

Myth or Reality?

New Modes of Governance and Environmental Enlargement in Hungary, Poland and Romania

Paper to be presented at the EUSA Tenth Biennial International Conference,

May 17 – May 19, 2007, Montreal, Canada.

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Abstract

This paper contrasts expectations derived from the theoretical literature on emergence of new modes of governance with empirical evidence, using data from empirical research on the adoption of and adaptation to EU environmental legislation during the EU accession process. The theoretical literature suggests that the huge costs implied by the compliance with EU directives and the weak state capacities available in the accession countries would encourage the emergence of new modes of governance. Empirical evidence from Hungary, Poland and Romania, however, shows that this is not the case. Institutional legacies, the simultaneity of transition and accession, and the time pressure to transfer the demanding EU regulations partially explain this observation. Most importantly, this paper finds that cooperation is most likely in those cases where at least a certain level of capacities is available to authorities, enabling them to remain in charge of the policy process.

1. Introduction

Accession appears to be both a blessing and a curse to transition countries aspiring to become members of the European Union. On the one hand, the implementation of the *acquis* supports their transformation from authoritarian regimes with state controlled economies into liberal democracies with market economies. On the other hand, the accession countries face great difficulties in restructuring their economic and political institutions in order to meet the conditions for EU membership. The adoption of and adaptation to the *acquis* run into serious problems concerning both the effectiveness and the legitimacy of EU policies. Since these countries are “weak” states that often lack the absorption capacity (resources) rather than the willingness to effectively implement EU policies, accession problems cannot simply be solved in the “shadow of hierarchy” (command and control). Alternative modes of governance based on non-hierarchical steering that systematically involve private actors in policy-making could be more effective in helping to ensure the adaptation of and adoption to the *acquis*.

In this paper we focus on the Eastern Enlargement process in Poland, Hungary and Romania and seek to explore the relevance of the non-hierarchical involvement of private actor in policy-making for the effective implementation of the *acquis communautaire*. How important have non-hierarchical modes of governance really been in the accession process? Have voluntary agreements, financial assistance, benchmarking, naming and shaming, technology-transfers, information exchange, and processes of (public) persuasion resulted in more effective implementation than command and control regulations? Which role have public-private partnerships played between public authorities, on the one hand, and policy consultancies, companies and NGOs, on the other hand? Have there been attempts of economic and (transnational) societal actors to compensate weak state capacities by establishing private regimes, and have they been effective?

This paper summarizes the main findings of expanded empirical case studies¹ regarding the adoption of adaptation to six EU directives in Hungary, Poland and Romania.² Starting from insights of the theoretical literature on the emergence of new modes of governance, we contrast our theoretical assumptions with empirical evidence on the scarcity of their emergence during the accession process. The first part briefly outlines the theoretical and analytical framework on which the research has been based. In the second part we shortly outline the problems the Central and Eastern European countries faced during the accession process, in particular concerning the restructuring of environmental legislation. Then we give an overview of our findings in the three countries under scrutiny. The paper concludes with some considerations on factors hindering and fostering the emergence of new modes of governance.

¹ The case studies focus on six environmental directives and were elaborated in the framework of the research Project “Coping with Accession: New Modes of Governance and Enlargement” (COPA) that is co-funded by the European Commission within the Sixth Framework Programme, Priority 7 – Citizens and Governance in the Knowledge-based Society, Project no. CITI-CT-2004-506392. For further information see <http://www.eu-newgov.org>. The case studies on Poland, Hungary and Romania are coordinated by Tanja A. Börzel at the Free University Berlin.

² The cases studies are based on empirical research concerning the following six Directives: Drinking Water (Directive 98/83/EC on the quality of water intended for human consumption), Large Combustion Plants-Directive (LCP) 2001/80/EC, Environmental Impact Assessment-Directive (EIA) 97/11/EC, FFH/Wildbirds-Directive 92/43/EEC, Water Framework Directive (2000/60/EC establishing a Framework for the Community Action on Water), IPPC Directive 96/61/EC concerning Integrated Pollution Prevention and Control.

2. Mission Impossible? Defining New Modes of Governance

There is a Babylonian variety of definitions and understandings of what new modes of governance are and what makes them really new as compared to traditional modes. Part of the confusion is related to the existence of a broad and a narrow understanding of governance, the latter of which is identical with what is usually understood as “new” modes of governance. This is not the place to rehearse the entire debate (for an overview see (Börzel, 1998)³. For the purpose of studying the role of new modes of governance in EU enlargement, we adopt the following definition. New modes of governance refer to the making and implementation of collectively binding decisions (based or not based on legislation) that:

1. are *not hierarchically* imposed, i.e. each actor involved has a formal or de facto veto in policy-making and voluntarily complies with the decisions made, and
2. systematically *involve private actors*, for profit (e.g. firms) and not for profit (e.g. non-governmental organizations) in policy formulation and/or implementation.

Non-hierarchical coordination is constitutive for new modes of governance. It is “governance without government” (Rosenau and Czempiel, 1992), which refers to a mode of political steering that does not authoritatively impose policies but is based on voluntary cooperation.

We can distinguish between two forms of non-hierarchical steering or modes to *voluntarily* engage actors in a particular behaviour that is deemed necessary to address a policy problem:

- the setting of positive and negative incentives, e.g. through side-payments, issue-linkage or sanctions, which changes the cost-benefit calculations of actors in favour of the desired behaviour, without affecting their preferences over outcomes;
- non-manipulative persuasion and social learning through which actors are convinced to change their preferences over outcomes in a way that concurs to the desired behaviour.

Understanding new modes of governance as the involvement of private actors in public policy-making through non-hierarchical coordination covers a wide range of potential arrangements. In order to avoid concept stretching, however, certain forms remain outside this definition. We exclude the lobbying and mere advocacy activities of non-state actors aimed at governments as well as supranational and international organizations. Private actors who are not active participants in governance arrangements or negotiating systems pose few challenges to existing concepts and theories in political science and international relations. Also excluded are those arrangements among private actors that

- are based on self-coordination and do not aim at the provision of common goods and services (markets);
- produce public goods and services as unintended consequences (e.g., rating agencies) or provide public “bads” (mafia, drug cartels, transnational terrorism).

Reasons for why state actors seek to involve non-state actors in public policy-making are usually derived from three different strands of theory. Transaction cost theory argues that state actors delegate public tasks because they want to reduce transaction costs imposed by lengthy decision-making processes in the parliament or within the government itself (Eppstein and O'Halloran, 1999). Principal-agent theory emphasizes the lack of information, expertise and/or time of the state principal in dealing with complex problems. Delegation does not only help the state to compensate for its weak capacities. It also allows to lock-in policies and protect them from

³ Cf. Börzel, Guttenbrunner and Seper (2005): “Conceptualizing New Modes of Governance in EU Enlargement”, http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=12.

changing political majorities (Moe, 1987). Network approaches highlight the functional interdependence of public and private actors in policy-making (cf. (Mayntz, 1997, Börzel, 1998)). Governments become increasingly dependent upon the cooperation and joint resource mobilization of policy actors outside their hierarchical control. Involving non-state actors in the policy process allows state actors to establish “webs of relatively stable and ongoing relationships which mobilize and pool dispersed resources so that collective (or parallel) action can be orchestrated toward the solution of a common policy” (Kenis and Schneider, 1991): 36). Next to tapping into the resources of non-state actors, their participation in the policy process helps to ensure effective implementation. The more the actors affected by a policy have a say in decision-making, the more likely they are to accept the policy outcome to be implemented, even if their interests may not have been fully accommodated. In sum, New Modes of Governance can significantly strengthen the capacity of state actors in public policy-making (cf. (Héritier, 2003)). The main incentive for non-state actors to get involved in the public policy-making is the exchange of their resources for influence on the policies by which they are affected.

While offering clear-cut explanations on co-operation, principal agent theory also gives hints on some risks that might arise from delegation. Among many other possibilities, state actors might suspect non-state actors of defection or be afraid of state capture, non-state actors at their turn might expect other non-state actors to shirk or free ride. Another strain within the literature used by recent governance research highlights also the critical role of the state for establishing “new modes of governance”, claiming that these need at least a “shadow of hierarchy” (Streeck and Schmitter, 1985: 25); (Mayntz, 1995: 163); (Scharpf, 1993) in order to materialise. Most of the literature focusing on new modes of governance has been used to analyse legitimate, weberian type of states located mostly in the Western hemisphere. If “new modes of governance” are also viable solutions in states with weaker capacities – like those in Central and Eastern Europe – is still an open question.

3. The Beauty and the Beast: EU environmental *acquis* meeting weak state capacities

The promise of EU membership has been the main political driving force leading the 10 Eastern European accession states during their overlapping transition and “Europeanization” period. Driven by rational and idealistic motivations, the EU adaptation process started well before the accession negotiations were closed (Schimmelfennig, 2001, Moravcsik and Vachudova, 2003). While this process was rather selective, after the opening of accession negotiations the adaptation of the overall EU legislation became a top priority for CEE policymakers (Börzel and Sedelmeier, 2006: 63). In contrast to former enlargement rounds, as in the case of Spain, Portugal and Greece, the CEE states had to adopt the whole body of EU law already before their accession date. This asymmetric, one-way and top-down process between EU and the applicant states was enforced by the rather strict accession conditionality and the EU’s distinctive emphasis on the development of administrative capacities in the CEE states (Dimitrova, 2002).

Accession conditionality is widely regarded as being the decisive factor in influencing domestic reforms in the accession candidates.⁴ The Commission and the member states closely monitored the legal implementation of the *acquis communautaire*, which became the central criteria for membership towards the end of the accession negotiations (Schimmelfennig and Sedelmeier, 2005). The “carrot” of EU membership perspective provided a huge incentive for the accession states to adjust to Europe and to “download” policies in the various sectors. The “stick” of conditionality meant at the same time that EU rules and norms had to be adopted in a rather

⁴ “Acquis conditionality” is not the only way by which the EU has sought to transfer its *acquis communautaire*. Schimmelfennig and Sedelmeier (2005) contrast their incentive model of conditionality with two alternative models based on social learning and lesson drawing.

inflexible way and under high time pressure. In order to help accession countries comply with the Copenhagen criteria, the EU installed several capacity-building mechanisms that could work as positive incentives. Grabbe identifies five “mechanisms of Europeanization” at work, namely models (provision of legislative and institutional templates), money (aid and technical assistance), benchmarking and monitoring, advice and twinning, and gate keeping (access to negotiations and further stages in the accession process) (Grabbe, 2003).

The enlargement of EU environmental policies was facing a complex and ambiguous environmental situation in the Central and Eastern Europe. On the one hand, the CEE countries enrich the EU with vast areas of pristine wilderness, large spots of untouched nature and an impressively high biodiversity. On the other hand, they suffer from the socialist legacy of forced and intensive industrialization leading to a significant number of environmental hotspots in the region. After the regime change and during market liberalization, most CEE countries witnessed a period of “natural clean-up” due to the breakdown of the state economy. With economic growth taking up in the second half of the 1990s, however, they started to experience similar environmental problems as the old member states did decades before. While some of the CEE countries had developed environmental regulations back in the 1970s, their effectiveness remained limited and did not meet the requirements of the environmental *acquis communautaire*. Environmental policy-making was largely carried out reactively by using end of pipe approaches and was based in general on command and control measures resonating well with the long standing traditions of paternalistic states (Caddy, 2000).

The EU accession process starting towards the end of the nineties implied that the CEE states were confronted with the challenge of implementing some 200 environmental directives. This transfer of European environmental policy did not only impose heavy costs on their weak fiscal capacities, as it was amounting about three to five percent of their GDPs (OECD countries spend between one and two percent of their GDP on environmental policy), but also meant to transfer regulations that were mostly alien to their political and economic systems as they clashed with the legacies of the socialist period.

The main challenge of environmental enlargement can be seen in the sheer financial burden imposed by the adaptation of the green *acquis* into national law as well as the extensive follow-up costs implied. Adding to this, accession states also needed to increase their administrative capacity in order to transpose EU requirements as well as the technical expertise on the practical application of the law and the monitoring of compliance. Financial resources do not only allow acquiring additional personnel, expertise and technical equipment. They can also help pay off the delegation of implementation tasks to third actors and compensate potential losers of a policy (Börzel, 2003). Yet, even if a state has sufficient resources, its administration may still have difficulties in pooling and coordinating them, particularly if the required resources are dispersed among various public agencies and levels of government. In the three countries analyzed in this paper this is aggravated by the inherently weak standing of environmental administrations within governments that often prioritize economic development.

Next to the financial burdens, a comprehensive environmental policy also needs the support of its target group. Essentially, environmental policy means high social costs with questionable revenues accomplished in the long term. This is seriously at odds with the low level of environmental engagement and a lack of public understanding and awareness of environmental concerns in most CEE states (Gerhards and Lengfeld, 2006, Lee and Norris, 2000). In such a situation the state needs the ability to engage different societal actors in the formulation and implementation of environmental policies - not only to get hold of their resources but also to enhance compliance. Turning to the case studies on the adoption of and adaptation to EU environmental policies in Hungary, Poland and Romania, the remaining part of this paper will inquire whether such new modes of governance have indeed emerged in the accession process.

4. Cases Studies: Tracing NMG in Environmental Adaptation

4.1 *Environmental policy in Hungary*

The basic tenets of Hungarian environmental policy emerged in the seventies and the eighties when the predominant paradigm of policy was mostly based on national quality standards and pollution permits. Command-and-control regulations were accompanied by a system of largely nonsensical and incidental fines for non-compliance, levied by state authorities towards state-owned enterprises (Caddy and Vari, 2002). By the early eighties environmental degradation caused by heavy industry became more than obvious and the state's inability to solve these problems emerged as a major societal grievance leading to the appearance of a strong environmental movement. By effectively using the space provided by the legalization of free associations and the rise of public concern on environmental damages for political mobilization, the environmentalist groups belonged to the main drivers of democratic transition in Hungary, providing a safe haven also for other opposition groups (Enyedi and Szirmai, 1998). After the regime change the importance of the movement decreased permanently but it is still the most important and best organised segment of Hungarian civil society with a considerable number of professionalized groups actively engaging in policy-making and protest. While the liberalization of the political and economic sphere has provided space for the influx of new ideas and a more participatory policy-making process, many of the old bureaucratic practices still prevail and “[...]there has been little borrowing for the ideas of new public management and policy implementation and little looking beyond the profession of law and the drafting of regulations to mobilize people and resources efficiently” (O’Toole, 1997). The conflicting coexistence of these the “old” and the “new” administrative style became characteristic for environmental politics in Hungary and leads to a typically incremental policy process, which is further strengthened by politically motivated re-structuring within the national and regional environmental administration. While the Law on Environmental Protection of 1995 - already incorporating many basic elements of EU environmental legislation - was drafted after years of consultation with hundreds of organisations, environmental policy has a generally low standing both within government and parliament. With environmental administration fighting an uphill battle against more influential resorts like economy, transport or agriculture, EU accession emerged as a welcome opportunity both to further integrate and upgrade environmental policy and legislation, and to secure financing for environmental projects.

Adopting and adapting to the environmental acquis in Hungary

The accession process was accompanied by an initial wave of optimism in Hungarian environmental policy circles hoping that the lost momentum for reform during the nineties could be effectively relaunched with the help of EU adaptation pressure. First of all, EU pressure meant a quite complex process of legal implementation. The general perception was that there were relatively few major discrepancies between EU and Hungarian bodies of law, the main challenge lying in the lacking implementation of already existing legislation. In several cases, the legal implementation of EU requirements could build both on (often fragmentary) national legislation and established domestic actors. However, in most other cases the high time pressure from the European Commission demanding the swift transposition of the *acquis* was making systematic participation of non-state actors that would go further than consultations, largely improbable. Second, legal implementation pressure often came with the need to change national or regional level institutional settings of the environmental administration, effectively changing the institutional balance within the structure of the administration. On the national level, new focal points needed to be established in order to coordinate the workflow and manage the communication between regional, national and EU administrations. This has led, for example, to the establishment of an IPPC Unit at the National Environmental Institute or the Interministerial Strategic Coordination Committee on the WFD. On the regional level a major bottleneck beyond legal transposition of the FFH, WF, IPPC or EIA Directives was caused by the increased number

of permitting procedures traditionally managed by single media authorities. These were heavily overburdened by the growing quantity and complexity of the tasks to be performed, causing serious delays in the permitting procedure. Driven by both, EU push and calls for more efficiency by economic actors, the unification of the water management and environmental authorities in 2002 into a “unified green authority” created a set of new institutions through drawing the two authorities together. Third, the accession process provided non-state actors both with institutionalized access points and possibilities to become involved in the implementation of the policies. Directives such as the FFH, WF, or the EIA did systematically enforce possibilities for public participation, whereas the IPPC and WF directives gave economic actors a higher leverage. While most of these provisions become active only during the implementation process, in some cases non-state actors could already become active during the transposition period. For example, in the case of the FFH Directive, environmental stakeholders participated at all levels of the process. Thus, MME/BirdLife Hungary was actively involved in the designation of protected areas while local NGOs helped providing expertise and data. Fourth, EU accession provided additional financial possibilities for funding and exchange both for the administration as well as for non-state actors. Most of these funding were channeled through PHARE financed institutional twinning projects which brought together relevant stakeholders from old and new member states (Tulmets, 2005).

For state administration, institutional restructuring together with the huge policy overload resulted in a quasi-permanent state of emergency during the accession period, that was absorbing most of the state capacities available. This perception of permanent change was even further aggravated by the changing composition of the environmental branch, which had a veritable odyssey behind itself that took it through different parts of the state administration, becoming consecutively united with the transport, water management, and agriculture as well as regional development administrations. In cases like the WFD implementation, where water management and environmental protection related epistemic communities share a long history of conflictual relations, these changes in affiliations have often resulted in serious frictions between the different policy communities forced to work closely together. The delayed transposition of the FFH directive can also be explained with deep-going conflicts between the agricultural and the environmental branch, which could not come to an agreement on using a common database for the designation of NATURA 2000 sites. Adding to this, high turnover rates within public administration due to its politicization and uncompetitive salaries are hindering the consolidation within the departments and the stabilization of external ties. EU membership did not lead to a consolidation of civil service either, as cuttings in government spending seriously demises the administrative capacities of the environmental authorities. Relations within government, between branches of state administration or even within one ministry were often accompanied by high transaction costs, new modes of governance, systematically including non-state actors could hardly emerge.

Paradoxically, while state actors both on the national and the regional levels were highly overburdened by the rising quantity and complexity of issues to be managed, they could also not mobilize enough capacity to make use of new modes of governance that would seriously discharge them. As several studies and workshops, most of them financed through PHARE funds, were organized in order to promote these ideas, this could not be a matter of missing information (Center for Environmental Studies, 2003, Kajner et al., 2002). New modes of governance, such as “voluntary agreements”, could not materialize due to legal uncertainties attributed to such procedures during times of EU – induced profound legal change. As the incoherence of the legal system is still rampant, fears from litigations are widespread. Adding to this, capacity problems to monitor compliance with such new and non-binding agreements and the fears of misinterpreting differential handling of business actors as corrupt practice by the public are prompting state administration to shy away from making use of such instruments.

While the EU adaptation process created opportunity structures for non-state actors to become more actively involved in the policy process, the non-emergence of new modes of governance can be also attributed to certain characteristics of non-state actors in Hungary. First of all, the capacities of sectoral business organizations strength is often limited and while claims about the general weakness of civil society in Hungary can be questioned (Stark et al., 2006, Petrova and Tarrow, 2007), a high level of specific policy expertise facilitating inclusion in the environmental policy process is mostly lacking. A second hindering factor lies in the specific heritage and identity of most environmental organizations that is clearly biased towards confrontation rather than cooperation of the state (Hajba, 1994). However, organizations with strong policy-making resources are able to follow double-edged strategies: while WWF-Hungary is a main partner of state administration in several projects regarding the WF directive and is developing a new, public participation based approach by initiating a innovative pilot river basin management plan on the Dráva river (Bera, 2005) it also filed a complaint to the European Commission against Hungary's non-WFD compliant definition of "water services". Third, certain recent changes made in the environmental administration, induced by the more integrated character of permitting, did in fact increase the secretiveness of the policy process. Fourth, uncertainties connected to the use non-binding regulations push even business actors affected by the IPPC directive to insist on "hardening" these initially soft instruments for the everyday administrative use.

The generally low emergence of new modes of governance does not mean, however, that consultations do not take place. State administration can selectively resort to long-established, formal and informal contacts towards relevant business associations, scientific background institutions or NGOs. Hand-picking the partners for consultation has several advantages. First, it could mobilize effectively relevant cognitive resources not available for the administration. Second, it could filter participation including only loyal and trusted non-state actors. Third, it made possible to do this in a timely manner so that it did not contradict with the strict transposition schedule dictated by the EU. Fourth, such contacts could be used to obtain legitimacy and fulfill legal requirements demanding public participation. This also shows that provisions laid down in the directive enforcing public participation do not necessarily create balanced representation between environmental and technical interest as these are managed through inclusive, but "cartelized" extensive policy networks that effectively bridge the state-non-state actor divide, are highly professional and can attract resources in a flexible ways. They both carry legitimizing potential for state policies and ensure at the same time through their embeddedness into the professional community that public participation provisions do not undermine the position of the consolidated main actors.

While Hungarian environmental policy-making is still largely dominated by state actors, there are evidences for the slow proliferation of inclusive steering methods. Most importantly, a clear EU push to include non-state actors can account for this. Second, it can be also a result of policy-learning and the establishment of trust relations, often connected to contacts and positive experiences made in PHARE financed twinning projects. Third, delayed transposition and implementation, due to lacking administrative capacities can also result in taking the "helping hand" of non-state actors. After Hungary was missing the transposition deadline agreed with the European Commission mostly due to low administrative capacities and conflicts within different branches in the government (Mocsári 2004), the ministry decided to delegate an information campaign about the designation process to the "NATURA 2000 Coalition" formed by some of the most powerful NGOs. While this increased the legitimacy of government policies, it could effectively prevent a threatening complaint in Brussels which was announced by this NGO coalition if the administration does not proceed with the designation process.

Financial capacities available to non-state actors were of high importance in shaping relations with the authorities. In the case of the IPPC directive highly competitive, mostly export-oriented industry branches, (e.g. pharmaceuticals) had no problems in playing a proactive role in designing BATs, but small and medium enterprises from the agricultural sector are faced with capacity

problems they can hardly solve. Also the case of the EIA Directive is telling here. As introducing impact assessment principles was already among the main political requirements during environmental protests of the late eighties, a quite active and internationally well-connected expert community on this issue was highly influential in Hungary. Holding the relevant expertise, non-state actors like the Environmental Management and Law Association (EMLA) and Öko Inc. were contracted to draft EIA legislation and advise Hungary during accession negotiations.

4.2 Environmental policy in Poland

Poland hosts some of the most valuable ecosystems in Europe, which suffered from decades of industrialization and an inefficient centrally planned economy. After the collapse of the communist regime, one of the numerous challenges was to set up an efficient environmental policy. Environmental legislation already existed before 1989, but suffered from inadequate charges and undeveloped markets (Żylicz, 2000, Żylicz and Holzinger, 2000).

To a limited extent, ecological activism was the only societal activity that was tolerated during communism in Poland. Therefore, unsurprisingly, an ecological “sub-table” was established at the round table talks between Solidarity and the communist regime, which started in 1989. It was agreed that the then environmental law should be codified within two years. However, only a few amendments of the old Environmental Protection Act of 1980 were adopted and with these amendments, Poland tried to fit the environmental law into the new conditions of market economy and democracy (Jendroska and Bar, 2005). It lasted until 2001 until a new comprehensive Environmental Protection Act was passed. The main reason for the difficult and delayed creation process of a new environmental law was the instability of power relations; frequent changes of government and the resulting rejections of governmental drafts in parliament lead to a “chaotic” legislation process (Sommer and Rotko, 1999).

Cooperation of state and non-state actors in Poland is difficult, as corporatist traditions are missing and the relationship of the two groups is often marked by mistrust and the lacking political will to give societal groups a real say in decision making. Soon after the regime change environmental concerns were high on the political agenda in Poland, but with the vast economic reforms interest in ecological issues faded and shifted to more pressing social issues (Żylicz, 2000: 9). The missing environmental awareness of the Polish population is often addressed as a hindering reason for efficient implementation of environmental legislation. There are a variety of environmental NGOs in Poland, but there are only few specialized groups who can hark back on secure founding. A specific feature of the environmental movement in Poland is the loose organizational structures between the specific NGOs. Notwithstanding, new opportunity structures have been opened for them by the Polish EU membership. NGOs are quite successful to exercise pressure on their national government by means of the European Commission. The same holds true for the state-industry relationship. Several industrial sectors are still mainly state-owned and therefore have a different position vis-à-vis the authorities and a different access to decision making arenas compared to privatized ones. This is also mirrored in the organization of business interests, as sectors, where foreign investment plays a crucial role, are better organized than the others.

Adopting and adapting to the environmental acquis in Poland

In Polish environmental policy making a command and control approach prevails with some nascent forms of non-state actor involvement in form of outsourcing, consultations and hierarchically dominated cooperation of public and private actors. Generally, we can say that this development is a result of weak financial and administrative capacities and the missing tradition of collaboration of state and non-state actors. During communism societal activity was repressed for decades and this is still visible in the missing communication arenas and the related inexperience of the two actor groups to deal with each other. Only in some cases, a cautious change towards more interaction can be observed. This development arises on the one hand

from EU requirements that push for private actor involvement and the learning effects of the cases where collaboration brings out good results. On the other hand, in some cases a mutual dependency of state and non-state actors and the allocation of resources non-state actors can provide, is the main driving force for increased cooperation.

However, the Polish state did not mobilize the resources of non-state actors in a systematic way. One hindering factor for the augmented inclusion of non-state actors in environmental policy making are the unstable power relations within the Polish state that led to a slow and unreliable legislative process. This is for example visible in the transposition of the EIA directive. The Environmental Legislation Act, the main document regulating the environment in Poland, only came into force in 2001. The EIA procedure, however, was quickly transposed in the late 1990s in order to secure EU funding but was, as a consequence, often criticized by the European Commission for not fulfilling the requirements to open up the process for the involvement of non-state actors. The instability of power relations has also negative effects for the willingness of non-state actors to bring in their resources because they have to fear that the political will changes and agreements reached with the preceding governments are not realized.

Next to the slow and somehow inconsistent legislation process, the environmental *acquis* is technically oriented and the European policy principles partly clashed with the traditions of the old legal system and administrative culture, which made the effective implementation of the finally reached regulations even more difficult. The administrative bodies are often overburdened with the practical application of the new law and, at the same time, they lack experience and know-how, how to negotiate with different kinds of non-state actors or how to monitor informal accords or voluntary agreements. State actors do not have sufficient capacities that give them enough security to involve non-state actors in the policy process, even in cases where they are dependent on resources of non state actors. In the case of the IPPC directive, the cooperation of state and non-state actors is a necessity in order to handle the challenge, posed by the European regulations. Private actors, especially companies and consultants are included in the preparation of national guidance documents for integrated permits as required by the directive. The incentives for state actors to include non-state actors are their resources, especially know-how and manpower, but also their financial contributions. Nevertheless, the non-state actors always remain in a precarious position; although they are involved, the standards set remain very strict, as authorities fear state capture. The missing competence of state actors, especially concerning the technical details of the directive, leads to stricter standards than necessary.

If missing state capacities are paired with missing political will to implement a directive, reinforced by political veto-players on the regional level, collaboration is refused by state actors even when offered. In case of the FFH Directive, it was only the external pressure from the EU Commission that made the Polish administration cooperate with non-state actors. After environmental groups had prepared a so-called “shadow list”, listing far more possible conservation areas than included in the “official list” of the Ministry of Environment, the European Commission demanded a revision. As a consequence, NGOs were entitled to draw up parts of the inventory because the Ministry of the Environment recognized their superior expertise. An interesting dilemma, which is somehow characteristic for the implementation of most environmental directives in Poland, can be observed. On the one hand, the expertise of the non-state actors is needed, on the other hand, they are not (equally) involved in policy making because of missing trust relations.

Some additional factors may reverse the described situation. As a consequence of institutional restructuring competencies in environmental management were transferred to the regional level but only minor financial resources were allocated to them. On the one hand, this further weakens the administrative capacities of regional authorities, whereas, on the other hand, in some cases exactly this increased pressure favours the emergence of collaboration. This may be a reason, why more non-state actor involvement is found on the regional level in Poland. In the practical application of the WF directive, councils and commissions for public participation and broad

consultation processes were introduced on the level of the regional water management authorities. First, this reflects the specific EU requirements that were anchored in the national water law. Second, special twinning projects, which actively forced public participation procedures in pilot river basins, promoted this development. In contrast, it is remarkable that the establishment of similar national water councils took far more time and its work is assessed more critically by the involved stakeholders. This shows that missing administrative and financial capacities, together with EU pressure and external policy learning, are favourable for the inclusion of non-state actors in order to allocate resources. However, decentralisation alone makes no new modes of governance. As the empirical investigations show, cooperation is more likely in cases where at least a certain level of capacities is available to authorities, enabling them to remain in charge of the policy process. Water Management has a long tradition in Poland and therefore the authorities can hark back on technical capacities, long transition periods are granted, which gives them more time to elaborate and monitor agreements, and money from the state budget is allocated to the regional units in order to establish public participation. By contrast, the reorganisation of the Drinking Water sector is much more sensible. The costs therefore have to be born to a large extent by the local municipalities, which were put in charge of water and waste water utilities in the early 1990s, and the consumers. The involvement of profit-oriented non-state actors could help local governments to cope with the necessary investments. While Polish law provides for the possibility of minority shareholding and joint ownership of water companies, local decision-makers are not inclined to cooperate with private companies. Their reluctance can be traced back to the fear too loose the control over this important public sector and that costs for consumers might rise enormously and hence weaken their position. In turn, non-state actor must have the needed resources and must be willing to offer them respectively. An important factor is the financial backing of non-state actor organizations.

In sum, hierarchical coordination is still dominant in Polish environmental policy making, mainly due to missing administrative capacities and missing trust relations between state and non-state actors. Specific EU requirements that push for involvement of a wide range of stakeholders, external policy learning in form of twinning, and decentralization can, under certain conditions, positively influence the emergence of new modes of governance. Mutual dependence of state and non-state actors or a strong need of relatively weak states for resources non-state actors can offer alone is not decisive.

4.3 Environmental policy in Romania

Like most other states of the region, Romanian environmental legislation was based on single-media permits prior to 1989 but law enforcement was generally weak and extensive industrial production was prioritized (Dragomirescu et al., 1998). The Ministry of Environment was established after the political changes in 1990 (renamed 2007 to the Ministry of Environment and Sustainable Development), which drafted a comprehensive Environmental Law in 1995. This included rather progressive legal instruments, but the weakness of the environmental resort, both in political and financial terms, was effectively hindering their usage. The EU accession process gave a new and forceful impetus leading to wide-ranging changes both of environmental administration and the relationship between the state and non-state actors active in this sector.

Romania was the last candidate country to open negotiations on Chapter 22 of the *acquis communautaire*. Environmental issues emerged as a major stumbling block on the countries road towards accession as Romania received a warning “red flag” in the last regular EC Country report before accession in 2005, meaning that the countries accession could be postponed because of the lacking progress in the adaptation process. Two main problems can be seen accounting for this. First, the weak political and administrative capacity to draft, monitor and enforce legislation (Krüger and Carius, 2001). Second, lack of finances earmarked for the transposition and implementation of this very cost intensive chapter – the costs of environmental accessions were

estimated to reach € 29, 3 billion, half of Romania's GDP a year (ECOTEC, 2000, DANCEE, 2003). As Romania is an accession "late-comer" it did not finalize its institutional consolidation to the extent the first wave of accession states had. Due to extremely weak state capacities, including staffing on the national, regional and local levels, constant institutional and legal reshuffling processes and the tight deadlines dictated by the EU, the public administration has largely chosen to muddle-through the adaptation and implementation process. Being under constant pressure from stronger ministries and struggling with high fragmentation, environmental policy usually harked back to the traditions of legalism and the dominance of command and control instruments, which resonate well with the traditional administrative style of the country.

Unlike several other CEE states, where environmental issues were central to the protest movements of the late eighties, in Romania the strongly authoritarian political system prevented the existence of any kind of parallel organizations. Although based on some pre-war traditions the environmental movement could soon recover after 1989, it is mostly organized on the local level, is financially dependent on external donors and remains mostly passive in lobbying or influencing policy-making. However, partially related to EU accession, this has been changing in the last couple of years.

Adopting and adapting to the environmental acquis in Romania

Romania started the accession race with extremely weak capacities in the administrative sector: coordination between national, regional and local levels was largely unconsolidated, monitoring and law enforcement scattered and corruption widespread (Craciun, 2006). Public administration was often understaffed and as a heritage of socialist environmental policies, its training largely technically biased. Due to the low wages in the public sector, personnel fluctuation remained a constant problem. While stop-and-go reforms and reshufflings did occur during the nineties, mostly due to bilateral foreign assistance, it was EU accession that has clearly emerged as a main driving force behind a number of changes of the last decade. First of all, the transposition of community legislation has resulted in an vast legal activism of the ministry. Due to the strict time schedule of the accession, dictated by the EU and domestically reinforced by the powerful Ministry of European Integration, this process was taking place mainly ad-hoc and new legislation was introduced into national law mainly by emergency ordinances of the government thus circumventing the Parliament. Second, EU accession resulted in a major institutional reorganization of the ministry, which led, among others, to the introduction of a new, regional level of environmental administration and the reorganization of the Environmental Guard, that could not efficiently fulfill its law enforcing functions due to unclear institutional dependencies and widespread corruption. Third, EU accession increased the participative opportunities for non-state actors through the legal provisions of horizontal directives such as EIA or IPPC. While during the rather secretive accession process participation of non-state actors in some cases even declined compared to the mid-nineties, legal provisions of these directives are being increasingly used during the last years by the civil society actors. Finally, EU accession provided cognitive, technical and financial means in order to fulfill the requirements of the directives. Targeting both, state and non-state actors, PHARE twinning projects, LIFE and ISPA instruments, often stocked up with bilateral aid funds from the EU member states, were partially financing new facilities or linking together policy actors (Papadimitriou and Phinnemore, 2004).

Despite of this external capacity-building support, new modes of governance were far from emerging as a typical feature of environmental enlargement in Romania. First, the high time pressure on legal adaptation, which was even higher in the case of the two laggard accession candidates, Romania and Bulgaria, was effectively binding the limited resources available in the environmental administration. The heavily understaffed and underpaid administration on both the national and the regional level tended to see the inclusion of non-state actors as a time

consuming and non-rewarding exercise. In most of the cases, second, the perception prevailed that the drafting guidelines of the EU did not provide much leeway for domestic fitting, but rather led to a “downloading” of the legislation followed by the “copy-paste method” of transposition. Third, institutional restructuring and conflicts within the administration, as in the case of the FFH directive, between the forestry department of the agricultural ministry and the biodiversity department of environmental ministry did not leave much capacity to include more actors in the policy process. Together, fourth, with the administrative culture, which tends to be legalistic and technically oriented, this can be seen as hindering the establishment of trust relations between state and non state actors. While it was mostly weak state capacity, that hindered the emergence of new modes of governance in Romanian environmental policy-making, in some cases, the relatively strong capacities available to state actors, such as the National Administration “Romanian Waters”, did not make the pooling of resources from non-state actors necessary. As in several sectors, such as energy, Romanian governments did prevent large privatization, the state ownership of the most Large Combustion Plants made the new modes of governance futile. While non-state actors were often targeted by the new legislation, typically they did not seek institutionalized ways of asserting influence on state administration. In several cases, corporatist relations between business actors, politics and administration survived the restructuring of Romanian industry (Cernat, 2006), making, thus, informal relations an easier way to achieve their aims. At the same time, sectoral business associations tend to be still weak in Romania, as are, in most cases, environmental NGOs.

As capacity-building, financed mainly through EU funds such as PHARE, LIFE or ISPA and the explicit recommendations of the EU to increase staff in certain areas slowly improved the administrative capacities available to the state, more inclusive policy-circles started to emerge. Even if reluctantly, explicit EU push to include non-state actors can be seen as resulting in a slowly emerging trend. Adding to this, trust relations fostered through longer periods of collaboration between state and non-state actors seem to have similar effects. While EIA adaptation has happened under time pressure and by command and control measures, there seems to be more openness in the implementation since the EU tries to promote the process. This might open doors to more systematic collaboration with the non-state sector, as some of the NGOs already possess relevant knowledge and are involved in spreading the information on EIA. At the same time, EIA provisions are likely to emerge as a highly politicised issue, as they are increasingly discovered by environmental groups as a tool in blocking regional development projects. The case of the Rosia Montana Gold Mine, where several NGOs are effectively using EIA and which is partly owned by the Romanian state, has become a highly meditated environmental conflict and a first major experimental field to test the power of such new tools. Apart of these, mostly externally influenced, ways to promote new modes of governance specific capacities available to non-state actors can, in some cases, lead to shared ownership. The FFH Directive seems to provide the most potential for this, as highly professional NGOs holding relevant and scarcely available knowledge, such as SOR/BirdLife Romania or the Milvus Group signed a partnership agreement with the Ministry for cooperation on designating bird areas (SPAs). However, also in this case funding came mainly through EU programmes such as PHARE CBC and LIFE. Due to the delays in the process public consultations on site designation did not take place and are expected to lead to conflicts in the future. Even in this case, the collaboration between NGOs and the administrations can be characterized as maintaining the shadow of hierarchy and being contractual and selective. Another path leading to active inclusion of non-state actors is related to the high costs posed by investment heavy directives such as the Drinking Water, IPPC or the LCP directive. Public utility reform in the nineties led to municipal ownership and as local self-governments were chronically lacking finances, in some cases concessionary public-private partnerships (PPP) with the participation of typically foreign public utility companies emerged. EU funding directly, or through associated financial institutions as the European Investment Bank, has helped the deregulation process to develop. It can also be expected that this tendency will proliferate further, as initial financing

through Public-Private Partnership concessions can be instrumental to kick-start investments in order to apply for further EU funding. Finally, collaboration between state and non-state actors can occur also to prevent or to postpone compliance with EU legislation. In the case of the LCP and IPPC Directives, which mainly target industrial actors, informal agreements with the administration emerged in order to negotiate individual transition periods for installation reaching up to 10 years for more than one fourth of the installations affected by these directives.

5. Conclusion

The adoption and adaptation to the EU's *environmental acquis* posed serious challenges to both, state and non-state actors in Hungary, Poland and Romania. The transfer of European environmental policies came with significant costs compared to the weak state capacities and meant a thorough legal and institutional reshuffling based on regulations that were often contradicting the policy-making traditions of these states. Given the limited capacities of state actors, the inclusion of non-state actors in policy transposition and implementation is an obvious possibility to compensate for state weakness. New forms of governance, such as co-regulation, delegation or private self-regulation can be seen as potentially providing ways to reduce the implementation burden by sharing it with private actors.

However, based on the analysis of the adoption and adaptation process of six environmental directives in Hungary, Poland and Romania, this study finds that this is not the case in these accession states. Full-fledged new modes of governance practically did not emerge during the accession period. The traditional command and control approach prevailed in all three countries and in some cases was even reinforced by the high time pressure of the enlargement process. There are only some nascent forms of cooperation with non-state actors emerging. Generally, even these remain weak and non-systematic and include rather weak participative modes such as outsourcing, consultation or asymmetrical cooperation. Systematically involving non-state actors is mainly perceived as time-consuming and non-rewarding. If pressure is exercised to include non-state actors, either from the EU or also by domestic actors, there are signs of a more inclusive involvement. However, public administration is often perceived to merely pay lip-service to EU requirements for public participation.

The main reasons hindering the emergence of new modes of governance are the weak administrative and enabling capacities of the state as well as weaknesses concerning private interest organization. Accession coincided with transition. On the one hand, managing the transition process required a strong government to introduce and implement often costly political and economic reforms. On the other hand, the transition process entailed high political and institutional uncertainties, which are reinforced by frequent changes in government and administration. This makes it difficult for non-state actors to establish stable relationships with state actors. Furthermore, Central and Eastern European countries share an institutional legacy of an authoritarian state that heavily interfered with society and economy. The organization of societal and corporate interests used to be weak. Even after transition, structures of interest intermediation remain fragile. Thus, systematically involving non-state actors in the making and implementation of public policy does neither resonate well with the traditional paradigm of a strong state nor can it build on stable state-society relations. Societal and economic interests often lack the necessary resources and/or the political willingness to organize and offer themselves as reliable partners to the state. In those cases, in which non-state actors did manage to organize, it often needed the help of transnational actors, such as international environmental organizations, policy consultancies, companies, or EU-level confederations. Paradoxically, state actors are reluctant to cooperate with non-state actors precisely because they lack resources which non-state actors may provide. It is exactly because of their weakness that state actors are afraid of being captured by powerful interests, who have superior expertise regarding the making of rules and cannot be monitored in their compliance.

While these findings are consistent across the case studies, the paper also finds variance regarding policies, time and countries. Regarding policy variance, policies with clear provisions towards participatory mechanisms, such as the FFH, IPPC and WF directives seem to hold more potential towards generating new modes of governance compared to the classical “old-style” regulatory directives. Time variance in the emergence of participatory politics can be explained mainly through the increased trust and cross-dependencies fostered in longer periods of non-systematic collaboration between state and non-state actors. Differences between the transposition and implementation period, as well as pre- and post-accession period are also telling, as the opening up of the multi-level governance system of the EU provide more connection possibilities for the non-state actors. This mainly explains the variance between countries, as this paper finds less inclusive policy-making in Romania, which has joined the EU in the second wave of accession in 2007.

Nonetheless, some observed developments cause hope for the emergence of new modes of governance. Decentralization, the specific EU requirements for participatory approaches and external policy learning increase cooperation. EU and international aid strengthen the capacities of state and non-state actors and therefore capacity problems hindering the cooperation may become levelled in the long run. At the moment, it is too early to make a clear statement, if these developments will really lead to more participatory structures in the future, as the practical application of EU environmental policies is still at the outset in Central and Eastern Europe.

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