



New Modes of Lobbying for New Modes of Governance Interest Groups and Experimentalist Governance in the European Union

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Summary

This thesis researches how interest-group behaviour contributes to the development and functioning of recursive, or *experimentalist*, governance frameworks in the EU. In response to often unpredicted developments and obstacles experienced since the establishment of the European Union (EU), new modes of European governance have emerged throughout the past decades. By and large, these new governance modes shift away from hierarchical, top-down policy-making, and are instead characterised by more horizontal processes. Governance scholars Charles Sabel and Jonathan Zeitlin argue in this respect that over the past fifteen years, European policy-making processes have increasingly become characterised by what they call *experimentalist governance*. In this governance model, policy is developed by means of broad framework rules, the details of which are determined throughout the implementation and revised on the basis of such implementation experience. Due to the explicit respect for differences in national and local context, in which the Member States are not required to give up (all of) their national sovereignty, this mode of governance seems particularly suitable for overcoming some of the thorny obstacles that the EU faces. The most central and distinctive feature of experimentalism is its focus on recursive review of policy and procedures. There is no direct intention to arrive at definitive policy solutions; the model instead works from the premise of revisability and corrigibility of provisional measures to be reviewed and revised on the basis of experience from the broadest possible range of relevant policy actors. In this process, a strict distinction between policy maker (principal) and policy subject (agent) blurs. This recursiveness arguably enhances the resilience and responsiveness to unpredictable changes in both policy problem and possible solutions.

Following the theoretical framework of experimentalist governance, the thesis looks at governance frameworks and institutional arrangements that are established under conditions of strategic uncertainty, polyarchy, and complex interdependence. Both these conditions, which may favour recourse to recursive governance frameworks, and the governance arrangements themselves are expected to shape the behaviour of the relevant interest-group actors. Indeed, as the policy-making process leans increasingly on the implementation, so too may interest groups' involvement shift or extend to the implementation phase. At the same time, whether and how these actors engage in the relevant governance arrangements is important for the effective functioning of the policy process. The form and extent of interest-group involvement in EU policy processes are determined as much by policy-makers' *demand* for information, as by interest-groups' *supply* of such information and input. This means that the thesis addresses an endogenous research question in which governance arrangements and interest-group behaviour influence one another. By looking at the role that interest groups play in new, recursive governance models in the EU, the thesis investigates the (changing) relationships between policy makers and interest groups, and how are those relationships shaped and reshaped.

Having introduced the thesis's topic in first chapter, the theoretical framework presented in Chapter 2 argues how the topic of interest-group behaviour is directly relevant for research on new modes of EU governance, and experimentalist governance in particular. It does not only argue *that* they are related, but also *why* it is important to investigate this relationship empirically in order to understand to what extent governance one paper corresponds with

governance in practice. Indeed, in a governance model where interest groups play a central role in the provision of information and expertise, it is crucial to know which groups can and indeed actually do so. This not only matters for arriving at suitable and effective policy outcomes, but also matters greatly for the extent to which the EU is able to produce democratically legitimate policy. In suggesting this theoretical relevance, the chapter also explains what is missing in the literature and thus in our understanding of the relationship.

The thesis's qualitative, in-depth comparative case-study design is presented in Chapter 3. The case selection follows a logic of gradually less likely conditions for experimentalism to be embraced by the relevant state and non-state actors – thus making it more difficult for such a governance framework to be further applied and developed. This likeliness refers to the policy-making conditions of the issue at hand (i.e. strategic uncertainty, polyarchy, and complex interdependence) as well as to the recursive character of the existing governance model and its institutional arrangements. The Industrial Emissions Directive (IED) is the case in which both the scope conditions of strategic uncertainty, polyarchy and interdependence are clearly present and in which an experimentalist governance framework has been applied for a longer period of time. The General Data Protection Regulation (GDPR) too is embedded in these scope conditions, and shows some recursive and iterative measures in implementing EU-level policy goals in the national context. The third case study, the Child Abuse Directive, displays the three scope conditions, which are moreover stressed by policy-makers and interest groups alike as the central challenges. This case, however, constitutes what I call *de novo* legislation, meaning that there is no pre-existing governance framework that policy-making actors can build or reflect on. The case study shows how lack of institutionalisation makes especially a *de novo* legislation vulnerable to failure. The Institutions for Occupation Retirement Provisions (IORP) II Directive, as the fourth and final case, may theoretically be argued to display the three scope conditions – and indeed, policy-makers initially proposed a number of recursive, cooperative measures to address these conditions. As it turns out, however, the relevant interest groups questioned the presence of complex interdependence in this legislation to such an extent that it strongly determined their preferences *against* the proposed recursive governance arrangements. Each case study is based on qualitative, in-depth interviews with key lobbying and policy-making actors.

The 2010 Industrial Emissions Directive, discussed in Chapter 4, constitutes the most developed case of an experimentalist governance framework – both on paper and in practice. It is expected that interest groups embrace a recursive, experimentalist, governance model not only because the issue of environmental protection is embedded in the three scope conditions for recursive governance, but also because the specific Directive has been working with recursive and corrigible measures for two decades. Indeed, the role of interest groups in policy implementation is clearly defined and institutionalised, and the relevant interest-group actors moreover seem to broadly agree with the recursive governance framework and their role in it. None of the non-state actors explicitly opposed the policy arrangements, and none favoured abandoning the governance model in the 2010 recast of the Directive. Despite a clear division between industrial and environmental interests, and correspondingly between their opposing objectives in terms of concrete policy outcomes, there was broad agreement among interest representatives on the recursive governance arrangements for (re-)defining and updating concrete policy goals. In

other words, the IED case shows how disagreement about concrete policy *outcomes* can lead to agreement on the policy *means* among opposing interests. The *de jure* role that interest groups have in the governance model – with a central role in the on-going updating and revision of emission standards – is described in the chapter and is argued to constitute a rather well-functioning case of recursive policy-making. The chapter discusses how this *de jure* pathway to interest group involvement may bring about a positive feedback loop in which positive experience with the policy process makes interest-group actors support these measures.

Chapter 5 presents the case of the General Data Protection Regulation of 2016 and its institutional arrangements for policy implementation. The policy issue of data protection and privacy in our digitalising world is clearly and rather explicitly embedded in the three scope conditions for recursive governance. However, although the governance arrangements of the GDPR's predecessor (the Data Protection Directive of 1995) indeed had some recursive elements, an important and somewhat remarkable feature is that interest groups were given only a very limited role in those arrangements. Interest groups in the GDPR policy-making process have indeed addressed governance arrangements in the legislative phase, albeit to a lesser extent than in the IED case. A distinctive feature of the GDPR's legislative process is the overwhelming influx of 'new' lobbying actors, resulting from both the extensive scope of the Regulation and the high salience of the issue of data protection and privacy. The scattered spectrum of lobbying actors caused the lobbying in the GDPR process to revolve primarily around definitions of (new) concepts – such as big data and encryption – and less around the governance arrangements. The lobbying process in the legislative phase of the GDPR thus contributed only modestly to the governance framework as such. This means that the developments in the governance framework of the GDPR are more the result of the policy-makers' efforts than those of the interest groups – even though the scope conditions for policy-making led the interest groups to favour recursive governance arrangements. The chapter discusses furthermore how interest groups have sought to participate and provide the necessary inputs outside the official, top-down implementation institutions. In so doing, it shows how recursive and cooperative elements may be introduced from the bottom up, through what I call the do-it-yourself-pathway to interest-group involvement.

Chapter 6 discusses the 2011 Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography as a case of *de novo* policy-making – meaning that instead of revising an existing governance framework, it proposes new legislation from scratch. The issue of protecting children against sexual abuse, which revolves strongly around the role of the internet in committing such crimes and distributing child sexual abuse material, also faces conditions of uncertainty, polyarchy and interdependence. Referring to these conditions, the initial proposal for this Child Abuse Directive indeed contained experimentalist procedures of recursive revision of strategies and practices, in which the Commission emphasised the need for close cooperation with non-state actors. The case study, however, shows that despite intentions from policy-makers to work towards a more recursive governance framework, and despite interest groups' explicit agreement with this move, neither policy-makers nor interest groups really focussed on the institutional arrangements for such recursivity. As a result, no such recursive governance arrangements have been installed or even proposed. As the findings

of this case suggest, interest-group actors tend to respond to, and lobby on, provisions in the legislation that *have* been proposed, and not on those arrangements that perhaps should have, but were *not* proposed. The case study thus shows the challenges of turning governance intentions into practice in a from-scratch-setting. It simultaneously shows how intentions can easily vanish without proper institutional arrangements – to the detriment of highly needed child protection policy.

The Institutions for Occupational Retirement Provision (IORP) II Directive, discussed in Chapter 7, is the fourth and final case study of this thesis. The chapter shows how strong interest-group opposition against recursive measures can hamper the development of such a governance framework altogether – against the intended governance approach of the policy makers at the European level. The opposition was based on the argument that the measures for regulating pension funds were not flexible enough to respect the diversity of pension fund systems across the EU Member States, and thus the strategic uncertainty in regulating them. Even more fundamentally, the chapter shows the importance of complex interdependence as a ‘possibility’ or scope condition for recursive governance. Interest groups argued that the issue of IORP regulation was *not* characterised by significant interdependence between states, and thus contested the need for EU-level policy altogether. A strong coalition involving almost the entire scope of affected actors successfully influenced the governance framework of the IORP Directive. The extensive lobbying focus on policy arrangements – rather than concrete policy outcome – is comparable with the lobbying focus in the IED case. Yet, in the IORP case this focus on institutions has had the opposite purpose and hence outcome, as it has prevented (more) recursive measures from being adopted and implemented.

Having discussed each of these case studies in detail, Chapter 8 compares the findings and draws some preliminary conclusions. This comparative chapter presents the conditions under which interest groups seem to favour the use of an experimentalist governance framework, and the conditions under which their actual participation in recursive governance arrangements can be expected. The research findings suggest that interest groups’ preferences and behaviour matter greatly for the development and functioning of experimentalist governance – both positively and negatively. Through explicit support for such a recursive governance framework, interest groups may indeed contribute to the emergence or further development of experimentalism by their lobbying objectives in the legislative phase. Moreover, interest groups can greatly contribute to the practical functioning of the policy process through their active engagement in policy implementation, which involves continued data gathering, information exchange and best-practice finding. Conversely, interest groups’ opposition to recursive governance arrangements may block the emergence of an experimentalist governance framework – against the intentions or preferences of policy-makers. The research findings furthermore suggest that in order for the relevant interest-group stakeholders to embrace a recursive governance approach, some general agreement among state and non-state actors on the nature of the policy problem is crucial. The thesis, finally, discusses both top-down and bottom-up pathways through which interest groups can extend their participation in response to (their support for) a recursive governance framework.

The case comparison is followed by the concluding Chapter 9, in which I discuss the implications of these findings for the theory and practice of experimentalist governance and interest representation, and in which I propose avenues for further research. The case-study research first illuminates different pathways through which interest groups can become involved in a policy-making process that does not stop when legislation is adopted. Top-down institutions can instigate what I call the *de jure* pathway to extended interest-group involvement. Interest groups can be attributed an explicit role in the formal composition of the central implementation institution, and can be formally engaged in discussions on implementation questions and evaluations. Both the governance arrangements of the Industrial Emissions Directive and those of the IORP II Directive show how interest groups are receptive to such access opportunities for continued involvement. Apart from the mere accessibility of such institutions, a second triggering element in this *de jure* pathway to extended interest group involvement is the status of the output of the implementation institution. Binding outcomes of such institutions make extended involvement more than just a voluntary extra opportunity for expressing one's preferences; instead, extended involvement becomes the most important part of the policy cycle for influencing actual policy outcomes.

Bottom-up initiatives may form a suitable alternative when the top-down institutions are not accessible to interest groups, but when the need to remain engaged is nonetheless strongly felt among the relevant interest-group actors. The GDPR case illustrates what I call the do-it-yourself pathway to extended involvement. The active implementation and high salience of the topic of data protection and privacy form sufficient incentives for (at least some) interest-group actors to develop their own initiatives. This incentive has proved an important condition for interest groups to invest the time and energy into developing such alternatives. By contrast, the highly inactive Child Abuse Directive does not at all motivate the relevant stakeholders to do so.

The conclusion reflects on interest groups' strategic behaviour and their adaptation to new modes of governance that are much more based on quick iterations and evaluations in their implementation than hierarchical governance models. The thesis suggests that interest groups seem to generally perform a dual lobbying role in order to adapt to such new governance structures. Dual lobbying found in three out of the four case studies means that *in addition to* lobbying in the policy formulation phase, interest groups actively engage in the implementation phase. The *de jure* pathway means that this duality is the result of the simple understanding that implementation is where policy outcomes are impacted most. The bottom-up pathway means that although not motivated by, or even despite, the official rules of the game, interest groups still understand that policy is shaped crucially in the process after legislation is adopted. Both pathways can shape the governance framework in practice and determine its functioning to a significant extent. The thesis thus shows that, as a general conclusion, it matters greatly how interest-group actors behave and respond to their institutional setting, as their responsive behaviour is neither direct nor automatic. This in turn is all the more relevant to study in the context of emerging horizontal and recursive – possibly experimentalist – governance frameworks in the EU, as their potential depends crucially on this reciprocity between governance institutions and key actors.