NEW MODES OF GOVERNANCE AND THE PARTICIPATORY MYTH

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1. Old and new Governance

The popularity of the concept of governance goes hand in hand with the identification of changes in modes of governing and the development of 'new modes of governance'. Identifying 'new modes of governance' is a risky task. Policy modes and tools discovered today as 'new' may have already existed but are only now catched by our new conceptual lenses. Policy modes and tools hardly start from scratch; they go often back to already existing practices. Moreover, one should be cautious and acknowledge that the emergence of 'new modes of governance' does not necessarily imply the disappearance of 'old modes' or not even that they have become predominant over the old modes of governance. Nevertheless, despite the difficulties to define precisely 'new modes of governance' and to distinguish them from 'old modes', there is a widespread agreement among such different scholars as political scientists, lawyers, public administration specialists and international relation theorists that policy-making and administration over the last 15-20 years has changed importantly. One of the most common arguments about 'new governance' is that it is characterised by heterarchy rather than by hierarchy, creating horizontal modes of governance among a multitude of actors – public and private – involving all relevant stakeholders. Often implicitly, but sometimes explicitly, this argument is linked with a normative democratic claim that praises the particular participatory features of 'new governance' as compared to 'old governance'.

In fact, such particular participatory nature would be welcome in such new modes of governance which often lack, or are weak in terms of, traditional political participation and accountability. This is true for private governance mechanisms or policy-modes in which private actors take increasingly over from public ones, as well as for governance in multi-level systems in which supranational and/or international settings do not offer the conditions - in terms of political institutions, political parties, civil society and public sphere - on which democratic accountability has traditionally been based in the nation states.

In relation to the European Union, the debate on new modes of governance has been particularly stirred by the emergence and development of the Open Method of Coordination (OMC). Yet, while particularly popular as example, the OMC is not the only new mode of governance. In particular European environmental and social policy have developed such instruments as benchmarking, voluntary accords, codes of best practice and procedural norms (Heritier 2002).

With respect for the difficulties to define 'old' and 'new', and taking into account the caution pled for above, Scott and Trubek (2002) have argued convincingly to use the 'old' Community Method as a useful baseline to identify such new modes of governance. As argued in the Commission's White Paper on European Governance, the Community Method is premised upon the Commission's exclusive right of legislative initiative, and the legislative (and budgetary) powers of the Council of Ministers and the European Parliament. It is mainly associated with binding legislative and executive acts at the EU level, the imposition of more or less uniform rules for all Member States, and the role of courts, and in particular the European Courts as central in guaranteeing respect for the rule of law. The Community Method does not entirely copy the 'traditional' public governance structure of the nation state, but it is nevertheless built on parliamentary representation linked to a separation of powers (defined as 'institutional balance'), and hierarchy in terms of generally binding provisions, hierarchy of norms, and public control on their respect.

Scott and Trubek (2002: 2) distinguish two categories of 'new governance'. The first category, called 'new, old governance (NOG)' still presents important elements of continuity with the Community Method but equally departs from it in one or more important respects; such as the introduction of civil dialogue in legislative processes, the use and increase of comitology – detracting substantial norm-setting from the traditional legislative process, and providing for a different institutional balance – and the use of legislative processes for the adoption of norms that leave substantial flexibility to the Member States, such as framework directives. The second category is 'new governance' in the strict sense as it provides fully-fledged alternatives to the Community Method, such as the OMC, the European social dialogue, or the partnership principle in the Community structural funding. Both the 'departures of the Community method' and the 'alternatives' are characterised by some common features. In contrast to the hierarchical strict substantial norms of the Community Method, Scott and Trubek (2002: 5-6) describe 'new governance' as characterised by *experimentation and knowledge creation*, *flexibility and revisability* of normative and policy standards, and *diversity and decentralisation* leaving final policy-making to the lowest possible level. Institutionally it tends to accept the necessity for coordination of action and actors at *many levels of government*, as well as between government and private actors, involving novel ways to expand *participation by elements of civil society* in policy-making and to extend *deliberation* among stakeholders. In a comparable way, Heritier (2002: 187) refers to new modes of European governance as characterised by the principles of voluntarism (nonbinding targets and the use of soft law), subsidiarity (measures are decided by the member states), and inclusion (the actors concerned participate in governance).

This paper will argue that more heterarchical, horizontal and flexible modes of governance do not necessarily imply more participation and inclusion in terms of involving all the stakeholders on which one could base some democratic claim. I will make this argument using the case study of a policy sector that has been characterised in the 1990s by a clear shift from 'old' to 'new governance', although not entirely abandoning the former, namely Community occupational health and safety policy (OH&S).

OH&S policy was once the 'jewel in the crown' of European social policy. By the end of the 1980s, Community policy in the field of health and safety at work had developed into a strong regulatory policy, ensuring a large number of OH&S Directives: about two thirds of all social policy Directives adopted have been in the field of OH&S, realising rather a 'race to the top' than a 'race to the bottom' in health and safety standards (Eichener 1993: 50). It was nearly exclusively based on the Community Method. However, at the beginning of the 1990s, awareness grew that better health and safety conditions do not merely result from higher European regulatory standards. European Directives have to be translated into national law, and to be applied in practice. Moreover, European social policy in this period, as exemplified in the 1993 Green Paper[1] and especially the 1994 White Paper on Social Policy,[2] clearly chose less regulatory intervention (Hervey 1998: 28) and aligned with the White Paper on Growth, Competitiveness and Employment in stressing the need for employment and competitiveness rather than social rights (Mangen 1997; Kenner 1995; Kuper 1994). In this generally changed context for European social policy (Streeck 1996; Cullen and Campbell 1998; Barnard 2000; De Schutter and Deakin 2005) also the nature of OH&S policy changed drastically (Neal 1998).

The legislative output reduced: while the Council adopted 15 OH&S Directive from 1989 to 1992, only nine OH&S Directives saw the light of the day in the following decade . A policy of exchanges of information, training and benchmarking would take over. The general terms of this 'persuasive

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[1] Commission, *European Social Policy: Options for the Union, Green Paper*, COM (93) 551 final.
[2] Commission, *European Social Policy - The Way Forward for the Union: A White Paper*, COM (94) 333 final.

policy-making' (Streeck 1996: 80) were set out in the General Framework for action in the field of OH&S – 1994-2000[3] and in the Fourth Action Programme 1996-2000;[4] and re-elaborated but mainly confirmed in the 2002 Communication on 'a new Community strategy on health and safety at work 2002-2006'.[5]

Community policy in OH&S since the 1990s is characterised by a testing out of a new institutional framework and new policy-instruments. However, whereas the OH&S regulatory policy of the end of the 1980s could count on the well-oiled machinery of the Community Method, the persuasive policy-making approach of the 1990s struggles with a lack of strategy and with a puzzle of new modes of governance. I do not argue that the regulatory approach of the 1980s and the 'old' Community Method were as such sufficient to have an effective OH&S policy. My focus here is on the participatory features of old and new modes of governance in OH&S in order to reply to the implicit – and sometimes explicit – normative democratic claims related to new governance. I argue that participation in the 'old' Community Method in the field of OH&S was well established, to the satisfaction of the main stakeholders; whereas the new modes of governance in this field are indeed more horizontal but are not particularly participatory in terms of involving the civil society actors who are most directly concerned by OH&S.

The analysis is based on official and working documents and on 20 interviews with central policy-actors in this field. Interviews have been held with four Commission officials responsible for OH&S; the Director of the European Agency for Safety and Health Protection at Work ; six members of the Agency Board (two government representatives, two trade unionists and two employer representatives), most of them equally acting in the tripartite Advisory Committee on Safety and Health at Work; two representatives from the European Trade Union Confederation and one from the European employers' organisation UNICE acting in the Agency and in the Advisory Committee; two officials of the European Economic and Social Committee (EESC) responsible for social affairs; two EESC members concerned with OH&S issues (one trade union, one employers); and two European Parliamentarians dealing with social affairs.

In the rest of this paper I will first analyse how the inclusion of stakeholders has been ensured under the Community Method. The following session will then look at how participation is organised in the new modes of governance that have characterised OH&S policy since the 1990s.

2. Participation under the Community Method

Community OH&S policy until the beginning of the 1990s has been nearly exclusively characterised by the adoption of legislative Directives. They were initially adopted under Article 100EC and since the Single European Act on basis of Article 118a (now 137) EC. At the national level, the adoption of protective norms to avoid accidents and diseases related to working conditions has been at the naissance of our welfare systems and systems of industrial relations. The emergence of a regulatory framework at the European level in this field could, therefore, hardly be imagined without involving the central stakeholders that are the social partners. The legislative process in the field of OH&S, and the inclusion of stakeholders therein, can be described as follows:

Commission initiative →tripartite Advisory Committee → Commission proposal → European Economic and Social Committee → EP ←→ Council (directive)

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3   Commission, *General Framework for action by the European Commission in the field of safety, hygiene and health protection at work – 1994-2000*, COM (93) 560 final.

4   Commission, *Communication from the Commission on a Community programme concerning safety, hygiene and health at work (1996-2000)*, COM (95) 282 final.

5   Commission, Communication *Adapting to change in work and society: a new Community strategy on health and safety at work 2002-2006*, COM (2002) 118 final,.

The initiative is taken by the Commission which may find inspiration for a proposal in various sources of information, such as private OH&S experts or (semi-)public OH&S bodies.[6] The first formal consultation will then take place with the tripartite Advisory Committee on Safety and Health at Work. The Advisory Committee (AC) has been created in 1974 in order to 'assist the Commission in the preparation, implementation and evaluation of activities in the fields of safety and health at work'.[7]

The AC consists of three full members for each Member State, i.e. one government representative, one trade union representative and one representative of employers' organisations.[8] Government representatives originate from the national ministries responsible for OH&S, or in some cases from semi-public authorities or agencies having responsibility for national OH&S policy.[9] The representatives of management and labour mostly come from the national social partners confederations, though in a small number of cases (and especially for management) they originate from sectoral national organisations, and even from private firms. The AC is thus composed of three 'interest groups', the trade union group, the employers group and the government group. Although these groups have only been recognised formally by the new AC Statutes of 2003, they have always played a role in the functioning of the Committee. Each of the interest groups holds separate meetings and they appoint a coordinator and a spokesperson, who acts as their main voice within the plenary sessions of the Committee.

Contacted by the Commission, the AC will set up a working group on the requested issue. At this working group level, technical argumentation is the rule. More broader socio-economic and interest based considerations enter more into the debate at the subsequent plenary meeting of the Committee, which will have been preceded by separate meetings of the three 'interest groups'. The Commission can take up inspiration already from the technical deliberations at the working group level where it is represented, whereas the formal opinion of the Committee adopted in the plenary will clarify the common position – and in some cases the divergent opinions - of the stakeholders represented in the Committee.

Having heard the opinion of the AC the Commission will then make its formal legislative proposal, which is sent at the same time to the European Economic and Social Committee (EESC), the European Parliament and the Council. It is the EESC which will first adopt an opinion on it. As an advisory body in a broad range of policy areas, the EESC has been created by the Rome Treaty to represent 'the various categories of economic and social activity' – reformulated in the Nice Treaty as 'the various economic and social components of organised civil society'. The (currently)[10] 222 seats of the Committee are divided between the Member States according to the list established in Article 258 EC. The Rules of Procedure of the EESC structure the Committee into three groups: national employers' organisations (Group I), national trade unions (Group II), and divers interests (Group III).[11] Group III is composed of national socio-economic categories such as agricultural organisations, organisations representing small and medium-sized enterprises (SMEs), the liberal professions, crafts, consumer organisations, environmental organisations, representatives of the academic world, persons representing the social economy, and organisations representing persons with a disability.

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[6] Interview with Commission officials.

[7] Council Decision of 27 June 1974 on the setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work, 74/325/EEC, OJ L 185/15, 9.7.1974, reformed by Council Decision of 22 July 2003 on setting up an Advisory Committee on Safety and Health at Work, OJ 218/1, 13.9.2003.

[8] Article 3 AC Statutes. Until 2003, the AC has been composed of six members per Member States (two for each group).

[9] This is, for instance, the case for the UK, Ireland, and Sweden.

[10] In the light of future enlargement, the Nice Treaty introduced in Article 258 EC a limit of 350 members of the EESC.

[11] The size of the three groups is more or less equal, though Group I today is somewhat smaller than the two other groups.

Composed of interest group representatives with a diversity of backgrounds, not limited to the particular technical field of OH&S, and in particular by including other interest groups than the social partners, the EESC could offer an additional forum of deliberation on OH&S issues after the AC has already given its opinion. However, in reality the role of the EESC in the field of OH&S has been modest (for more details, see Smismans 2004, 173-180). In this technical field the deliberation in the EESC has often been limited to management and labour, and no particular efforts have been made to broaden the deliberation to other functional groups. Moreover, where very technical proposals are at stake, the debate within the Committee often remains limited to a very small number of EESC members. However, the debate has been more extensive on Commission proposals setting out more profound principles in OH&S policy (such as was the case for the 1989 Framework Directive on OH&S, and for the Fourth OH&S Action Programme) where the EESC expresses the opinion of the stakeholders, in particular the social partners, on the fundamental direction of OH&S policy.

After the intervention of the EESC, no other institutionalised forms of interest group participation intervene in the policy-making process. Obviously, informal lobbying (also from the social partners) can take place over the entire policy-making process, although interest groups and the social partners argue that 'the game is played' when a proposal arrives on the table of the Council.

Taken together, the interviews hold among the central policy actors in this field express satisfaction with the way interest group participation is organised under the Community Method; although it is mainly the tripartite Advisory Committee, rather than the obligatory consultation of the EESC, that allows to make such a positive assessment. Although the consultation of the AC is not obligatory the Commission will hardly ever act without its advice.[12] In particular during the 'regulatory boom period' (1987-1992), the interaction Commission-AC was a well-oiled machinery.

The role of the AC remained modest until 1987.[13] The modest development of OH&S policy until 1987 indicated that the AC met only on a few occasions and this did not favour the development of a coherent working practice within the committee. It proved very difficult to bring management and labour (and representatives from national administrations) to a common agreement. The fact that OH&S directives had to be adopted with unanimity (namely under Article 100 EEC) did not favour a deliberative attitude among those AC members (management and some MS representatives) who were against European OH&S regulation, since this could easily be blocked further on in the policy-making process. The Single European Act therefore had a serious impact on the working of the AC. The qualified majority voting (QMV) opportunity enshrined in Article 118a EEC did not only lead to a boom in OH&S legislation, it also enabled a stronger involvement of the AC in this regulatory process. Since QMV made it more likely that legislation would be enacted, the 'deliberative attitude' – and in particular the willingness of management to deliberate - within the AC increased.

A 'smooth' co-operation between management and labour within the AC seems to be a decisive factor in the Committee's influence. It is evident from all the interviews that consensus within the AC is a dominant factor in its influence. According to a Commission official, not respecting a clearly expressed consensus in the AC would only lead to insurmountable problems in implementation.

The AC's intensive deliberation and final consensus on a proposal for the 1989 Framework Directive was a decisive contribution to the development of the legal framework for OH&S regulation. The 1989 Framework was soon followed by an important number of 'individual directives' for which the AC often had given 'technical specifications'. As an AC member from the employers' group states, 'through these hectic days on consultation, a sense of common purpose and corporate responsibility was developed which greatly helped to expedite the Advisory Committee's work'[14]

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[12] See, though, below on how the shift to persuasive policy-making also changed the consultation practice with the AC.

[13] Although it played a considerable role in the development of the first OH&S Action Programme in 1978 (R. Baldwin and T. Daintith 1992: 5).

[14] Social Europe 2/90, p.25.

One should not reduce the influence of the AC to its ability to find a consensus which is then listened to by the Commission. It became clear from the interviews that a very important influence of the AC does not reside in its common opinion as such but in the shuttling between the ad hoc working groups and the Commission. Although a degree of consensus will already emerge at the working group level, the Commission can through its participation in the ad hoc groups 'pick and chose' from those arguments it could integrate in its proposal.

Moreover, the interest groups in the AC can present their own 'interest group opinion' through the decision-making process, be it a 'formally adopted' dissenting opinion, or a mere working document used in the preparation of the common AC opinion. In particular the AC trade union group regularly presents its separate interest group opinion to the trade union colleagues in the EESC, and to allies in the EP.

At the level of COREPER, on the other hand, national representatives will only take an AC opinion as support if it accords with their national line (Daemen and Van Schendelen 1998: 139). They are generally well-informed on the AC positions.[15] The number of (national) OH&S experts is limited and consequently they often appear at both levels (sometimes combining the function of AC member and national representative at the working group level of COREPER). The AC is therefore also noted by the members of the 'government group' as a means for the Member States to be informed on the Commission's intentions at an early stage of the decision-making process.[16] More generally, the committee is highly valued as a meeting place; namely management, labour, Member States (and the Commission) become informed on each others' positions, both via exchanges of information within the three interest groups and via interaction between the interest groups (Daemen and Van Schendelen 1998: 146).

The influence of the AC thus operates at different levels and is difficult to measure. In comparison to the main Community institutions, the AC is only a side player. It is not a decision-taking body but remains an advisory committee. It leads mainly to technical adjustments of the Commission's drafts. Normally its work does not lead to fundamental changes in the Commission's initiatives. Yet, if the AC expresses a large consensus against a Commission proposal, the Commission is likely to listen to comparable voices also in other places, which may lead to a serious readjustment or even a withdrawal of the proposed initiative. Occasionally an expressed consensus by management and labour within the AC, against the 'government group' has even led to the Commission withdrawing its initiative.

In relation to other forms of functional participation in OH&S, all interviewees (including those in the EESC) agreed that the AC clearly has more influence than the EESC. Yet, some interviewees mentioned that 'the parallel informal consultation' is more influential than the AC. The European Trade Union Confederation is surely an important player in this informal parallel consultation. Nevertheless, one cannot but notice that the AC seems to play an important role for the trade union group in particular. Members from labour are most active inside the AC (Daemen and Van Schendelen 1998: 137) and they are equally most active in promoting the AC opinion or their interest group opinion outside the AC. According to an AC member on the trade union side 'where workers are concerned, the AC is the most important body when it comes to initiating activities in the field of safety at work in the Community and influencing opinion formation in the Commission'.[17] Yet, it was an AC member from the 'supposedly less interested' government group who said: 'if this body did not exist, it would certainly be necessary to set it up.'[18]

[15] Contrary to the positions taken by the EESC.
[16] Social Europe 2/90, p.23.
[17] Social Europe 2/90, p.24.
[18] Social Europe 2/90, p.23.

3. Participation in the new modes of governance

While the main stakeholders in OH&S policy have been rather satisfied with the way their participation has been organised under the Community Method, there is much less satisfaction with the way they can participate in the new governance processes that characterise OH&S policy since 1992. The EESC, for instance, criticised strongly the Fourth OH&S Action Programme (1996-2000) for creating a plethora of new committees, appearing to sideline the tripartite Advisory Committee and the social partners.[19] The Fourth Action Programme itself had been elaborated and adopted without satisfactory involvement of the stakeholders.[20]

The shift to more persuasive policy-making in the field of OH&S is accompanied by new governance instruments such as the creation of an information agency, social dialogue, more relience on comitology, more focus on implementation and control, and the suggestion to use the OMC. While this persuasive policy-making is surely more horizontal than the Community Method, participation of stakeholders in it is not organised in a satisfactorily manner.

3.1. The Bilbao Agency

One of the main features of policy-making post-1992 is the reliance on exchanges of information. The creation in 1994 of the European Agency for Safety and Health Protection at Work resulted directly from this desire to obtain via non-legislative measures and exchanges of information a better application of the existing legislative framework. The Bilbao Agency has been created[21] with the explicit aim to collect and disseminate technical, scientific and economic information on OH&S in the Member States in order to pass it on to the Community bodies (in particular the Commission), Member States and interested parties. To realise this task it had to establish and co-ordinate a network linking national, Community and international organisations dealing with OH&S. In each Member State a National Focal Point is appointed - in general, a division of the ministry of labour or a national independent agency responsible for OH&S policy. The National Focal Points are the key players in the network of the Bilbao Agency; they are responsible for the organisation and co-ordination of the national network and ensure the transmission of information from and to the Agency.

Although the Bilbao Agency is one of the smaller European agencies,[22] its creation has gone parallel to a strong reduction of resources of the Commission division responsible for OH&S.[23] Although there are several reasons for this reduction – such as changing policy priorities to public health and employment rather than OH&S – it implies that the Agency uses a considerable amount of the (very limited) Community resources assigned to OH&S and was deemed to become a central actor in this field. However the Agency does not live up to the expectations (for details see Smismans 2004: 285-296; COM (2001) 163 final; and R. Arnkil and T. Spangar 2001). As a structure of coordination of national administrations, an interviewee described the Agency's working as follows:

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[19] EESC opinion on this programme, OJ C 039 of 12/02/1996, p.26, point 1.6.

[20] In particular the AC was frustrated on the (lack of) consultation on the Fourth Action Programme. It had set up an ad hoc working group which met intensively to prepare common recommendations for further OH&S action, leading in 1993 to an AC opinion unanimously adopted which set out guides for the future Community OH&S policy. However, the Commission barely participated in the ad hoc working group, and did not at all integrate the AC recommendations into the Fourth Action Programme. In fact, the Fourth Action Programme encountered subsequently serious criticism in both the EESC and the EP, and a substantial part of it, namely the SAFE programme, got never adopted by the Council.

[21] Council Regulation establishing a European Agency for Safety and Health at Work, EC 2062/94 of 18 July 1994, OJ 1994 L 216/1; amended by Council Regulation EC 1643/95 of 29 June 1995, OJ 1995 L 156/1.

[22] It has 35 staff members, compared to, for instance, 220 for the Office for Harmonization of the Internal Market, and 130 for the European Training Foundation.

[23] In this period its staff was reduced from 120 to 20.

'the Member States gather information and make a national report. Their most important concern is that their national report is accurately reflected in the Agency report. Member States representatives are hardly interested in the reports of the other Member States or in the coherence of the final Agency report.'

Doubts on the added value of the Agency have several origins: its National Focal Points lack the necessary resources; unlike to the European Foundation for the Improvement of Living and Working Conditions, the Bilbao Agency has no competence to develop its own research; and Member States are resistant to the Agency engaging in a critical synthesis of the information provided. One of its main shortcomings is that the Agency does not ensure the necessary participation and does not reach out to all relevant stakeholders.

For sure, the Agency Board is composed of a representative from government (national administrations), management and labour for each country. Government representatives, though, have a double vote, a solution which was introduced after that an initial design for composing the Board had not worked and had considerably delayed the starting up of the Agency (Smismans 2004: 265). Yet, while Member States may have considered it important to retain control over the Agency, in practice decision-making within the Board functions consensus-based. The main problem regarding the participation of and reaching out to stakeholders concerns the network of the Agency. A certain dissatisfaction and preoccupation with the current involvement of social partners in the national networks can be ascertained in documents of the Agency[24] and the AC, and in the interviews hold. While national Focal Points seem quite naturally to ally with research and prevention institutions (given the need for expertise), the involvement of social partners at the national level seems only to result from the repeated pressure from the Agency to do so (encouraged by the social partners representation in the Board). In several of the interviews with social partners representatives on the Board, the complaint arose that the Focal Points are too strongly in the hands of the national administrations. Signs of dissatisfaction with current social partners' involvement in the Agency network have also been expressed via the AC.[25] The AC underlined the need to strengthen social partners' participation, so that the elaboration of the national responses is not only the result of effective concertation but is also widely based on contributions of the social partners themselves. Put differently, it is not enough that social partners agree in broad terms via the tripartite committees or arrangements on the functioning of the national network, but information sent to the Agency should be more strongly based on elements provided by the social partners. Moreover, the 'social partners' consulted through different structures of the Agency are often the same persons. Social partners' representatives involved at national level in preparing Focal Points meetings, replying to surveys or commenting on the work of the national expert in the Agency's thematic working groups, are often the same persons as those acting as social partners' representatives on the Agency Board. In the end, the information obtained by the Agency from the social partners may be based on the expertise of a very limited number of persons. This may be a problem in terms of information gathering, but the small circle of persons (representing the social partners) in the Agency's functioning will appear in particular problematic in terms of the diffusion of information, i.e. in terms of reaching out to all those concerned. As a Focal Point representative states it: 'the Agency desires that its information exists for the benefit of all those concerned, in particular the individual employer and employee, but to date its products remain a concern of the Commission, the Member States, and the prominent OH&S experts'.

3.2. The European social dialogue

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[24] E.g. Annual Report 1998, p.7.

[25] AC opinion 'comment on the Agency's Working Programme 1999' cited online at
<http://fr.osha.eu.int/systems/int_eur_5.stm>

The European social dialogue is also regularly mentioned as an example of 'new governance' since it would leave regulation directly in the hands of the social partners. In a restrictive sense the European social dialogue can be described as an (alternative) source of Community regulation (Lo Faro 1999), based on the procedures that were first introduced in the Social Agreement attached to the Maastricht Treaty and now enshrined in Articles 138-139 EC. They require the Commission to consult the social partners on legislative initiatives in the social field, on which occasion they may prefer to deal with the issue by negotiation. If an agreement is reached, such a European collective agreement can be implemented either 'in accordance with the procedures and practices specific to management and labour and the Member States', or – and more likely - by Council Directive. In a broader sense, the European social dialogue is a complex multi-level process, which can take place independently or dependently of the procedures of Articles 138-139 EC, at intersectoral, sectoral or euro-company level; and leading to various outcomes going from joint opinions to binding agreements *erga omnes*.

It has been suggested that due to the difficulties to create a classical form of 'collective bargaining'at the European level – dealing with such 'key' industrial relations issues as pay rates, basic terms and conditions of employment, and the management of industrial conflict – the traditionally 'non-conflictual' issues (such as the common concern for safe and healthy working conditions) may be convenient subject-matters for providing some ostensible 'substance' to the European social dialogue (Neal 1999: 246). Post-Maastricht, Community action programmes on OH&S stress the importance of using the instrument of social dialogue in this policy field. However, the success of this policy instrument in OH&S is modest.

First, the consultation requirements of the social dialogue procedure of Articles 138-139 EC have created confusion in the established consultation practice under the Community Method. Until Maastricht, OH&S Directives have mainly been adopted on basis of Article 118a, involving the consultation of the AC and the EESC as described above. With the adoption of the Social Agreement appended to the Maastricht Treaty a second legal basis became available for OH&S regulation (namely, Article 2 Social Agreement), in which case the social dialogue procedure – consulting the European social partners' organisations – would have to be applied. Yet, the Commission went on to use Article 118a EC and not Article 2 Social Agreement as a legal basis. Contrary to other social policy sectors, OH&S legislation could already be adopted with qualified majority vote under the Treaty (thanks to Article 118a). As a consequence, the Commission preferred to base OH&S proposals on the Treaty and not on the Social Agreement in order to make the provisions also applicable to the UK which had not adhered to the Social Agreement. The social dialogue procedure thus remained without application in the field of OH&S. The Commission could have applied on a voluntary basis the social dialogue consultation procedure even for initiatives based on the Treaty – as it had actually promised to do in a Communication on the social dialogue.[26] That it has not done so, illustrates its reluctance to apply the social dialogue consultation in the field of OH&S, as it creates overlap and confusion with the existing pattern of consultation.

This became clear with the Amsterdam Treaty, which introduced the social dialogue procedure of the Social Agreement into the EC Treaty (Articles 138-139EC) and made it, therefore, obligatory in the field of OH&S. Since the Commission intends to continue to consult the AC – despite not being obliged to such consultation, but given its positive experience with it– the two procedures, namely social dialogue consultation, and AC consultation, take currently place in parallel, which implies considerable overlap. To an important extent the two procedures consult the same persons, since the European social partners organisations consulted under Article 138 contact the OH&S experts of their national organisations, but precisely these same OH&S experts are often appointed by their national organisations to sit in the Advisory Committee.

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[26] COM (1996) 448 final.

Second, in terms of agreements between the social partners the European social dialogue can present some modest results in the field of OH&S, in particular at the sectoral level. On the web page of the Commission's Directorate-General for Employment and Social Affairs a list of 18 'main joint texts' on OH&S issues at sectoral level can be found.[27] Two of them are joint opinions on a legislative proposal from the Commission. Most joint opinions are gentlemen's agreements between management and labour clarifying the employment relationship or providing some tools for this relationship such as joints manuals, codes of conducts and training material. Although none of the sectoral dialogue committees has adopted a binding agreement on OH&S, it is argued that some joint texts and recommendations come close to "collective agreements" designed to regulate aspects of industrial relations in the sector concerned (Marginson and Sisson 1998: 519). Agreements on OH&S are more likely to be signed at the sectoral level than at cross-sectoral level; they can provide a solution for those sectors which have been explicitly excluded from 'cross-sectoral' regulation by a Council Directive or to adapt this regulation to the particular OH&S needs of the sector. In this way the fishing sector adopted in 1998 a common opinion on safety on board fishing vessels under 15 metres in length, previously not covered by Council Directives.[28] One could also note that the first (path-breaking) sectoral European agreements which have been implemented by Council decision dealt with working time,[29] which can be considered an 'OH&S issue' in the broad sense of the term.

However, negotiation is unlikely to occur over the typical technical aspects of OH&S protection but will rather be confined to issues on the borderline between regulating health and safety at work and regulating the employment relationship. According to the European social partners themselves, the technical nature of OH&S precludes that the European social dialogue would play a major role in the field. ETUC and UNICE agree that negotiation on OH&S will be the exception to the rule[30] and can at best occur over procedural matters, information, consultation, participation and training.[31] Vocational training is indicated by the social partners as the most likely candidate for social dialogue in the OH&S field.[32] The Commission has also proposed to get the social partners around the table on another 'borderline issue' of health and safety at work, namely the issue of stress. Yet, given the expressed resistance of the employers' organisations to consider stress as an element of OH&S, it is very unlikely that the initiative will end up in an agreement.

One can conclude that the European social dialogue may provide some added value to OH&S. Yet, as a consultation technique it has created more confusion than it has created added value, compared to the traditional consultation under the Community Method. As an alternative mode of governance that leaves regulation entirely in the hands of the social partners, it would be wrong to believe that (cross-sectoral) European collective agreements adopted (and implemented by Council decision) under Articles 138-139 would become a frequently used source of Community regulation on OH&S, or that OH&S standards in the EU would be defined in a multi-level self-regulatory bargaining system of the social partners. Social dialogue agreements will be confined to providing adjustments at the sectoral level and to dealing with some less technical aspects of health and safety protection, such as training.

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[27] http://www.europa.eu.int/comm/employment_social/soc-dial/social/euro…/index_t6_en.html

[28] *European Social Dialogue Newsletter*, Special Edition August 1999; 'Highlights 1998', p.5.

[29] Wheres the first European sectoral agreement ever - signed in 1997 – dealt with paid employment in the agricultural sector and was implemented 'in accordance with the procedures and practices specific to management and labour and the Member States', the first sectoral agreement implemented by Council decision was adopted in 1998 to regulate working time in the sector of sea transport. Other sectoral agreements followed to regulate working time in the transport sector, namely in the sector of railways and civil aviation.

[30] Position de la CES sur l'application du traité d'Amsterdam dans le domaine de la santé et de la sécurité sur le lieu de travail, document adopté par le comité exécutif les 16-17 septembre 1999. Commentaires de l'UNICE du 27 avril 1998 sur 'la consultation des partenaires sociaux dans le cadre de la politique communautaire de protection de la santé et de la sécurité des salariés sur le lieu de travail'.

[31] Internal document ETUC.

[32] Interviews.

3.3. Comitology[33]

As argued by Scott and Trubek, comitology is not an entirely new mode of governance and full-fledged alternative to the Community Method. In the field of OH&S it also appeared before the 'shift to new modes' during the 1990s. It has, though, common features with 'new governance' in departing from the Community Method. Moreover, whereas by 1992 there has emerged a rather broad consensus that the legislative framework on OH&S covers the main needs for protection, this framework needs now regular adjustment to the ever changing risk factors, due to new agents and production procedures and new scientific developments. To allow for such adaptations to technical change, nearly all OH&S Council Directives include a technical annex. Changes to the technical annex can be made through a typical comitology procedure, namely, in order to adopt the implementation measures the Commission has to consult a committee composed of the representatives of the Member States (and chaired by a representative of the Commission). More precisely, the involvement of a regulatory committee is required, as described in the Comitology Decision 87/373/EEC and revised by Decision 1999/468/EC.[34] If the committee's opinion, expressed with qualified majority vote, is in accordance with the proposal of the Commission, the latter shall adopt the measures. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken and inform the European Parliament. The Council shall act by qualified majority. If, on the expiration of three months from the date of the referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

The technocratic nature of comitology decision-making is well-known and widely discussed. Even though the position of the EP in comitology has been improved by the 1999 decision, it remains merely "informed." In theory, the Council may play a prominent role in comitology, which would ensure the involvement of political territorial representatives, but, in practice, comitology rarely leads to the involvement of the Council because the deliberation between the Commission and national administrators in comitology mostly ends in agreement.

Also in terms of participation of civil society actors, comitology in the field of OH&S scores less than under the traditional legislative road. Contrary to legislative initiatives, the EESC is not consulted in the comitology procedure. However, although there is no obligation for consultation, the Commission always asks the advice of the tripartite Advisory Committee when proposing implementation measures that will subsequently be sent to the comitology committee. Yet, the social partners in the AC have not always the necessary resources to follow up the very technical measures that may be adopted through comitology. This is particularly the case when comitology procedures are very 'science-based' and focus on the inclusion of scientific experts, for instance, by the creation of a scientific committee. This is, for instance, the case for the adoption of 'occupational exposure limit values' (OELs), i.e. the maximum value of a certain agent to which a worker can be exposed, as used in the field of chemical agents.[35] While OELs may be a very technical matter, the protection of workers' health and safety often stands or falls with the allowed level of exposure to certain agents. Schaefer (1996: 18) argues in this context that the comitology committees dealing with the definition of such limit values are 'in some respects [...] the most far-reaching legislative type of committee'. Although – and contrary to other comitology procedures –

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[33] For a detailed analysis, see Smismans (2005).
[34] Due to space limitations, I will not be able to elucidate the subtle differences between Council Directive 87/373, 1987 O.J. (L 197), and the new Council Directive 99/468, 1999 O.J. (L 184). *See* Lenaerts & Verhoeven, at 675–78.
[35] Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work, OJ L 131/11 of 5.5.1998.

the consultation of the AC is in this case obligatory, the tripartite advisory committee has difficulties to ensure its role as a check on the scientific debate that has taken place in the Scientific Committee. The AC has created an 'ad hoc working group on occupational exposure levels'. However, the relation between the Scientific Committee on OELs (SCOEL) and the AC is not well established.[36] The technical and complex nature of each individual OEL makes it impossible for the AC members to deal with the issue profoundly. Each chemical agent is different. As a consequence, the best technical experts often are linked to the industry that produces that agent. They can have access to the process both at the level of the SCOEL and via the employers' representatives in the AC.[37] For the trade unions it is very difficult to develop a comparable expertise. Within the AC it is mainly the limited staff of the TUTB (Technical Bureau of the European Trade Union Confederation) who work on OELs, but as they say themselves: 'we can only pick out some OELs (or some standards in case of product regulation) to follow up, given shortness of staff'.[38] It is clear that it is not enough to guarantee interested parties a voice in the decision-making process via a committee seat if the 'weaker interest' is not equally offered the financial means to use this seat in an optimal way.

Compared to the normal legislative process, comitology thus implies a certain 'technocratisation' of decision-making, in which the representatives of national administrations play a central role in the comitology committee, combined with a further reliance on scientific experts for particularly technical issues. Not only do the European Parliament and the Council hardly play any role in comitology, also the 'broader civil society deliberation' of the EESC is excluded, whereas even the technical experts of the social partners represented in the AC are not always able to follow-up these technocratic procedures.[39]

3.4. Implementation and control

An important feature of OH&S policy-making post-1992 has been the stress on improving better implementation by strengthening control on application of OH&S norms. The Commission, though, has limited competence and resources to ensure such control. During the 1990s it has increased the use of its power under Article 226 EC to address a reasoned opinion to a Member State if it considers the latter has not fulfilled its obligations under the Treaty and subsequently to bring the matter before the Court if the State concerned does not comply with the opinion.[40] In all the cases the Commission took action under Article 226, either a Member State had failed to communicate to the Commission the national measures transposing a Directive, or the Commission had considered the communicated measures to be insufficient to transpose the Directive. Yet, the Commission lacks the necessary resources to ensure control over whether the Member States have *de facto* taken all the necessary measures - let alone to control over *de facto* application.

In many countries trade unions and workers' representatives play an important role in the control of the application of occupational health and safety standards, in particular at firm level (Krieger 1990; Biagi 1991; Walters 2002). European OH&S Directives have encouraged the involvement of workers in controlling the respect of these OH&S standards. The possibilities of the institutions representing the interests of workers to participate have been significantly increased in many

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[36] Interviews with AC members and European social partners.

[37] Though the interests of particular (chemical) industries do not by definition correspond with the interests of the employers in general.

[38] Interview with TUTB member.

[39] See also the critique of the EESC which criticised that comitology procedures do not explicitly require the consultation of civil society actors, and expressed concern that the SCOEL would sideline the role of the social partners. EESC Opinion on the Fourth OH&S Action Programme (1996-2000), OJ C 039 of 12/02/1996, p.26, point 1.6

[40] It brought, for instance, Germany and Italy before the Court for having failed to correctly implement the 1989 OH&S Framework Directive.

Member States.[41] However, while theoretically institutional opportunities are increased, there remains an important lack of information on how institutions specifically responsible for OH&S work in practice.[42] Moreover, while data on the involvement of workers in OH&S are very partial, it results that institutional opportunities for worker involvement in OH&S do not as such guarantee workers being better informed and participating.[43]

Neither is there any guarantee that information gathered through worker involvement will find its way back up to the regulatory level. Most OH&S Directives, and in particular those adopted following the 1989 Framework Directive, require the Member States to send every four or five years a national report to the Commission indicating the state of the practical implementation of the Directive. The way in which the national reports are drafted differs from country to country. The Directives normally require that the points of view of employers and workers be indicated in the national reports. However, often their involvement in the drafting of the report is minimal. In fact, the national reports often do not more than indicating the transposition measures already communicated to the Commission, whereas information on practical implementation is lacking.

In the light of tackling the implementation gap, the Commission has also set up in 1995 the Senior Labour Inspectors Committee (SLIC) with the task to 'give its opinion to the Commission, either at the Commission's request or on its own initiative, on all problems relating to the enforcement by the Member States of Community law on health and safety at work'.[44] The SLIC is composed of representatives of the labour inspection services of the Member States (two from each Member State). The labour inspection services of the Member States play indeed a central role in controlling the application of (European) OH&S regulation. Yet, in the assumed participatory era of new governance one would have expected that such a committee - which aims to bring together those concerned with application in order to exchange information and best practice and to advise the Commission - would have included representatives from the social partners and in particular from the trade unions.

3.5. The Open Method of Coordination

The 'reconfiguring' of OH&S policy during the 1990s is part of a broader shift in the European social dimension, increasingly relying on the soft co-ordination of national policies, as exemplified by the OMC. As argued above, the OMC is the most cited standard example of 'new modes of governance' in the EU. It has also been argued that the OMC is a particularly participatory mode of governance. It has been described as a way of 'radicalising subsidiarity' (Lebessis and Paterson 2001: 292; and Hodson and Maher 2001: 728) and as an example of 'democratic experimentalism' or 'directly-deliberative polyarchy' (Eberlein and Kerwer: 2002; and Cohen and Sabel 2003).

In the field of OH&S, the focus on exchanges of information and best practice dominated the Fourth Action Programme, and the Bilbao Agency was set up to play an important role in this regard. Moreover, in its Strategy for OH&S for 2002-2006, the Commission suggested to apply the OMC also in the field of OH&S.[45] An opinion of the EESC,[46] and my interviews held with representatives of the European social partners reveal that also the social partners are in favour of an

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[41] Commission Communication on the practical implementation of the provisions of health and safety at work Directives 89/391 (Framework), 89/654 (workplaces), 89/655 (work equipment), 89/656 (personal protective equipment), 90/269 (manual handling of loads), 90/270 (display screen equipment), COM/2004/0062 final.

[42] Ibid.

[43] Ibid.

[44] Article 2 para.1 Commission Decision 95/319/EC of 12 July 1995 setting up a Committee of Senior Labour Inspectors, OJ L 188/11 of 9/8/1995.

[45] Commission Communication on a New Community Strategy on Health and Safety at Work 2002-2006, COM (2002) 118 final.

[46] EESC Opinion on Request by the European Commission for the Committee to draw up an exploratory opinion in anticipation of the Commission Communication on health and safety at work, 11 July 2001, indent 3.3.

OMC in this field. This could be done by developing a separate OMC on OH&S, or –as the Commission suggested- introduce quantified targets for OH&S in the Employment Guidelines.

An OMC procedure would enable that guidelines, 'publicly' debated in Commission, EESC, EP and Council would set levels for the reduction of certain risks and hazards in the workplace or set standards for health and safety services. Member States would have to make public their efforts to reach these targets by providing regular reports (e.g. each year). These reports would be assessed at the European level by the Commission and the Council, who would also be able to make on this basis recommendations to the Member States. At a time that Member States are reluctant to new legislative standards in the field of OH&S, the OMC monitoring system looks attractive to go beyond the too soft merely voluntary exchange of information that is supposed to develop through the network activity of the Bilbao Agency. Ideally, such procedure would involve all stakeholders and ensure bottom-up gathering of information through the national reports which would inspire the (re-)drafting of new guidelines and targets at the European level.

However, whereas OH&S policy has changed in the 1990s to more persuasive governance, the development of revisable and monitored targets defined in a participatory way may remain wishful thinking. First of all, experience with the OMC in other policy fields show that claims about its particular participatory character should be taken with much caution. Although there are some signs of civil society involvement in the OMC – strongly dependent on policy area and national circumstances (De la Porte and Pochet 2005; Armstrong 2005; Kerschen 2005) – the dominant picture remains one of a narrow, opaque and technocratic process involving high domestic civil servants and EU officials in a closed policy network, rather than a broad transparent process of public deliberation and decision-making, open to the participation of all those with a stake in the outcome (Zeitlin 2005: 460; Smismans 2004a; Jacobbson and A. Vifell 2002; E. Léonard 2001).

Second, to date the suggestion made by the Commission to introduce the OMC in the field of OH&S has not been taken up, and the revision of the Lisbon Strategy[47] makes such event ever more less likely. The Revised Lisbon Strategy aims at reducing the complexity of the multitude of OMC procedures, focusing and prioritising growth and jobs. This reduces strongly the detail of the Employment Guidelines and the likelihood to integrate OH&S standards in it; let alone setting up a separate OMC on OH&S.

4. Conclusion

In this paper I have used the sector of Community OH&S policy as a case study to put at the test the claim that new modes of governance would be more participatory than 'old modes'. Using the Community Method as a point of reference to identify new modes of governance, Community OH&S policy post-1992 has been clearly characterised by a shift towards new policy instruments. However, rather than strengthening the participation of all stakeholders in policy-making, the shift to these new policy instruments and to persuasive policy-making often appears to address primarily the national administrations (comitology, SLIC, dominance of MS representatives in Agency) and to lead to a certain level of 'technocratisation' of OH&S policy-making (comitology, SCOEL, and to a certain extent also SLIC). For sure, civil society actors like the social partners are not entirely absent in this design. Regarding control of implementation and application of OH&S standards, workers' representatives play traditionally an important role, and OH&S Directives have stressed this importance. Yet, data on their involvement on control of European OH&S norms remain scarce and the firm-level participation does not reflect into a control-policy and redesign at the European level. Also the European social dialogue leaves some OH&S issues in the hands of the social partners, but only at the margin, on issues as training or for some particular sectoral contexts.

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[47] Commission Integrated Guidelines for Growth and Jobs (2005-2008), COM (2005) 141 final, 12.4.2005; And Commission Staff Working Paper 'Working together for growth and jobs. Next steps in implementing the revised Lisbon Strategy', SEC (2005) 622/2, 29/4/2005.

One can conclude that, whereas the main civil society actors in OH&S – namely the social partners – have been satisfied with their involvement under the Community Method, their participation in the new modes of governance shows (still) important shortcomings. This does not imply that the Community Method should be used to the exclusion of other policy instruments, but it warns us that one should be very reluctant in arguing that 'new modes of governance' are characterised by their particular democratic participatory nature.

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