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NEGOTIATED ORDERS: INITIATING EU COMMISSION LEGISLATIVE DRAFTING

***** DRAFT VERSION *****

by

Erik Højbjerg
Center for Public Organization and Management
Copenhagen Business School
23C, Blaagaardsgade
DK-2200 Copenhagen N
Tel. +45 3815 2186 Fax +45 3815 2200
email: ech@cbs.dk

Abstract

According to the policy network perspective on European integration the Commission's legal monopoly to propose new legislation is among its most powerful tools. Paradoxically, however, how legislative drafting is actually initiated and organized, and in what ways it influences the negotiations in the Council is 'virgin soil' within this approach. Hence, there is a general lack of systematic knowledge concerning who takes what initiatives, on what conditions and with what effects. The paper aims at contributing to a theoretical understanding of this uncultivated field of research by suggesting a methodology, or point of observation, referred to as 'negotiated orders' in which the gradual and interactive articulation, selection, and stabilizing of political ideals frame the processes of initiating legislative drafting, simultaneously enabling and constraining the possibilities of politicization in subsequent Council negotiations.

1. Introduction

In the recent years, one of the key theoretical points for debate on EU policy-making, has been the question, whether the policy-process can (if it ever could?) be conceptualized as a rational decision-making model. Hence, the governance structures associated with market and hierarchy are seen as increasingly inadequate methodological concepts for making sense of European integration. The notions of multi-level governance and policy network governance point to the need of giving more disaggregated accounts of the policy-process, in a situation where fragmentation, contingency, the breaking down of hierarchies, and the overall growing complexity seems to be irrefutable attributes of the object of analysis (Peters, 1994, Mazey & Richardson, 1995, Anderson & Eliassen, Rhodes, 1996, Rhodes, Bache & George, 1996, Scharpf, 1994). Hence, there seems to be a growing interests in studying the relationship between formal and informal conditions for the exercise of power and influence, interest inter-mediation, public-private relations, and state-community relations on a more contextualized and middle-range level of analysis. Within this framework the paper will focus on one particular aspect of European policy-processes, the initiation of Commission legislative drafting. The basic questions asked are: What constitutes the architecture of compromise between different, potentially conflicting, policy ideals in an initiative? How can we identify what actors are engaged in the formulation of Commission initiatives? What resources are required to influence the drafting of proposals? And, finally, what effects does the drafting process have on subsequent proposal submission to and negotiation in the Council?

The aim is to address these questions from a theoretical and methodological perspective, rather than an empirically motivated analysis. In section *two*, the concept of social complexity is discussed, how it can be studied, and what constitutes the epistemological starting point for the paper. In section *three*, the concept of rationality is related to the concept of social orders. After a brief review, in section *four*, of the governance structures associated with market and hierarchy, section *five* discusses the policy network model with respect to its potential for studying the complexity of

policy processes in the EU (Marsh & Rhodes, 1992). Here, the basic claim will be that the rationality assumptions inherent in this approach may not only limit its ability to analyze the governance of complexity, but also prevent it from analyzing, and hence ascribing specific importance to, the initial phase of EU policy-making. In section *six*, therefore, four conditions for designing network relations are presented, drawing primarily from the work of Jerzy Hausner and Ash Amin (Hausner, 1995, Hausner & Amin, 1997) on interactive governance, the negotiated economy approach, developed by Ove K. Pedersen and Klaus Nielsen (Nielsen & Pedersen, 1991, Pedersen, 1993), and Charles Sabel's work on constitutional orders (1993). This leads to a presentation, in section *seven*, of an alternative network approach (negotiated order) using the concept of 'reflexive rationality' as the intellectual and cognitive basis for governing complexity through social design. In section *eight*, the negotiated order approach is applied on EU legislative drafting processes.

2. Complexity

The concept of complexity is drawing increasing attention in the social sciences. In economics complexity is dealt with through institutional economics, partly structuring and transforming markets that are no longer dominated by independent actor interaction (North, 1990, Hodgson, 1989, Pryor, 1996, Gottinger, 1983). In political science complexity relates to the state's inability to govern societal development through hierarchy and control, resulting in increasing fragmentation, and polycentric, network-like organization of political interaction and communication (Willke, 1992, 1994, Marsh & Rhodes, 1992, Rhodes, 1996, Kooiman, 1993, Kaufmann, Majone & Ostrom, 1986). Reflexive law studies point to the limitations of legal instrumentalism in terms of regulating social structures that are increasingly differentiated and autopoietic (Teubner, 1986, 1996). In the same line of thought, complexity and functional differentiation is seen as the basic precondition for the reproduction of society and social relations in sociology, where concepts like autopoiesis, self-organization, and structuration constitute the productive framework for meaning (Luhmann, 1995, Giddens, 1991). Finally, in the area of European integration,

complexity also finds its place with perspectives stressing that the policy process is framed through a multitude of levels and actors with no, or only limited, predefined interrelationships and characterized by competing ideals and rationalities for integration (Marks, Scharpf, Schmitter & Streeck, 1996, Wallace, 1996, Marks, Hooghe & Blank, 1996, Peters, 1992, Rhodes & Mazey, 1995, Peterson, 1995, Jachtenfuchs, 1997).

But what is social complexity? How can it be governed? Based on the literature mentioned above, complexity seems to presuppose that social interaction and social outcome has multiple determinants, is socially and culturally embedded, time-and-space bound, founded on cognition, and has a high degree of variety and variability. However, these dimensions do not explain the emerging interest in complexity in the social sciences, let alone point to a specific methodology for studying the governance of complexity. The field is itself very complex and heterogeneous. Hence, governance of complexity involves much more than just finding adequate methodological concepts. It involves uncovering the basic ontological and epistemological conceptions of complexity.

By starting from the assumption that *"...what exists (social ontology) and knowledge of what exists (epistemology) are not reducible to rationalist logics of abstraction or action"* (Hausner & Amin, *ibid.*; 1), the concept of 'social complexity' becomes rather demanding on methodological level. It requires the identification of some intermediating properties closing the divide *"...between complexity as an "objective" social reality and complexity as a paradigm that help us make sense of the world as it is."* (*ibid.*; 4). If, then, there is no *necessary* relationship between an objective reality and a subjective perception of reality, the relationship will need to be articulated or subjectively constructed (Jessop, 1991; 11ff, Hausner, *ibid.*; 257). The concept of 'articulation' has been used to denote a political practice involving processes of constitution and subversion of 'the social', taken to mean *"...a particular set of meaningful practices which are relatively enduring and recursively validated by social*

agents. It takes the form of a relational totality of differentiated identities articulating complex ensembles of rules, norms, resources and structural principles of organization" (Bertramsen, Thomsen & Torfing, 1990; 29). Hence, articulation mediates between contingency on ontological level and necessity on epistemological level, and draws attention to concepts like "reflexiveness", "interaction", "deliberation", and "networking" which seem to inherit these mediating properties.

In turn, the articulation of this relationship varies in accordance with different forms - paradigms - of rationality and types of actors, each justifying different points of observation and providing different governance potentials.

3. Rationality and social orders

One such form is *substantive or instrumental rationality*. Basically, this form excludes the notion of complexity, asserting that the social context for action, based on universal laws of cause and effect, is predictable and stable. Thus, the outcome of social interaction is the result of individualist action or structural determinance. This reductionist and individualist conception of ontology implies that actor rationality can be no more than reactive, involving no potential for adaptiveness or transformation.

A second form is the Simonian *procedural rationality*. Here, rationality is contextual, confronting actors with the unpredictability and uncertainty of complexity. Actors are bounded in their behavior to deliberation, existing rules of interaction, and decision-making processes. In this sense actors are inscribed with cognitive capabilities, giving them the possibility of acting intentionally, and finding solutions to problems of complexity through perception and conscious design. This involves adapting to exogenous changes in the environment, without actively changing the context of action itself.

The third and final form is *reflexive rationality*. This is based on a perception of rationality, in which knowledge accumulation, feedback between deliberation and

outcome, and continual communication form the basis for solving complex problems. It involves a process of social interaction, whereby common conceptualizations of reality are gradually articulated, specifying criteria for what constitutes social knowledge and meaning. In this sense, it endogenously shapes the context of social interaction by establishing time and space boundaries. Actors displaying reflexive rationality have the ability to recognize that there is no pre-defined logic for social interaction, permitting them to act strategically in order to shape solutions to problems of complexity.¹ However, reflexive actors also recognize that problems of complexity cannot be resolved by one actor only, but requires interactive communication.

The different forms of rationality and actor types appear to be connected with, but not exclusively conditioned by, different social orders or governance structures. A social order is not an objective, external, and exhaustive context for social action, but itself a result of socially, culturally, and historically embedded interaction (Granovetter, 1985). Social orders are therefore specific, historical points of description of governance. When dealing with different forms and types of rationality it is important to take into account that the emergence of new social orders, e.g. the 'mixed economies' in modern welfare states, does not necessarily mean the dissolution or invalidation of the old (Pedersen, 1993). Different orders co-exist, ascribing different roles and functions to actors according to their rationality. The methodological point here is that recognizing the differentiation of social orders in relation to governance of *complexity*, helps us avoid the problems associated with mixing incompatible actor rationalities (Hausner & Amin, *ibid.*; 8). For example, when dealing with complexity, the social order connected to instrumental rationality is of little help. Hence,

¹ The notion of 'strategy' in relation to reflexive rationality goes beyond the concept of 'tactics' used in game theory (Bjerke, 1992; 112). In this sense, strategic behavior denotes an agent's motivation for bringing into existence a specific - imaginary or real - system, to secure strategic benefits for his own interests over those of other agents or groups. How this implies 'reflexiveness' becomes evident with Hausner: "*A definition of strategy should (...) include two basic, though frequently overlooked, elements: the agent's self-knowledge vis-à-vis his vision of the system, its desired form, and his ability to exercise power. Both factors determine the agent's identity and the rationality of his behaviour.*" (1995; 257, emphasis in original).

instrumental rationality is connected to the governance structures traditionally associated with modernity, namely markets and hierarchies; procedural rationality is located in governance structures characterized as networks; and reflexive rationality unfolds within governance structures that I will call negotiated orders. Since only networks and negotiated orders include notions of rationality related to the governance of complexity, the remainder of this paper will be limited to a discussion of how to apply these two points of observation, as the basis for understanding processes of initiating EU legislative drafting. However, first a brief account of how market and hierarchy have been conceptualized in the field of European integration, and why they seem inadequate as a starting point for understanding complexity in the EU institutional set-up.

4. Market and hierarchy

The dichotomy of market and hierarchy can certainly be related to both past and present theories of European integration, drawing partly from the international relations discipline, and partly from state theory. On one hand, international relations theorists have emphasized the competitive, market-like, and anarchic organization of the 'world polity', comprising independent (national) states acting collectively only if and when mutually beneficial outcomes can be produced (Waltz, 1993). In the EU arena this position can be found in (liberal) intergovernmentalism stating that integrative impetus rests primarily with the Council shaping inter-state bargaining (e.g. Moravcsik, 1993, 1995, Garret & Weingast, 1993, Putnam, 1988). The basic assumption underlying the complexity of market selection is that nothing can be steered. On the other hand, drawing from an inspiration by federalist state theory, it has been suggested how collective action, and thus supranational government, is possible through hierarchical organization, involving the pooling of national sovereignty (Lindberg & Scheingold, 1970, Keohane & Hoffmann, 1991). Here governance is a function of distribution of formal competencies, subordination, decision and control. Proponents of this perspective in studies of the EU have stressed that the normative basis for integration is the sense of political community, reified

through formal decision-making processes and structures for interest representation (Pinder, 1991, Strain, 1993, Wallace, 1990). In contrast to the market, the assumption underlying hierarchy is that basically everything can be steered. Market and hierarchy have thus been conceptualized as ideal types of governance structures suited to manage relative stability, a high degree of predictability and reach equilibrium, through calculation, computation, optimization, decision and control.

5. Policy networks

The emerging tendency in the social sciences, particularly in economics, political science, law and sociology, of describing west European politics within a framework where increasing complexity in social relations seems to defy the governance or steering capabilities associated with market and hierarchy, can also be identified within the network perspective on European policy-making (Jachtenfuchs, 1997; 9).

Without over-simplifying the most common uses of the policy network term in EU studies normally range from highly integrated, dense, and restricted actor-configurations in 'policy communities' (Marsh & Rhodes, 1992; 249ff) to loosely coupled, fluid, and open 'issue networks' (Heclo, 1978). The central feature in Marsh & Rhodes concept of 'network', at the same time denoting a base-line definition, is that networks constitute sets of resource-dependent organizations, with some degree of stability (Rhodes, 1981). *"Most important, the distribution of resources explains the relative power potential of actors within a network and the differences between networks. It is a middle-range or meso-level theory which helps us to understand the policy process at the national or supranational levels by comparing variations between policy sectors"* (Rhodes, Bache & George, 1996; 382). The concept has thus been used, to a greater or lesser extent, in explaining sectoral policy outcome as the result of network interaction. However, as a specific form of social order, it does not apply to all political systems. It assumes *"...a degree of pluralism, the relative separation of public and private actors, and complex policies needing many resources which are not concentrated in the state"* (Rhodes, Bache & George, *ibid.*; 382). The underlying

assumption is that the West European welfare states polities are increasingly characterized by fragmentation, autonomization, and functional differentiation between policy issues, demanding specialized solutions and involving the integration and weighing of the interests, knowledge, and resources of a wide variety of societal actors as a basis for policy-making.

Within the general framework of policy networks it has thus become fashionable to conceptualize the EU as a system of 'multi-level governance', denoting not only a differentiation of, but also an interdependence between, the levels of regulation, i.e. supranational, national, and local; the processes of interaction, i.e. political, administrative and judicial; and participating actors, i.e. public and private.

Although drawing from a multitude of different - and sometimes even conflicting - theoretical assumptions, the contributions under the heading of policy networks and multi-level governance are pervaded by at least 4 common traits: first and foremost there is a general consensus with regard to the (meso-level) complexity of the EU configuration, involving a skepticism towards reductionistic accounts, which assume that integration will follow one single and unifying principle, be it either intergovernmental bargaining or supranational policy-making; second, there is a tendency towards descriptive analysis of EU policy processes, rather than explanatory analysis²; third, emphasis is placed on process orientation based on the recognition that policy-making takes place under uncertain and changing conditions, not in static environments, and as a consequence of this; fourth, the policy network perspective stresses the contextual, i.e. the spatio-temporal, dimensions of European policy-making, often differentiating between stages in policy-making. In relation to the integration theories developed and applied from the 1950'ies and 1960'ies and their

² It should be noted that there is considerable dispute whether the policy network approach is descriptive, explanatory, or both. Proponents claiming that it has both descriptive and explanatory potential simultaneously stress that in specific cases it can be difficult to determine any causal relationship between a policy network and a particular policy outcome. The reasons for this, they claim, is that the approach is weak in terms of describing the contextual setting of particular networks imposing restraints on the effects of network interaction (Marsh & Rhodes, *ibid.*, 14-15).

demise from the mid-1970'ies onwards, these overall common denominators thus form an alternative approach to making sense of the complexity in the actual processes unfolding in European integration.

Arguably, the policy network perspective apparently seems to transgress the unfruitful oppositions of agency and structure by pointing to policy outcome at the EU level, not as a result of individualist action (market) or structural determination (hierarchy), but of continual social interaction and networking under changing and complex conditions. No doubt, the network concept is a powerful metaphor for describing the governance of complexity through the interlocking of actors structured around a multitude of formal and informal institutions. Studies echoing the policy network approach have shown how decision-making in the EU takes place within a fragmented framework of bureaucratic politics (Peters, 1992); how networks constitute important arenas for agenda-setting (Peterson, 1995, Peters, 1994); and it has been applied to policy implementation and outcome in different policy sectors (Mazey & Richardson, 1993), including the structural funds (Marks, 1992), environmental policy (Richardson, 1995), technology policy (Peterson, 1992), and telecommunications policy (Fuchs, 1994, Schneider, Dang-Nguyen & Werle, 1994).

An exhaustive account of the different uses of the policy network and multilevel governance approach on European policy-making is neither possible within, nor relevant to this paper. The present ambition is merely to point to some common, fundamental theoretical assumptions unifying the approaches. One thing is to assume that policy-making varies across specific policy sectors and levels; in accordance with the distribution of resources between varying participants; and in specific phases in the policy process. A completely different thing is on what grounds these assumptions of complexity can be said to produce, and, more importantly, to validate knowledge about specific issues related to European integration. The question is to what extent the policy network literature takes the contingent relationship between the ontological and epistemological dimensions of complexity into account. And hence

what kind of paradigmatic thinking or rationality underlies the approaches. As noted earlier the concept of rationality inherent in network analysis is procedural, but what consequences does this imply for analyzing the complexity related to initiating EU legislative drafting?

One way of answering these questions is to discuss the specific factors determining the constitution of particular networks, as presented by the approaches themselves. Again, drawing from the much cited text by Marsh and Rhodes four general features or characteristics are presented as "...*diagnostic criteria (...) setting the outer limits of the analysis*" (1992; 251). First, *membership* refers to both the number of participants and the types of interest. Second, *integration* denotes frequency of interaction, continuity, and consensus. Third, *resources* relates to the distribution of resources both within networks, and within the participating organizations. And fourth, *power* concerns the power relations within the network. With these four key variables differences between specific policy areas can be described, and how policy networks help shape political outcome.

What is interesting about the four characteristics of policy networks is that they specify conditions for *stability, continuity and routinization* (Marsh & Rhodes, 1992; 261). They specify the rules of the game, by disclosing the institutional architecture of interaction, in terms of criteria for inclusion and exclusion; resource dependencies; common values leading to consensus; procedural norms balancing interest intermediation; and power relations determining decision-making. In short they specify the material and cognitive basis for the institutional set-up of networks. As such, the policy network concept rests on a procedural rationality, whereby behavior and action is bounded by enduring institutional practices, formal as well as informal, constituting the reproductive framework of networks (Dimaggio & Powell, 1991, Scott, 1994b).

In turn, what seems to be missing, is a specification of the conditions under which policy networks change - the dynamic aspects of network interaction - but also how

they are created. In the policy network perspective change is primarily conceptualized as the adaptation to exogenous developments in the network environment, or as incremental infra-network development through intentional and conscious design, constrained by existing institutional structures (Marsh & Rhodes, *ibid.*; 257-261). This will be discussed below.

Although some writers stress the importance of policy networks for policy initiation in the EU (Marks, 1992, Peterson, 1995), they fail to develop a conceptual framework for studying the creation of the institutional structures that settles relations of resource dependency between participating actors. The problem can be illustrated with Peterson: "*Networks emerge when specific policy tasks can only be achieved through the exchange of resources possessed by a range of actors*" (1995; 76). The contestation here is not that networks are not important in the formulation of policy initiatives in the EU. On the contrary, the network concept is a strong metaphor for grasping the processes leading to the placement of policy initiatives on the EU agenda and how decisions taken at the policy formulation stage help frame subsequent negotiations in the Council (Peters, 1994). What is contested is the assumption that the specific *policy tasks* networks are apt to solve, seem to exist as external or *a priori* contexts for the emergence of networks. Starting from this assumption, no doubt the configuration of resource dependencies - and control - will have some impact on how decision-making proceeds within networks, and, ultimately, for policy outcome. However, it presupposes that the specific policy problems, the tasks networks can effectively solve, either already exist as 'objective' conditions for social interaction or are articulated in contexts, not subject to network mediation.

For Peterson, as indeed for much of the multi-level governance literature in general, part of the problem lies in the differentiation of levels of analysis. Distinguishing between a super-systemic, a systemic, and a sub-systemic level of analysis for studying decision-making in the EU, Peterson claims that they are hierarchically ordered, respectively addressing the questions, "*how can EU governance change?*",

"how should it be done?", and *"how do we do it?"* (1995; 71-76). In this line of thought, decisions made on a higher level seem to determine the issues addressed on a lower level. Hence, the history-making decisions on the super-systemic level, involving constitutional policy, tends to frame the policy-setting decisions on systemic level, in turn setting out the 'Community method' of decision-making, finally designating the range of policy-shaping decisions on sub-systemic level, where the actual decision-making concerning specific (sectoral) policy options is made. Different sets of actors, procedures for interaction, and resources can be ascribed to the different levels. According to Peterson, policy networks are primarily relevant for the sub-systemic level.

The top-down causal linking of the three levels in terms of the overall policy issues, or tasks, addressed on each level, clearly reflects the procedural rationality inherent in the policy network approach. General policy issues always already exist on the different levels forming a normative framework for action, around which, for example, networks can be mobilized. The rules of the game are set in advance, specifying 'meaningful' conceptions of problems of complexity. In turn, networks can then frame the policy process by intentionally establishing interdependencies and rules for negotiation between public and private actors (Rhodes, 1996; 660). These will be based on the collective or individual perception - according to the distribution of resources and network power balance - of the policy issue. Thus, common norms and values are an important condition for the establishment of policy networks, but confined by the procedural rationality, the approach cannot explain the *creation* process of the common values establishing conditions for the emergence of networks. This implies that on methodological level the policy network approach is limited in terms of explaining how particular issues are placed on the EU agenda, and what factors determine the specific constitution of networks.

6. Interactive designing of networks

One lesson to be learned from the policy network approach is that networks can be consciously designed, in accordance with the configuration of participating actors, the distribution of resources and power, and the policy problems holding them together. They are not only the result of the contingencies of human action. However, this does not imply that they are instrumentally formed through social engineering, for example by imposing formal authority or dominant control of resources. In stead it implies interactive social designing, *"...the result of which can never be wholly determined by its various participants, even if some of these participants attempt to impose their own will on others"* (Hausner & Amin, *ibid.*; 13). The reason for this is that interactive social designing occurs simultaneously on three levels, where reciprocal social interdependence becomes crystallized: inter-personal relations, inter-organizational relations, and relations between functionally differentiated sub-systems (or networks). In contrast to the policy network approach, only focusing on the relationship between the first two levels of interaction (Marsh & Rhodes, 1992; 261-262), as will be discussed below, this perspective is more comprehensive in identifying the factors constraining and enabling the designing of networks. Policy network analysis emphasize that networks can overlap, organizations can participate, play different roles, and hold different resources, simultaneously in different networks. Networks cut across organizational boundaries between public and private, and even within individual organizations, such as the EU Commission (Peters, 1992, Peterson, 1995; 74, 79). But in these cases the inter-network relations only serve coordinative purposes, securing effective service delivery. They do not constitute a factor that help shape particular networks. When studying the designing of specific networks all three levels should be taken into account at the same time. Why is this so important?

The theoretical conditions for describing the governance of complexity in social orders characterized by fragmentation, differentiation, and autonomization rest on the assumption that some kind of systemic (or as Peterson puts it 'super-systemic') unity can be identified. Without such a unity the product of social interaction within

differentiated sub-systems would remain uncoordinated, eventually resulting either in anarchy or in the re-instatement of hierarchy. In other words, societal sub-sectors need legitimization in order to be reproduced. As admitted by Marsh and Rhodes, the legitimacy of networks need not be political in terms of democratic representativity or formal authority, but rests rather "...in the claims to superior expertise and/or to increased effectiveness of service provision" (1992; 265). However, this is just one form of legitimization, particularly associated with the policy network approach. Other forms could be conceptualized. Hence mechanisms that provide actors with the possibilities of communicating on the meta-level is required if systemic unity between different and semi-autonomous social orders is to be produced and reproduced. Such mechanisms could be called 'coding' and 'super-coding' respectively securing intra-network and inter-network interaction and communication (Hausner & Amin, *ibid.*;7). The process of coding and super-coding, and the interweaving of the two, describes not only the development of a conceptual framework for communicating and understanding on systemic level, but also how autonomy of agency is combined with systemic unity (Hausner, 1995; 250). The interactive social designing of networks will need to take into account that the mutual interdependence will be established through coding processes that cannot be fully controlled.

It follows from the three levels of interactive social designing that at least four general conditions for designing social orders can be identified: First, it requires the functional differentiation of social sub-systems or networks (*The structural condition*). Second, a sense of community, or shared values and norms is required (*The institutional condition*). In addition, third, an infrastructure of discourse or communication, providing a common framework for meaning is needed (*The cognitive condition*). And, finally, strategic guidance is a condition for interactive social designing (*The reflexive condition*). As the first two conditions have already been discussed, only the common framework of meaning and strategic guidance will be taken up below.

The conditions for and processes embracing the production of meaning is an intricate issue in the social sciences. Within the perspective characterized by the assumption of reflexive rationality a wide variety of approaches can be identified, including discourse analysis (Foucault, 1972, Fairclough, 1992), semiotics (Baudrillard, 1996, Eco, 1979, 1996), system theory (Luhmann, 1995), and deconstruction (Laclau & Mouffe, 1985, Critchley et al., 1996, Derrida, 1981). One particular approach, applied to describe the evolution of a common framework of meaning, primarily between public and private actors in Denmark, is the negotiated economy approach (Nielsen & Pedersen, 1991, Pedersen, 1993, Andersen & Kjær, 1996). Building on institutional theory in organizational analysis, hermeneutics, and linguistic philosophy the basic claim here is that social meaning is developed and sedimented - and can be studied - following a gradual, progressive process, whereby 1. values (ideals) over time can assume the character of, 2. widespread language codes (discourses), potentially giving rise to, 3. more or less stable informal (institutional) and formal (organizational) relations between actors. Thus, it involves a description of the institutionalization of meaning. Without implying an epistemological idealism (voluntarism), the distinction between ideal-discourse-institution is exclusively (logical) analytical and does not specify an empirical zero point. In addition, there is no necessary dynamic logic in the transition from ideal, across discourse, to institution and organization. Therefore, none of the stages constitute a guarantee for the transition to the next stage. This is in the line of thought with the concept of 'articulation' mediating between ontological contingency and epistemological necessity discussed earlier. Complexity in social relations is dealt with through the interactive *negotiation* of ideals, discourses, and institutions.

No single actor can dominate the process of institutionalization by virtue of judicial competencies, economic resources or representational legitimacy, because the process itself involves a construction of positions of authority, power, and legitimacy (Meyer, Boli & Thomas, 1994; 10). However, this need not imply that the process defies influence from specific actors. On the contrary, in *language games* and *negotiation games* actors can try to induce or institute specific meanings onto other

actors, i.e. criteria for compromise, thereby guiding the process of institutionalization (Pedersen, 1993; 297-98).

By consequence, this perspective assumes that there can be no predefined meaning, no fountain of truth, from which universal principles of human interaction can be extracted and applied. In addition, therefore, knowledge about social interaction cannot be static, because it requires continual reproduction of the framework of meaning constituting substantial (material) and procedural aspects of institutionalized knowledge (Andersen & Kjær, 1996; 14). Meaning is hence constructed in a reflexive interaction, gradually sedimenting and crystallizing common world views through institutionalization processes. Highly institutionalized meaning tends to have a status of non-contested taken-for-grantedness, whereas meaning with a low degree of institutionalization is conflictual and controversial. In both senses, meaning - in contrast to beliefs, ideals, or values - can only be validated as such, if it is socially founded (Scott, 1994a; 57-59). This has fundamental methodological implications.

If we accept that meaning *belongs* to nobody, because it is socially and interactively constructed, then the *bearers* of meaning, i.e. actors, must themselves be the result of social interaction (Meyer, Boli & Thomas, *ibid.*; 11-16, Hausner, *ibid.*; 257). For example, the establishment of the Commission's Directorate General XI (Environment, Nuclear Safety & Civil Protection) in 1981 could be explained as the result of a decade of increasing environmental activity in the EEC. From 1972-1973, following the Paris Summit and the endorsement of the first environmental action program, to 1981, the Community gradually institutionalized a common framework of meaning, or body of knowledge, in the field of environmental protection that formed the basis for the creation of DG XI. Since then, DG XI has been charged with the administration of Community environmental policy, including the preparation of new acts. Today, nobody would contend that DG XI has to be taken into account when studying the forming of EU environmental policy. The example serves to illustrate that searching for

the institutionalization of meaning cannot be separated from a study of the construction of justified actors-positions.

This institutional approach can be applied to describe the creation of shared values and norms as a basis for network establishment, as well as common frameworks of meaning across different networks. In this sense, it reconciles autonomy with systemic unity. Yet, its foundation is a reflexive rationality, because meaning is constructed interactively through negotiation, not in exogenous contexts for interaction. The network creation is studied endogenously, simultaneously establishing conditions for governance of complexity through differentiation and meta-level coordination.

The final condition for the interactive designing of social orders is strategic guidance. As indicated earlier, this does not imply structural dominance or hierarchical power imposed through processes of social engineering. In stead, it requires reflexive capabilities providing the coordination of actions from functionally differentiated, autonomous, institutional structures through problem specific negotiation (Hausner & Amin, *ibid.*; 13-14). The systemic level coordination is however not the only context for strategic guidance. Strategic guidance can also usefully be conceptualized as a means for establishing a relationship between coding and super-coding, in terms of network autonomy within systemic unity. Sabel has used the term 'constitutional orders' to denote an alternative governance structure to market and hierarchy, especially adaptable to social complexity (1993). Constitutional orders consist of constituents and a superintendent. The constituents may be a mixture of any societal unit; firms; individual citizens; government agencies; organized interests etc., and the superintendent may be a court of law; a bureaucratic entity; or an arbitration committee etc. The role of the superintendent is to *"...determine the justification and responsibilities of the constituent units and set the rules by which they conduct transactions and resolve disputes arising under those rules insofar as the constituents cannot do so themselves"* (Sabel, *ibid.*; 73). The authority of the superintendent rests

not in a universal or permanent empowerment, but on its iterative ability to provide coordination between its constituents within overall societal norms and rules. This means that the superintendent has a dual limitation in its autonomy: First, its activities towards the constituents must comply with the rules, which are valid for the superintendent itself, corresponding to the meta-level framework of institutionalized meaning. The constitutional orders are hence limited in their self-organization or autopoiesis, because they are inter-connected through meta-level communication or super-coding. Second, the superintendent can only issue rules after consultation with the constituents, ascribing a representative legitimacy to its authority. In this way, the superintendent is limited in terms of imposing intra-constituent coding. Taken together, the relationship between the constituents and the superintendent is indeterminate, because the interaction in the constitutional order, and its effectiveness in terms of providing coordination, rests on deliberation, reflexive interaction, negotiation, and adaptation.

The intention of introducing Sabel's concept of constitutional orders lies less in its ability to describe the general conditions for governance of complexity, although his contribution in this respect is undoubtedly significant, but rather in pointing out, how fragmented social orders, functionally differentiated sub-systems, or networks can be interactively designed through the intervention of strategically guiding agents (superintendents), constrained and facilitated by self-organization and systemic unity. In this sense, strategic guidance is not only the ability to coordinate multiple governance networks, but equally the capability to create and develop intra-network relations, through interactive social design. The main tasks of strategic guidance is hence to guide, arbitrate, and facilitate, making leadership an endogenous quality (Hausner, *ibid.*; 250).

On this background, the policy network approach seems restricted in two different ways, with regard to its ability in describing the interactive designing of networks.

The first problem arises, as already noted, when the *levels* of social interaction are limited to inter-dependence between inter-personal relations and inter-organizational relations, i.e. between the micro and meso level of interaction. The basic implication of this limitation is that the existence of relations between functionally differentiated networks on systemic (or super-systemic) level is implicitly taken for granted. As illustrated by Peterson, the different levels address different types of questions according to relatively independent sets of procedures, and with relatively independent objectives. However, the levels are ordered in a specific way, so that actors on each level always know the types of issues and problems that are to be addressed. It is then assumed that in the conveying of policy issues from a higher level to a lower level of interaction, the higher level framework of meaning is automatically transposed to the lower level, constituting exogenous contexts for interaction. In contrast to this view, the interactive social designing approach claims that time, space, and (policy) substance for individual networks is transformed and created through the simultaneous interaction on inter-personal, inter-organizational, and inter-network levels, and that only if we adopt such a perspective, can we describe how networks are indeed endogenously formed and what consequences they may have for policy outcome.

Therefore, the second problem in the policy network or multi-level governance approaches, concerning their ability for describing the interactive designing of networks, has to do with the *conditions* they claim have to met in order to identify network relations. Building on a procedural rationality they only seem to stress that a functional differentiation of societal sub-sectors is sufficient, if the differentiation is supported by the existence of shared norms or common values, or in other words, if interaction is enabled by existing institutional relations. Hence, they assume that it is adequate to expect the development of network relations if a sub-systemic policy issue can be identified, around which actors mobilize their resources. In turn, the policy network interaction may determine policy outcome. Put sharply, the explanatory and predictive power in the policy network approach thus ultimately rests

in a tautology: policy outcome can always be reduced to the specific configuration of resource dependencies within networks building on common values, because networks are constituted around common values establishing the inter-dependencies, which result in specific policy outcomes.³ Without overstating the possible inconsistencies in the policy network approach, a more fruitful way of conceptualizing the creation and designing of networks would nevertheless be to integrate the last two conditions mentioned above. By studying how a conceptual framework for meaning is gradually and progressively institutionalized, simultaneously creating network autonomy and systemic unity, the common values and shared norms holding networks together can be disclosed as endogenous variables. And by studying how specific agents, empowered as superintendents, can effectively guide the process of autonomous network building through reflexive strategic choices, reflecting compromise within network participants, and at the same time reinforcing systemic unity, the process of strategic guidance, as the condition for governance of complexity can be revealed.

7. Negotiated orders

The network structure, resulting from the interactive social designing through the application of reflexive rationality, can be termed negotiated orders. Hence, negotiated orders emerge, when strategic guidance, founded in reflexive rationality, provides the possibilities of directing the production of meaning, in which common values is created within functionally differentiated sub-systems, simultaneously securing systemic coordination.

³ An example of this tautological reasoning can be found with Peterson, claiming that the policy network model "...offers the interesting and testable hypothesis that the internal characteristics of policy networks in different sectors are a primary determinant of EU policy outcome" (1995; 80). It is tautological insofar as the criteria established for validating the hypothesis lies in the specific internal characteristics defining policy networks. In other words, Peterson assumes that a causal link between resource dependencies within networks and policy outcome can be established, but the specificity of causal determinance only rests in the different properties defining policy networks as a methodological concept. By implication, if we find the specific properties defining networks in a policy outcome, then we can always deduce a causal link between a network and the policy outcome.

This perspective does not imply a traditional concept of negotiation or bargaining. Traditional approaches, e.g. game theory (Bjerke, 1992, Elster, 1992, Elster & Hylland, 1986), tend to see the process of negotiation in terms of the interchange of clearly identifiable, and given preferences or interests. The context of negotiation thus implied is one of stability and predictability, allowing only for instrumental rationality associated with markets or hierarchies. In the (policy) network perspective negotiation is conceptualized as the balancing of contextually bound actor resources. As contexts change, so does the conditions for negotiation, resulting in uncertainty. To cope with this, actors are left with the institutional rules of the game governed by a procedural rationality, appointing relevant resources to specific purposes.

The negotiation concept associated with negotiated orders assumes the interchange of 'reflexive knowledge' (Hausner & Amin, *ibid.*; 5). Reflexive knowledge is developed through social interaction, where the solution to complex problems is obtained through iterative processes of communication, cumulative learning, and feedback between deliberation and outcome. Negotiation does not only unfold around a table between agents with different pre-given interests, resources, and objectives, resulting in a re-organization of a social order. It also involves *both* the selection of agents with specific, legitimate interests and resources, *and* the 'creation of the negotiating table' in terms of common problems demanding common solutions. And in the process it results in the transformation of the social order, by appointing new actor-positions, creating new resources, and specifying new objectives.

It follows that negotiated orders are especially adaptable to contextual change, because the boundaries between the negotiated order network and its environment is subject to an endogenous construction, based on a recursive interpretation of extra-network complexity. In this sense, exogenous change in the network environment is 'filtered' through the infrastructure of communication and meaning pertaining to the network, making adaptation an endogenous quality. It would therefore seem appropriate to distinguish between two different kinds of network effectiveness

(Grabher & Stark, 1997; 10ff). On the one hand, allocative effectiveness referring to the effective use of available network resources, established through infra-network negotiation. In this perspective networks are treated as a property providing service delivery within existing rules, clearly illustrated by the policy network model. On the other hand, *dynamic effectiveness* understood as the ability to promote innovation, developed through negotiation about infra-network form. This implies focusing on the properties of networks. The negotiated order approach covers both these types of effectiveness, but emphasizes the innovative potential of the latter, as a condition for adaptation to contextual change.

Within this framework strategic guidance becomes essential for the establishment of negotiated orders. This is because in order to govern, through interactive design, a situation characterized by a high level of complexity, i.e. absence of predictability or contextual procedures, the effective deployment of the intermediating and stabilizing potentials associated with strategic guidance is a first condition. As noted above, the relative success - and legitimization - of the superintendent lies in the ability to facilitate, arbitrate, and coordinate interaction between autonomous actors, but at the same time justify actor-positions, appoint responsibilities, and set the ground rules. In addition, the success is grounded in the capabilities of providing network or group autonomy within an overall systemic framework of meaning. This naturally raises the question of how the superintendent is appointed, conditioning the governance of complexity through interactive social design.

No single property determines the constitution of a superintendent. Formal authority, economic resources, or superior knowledge is of limited importance in a situation where there is no clear hierarchy, procedures for interaction, or common framework for meaning. The latter have to be created through the gradual process of institutionalization, thereby stabilizing and sedimenting the allocative effectiveness of a social order. Hence, obtaining the position of the superintendent requires the highest level of reflexive rationality. It requires the capability of articulating ideals, around

which actors can be mobilized and created through deliberate processes of meaning production, reconciling different world views by establishing new common frameworks. However, the superintendent's empowerment is neither all-dominant nor permanent. The reflexive properties have to be constantly reproduced in order to secure dynamic effectiveness.

Methodologically, a negotiated order can only be identified retrospectively, because the criteria determining the specific constitution of the order are the result of deliberation, interaction, and negotiation. Therefore, it rests in a diachronic methodology systematically disclosing the endogenous articulation, selection, and institutionalization of the different constituting elements. As a strategy for analysis, the starting point is the more or less taken-for-granted institutional structure, e.g. a legal act or a highly institutionalized practice, reflecting a common framework of meaning, the relative division of labor, procedures for social interaction, including conflict resolution and compromise, and criteria for in-/exclusion and general adaptability. The creation of all these features can be studied following the processes of interactive and reflexive negotiation leading to the production of a general framework of meaning, gradually sedimenting and crystallizing reciprocal social relations.

In the next section, I will apply the conceptual framework of negotiated orders as the methodological basis for studying the initiation of EU Commission legislative drafting.

8. Negotiated ordering in EU legislative drafting

The process of drafting EU Commission legislative acts can be seen as the process ultimately resulting in a taken-for-granted institutional structure, following a Council endorsement of a Commission proposal. The bulk of literature on EU policy-making focuses almost exclusively on the stages following the Commission's launching of a formal proposal. Although there is a general recognition of the substantial influence associated with the initiation monopoly, giving the Commission a possibility of acting

as a *first mover* either independently or in co-operation with specific external interests (Héretier, 1996), interaction processes between the Commission, Council, European Parliament, regional authorities, national civil servants, and private lobbyists etc. nevertheless still form the 'true' context for negotiating and implementing EU law. It is assumed that the Commission proposals will always to a greater or lesser extent mirror common European policy concerns. If they should represent a strong Commission institutional bias, then the formal negotiations between the EU institutions and national and regional authorities, influenced in different ways by lobbying, will effectively obliterate unwanted elements. In turn, the Commission's formal right to withdraw submitted proposals from the EU agenda constitutes a guarantee for Commission influence in the formal negotiations.

The formal institutional structure for EU decision-making can indeed be pervaded by actual processes of informal interaction, as is clearly illustrated by the increasing private interest engagement on multiple levels and between multiple actors (McLaughlin, Jordan & Maloney, 1993, Pedler, van Schendelen, 1994, Streeck & Schmitter, 1991, van Schendelen, 1993). However, this does not seem to constitute a serious methodological challenge for much theorization on EU policy-making. Although there is a legitimate research interest in disclosing the forms and consequences of informal policy-making, creating relations of interdependence and autonomy (Middlemas, 1995), the result of EU negotiations are still seen as reflecting some sort of common European compromise. In this perspective, EU law *incarnates* a common framework of meaning endorsed by the Council. Once a proposal has finally been decided, the origin of the proposal's *rationale* is irrelevant or taken for granted, because the actual legislation specifies the object of regulation, procedures for interaction, and rules for conflict resolution etc.

Contrary to this *formalistic* perspective, the negotiated order methodology assumes that the fundamental cognitive framework inherited in EU law is established long before proposals are actually submitted to the Council. In this respect, the process of

initiating legislative drafting is of crucial importance to comprehend what subsequent formal negotiations are all about. First, the initiation process outlines the basic *purpose* of EU legislation and thereby contributes to the overall framing of EU integration. Second, the process establishes a wide range of *institutional fixations*, constraining and enabling the possibilities of attending interests in the formal decision-making processes. The consequences of the choices made in the initiation phase can therefore not be overstated.

Correctly - from a legal standpoint - the initiation monopoly is an exclusive Commission competence, by and large outside public scrutiny (Matlary, 1996; 10). In addition, there are no or only very general rules regulating how the Commission should organize and carry through the drafting of proposals. This dual autonomy of *what to draft* and *how to draft* is generally acknowledged as the most powerful Commission instrument because it provides a head start in the decision-making process. Perhaps this is also why the policy network approach, and certain multi-level governance contributions, focus much attention on the Commission's position in various networks (Peters, 1992, Peterson, 1992). They assume that the Commission's formal authority in regard to agenda-setting constitutes an important resource, which other actors are highly dependent on if they want to influence the policy-making process. In turn, the Commission is itself dependent on expertise from other network actors. This would explain the overall emergence of policy networks in the initiation stage. However, the real influence of policy networks lies in the ability to exploit the procedural norms governing the formal negotiations. This implies mobilizing network actors around common values that can counteract opposition from extra-network agents. In so doing, the approaches assume that the Commission is principal in designing the network relations, because it holds the dominant resource. Nevertheless, as discussed earlier, this perspective fails to account for the creation of common values and norms holding networks around Commission legislative drafts together. As a consequence, the two powerful instruments of what to draft and how

to draft do not necessarily provide the Commission with adequate properties to guide the formulation of legislative proposals.

Adopting the negotiated order approach, the initiation of EU policy processes is first and foremost characterized by complexity. There are no ground rules specifying exactly what to draft or how to do it, because the criteria for choice have not yet been established. There is no necessary logic in the configuration of participating actors representing specific interests, expertise, or economic resources, because no justified actor-positions have been appointed. In sum, the complex field is open for articulation of policy ideals. Recognizing this will force us to locate where and how such ideals are indeed shaped, as the basic condition for the drafting, submitting, negotiating, and endorsing of legislative proposals.

Every legal act has its own history of institutionalization that can be systematically revealed. This negotiated order methodology does not stop at the identification of common values, but goes further to study the fundamental conditions for identifying common values through coding processes. It assumes that the specific framework for meaning is an important property in initiation processes, because it is here the fundamental purposes of future legislation is shaped, constituting legitimate actor-positions, resources, and roles that will ultimately form part of a Council compromise. Hence, when proposals are forwarded to the Council for formal negotiation, they already hold a specific historical compromise between a network of actors, of which the Commission is only one, carrying a general framework for politicization. Within this 'coded' framework Council negotiations can change, remove, and add specific elements through processes of confrontation and compromise. But when politicization involves introducing interests and values that cannot meaningfully be placed in the infrastructure of communication, the emerging allocative and dynamic effectiveness of the negotiated order is threatened, resulting either in the dissolution of the network, and probably a withdrawal of the proposal, or the effective exclusion of opposing interests, thereby reinforcing network unity. In this context, the Commission does not

necessarily possess the power to act independently of the actors constituting the proposal network, because in the long run it is dependent - among other things - on legitimization, in terms of securing meta-systemic unity.

By implication, disclosing the institutionalization of legal acts is simultaneously exposing the negotiated order forming their context. Does this mean that reflexive strategic guidance is a part of every negotiation process? Remember, a social order is a point of observation, making sense of the complexity of the world. The point of observation associated with negotiated orders presumes that institutionalization of meaning cannot be dominated by one single actor, it is the result of negotiation between autonomous agents. However, negotiating also implies the gradual convergence of different ideals and interests, and although all actors may be satisfied with the results - a win-win situation - some actors nevertheless possess the ability to reflexively and interactively persuade, direct, or guide other actors. It need not imply a conscious empowerment of a superintendent. Particular actors may not even be conscious about their guidance activity. And guidance can shift between different actors in the process of institutionalization. But guidance occurs, securing network autonomy and systemic unity. As a point of observation, the negotiated orders approach makes the production of meaning and its active guidance visible to observers of governance of complexity. When the basic four conditions for the interactive designing of networks can be identified (functional differentiation, common values, infrastructure for communication and meaning, and strategic guidance) the emergence of negotiated orders can be observed.

In this sense, the Commission may have a special position in the initiation of legislative proposals. As part of the functional differentiation it *does* possess certain capabilities other actors do not. The monopoly to propose legislation is important in this context, because in principle it provides the Commission with the opportunity to construct the boundaries for time and space in the formal Council negotiations. The Commission has an institutional capacity for deciding *what* to submit, but equally

important, *when* to submit formal proposals. Hence, the Commission has the potential for strategic guidance, at least once an initiative has been articulated around common values. However, to what extent the Commission has the capacity to provide strategic guidance in the *production of meaning* surrounding specific initiatives remains an empirical question. Other actors may or may not possess the ability to reflexively guide the infrastructure of communication. Facing complexity, policy initiatives start with a struggle about defining a common language, an architecture of meaning, making a specific problem issue visible to actors. This can happen simultaneously in different functionally differentiated contexts. In the gradual, interactive development of this language certain values emerge. These narrow the scope and form of problem issue, making it possible to promote certain interests, and bind certain actor-positions, ultimately resulting in the institutional structure surrounding a formal proposal to EU legislation. The subsequent Council negotiations, with all the familiar and well-documented features of intergovernmental bargaining, inter-institutional conflict, and lobbying, are hence both constrained and enabled by the preceding strategic guidance providing a foundational rationale for the policy-process.

In sum, to illuminate who takes what initiatives, on what conditions, and with what effects, the disclosure of how negotiated orders emerge, however sketchy presented here, seem a promising methodology.

Conclusion

This paper has tried to show, how a supplemental, if not alternative, approach to the policy network model's theorization of EU policy processes can be conceptualized. It has focused specific attention on the earliest stages in the drafting of Commission legislative proposals, and suggested a methodology for studying the consequences of choices made here on subsequent Council negotiations. The primary ambition has been to illustrate how changing the general perspective from one building on procedural rationality to another building on reflexive rationality can provide a

theoretical and methodological framework for understanding the emergence of policy initiatives in the EU and how they condition subsequent policy-processes. The formal Commission competence to determine what to draft, how to draft, and when to submit proposals is just one particular feature of the policy-process. When applying the negotiated order methodology the exercise of formal authority is conditioned by its meaningfulness in relation to a social context that emerges as the result of reflexive interaction, negotiation, deliberation, and strategic guidance. Therefore, proposals forwarded to the Council embody a conceptual framework for meaning, in which the overall purpose of future legislation is embedded. However, simultaneously, they appoint legitimate actor-positions, criteria for compromise and conflict, and a scope for adaptability. The submitting of proposals to the Council thus represents a specific point in the overall policy-process, where an institutionalization of solutions to common problems has reached a level in which the expected outcome is inside the proposal's framework of meaning. The capacity to provide this rest not exclusively in the Commission formal competencies, but collectively, in the involved actors' reflexive, cognitive, and strategic capabilities.

In this paper, the negotiated order perspective has just barely been outlined. Extensive theorization is needed in order to found a more comprehensive and operational methodology for the analysis of EU policy-processes. This includes a digestion of the existing literature on complexity in EU policy-making, where undoubtedly a wealth of fruitful insights can be found. Here, only a little part of the policy network literature has been explored, or, perhaps, misunderstood.

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