

Between Governing and Governance

On the Emergence, Function and Form of Europe's Post-National Constellation

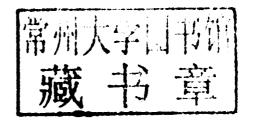
POUL F KJAER

HART MONOGRAPHS IN
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BETWEEN GOVERNING AND GOVERNANCE

This book explains the emergence and functioning of three forms of governance structures within the context of the European integration and constitutionalisation process: comitology, (regulatory) agencies and the Open Method of Co-ordination. The point of departure is the insight that the intergovernmental/supranational distinction, which most theories of European integration and constitutionalisation rely on, has lost its strength. A new paradigm of EU research is therefore needed.

Against this background it is suggested that the distinction between governing and governance provides a more appropriate basis for analysing the phenomenon of integration and constitutionalisation in Europe. The distinction between governing and governance allows for an understanding of the EU as a hybrid consisting of a governing dimension, characterised by legal and organisational hierarchy, and a governance dimension, which operates within a network form characterised by legal and organisational heterarchy. The function of governance structures is to ensure the embeddedness of the governing dimension in the wider society. Instead of representing contradictory developments, the two dimensions are therefore mutually constitutive in the sense that more governing implies more governance and vice versa. These theoretical insights are illustrated through two detailed case studies which respectively reconstruct the operational mode of the Open Method of Coordination within EU Research & Development Policy and the regulatory system for the EU chemicals market (REACH).

The book is inter-disciplinary in nature and incorporates insights from law, political science and sociology.

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Poul F Kjaer Frankfurt am Main, July 2009

Abbreviations

APEC Asia-Pacific Economic Cooperation
ASEAN Association of Southeast Asian Nations

AU African Union

BEPG Broad Economic Policy Guidelines

CAN (Comunidad

Andina) Andean Community

CAP Common Agricultural Policy

CdT Translation Centre for the Bodies of the European

Union

CEES Central and Eastern European Countries

CFI Court of First Instance CFP Common Fisheries Policy

CFSP Common Foreign and Security Policy
CfRA Committee for Risk Assessment

CfSEA Committee for Socio-Economic Analysis

CIS Classical Institutional Structure

CM Community Method

Commission Commission of the European Communities

CoR Committee of the Regions

COST Co-operation in the field of Scientific and Technical

Research

Council Council of the European Union

CREST Committee on Science and Technical Research

CT Constitutional Treaty

DDP Directly-Deliberative Polyarchy
EAR European Agency for Reconstruction

EASHW European Agency for Safety and Health at Work

EURATOM European Atomic Energy Community

EC European Community
ECA European Chemicals Agency

ECA European Chemicals Agency
ECB European Central Bank
ECJ European Court of Justice

ECSC European Coal and Steel Community
EDC European Defence Community

EEA European Economic Area

EEC European Economic Community
EES European Employment Strategy

EESC European Economic and Social Committee

EFSA European Food Safety Authority

x Abbreviations

EMBO European Molecular Biology Organization

EMCODA European Monitoring Centre for Drugs and Drugs

Addiction

EMEA European Medicines Agency
EMU European Monetary Union
EP European Parliament

ERC European Research Council

ESCB European System of Central Banks
ESDP European Security and Defence Policy

ETF European Training Foundation

EU European Union

FP Framework Programme(s)

FRA European Union Agency for Fundamental Rights

GS Governance Structures IB Institutional Balance

ICANN Internet Corporation for Assigned Names and

Numbers

IGC Intergovernmental Conference(s)

IM Internal Market

IMF International Monetary Fund

LRT Lisbon Reform Treaty

MEP Member(s) of the European Parliament

Mercosur

(Mercado Común

del Sur) Southern Common Market

MS Member State(s)

MSC Member State Committee

NAFTA North American Free Trade Agreement

NMG New Modes of Governance NPM New Public Management

OECD Organisation for Economic Co-operation and

Development

OLAF (Office européen de Lutte

Anti-Fraude) European Anti-Fraud Office
OMC Open Method of Coordination

PJCC Police and Judicial Cooperation in Criminal Matters

PPP Public Private Partnerships
QMV Qualified Majority Voting
R & D Research & Development

REACH Registration, Evaluation, Authorization and Restriction

of Chemicals

SEA Single European Act

SICA (Sistema de la Integración

Centroamericana) Central American Integration System

SGP Stability and Growth Pact

SIEF Substance Information Exchange Forum SME Small and Medium Sized Enterprises

SPORT Strategic Partnership on REACH Testing

UK United Kingdom

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Commission of the European Communities: Decision 2008/37 of 14 December 2007 setting up the European Research Council Executive Agency for the management of the specific Community programme Ideas in the field of frontier research in application of Council Regulation (EC) No 58/2003
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Commission of the European Communities: 'White Paper on Food Safety', COM
(1999), 719 final
Commission of the European Communities (2000): Communication from the
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Commission of the European Communities: European Governance. A White
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Commission of the European Communities: White Paper: Strategy for a future
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Council Joint Action 2001/554/CFSP of 20 July 2001 on the establishment of a
European Union Institute for Security Studies
Council Joint Action 2001/555/CFSP of 20 July 2001 on the establishment of a
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Commission of the European Communities: Proposal for a Regulation concerning
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Directive 1999/45/EC, COM(2003)644 of 29 Oct. 2003
CREST: Draft Summary Conclusions of the 288 th meeting of the Scientific and
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Commission of the European Communities: 'Facing the Challenge. The Lisbon
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Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the
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