. If that same constituency is, however, fragmented into a number of disconnected national publics – as is often the case in the European Union - publicity can easily lead to a situation in which different speakers talk to different audiences and serve different, and sometimes even mutually exclusive, normative expectations. Thus the effect of publicity in European negotiations is ambivalent: on the one hand, it provides incentives for speakers to argue. On the other hand, it easily leads to a situation in which each delegate argues according to different normative standards, and in which a noisy dialogue of the deaf is the most likely outcome. Consequently, publicity is no guarantee for constructive discourse.

The emphasis which the EU, from its very beginning, has put on a formal codification of commonly binding law and strong supranational institutions reflects this. Constructive discourses among national delegates need supportive mechanisms to ensure that the same normative standards are applied when different delegates meet. As Habermas points out: "The law acts as if it were a transformer, ensuring in the first place that the network of socially integrative pan-societal communication does not break down. It is only in the language of law that normatively meaningful messages can circulate throughout society" (Habermas 1992: 78, own translation). Legal rules provide a mechanism that "allows for highly artificial communities... that are bound together simultaneously by the threat of external sanctions and the assumption of a rationally motivated acceptance" (Habermas 1992: 23, own translation). And, indeed, in European politics today, good arguments not only have the (sometimes rather small) probability of convincing other governments of the adequacy of one's own position, but also (and sometimes far more important) of making the Commission, the Court or the Parliament willing to join forces with that self-same position. Good arguments can be tools for gaining the support of institutional actors, just as bad arguments can prompt their opposition. If, for example, the government of a Member State imposes trade barriers against imports from another Member State, it is well advised to produce argumentative justification and give convincing explanations for the reasons behind its actions. If it does so, its measures will be supported by the Commission (and, if necessary, by the Court). However, if it acts without justification and without convincing arguments, it will have to face the opposition not only of the affected government but also of the Commission (and, if necessary, the Court), and be confronted with the corresponding costs. Accordingly, the myriad of technocratic committees and the sometimes highly complex decision-making procedures can be interpreted as means for structuring deliberative political spaces. Although the sometimes opaque structures of the EU are hard to justify, it would be equally inappropriate to expect the EU to establish streamlined top-down decision-making structures. Because the EU is basically a discourse based structure that can only provide incentives but no coercion, it must put special emphasis on reflexive and recurrent processes of interest mediation. Hence, what is needed and what has been well established in the EU is a set of procedures that enables a permanent discourse about the appropriateness of rules, about their adaptation to changing steering requirements and new political preferences. And indeed, it is one of the most important functions of comitology committees in the EU to do so. They serve as political fora which perpetuate the discourse about the meaning of shared rules, about acceptable ways of interpreting and adapting them. Although formally equipped with the task of supporting and

supervising the Commission in its implementation of European law, they de facto have developed into a decentralized political bureaucracy in which the every-day business of the EU is administered.

4. Conclusion

This paper has argued that the legal output of the EU can easily be compared to an average nation-state and surely surpasses that of any other international organization. And although the EU has neither become a state-like entity nor possesses any powers to coerce Member States into compliance, its rules are almost always respected. Both dominant approaches to European governance are rather poorly equipped to understand these astonishingly successful rates of efficiency and effectiveness of European governance: supranationalism and intergovernmentalism explain successful European policy-making as a function of centralized power resources either on the part of the European institutions (supranationalism) or a coalition of dominant Member States (intergovernmentalism). Both, however, are in sharp contrast to any more sophisticated understanding of the European reality.

Against the background of the analysis developed in this paper, the EU is a political system that increasingly utilizes publicity and legal procedures to transform strategic bargaining into deliberative problem-solving. Its comparatively good record in terms of efficiency and effectiveness can be understood as the product of a – grosso modo – deliberative mode of interaction that rewards an orientation towards collective problem-solving and is hostile to self-minded power play. Whereas a central body with superior resources is clearly absent, the EU nevertheless works sufficiently well without having either to wield the threat of brute force or to replicate the model of national majoritarian democracy.

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