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REFGOV

Reflexive Governance in the Public Interest

Integrated Project

Priority 7 – Citizens and Governance in a knowledge-based society

EXECUTIVE SUMMARY

June 2005 – May 2010

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Executive summary

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It is important at the outset to call to mind the objective of the research project and review the theoretical hypothesis that underlies the term "reflexive governance".

The purpose of our inquiries has been to try to resolve two conceptual blockages in theory of democracy.

Current theories of democracy are faced with two basic conceptual blockages that relate to the conditions in which an operation of collective action can be fulfilled. To put it more precisely and in more theoretical language, these blockages relate to the conditions for fulfillment of the operation by which citizen members of a given social group can arrive at shared normative meaning and, in light of this meaning, redefine their identities as actors. By "redefine their identities as actors" we mean redefine the way these citizens conceive themselves and the world. Even those more recent approaches in theory of democracy that are oriented towards potentiating citizens' capacity for participation have not succeeded in resolving these two blockages.

The first of these conceptual blockages consists of reducing the conditions for fulfillment of the operation described above solely to intervention by the established public authorities. To accept this reduction is to assume that, in order to advance the social cause, it is sufficient to trust the assurances of success provided by the cooperative practices adopted and promoted by the established authorities. Nowadays many theorists recognize the inadequacy of this assurance on its own and are seeking to supplement it with constraints designed to elicit citizen participation. Insight into this inadequacy is indeed what gave rise, over thirty years ago, to a critique of governance by command and control and the search for new modes of governance. As we know, this search evolved over time. In the course of this evolution, the model of regulation by the market was initially promoted. This progressively gave way to advocacy for more cooperative and more participatory forms of decentralized governance. In some cases these were conceived on the basis of new institutionalist economic approaches; in others, on the basis of more deliberatively-based theories of governance and collective action.

From the moment when the success of a collective action is understood as depending not just on market-style decentralized coordination but also on deliberative and cooperative practices, the process of development of what we call a reflexive approach to governance is under way. In this new perspective, in contrast to governance based on the command and control model or the market mechanism alone, the success of any collective action comes to be subordinated to the success of a learning operation. An understanding of the way this learning operation unfolds requires a certain idea of reflexivity. Under this idea, the transformation of a given context requires that the actors involved divide their attention between the anticipation of consequences and a specific operation: that of reexamining "accustomed competencies and behaviors" in order to acquire new competencies. To be able to take place, this operation of "reexamination" would require specific institutional mechanisms.

At this point, the second conceptual blockage arises. It consists of making the success of an operation of collective action (that is, the success of the operation of practical acceptance of a shared norm) depend exclusively on the proliferation of mechanisms that are assumed to foster cooperation and participation by citizens in the processes by which these norms are developed and applied. At this stage, the assumption is made that the conditions for transforming the identities of participating citizens – that is, the conditions for transforming the way these citizens conceive themselves and the world – emerge solely from the pragmatic conditions presented by the cooperative and participatory models. This second conceptual



blockage subsumes under the operation of acceptance the whole question of the conditions for success of the operation of transforming the actors' identities.

It was in order to address the second conceptual blockage that research into the theory of collective action and governance was recently given a fresh start, which has issued in a "pragmatist" redefinition of collective action. This pragmatist redefinition is oriented towards processes of shared inquiry as part of problem solving and promotes recourse to pragmatic mechanisms for learning by monitoring. These mechanisms include co-design, benchmarking, and error detection.

It is in the light of this evolution in the debate on theory of democracy and theory of collective action that we designed our study on "reflexive governance". Our investigation has unfolded on three fronts.

1. First we highlighted advances made by three more reflexive theoretical approaches that have been progressively constructed by current research in the social sciences in order to correct the weaknesses of non-reflexive approaches to governance (whether those based on regulation by command and control or those based on regulation by the market mechanism alone). These are the neo-institutionalist economic approach, the relational and deliberative approach, and, most recent of the three, the pragmatist approach. In highlighting their advances, we also showed how these approaches reflect a deepening understanding of those institutional mechanisms whose existence is necessary to the success of the learning operation on which rests in turn the success of a collective action; and we paid particular attention to the pragmatist approach.

2. However, our investigation has not been limited to this. We also pursued and furthered the inquiry begun by that recent pragmatist turn in theory of collective action, in order to better describe the nature of the conditions necessary for the success of the learning operation and thus make it possible to better resolve the two conceptual blockages in theory of democracy. That is, while acknowledging the advances yielded by the three recent more reflexive approaches to governance and especially by the pragmatist approach, our investigation undertook to carry these advances still further. In our investigation, we have sought to show why, to resolve the conceptual blockages that prompted a pragmatist inquiry into the mechanisms of collective action and normative operations, it is necessary to take the implications of the pragmatist approach to even deeper levels. At these new levels, we attain what we are calling a *genetic approach* to collective action. As our investigation has shown, pragmatism, by virtue of its experimentalist conception of both governance and learning, enables us to avoid mentalist and constructivist reductionism in how we conceive the operation of collective action. And yet it nevertheless continues to "postulate as having been fulfilled" the identity transformations that bring about a collective action. In contrast – and this constitutes our theoretical hypothesis – what is necessary is to avoid such a "postulate" and grant specific attention to the conditions for *engendering* the transformation of the actors' positionings and identities. That is, what is needed is a *genetic approach* in our understanding of the transformation of the actors' positionings and identities. This applies especially to our grasp of the conditions needed for what we call the *terceization* process in actors' identity making. We have thus sought to go further in the direction initiated by the pragmatist turn, by expanding the conditions for success of reflexive governance to include these conditions for engenderment.

3. To explore this theoretical hypothesis, we designed different "thematic" studies whose purpose has been to "test out" the productiveness of the genetic approach to governance in specific areas. These include: biodiversity governance; corporate governance; the restructuring of "services of general interest" in the energy and health care sectors; and fundamental rights. The approach we adopted was to have each of several research teams investigate a chosen field of research, with all teams following a common program of inquiry. This common program comprised three stages. First, we sought to identify the "limitations of



mechanisms of governance” that current research in these thematic fields is working to overcome. Second, we highlighted the reasons why improving these governance mechanisms requires “attention” to the conditions that allow for ensuring that effective transformation of actors’ identities and positionings that is at the heart of collective action. Third, we tried to put new questions to existing improved versions of these governance mechanisms in order to incorporate into them the genetic requirements for transforming actors’ identities.

As regards the results of these thematic studies, a clarification is in order. In several of the case studies, the “genetic” conditions that our investigations brought to light as the conditions for success of the learning operation necessary to ensure “governance in the public interest” were still being framed in the terms specific to the new institutionalist, deliberative, and pragmatist reflexive approaches.

The different case studies are all linked to some extent to the theoretical approach proposed in the project, but three case studies are more closely associated with inquiries into the kinds of systems required by specific attention to the problem of actors’ capacitation. The first ‘set’ was developed in the Global Public Services subnetwork (see hereafter). It consists of the European study on forest management and the case of the International Seedbank Network of the CGIAR as explained hereafter under (GPS). The second was conducted in the Healthcare sub-group of the Services of General Interest subnetwork in the UK. Both approaches are presented in the REFGOV Common publication. The third case study concerned the union movement as actor in the context of the liberalisation of Belgium’s energy policy. This case study on the Union movement as a collective actor was conducted by one of the authors of the Synthesis Reports in a specific workpackage (WP5) and is relevant to both the Theoretical Unit (TNU) and the Services of General Interest subnetwork (SGI). It is presented in the last chapter of the publication “Democracy, Law and Governance”¹ and is further developed in the REFGOV paper WP SGI-25.

1. Global Public Services - GPS

The GPS subnetwork has developed a set of comparative case studies into the institutional design of social learning in the provision of global environmental services and two in depth case studies which more specifically analyze the mechanisms of reflexive governance in a more complete institutional framework.

Based on extensive comparative institutional research on the provision of global environmental services in years 2 and 3, a model was elaborated that focuses on three mechanisms for enabling effective social learning, which are based respectively on the work within sociological institutionalism on the formation of democratic identities and capacities, the work of Charles Sabel on democratic experimentalism and the work in the synthesis report II of the REFGOV network on the genetic approach to governance.

For the purpose of testing this model, two cases were selected in the field of GPS where the limits of the incentive policy and direct regulation clearly have been established, and where reflexive learning is expected to play an important role. The first case study is situated on the local level and analyses the governance characteristics of an innovative instrument for sustainable forest management in Europe. The second focuses on the role of the international centers of the Collaborative Group of International Agriculture Research (CGIAR-centers) in carving out and maintaining a global commons in genetic resources, which has led to the International Treaty on Plant Genetic Resources in Food and Agriculture (ITPGRFA) ratified in 2004.

¹ Major output of the theoretical work conducted in the REFGOV project Lenoble, J. and Maesschalck, M., *Democracy, Law and Governance*, 2010, Ashgate, Aldershot, 268 p.



A double set of propositions were identified within this research, which should serve as guidelines for further deepening of the learning process within the genetic approach. First, the contribution of the institutional innovations to effective reflexive learning depends on an institutional assessment of the learning process by the concerned actors themselves. For example, in the field of genetic resources governance, the REFGOV research led to the proposition of and experimentation with a new methodology of multistakeholder expert dialogues to overcome current blockings in the negotiations related to major frame conflicts. Second, successful learning depends on the development of action strategies for associating new actors within the redefined institutional horizon. In the field of genetic resources governance, new challenges such as global infectious diseases and patenting of microbial resources for biofuel production, have increasingly led to the need to associate new actors to the cooperative networks, within a redefined common horizon. To satisfy this second condition, the GPS subnetwork developed with the concerned actors a set of strategies for the inclusion of new user communities in the reflexive learning processes, based on the knowledge gathered on the pitfalls of the latter processes.

This set of two in depth case studies constituted the thematic studies among the most closely associated with the theoretical approach of the project as referred in the first part of this summary.

Main publications referring to this thematic research see the table hereafter - For a more complete list see the project website <http://refgov.cpd.ucl.ac.be/?go=publications>

2. Fundamental Rights - FR

During the past five years, the work carried out by the FR has been focused on the exploration of the REFGOV hypothesis as applied to fundamental rights' governance in the EU. In this framework, we have examined the different institutional responses and policy tools employed in this policy area, seeking to identify advantages and shortcomings that would allow us to formulate improved mechanisms for the practical realization of individual rights in Europe through decentralised experimentalism and mutual learning. A set of policy recommendations on the forms the governance of fundamental rights should take in the future constitutes the final outcome of our research. These recommendations are firmly anchored in the theory of governance that the project builds upon, but they also seek to take into account the current dynamics of the European Union in this field.

The REFGOV project is based on the premise that the current attempts at improving public law and policy-making by enhancing both its legitimacy and its effectiveness are based, albeit implicitly, on different understandings of what is required to coordinate a pool of actors involved in the design and the implementation of rules and policies. How the public interest should be defined, through which procedures it should be developed, remains contested. The REFGOV hypothesis relies on the idea that collective learning, as an alternative to both markets and hierarchies, should be the central concern of governance mechanisms. But it also presents a specific view of what collective learning means, and of which governance mechanisms are required. Indeed, we build on the idea that learning can only successfully take place if the actors involved are able to reconstruct reflectively their identity on the basis of their past history and, on that basis, to project themselves in the future, by asking what conditions should be created in order for them to have the ability to question the framing they spontaneously adopt of issues they debate upon. We refer to the first condition as the condition of *reflectability*, which is orientated towards the past. We refer to the second condition as the condition of *destinability*, which, on the other hand, looks towards the future. An actor involved in governance processes will only effectively contribute to collective learning if s/he makes an effort in both directions, so that he becomes capable of shifting his/her perspective on the basis of the perspectives adopted by others. The capacity of the actors to benefit from collective learning cannot be presumed, though; it must be affirmatively



constructed, on the basis of this dual requirement. The final aspiration of the REFGOV project is to promote collective learning without falling into the trap of postulating an innate capacity of actors to effectively improve their understandings of the situations which they confront; but without being content, either, with external mechanisms promoting collective learning that do not address the need to build affirmatively the capacity of these actors to contribute to the design and implementation of the policies at issue. The focus, therefore, is on the conditions that are necessary for the success of the learning operation that lies at the heart of the governance process.

The work of the FR has been organised in three phases. First, we sought to develop and further refine the working hypothesis of the project as it relates to fundamental rights (June 2005-2006). We started from the realisation that rights are not only to be proclaimed and, once proclaimed, guaranteed by courts, but that they are also to be implemented; policies must be adopted in order to fulfil them. How these policies are to be adopted; which governance mechanisms should underpin a deliberation organized on those policies; which policy tools grant an opportunity to the stakeholders involved to effectively learn from their interactions with others, moving from mere bargaining on the basis of fixed interests into truly deliberative processes based on an attempt at collective learning, are all questions that require answers tailored to the specificities of the domain of fundamental rights. Accordingly, during the first year of activities we attempted to reach a common understanding of the questions to be answered, the framing of the problems to be solved, and the tools to identify appropriate responses, by taking into account both the risks and opportunities presented by the fact that in this area, most issues are still largely addressed on a decentralized basis – i.e. at the level of the Member States, rather than through harmonization at EU level. In this context, the risk is that each Member State seeks to pursue policies in this field on the basis only of its national interests. The opportunity, by contrast, is that each actor involved in such processes – at both national and EU level – can seek to learn from the way similar issues are tackled in other Member States – not only as tools which s/he could use for his/her own purposes, but also as opportunities to question his/her presuppositions about what needs to be addressed or how the problem at issue is to be described, and how solutions can be identified. Against this backdrop, we came to the conclusion that the development of mechanisms that organise a form of collective learning among the EU Member States would allow us to think beyond hierarchies and markets thereby enabling the overall improvement of the fundamental rights policy of the EU. Such tools should propose an answer based on deliberation about the reality of interdependencies between States. This is the basis on which the working hypothesis of the FR has been build.

During the second phase of the project (June 2006-June 2008), we sought to test our hypothesis in four thematic fields: social rights, anti-discrimination law and policy, criminal law, and data protection. The empirical research performed in each field was coordinated by one partner within the project, under the general supervision of prof. De Schutter (CPDR-UCL). The coordinators were, respectively, prof. S. Deakin and C. Barnard from Cambridge University (social rights), prof. M. Nowak from BIM-Wien (anti-discrimination), prof. P. de Hert from the VUB (criminal law and procedure), and prof. S. Gutwirth, also from the VUB (data protection). In order to facilitate the implementation of the second phase of the research, a set of guidelines was prepared by the coordinator on the basis of the results of the first phase, whose purpose was to provide a grid of analysis of the developments documented in each of the fields under study.

The work undertaken by each of the sub-units aimed overall at analysing the policy field concerned through the lenses of the REFGOV hypothesis. The approach was threefold: a first objective was to identify the existing forms of new modes of governance within the policy area at issue, mapping current practices both at the level of the Member States as well as at EU level; then, the strengths and weaknesses of any such modes of governance were to be identified; finally, ways through which a more developed open method of coordinating Member States' policies in the area under scrutiny could produce beneficial effects and the risks it could

potentially entail were also to be examined. The role of the different actors partaking in the legislative procedure, the existence of non-legislative tools and mechanisms of deliberation, the impact of international and European human rights standards, as well as the role of consultations, evaluations and impact assessments were explored.

The final objective was to identify in each thematic field (a) mechanisms that might both diversify and multiply the existing incentive frameworks for collective learning, (b) mechanisms that might both expand the range of stakeholders involved and ensure their empowerment by providing them with the adequate information and resources, and (c) mechanisms which would encourage collective learning by experimentation and could ensure that the conditions for collective learning were themselves made open to deliberation.

The main contributions of the first and second phases of the research have been published as *Human Rights in the Web of Governance. Towards a Learning-Based Fundamental Rights Policy for the EU*, O. De Schutter and V. Moreno Lax (eds.), (Bruxelles: Bruylant) 2010.

The third phase of the research (June 2008-May 2010) was devoted to taking stock of the developments during the previous phases, in order to move towards the formulation of policy proposals, taking into account the general hypothesis developed in the REFGOV research, and paying special attention to the capacities of the actors involved in decision-making to question the background presuppositions of the positions adopted by the different actors involved.

The recommendations proposed (see REFGOV working paper WP-FR-33 'A New Direction for the Fundamental Rights Policy of the EU') take account of the full institutional setting in which the fundamental rights policy of the EU shall develop in the future, including the changes introduced by the Lisbon Treaty – especially the acquisition of legally-binding force by the EU Charter of fundamental rights –, the establishment of the Fundamental Rights Agency, the development of national institutions for the promotion and protection of human rights at national level, and the increased reliance on human rights impact assessments and similar tools. They address the following questions:

a) *Allocation of competences between the EU and the Member States and principles of subsidiarity and proportionality.* The emphasis here is on the process through which the issues on which initiatives might be required at EU level can effectively be identified, and particularly, on how the requirements of subsidiarity and proportionality could be redefined in a more 'pro-active' mode, taking into account – beyond the formal distinction between different levels of governance and the division of tasks between them – the influence policies pursued at each level (regional, national, European, global) exercise on all the other levels.

b) *The relationship between the 'economic' and the 'social' constitutions of the EU.* The economic constitution is the set of rules defining, for any single entity, the division of tasks between the political authorities and the market, i.e. the role of the State in the market. The object of our inquiry was to determine whether this notion should not be complemented by that of a 'social' constitution, i.e. by the imposition of positive obligations imposed on the State to take action when inter-jurisdictional competition (between States) or the exercise of their economic freedoms by private actors (particularly freedom to provide services and freedom of establishment of undertakings) threatens to disrupt the balance between economic freedoms and social rights which is considered desirable.

c) *The legislative process: standard-setting in the area of fundamental rights.* Another set of questions concerned the preparation of legislative proposals; the role of the different actors in the legislative procedure; and the implementation of EU legislation by the Member States. We asked, in particular, whether current modes of consultation of stakeholders are satisfactory, which role impact assessments play in the legislative process, and how the reference to internationally recognized human rights plays a role in the formulation of proposals that relate to fundamental rights.

d) *Non-legislative tools which could be relied upon in order to develop the fundamental rights policy of the EU.* The role of the Fundamental Rights Agency and of open methods of coordination between the EU Member States, as they have emerged in a number of areas in the implementation of the Lisbon Strategy (2000-2010), have equally been discussed, and proposals have been made to improve the potential of these tools.

Main publications referring to this thematic research see the table hereafter - For a more complete list see the project website <http://refgov.cpd.ucl.ac.be/?go=publications>

3. Services of General Interest - SGI

The research in this sub-network was conducted in five different workpackages devoted respectively to services of general interest the Energy sector, services of general interest in the Healthcare sector, the regulation of public bodies, "collective actors" in the public services and finally to the analysis of the transformation of public services and the conception of what they are from a historical perspective.

Collective actors

The research conducted in this section of the SGI subnetwork meant to highlight and reconstruct empirically, using the theoretical approach proposed in the project, the reflexivity of collective actors who have been involved in the debate on the recent transformation of SGI governance. This was done through a case study on the Unions in the Belgian energy sector. The development of the case study and the final results are presented in the publication on the theoretical work "Democracy, Law and Governance" and in the REFGOV paper WP-SGI-25

Energy group

The Research Process and Methodology

The SGI-Energy sub-group included researchers from the UK, from Germany, from Hungary and from Canada. Its work commenced in Autumn 2005 with discussions with other sub-groups on services of general interest about the methodology to be adopted and with an exchange of common ideas. Historical studies of energy regulation in the researchers' respective countries were also drafted. The objectives of the main study were to assess the capacities of regulatory institutions in energy for social learning, looking at both their existing activities and their potential. This was conducted within the general analytical framework of the REFGOV programme as set out in the successive synthesis reports and finally in the common publication. A further aim was to propose institutional arrangements which could provide for more sophisticated forms of social learning.

A common approach for the different teams was secured through regular meetings in Paris and Brussels, and through a workshop held in Bristol in Summer 2007. Particularly strong links were maintained with the SGI-Healthcare sub-group. Within this general approach each national team adopted a slightly different emphasis in its study. That from the UK examined the regulatory institutions adopted after privatisation and liberalisation and changes made in the land-use planning system to support security of supply; that from Germany the changing arrangements for network access; that from Hungary the moves from a centrally-organised economy to one with limited competition with a particular emphasis on price regulation, and the Canadian team emphasised the role of multi-level governance and the role of the provinces, as well as the relations between Canada and the wider energy context of North America as a whole. Reports on the experience in each national context were drafted, and a chapter summarising key findings was included in the common publication. Sessions were also

organised in the final conference in May 2010 in which the findings were discussed with rapporteurs.

Findings and Recommendations

The national case-studies were structured around the four theoretical models set out in the two REFGOV synthesis reports and presented in chapter one of the REFGOV common publication²: institutional economics; the collaborative or relational approach; democratic experimentalism and the internal and pragmatic, or 'genetic' approach.

The case studies were unanimous in finding the dominant model to be that of institutional economics, a finding which is hardly surprising given the major stress in this sector on economic liberalisation accompanied by varying forms of regulation. There are also elements of the collaborative or relational approach, but very little going beyond this except in some very isolated pockets of administration.

Thus institutional arrangements for social learning appear underdeveloped in the energy field in all of the cases studies; remarkably less developed than in the case of the healthcare study. Reasons for this include, notably, the pressure, both at European level and nationally, for economic liberalisation in which the market is seen as the major means of social learning and participation is achieved through free exchange. The German experience pointed to the difficulty of effective social learning through self-regulation where interests such as those of consumers, and the public interest, are not represented. In the UK, rapid liberalisation led to near-total neglect of security of supply issues; these are now having to be approached through state-led decisions on the generating mix, including reliance on nuclear power, which have themselves led to controversial attempts to re-shape participation in decision-making.

There were, however, some pockets of practice which suggest potential for moves beyond institutional economics and the collaborative and relational approach. Thus, in the UK, notions of 'participatory planning' moved in the direction of a more experimentalist model; in Canada, and especially in Quebec, the involvement of native and aboriginal communities went beyond the traditionally passive process of consultation. Also in Quebec, there was some evidence of reflexivity in the market for alternative energy production, such as wind power, involving both some private generation and inclusion of native communities. In Germany, the monitoring and evaluation roles of the new regulatory agency, together with opportunities for consultation and participation in its decisions, might offer potential for further development of more reflexive procedures for social learning. However, what is striking in all these cases is their isolation; they did not form part of any **general** attempt to create such procedures, and, crucially, there is no agency responsible for monitoring their success and benchmarking, thus providing opportunities for 'learning about learning.'

These findings led directly to institutional proposals. They included clarifying the decision-making hierarchy and creation of an independent body to facilitate public participation in official decisions, including organising participatory impact analysis and assisting in the organisation of civil society groups. Further proposals included increasing the capacities of regulatory bodies, for example through monitoring and evaluation duties. The aim of these proposals was augment trust, lack of which was seen as the major obstacle to more effective social learning, and so secure 'learning about learning' through monitoring and bench-marking.

Major Outputs

Each team made available national reports via the REFGOV website. Findings were summarised in the chapter included in the REFGOV common publication in 2010, and each

² Lenoble, J. and Maesschalck, M., *Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance* in Lenoble J. and De Schutter O., *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (2010), Oxford, Hart Publishing, 3-21 pp.

national team undertook further publications based on the findings. For example, for the UK they contributed to a discussion regulation as deliberation in Tony Prosser's *The Regulatory Enterprise* (2010); the German team published extensively in relation to energy regulation, including the publication of a 400-page dissertation. The Hungarian team published a major account of price regulation in the electricity market, and the Canadian team published extensively on the effects of liberalisation in their energy sector. Further details of the publications can be found elsewhere in this report.

Main publications referring to this thematic research see the table p - For a more complete list see the project website <http://refgov.cpd.r.ucl.ac.be/?go=publications>

Healthcare group

Overview

The work of the healthcare sub-group culminated in the development of institutional proposals for the improvement of healthcare governance in England and Wales, France, and Hungary, linked to case studies of collective learning. The case studies revealed significant, but very different, barriers (obstacles, 'roadblocks') to collective learning in each of the four countries. These barriers to social learning were analyzed as appropriate in terms of the institutional economic, collaborative and relational, democratic experimentalist and genetic approaches.

In Hungary, institutional proposals focus on the economic and deliberative/democratic foundations of reflexive governance, emphasizing the need to establish transparency in economic processes and strengthen representative bodies (HIF, Civil College, Regional Health Councils, Advocates of Patients Rights, etc). The research highlights the potential of locally-based initiatives for countering obstacles to collective learning posed by national government's resistance to change. In France, institutional proposals are related to the specific case study on the reframing of actors' identities in addressing the problem of healthcare expenditure control, with particular attention to the legislative actor and the role of the Council for Healthcare Insurance Reform as a reflexive actor in transforming the national policy debate.

The case study of Patient and Public Involvement (PPI) in England and Wales shows how reflexive governance may be analyzed in terms of the progressive broadening of conditions of social learning (economic institutionalist, collaborative/relational, and pragmatic) in collective actions to resolve problems in the general interest. The attainment of fully reflexive governance is shown to be dependent on a combination of institutional conditions and capacities that are cumulative rather than mutually exclusive. Hence the effective engagement of patients and the public in decision making processes is essential to establishing the collaborative and relational foundations on which advanced social learning operations – involving cognitive reframing and identity transformation on the part of key actors in healthcare networks – are based. The case study considers in detail how the recently reformed PPI frameworks in England and Wales may impede or facilitate the development of such conditions of social learning within particular organizations (for example, regulators, purchasers and providers, NGOs), in the relationships between these bodies, and in healthcare networks as a whole.

Three main lessons are drawn from the UK case study. First, the government should pay specific attention to the *social learning* dimension of governance in public service sectors such as healthcare, as distinct from more familiar issues of efficiency, legitimacy and accountability. Such recognition might lead to a better understanding of the relationship between the economic and democratic strategies for healthcare modernisation, and of the need to avoid undermining the basic collaborative and relational conditions of effective social learning. Second, the fundamental problem for government remains how to secure these collaborative and relational foundations and how to build on them the further experimentalist and pragmatist elements necessary for fully reflexive governance. Finally, the limits of what can be achieved through regulation and other forms of government intervention must be properly

acknowledged. Combined with appropriate economic and social policy initiatives on the part of government, regulation can help secure the conditions of more effective social learning, but it cannot compel the resolution of the most complex and intractable governance problems. Such resolution is likely to require a kind of radical transformation in the identity and role of key actors in healthcare networks that cannot be externally imposed.

From Collaborative to Genetic Governance – Healthcare Services in England

Resources in the later stages of the project were concentrated on the development of a specific case study of the role of NGOs in health and social care networks in England, with particular reference to two particular NGOs (a mental health charity, and a cancer care charity). Illustrating the REFGOV hypothesis, this case study demonstrates how the ability of actors such as NGOs to realize the interests of those they represent is dependent on their engaging in processes of reflexive social learning, and in particular on their ability where appropriate to transform their collective identity by reframing the way in which they represent their interests. The case study shows how each NGO engaged in deliberative and collaborative processes in seeking to maximize the satisfaction of their beneficiaries' normative expectations. Further, in recent years each organization appears to have reframed their identity in the context of developments in their policy environments. That is, in each case there has been development in the organization's understanding of what it means to seek to maximize the satisfaction of the normative expectations of members of the collective action. As would be expected of two diverse organizations, the nature of change in each is very different. However as the REFGOV hypothesis predicts, these changes have not been spontaneous, and in both cases it is possible to identify how the change has involved reflectibility and destinability as elements in social learning.

Further research – transformative potential of 'third sector' organizations

Our preliminary empirical case study examining the role of NGOs in healthcare networks in England suggests that charitable and other 'third sector' bodies have a unique potential to contribute to the resolution of many contemporary public service problems, and that this potential is linked with their capacities for responding to challenges and opportunities in their environments through social learning involving the reframing of problems and representations, and the adjustment and transformation of their collective identities. Members of the UK healthcare research team based at the University of Leeds, the School of Hygiene and Tropical Medicine (University of London), and Swansea University are seeking funding to explore this hypothesis and deepen the REFGOV research agenda by: (1) broadening the focus to include social learning occurring within, and in relationships between, other organizations (regulators, commissioners, policy-makers, partners); (2) comparing the forms of engagement of NGOs in policy making and the provision of services under contract with government agencies in the different institutional and organizational environments of health and social care in England and Wales following devolution; and (3) exploring the way in which government policy and regulatory frameworks impede or facilitate the capacities of actors to engage in social learning in these policy and regulatory environments.

Major Outputs

Each team made available national reports via the REFGOV website. The Healthcare group to the common publication is one of constitutes one of to the contribution the most closely associated with the theoretical approach developed in the project: P. Vincent-Jones and C. Mullen, 'From Collaborative to Genetic Governance: The Example of Healthcare Services in England' in O. de Schutter and J. Lenoble, eds., *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart Publishing, 2010), 147-178. Other case studies were in the wake of the REFGOV research. They are listed in the table [hereafter](#).

For a more complete list see the project website <http://refgov.cpd.r.ucl.ac.be/?go=publications>

Regulation of public bodies

The objective of the work-package addressing regulation of the public sector was to inquire into the extent, nature and potential of reflexive governance in the public sector through comparison of reflexive governance in the UK and Australia. Scoping work was undertaken in respect of regulation of prisons, higher education institutions and programmes of better regulation. Better regulation was selected for the empirical component of the research for a number of reasons. First there was evidence of a strongly reflexive element in supranational policy in the EU and in particular in the OECD. Second there was very limited evidence of reflexive governance in the regulation of prisons. Third, policies of better regulation have a high degree of importance within both EU and national regulatory policy. A programme of documentary research and interviews was undertaken within the UK and Australia and Ireland was added to the research because of the interested it added as a late mover on better regulation policies (a policy taker rather than a policy maker, in contrast to the UK and Australia). The outputs of the research include a substantial working paper which reports the empirical research, two further working papers addressing both theoretical and empirical results from the research, a chapter contribution to the project book on Reflexive Governance, addressing meta-regulation and reflexive governance in regulation generally, and a commissioned article for a journal special issue on democratic governance and better regulation. The research has found that whilst national policies on better regulation give prominence to more open and reflexive processes for shaping both objectives and instruments for regulation, the implementation of the policies tends to be restricted to more mechanistic and narrow processes of regulatory impact analysis. The research highlights parallel policy processes in regulatory fields such as environmental regulation where there is greater evidence of reflexivity in regulatory governance and offers institutional recommendations for learning from such experience to deploy more reflexive governance modes as a more integral part of better regulation policies. Strong communication between the sub-group projects supported mutual learning and is reflected in the extensive cross-references in the chapter contribution to the project book. In this way the research effectively provides a synthesis of the theory, the empirical research and the institutional proposals.

List of outputs see table p.20 and website <http://refgov.cpdr.ucl.ac.be/?go=publications>

Historical perspective

The research on the historical perspective was built in three steps. Initially, the national teams of the SGI – sub-network produced an analysis of key documents reflecting the transformations in the SGI - governance facing the neo-liberal critiques on the legitimacy and efficiency of the public intervention. In a second step, the national teams produced papers devoted to specific public sectors: Energy and Healthcare. The purpose was to give an account of narratives of the governance design evolution. Specifically, these papers focused on how the institutional design has been conceived and justified. In a third step, the project was to confront these narratives of the governance technology and to point out how is configured the common knowledge of the services of general interest. To this end, on the basis of a synthesis of the national teams' contributions, the research chose to focus on the role of the international comparisons in the national discourses, especially in the Healthcare sector. In reporting the transformation of the comparison methodology, it was possible to highlight the influence of the neo-liberal critiques in the way services of general interest are represented in Europe. (paper REFGOV-WP-SGI-26 "Justifications and the organization of services of general interest. Historical perspective on governance".)

4. Corporate Governance - CG

The aim of the corporate governance subnetwork within REFGOV was to carry out a programme of empirical research on corporate governance that was comparative in scope, broadly interdisciplinary, and informed by developments in reflexive theories of learning and evolution. The empirical work included legal studies of the development of norms and standards in the corporate governance field at global, European, national and sectoral level; econometric analysis of the impact of corporate governance norms on financial development and managerial practice; and case studies of the operation of corporate governance standards at sector and enterprise level.

The starting point for the research was a conception of reflexive governance as a set of mechanisms for dealing with coordination failures, in the name of the public interest, in ways which go beyond hierarchical or 'command-and-control' techniques of regulation. The corporate enterprise provides a useful context in which to study reflexive governance, given the coexistence, in this field, of different forms of regulation (legislation, case-law, codes, disclosure regimes, and accounting standards). There has also been a conscious mixing of what might be called 'regulatory' and 'incentive-based approaches'. A good example of this is the 'comply or explain' principle which underlies the corporate governance codes which first emerged in the 1990s.

One of the concrete themes that we have been looking at concerns the growing influence of the so-called 'shareholder value norm' in policy and practice. This can be seen at the level of legal instruments, such as recent European directives (such as the Takeover Directive), and in the way in which capital market considerations are coming to play a greater role in managerial decision-making in several European countries which, until recently, were insulated from such pressures. From a 'reflexive' perspective, the shareholder value approach raises questions about the sustainability of firms in an environment where short-term financial pressures are driving outcomes. In our empirical work, we have addressed the issue of how firms are responding to these pressures, while attempting to balance the interests of a wider range of constituencies (or so-called 'stakeholders') whose cooperation is needed over the longer term. A first empirical finding, based on a comprehensive mapping of developments in company legislation and corporate governance codes in a wide range of countries in the EU and overseas, is that corporate governance standards based on the shareholder value approach, in particular norms relating to independent boards and minority shareholder protection in takeover bids, were very widely adopted in many countries during the course of the 1990s and 2000s. The shareholder value model originated in common law/liberal market systems, such as the UK, and then spread to civil law/coordinated market regimes. It was widely diffused in developing and transition countries. However, our empirical work has also established that this convergence on the shareholder value approach has taken place largely at the level of formal laws, and has had a limited impact on the practice of governance at market or firm level. Thus econometric analysis has shown that formal strengthening of shareholder rights has not, on the whole, been correlated with financial development, in the sense of producing an increase, for example, in stock market capitalization or private credit relative to GDP. These findings call into question some of the core predictions of mainstream corporate governance theory as well as the expectations of policy-makers in this field. Case studies of regulatory change have provided possible explanations for the non-effect of legal reforms, by highlighting the role of path dependencies at national level. Case studies of the Hungarian and Slovenian corporate governance codes have stressed the importance of local path-dependent factors, arising from the transition process, in limiting the degree of convergence with Anglo-American practice. A case study of the operation of the Belgian corporate governance code illustrates the lack of fit between norms designed for the liquid capital markets and dispersed ownership which characterize British and American practice, and the concentrated ownership structures of most Belgian listed companies.



Sectoral and firm-level case studies show how, in a number of contexts, the influence of the shareholder-value norm has been mediated by institutional and organisational practices which reflect a stakeholder-orientated or communitarian logic. Econometric analysis of the relationship between corporate governance forms and HRM practices at workplace level in Britain and France identified growing financial pressures on firms in both countries, but also evidence of 'negotiated shareholder value' or rent-sharing between workers and shareholders, in particular in the French case. The use of contractual devices for risk-sharing and deliberation between stakeholders was highlighted by a study of the construction of the Heathrow Terminal 5 building. This work suggested that, even in the context of the strongly shareholder-orientated UK system, utility regulation and contractual governance could play a role in lengthening time horizons, thereby mitigating short-term financial pressures, and embedding a learning-based approach to problem solving. A study of hedge fund activism demonstrated the limits of the shareholder value approach in continental Europe and Japan, against the background of a communitarian ethic within firms and a relational approach to investment practice from institutional shareholders. The analysis of network relations in the wine producing sector stressed the endogeneity of practices with regard to local conditions, which led to different forms of network relations emerging across the different countries studied, but also within them, as different regions exhibited divergent tendencies. This work also shows that transnational norms governing SMEs and network forms may play a role in removing barriers to the emergence of effective forms of inter-firm contracting.

A central goal of the work of the corporate governance subnetwork has been to integrate empirical research with the theoretical framework of the REFGOV project. Studies of the 'comply or explain' approach to corporate governance looked at the issue of how far this type of 'soft law' approach is capable of generating a learning process around what constitutes 'best practice'. The studies found evidence of 'herding' and a tendency towards convergence in formal compliance, at the expense of learning based on diversity of practice. The Terminal 5 study applied the distinction developed by Lenoble and Maesschalck between new-institutionalist, relational, pragmatist and 'genetic' modes of reflexive governance. The study demonstrated that the incentive structures put in place by T5 contracts, while containing some new-institutionalist elements, were also left incomplete by design in significant respects, so as to allow room for relational approaches to develop. The 'genetic' approach to reflexive governance has been used in a set of case studies of inter-organizational partnerships, allowing labour market regulation to evolve flexibly from traditional social regulation constructed on the basis of bilateral employment relations whilst preserving the public interest.. Reflexive insights were also applied to analysis of the recent financial crisis. The perverse effects of bonus regimes and executive payment systems, and the ineffectiveness of internal audit mechanisms and external shareholder monitoring, highlight the limited effectiveness of incentive systems based on new-institutionalist approaches to governance.

Another of the concrete themes which we have been exploring relates to corporate social responsibility ('CSR'). CSR is being actively promoted by governments as a 'reflexive' type of regulation which depends on voluntary action by companies 'beyond compliance'. Because corporate reputation has an economic value, firms are incentivised to respond to demands from shareholder activists and the wider public to minimize the harms they displace on to third parties. However, our empirical research suggests that CSR often misses its targets. Investors with a 'socially responsible' agenda are deterred from seeing it through, because these activities involve high costs to them, whereas the benefits flow to other investors or to 'society' generally. From a reflexive point of view, what is missing is the kind of learning process which would embed CSR in organisational practices. This suggests the need for a re-think on the role of company law (and related forms of legal regulation) in providing the right kind of framework for CSR to develop.

The work of the subnetwork was characterised by methodological pluralism, in the sense of combining quantitative and qualitative approaches, and by innovation in the methods used, in particular with regard to the use of novel 'leximetric' techniques for mapping legal and



regulatory change over time. The development of longitudinal datasets on legal change, when used in conjunction with time-series and panel-data econometrics, made it possible to test some of the core hypotheses in the law and finance debate, and to produce findings which called into question the previously prevailing wisdom in this field. Case study work provided in-depth accounts of institutional change in a wide range of contexts, complementing the quantitative analysis.

The subnetwork also sought to advance the theoretical understanding of governance. In particular, theoretical work addressed points of contact between approaches based on the 'law and economics' conception of governance, on the one hand, and systems-theoretical analyses on the other.

The work of the sub-network has been extensively disseminated. There have been (or will be, in the case of forthcoming work) publications in a number of internationally-recognised, peer-reviewed journals (including *Socio-Economic Review*, *Industrial and Corporate Change*, *British Journal of Industrial Relations*, *Industrial Relations Journal*, *Journal of Empirical Legal Studies*, *Journal of Corporate Law Studies*, *European Law Review*, *European Law Journal*, *International and Comparative Law Quarterly*, *American Journal of Comparative Law*, *Journal of Institutional and Theoretical Economics*, *Cambridge Journal of Economics*, *Economy and Society*, *Journal of Economic Geography*, *Louvain Economic Review*, and *Economics Letters*). International conferences at which the work has recently been presented include the SASE conference in July 2009 and the Strategic Management Conference in October 2009. Findings from the project will be presented as part of an invited session at the International Economic Association congress in 2011.

The work has been very widely disseminated to non-academic users and stakeholders including companies, NGOs and policy makers. Several members of the project team have provided advice, based on the REFGOV research, to governments, companies and other non-academic users of research. A Symposium was held with REFGOV support (co-sponsoring the event with the UK ESRC) at the Judge Business School in Cambridge in June 2009 in which over 100 participants took part. They included senior managers from leading global companies (Saint Gobain and McKinsey & Co.), senior academics in the corporate governance field (Professor Andrei Shleifer from Harvard University who was the keynote speaker), and policy-makers who have had a seminal influence on the development of the corporate governance field (Sir Adrian Cadbury). There was also extensive user participation from corporate governance practitioners in the final conference of the REFGOV project in Brussels in May 2010. The main findings from the wine studies were presented at a series of user workshops during 2009 and 2010, and two international conferences on the wine research were held with stakeholders, in Brussels in March 2010 and in Porto in May 2010. Those taking part included representatives of trade associations and firms in the wine production sector from several EU member states.

Recognition of the academic value and policy impact of the research has come from, among other things, the award of the European Corporate Governance Institute prize for legal research to working papers based on the REFGOV work in both 2009 and 2010

A selection of the main outputs is listed in the table p.20. For a more complete list see the project website <http://refgov.cpdf.ucl.ac.be/?go=publications>

5. Institutional Frames for Markets - IFM

The contribution of the IFM network to the Ref-Gov project was to go beyond the current approach of economics — including New-Institutional Economics and Evolutionary Economics — regarding the design of institutional frameworks. These current approaches see the process of institutional design as "mechanical" — institutions design being seen as a matter of selecting turnkey tools available on the shelves to address specific socio-economic issues — or as a non-controllable and myopic "biologic" process by which local innovations are adopted and selected



through various processes that are beyond the control of agents, instead of approaching it on the basis of the knowledge accumulated over the past years. To do so, we endorsed an approach of governance in term of learning processes, and we tried to identify the logics (and their interplay) behind the design and evolutions of institutions: the economic quest for efficiency; the political fights for strength and rewarding positions; the legal constraints of security and stability. We claim that these interactions have to be better understood to build more relevant governance strategies.

The objective of the IFM sub-project in the RefGov project, therefore, was to provide a systematic analysis of the interplay between governmental regulations and self-regulations in the building of institutional frameworks for markets. It focused first on the complex processes by which governmental interventions and agreements between stakeholders combine to establish collective rules framing market activities. Second it analyzed the results of these processes both in terms of efficiency of the performance of markets, and in terms of their ability to take into account the interests of the various stakeholders in the society (i.e., the public interest).

The IFM project was organized into three phases:

- A short starting phase (May 2005-Feb 2006) was dedicated to analyzing the "state of the art" on the subject.
- For a longer interim phase (Feb 2006-June 2009) five parallel-applied research programs were carried out dealing with complementary issues.
- A concluding phase (July 2009-May 2010) has been aimed at collectively build a synthesis of these researches.

The objective of the first year was to launch both the surveys on the state of the art and the five parallel applied studies. The second year was dedicated to the completion of the publication process resulting from the first phase, and to the development of the various applied studies, resulting in an important number of publications and working papers. The third and the fourth years were dedicated to the deepening of the five parallel research programs. In addition, in 2008, the scholars involved in IFM decided to reshape the last phase of the project, both to take into account the new research dynamics initiated within the IFM sub-network, and to better highlight how the deepening of the knowledge on the economic outcome of institutions and of the strategic games played around the design of institutional framework might contribute to advances in the theory of reflexive governance.

Before discussing the details of the advances performed during the fifth year of the project, we present the achievements of the working plan and explain the logic of the main amendments to it.

1.1- Working Plan

First Phase

The first phase resulted on two syntheses-reports on the state of the art in economics, and especially in New Institutional Economics on:

- The analysis of the Institutional Frameworks enabling market to perform (jointly written by Eric Brousseau (U. of Paris X) and Antonio Nicita (U.of Siena)). A first working paper was turned into a shorter publishable paper, recently published in the Special issue of the *Revue d'Economie Industrielle* gathering contributions on the main advances in industrial organizations for the last 30 years. It points out the contribution of New-Institutional Economics on policy making in matter of market design, and deduces the research agenda resulting from the shortcoming of NIE from that perspective. It insists in particular on the complexity of strategic games at play within institutional frameworks among a vast number of diverse stakeholders able to manage several tools (negotiation, process of law making, enforcement mechanisms, etc.). It calls therefore for a better understanding of processes of institutional evolutions and for the implementation of step-by-step processes of reform where



reforms should be permanently assessed to favour learning on actual impacts of alternative policy reforms in various contexts.

- The assessment of the current deregulation processes in network industries (jointly written by Eric Brousseau (U. of Paris X) and Jean-Michel Glachant (U. of Paris XI)) forthcoming in a book co-edited by Eric Brousseau, Cecile Meadel and Meryem Marzouki at Cambridge University Press. This paper explains why and how the logic of regulations has been transformed in most network industries for the past 30 years. The governance of networks has been becoming far more complex and subject to permanent changes due to technical changes, to the collapse of barriers to trade and hence, to permanent process of innovation fostered by competition. These are the main reasons for the failures of the traditional command and control regulations. In the same time, pure competition is not sustainable in these industries characterized by sustainable monopolies (or oligopolies) and strong interdependencies. This is why the process of competition should be overseen by regulators organizing forums allowing the various stakeholders to defend their interest, while at the same time they would be led/incited to provide information to the regulator. Such forums are the only way to guarantee a permanent learning by the regulators about issues and their solutions.

The book is expected to be published in 2011.

Second Phase

The second phase started in Feb 2006 and ended in June 2009. It consisted of five parallel programs coordinated by a specific team:

Each of the programs consists of research carried out either collectively or separately and of regular exchanges among the participants in the various programs; Specific meetings gathered members and non-members of the programs. They were generally at the core of processes of collective publication. Four main meetings were organized between June 2009 and June 2010 (see the details in the appendix):

- Workshop on "Manufacturing Markets: legal, political and economic dynamics" on June 11-13, 2009 in Florence
- Workshops on "Measuring Law and Institutions III", on October 2-3 in Barcelona
- Workshop on "Open Models of Innovation and of Information Goods Production and Distribution" on January 17th, 2010, in Paris
- Workshop on "Digital Business Models: Understanding Strategies", on June 25-26, 2010, in Paris

Beside these workshops, the main output of the efforts carried out under the Ref-Gov project resulted in the publication of working papers aimed at being published in scientific journals and collective books.

Third Phase

In line with the reorganization of the conclusive phase of the project discussed in the 2008 report, the finalization of the IFM project was rescheduled. Two workshops (initially planned in Sept 2009 and Dec 2009) dedicated respectively to institutional policy making and to analytical advances on the economics of institutional frameworks, were re-scheduled and aimed at preparing significant collective publications, to be disseminated in particular thanks to the international Ref-Gov conference held in May 2010 in Brussels.

The first workshop "Manufacturing Markets: legal, political and economic dynamics" was held on June 11-13, 2009 in Florence (see details in the Appendix) was jointly organized by EconomiX (U. Paris Ovest) and ADIS (U. Paris Sud) both as a conclusive event of the second phase of RefGov and as the launching of the third phase. A group of more than 45 researchers in law, economics, political science, economic history gathered for 3 days in Florence for intensive discussions around more than 20 papers envisaging from different perspectives how institutional frameworks result from the interplay among three logics: the economic seek for efficiency; the political fights for strength and secure positions; the legal constraints of security and stability. A book to be published by Cambridge University Press is currently in preparation



(Copy edited manuscript scheduled in the end of 2011). The book should be a significant advance in the perspective of the NIE, since it develop the analysis (applied to various domains) of the constraints under which institutional reforms to implement more efficient markets should be driven. Here, thanks to its systematic effort to analyze the process of institutional change, the IFM network will be directly contributing to the design and implementation of structural policies.

The second workshop “Measuring Law and Institutions III: Analytical and Methodological Challenges” took place in Barcelona on October 2-3, 2009 (see details in the Appendix). The aim of this workshop was to discuss the current state of development of the theory of institutions in parallel with the advances in their measure and in empirical methodologies, so as assess what has been achieved and elaborate plans for future research. It was a major “reflexive” enterprise of the NIE community aimed at enriching the toolbox of the scientific community thanks to methodological propositions, which contribute to progressing in the analysis of institutions and in the performance of institutional policies. We are convinced that the development of these techniques over the past years was responsible for major policy mistakes in matter of “institutional design”. In the same time, we think that the progress made over the past years in matter of measurement and theorization of institutions is essential to sustain the development of better understanding and policies. We think therefore essential to highlight, especially thanks to a position paper reflecting the opinion of leading scholars in the field, the research directions to be drawn and the policy recommendations to be deepened. A symposium of a journal should follow. A preparatory roundtable on the topic gathering D. Acemoglu (MIT), M. Aoki (Stanford), S. Masten (Michigan), and B. Weingast (Stanford) was held at the ISNIE Conference in Berkeley in June 2009.

Dissemination Policy

The major dissemination policy chosen by the IFM Network is scientific publication. Indeed scientific publication is both a way to diffuse the knowledge produced in the network and a way to develop scientific reputation of team members. This second aspect is essential because such reputation incites decision makers — both policy makers and business executives — to consult scientists when elaborating reforms and designing strategies. Thus several members of the teams are regularly involved in decision making either as consultant or as members of high-level experts committees. This is particularly the case of Benito Arrunada on the design of property rights systems, Eric Brousseau on the management of institutional reforms, Jean-Michel Glachant on the building of the EU integrated energy market, Antonio Nicita on antitrust policies, Stephane Saussier on Public-Private Partnerships.

It is also worth to note that, in terms of publication, the members of the team did not focussed on scientific journals only. Major international journals have indeed an important audience, but only in a given scientific field. The members of the IFM team also targeted other disciplines, and a wider audience beyond the sole scientific one, by focussing part of their efforts in publishing collective books. Several books published by the most prominent international publishers will come out of the process initiated by IFM-RefGov, authored and edited in particular by Benito Arrunada, Eric Brousseau, Jean-Michel Glachant and Antonio Nicita. All these books are also an essential way to spread the research carried out in RefGov in the long run. The team also communicated its research to broader audiences, performing many lectures and publishing short papers in trade journals and press articles.

1.2- Development in the framework of the Second Phase

1.2.1- Creation and Governance of Competitive Mechanisms in Network industries (WP12)

[Coordinator: Adis/U.Paris XI / Teams Involved Adis/U.Paris XI, CE.EI/Praha, U.Siena, EconomiX/U.Paris X].



Reforming network industry on a market base in an institutional reflexive frame is still an open challenge. The large amount of work REFGOV WP12 did in that last period is illustrated by the working papers published both by U. Paris Sud and CERGE (see the appendix and the REFGOV website). They contributed to collecting evidence, building analytical tools and elaborating the corresponding theory.

The team explored several new fields looking for evidence permitting to analyze deeper the European experience with network industry. We did look at:

- practical arrangements to separate a network industry from its network (an “unbundling” required by the energy Third Package of EU legislation)
- alternative organizational infrastructures for creating a new downstream market (the electricity retail market)
- how market tools and non market tools really work in contributing to the EU gas security of supply
- the various ways the European Commission could create European Agencies for the network industries
- the detailed practicalities of European competition policy with long term energy contracting and with exemption of regulation for new “market based” electrical transmission lines
- the main challenges that the EU large-scale wind power policy brings to a market-based electrical system

The standard economic approach does not allow describing and explaining the very core characteristics of the network industry market base reform. What is lacking in the current approach is that “markets” are difficult to “open”, because there is no “underlying” market to be open. The market infrastructure has to be built. The market competition has to be built. The basic architecture of rules and rights for the monopoly part and the competitive parts has to be built – while it necessarily shapes the following voluntary rearrangements of rules and rights. The competence and knowledge of both Competition and Regulatory Authorities have to be built while they are going to be used as they are since the very start.

All these transformations consume an enormous amount of political, executive and legislative strength, and take time (over more than 15 years) under a very constrained political and legal set of rules. No Member States institutional bases, no European institutional bases have ever been designed to deal with that 15 years long intricacy of changes.

Basically these reforms are require governments, courts, competition and regulatory authorities cooperating inside each of the EU countries, while discovering what the question is made of, or cooperating to be able to investigate deeper into this or that part of the problem or the feasible remedies. Then do the same with neighbouring countries, and do it also with the EU corresponding authorities, to end with a certain EU frame. The key feature of this appears to be institutional as much as “market based rationale”. Moreover, network industries are typical sets of vested interests concerning very high stakes. Investors, companies, consumers having all benefited of some political or legal advantage at some point. It results in a endless and wide scale political economic conflicts.

Of course all the pressure put into the process of change by stakeholders is not purely “interest minded”. Frequently, the stakeholders do not know exactly what the actual properties of the existing system or of the alternative changes are. A significant amount of the energy used to freeze the moves or to control the changes only express the amount of uncertainty frightening this or that stakeholders.

In the energy sector the already very demanding liberalization process is made even more challenging by a deep transformation on core dimensions of the regulatory framework; while the completion of the EU internal market is not yet achieved. Indeed, the EU has been pushing two new very demanding dimensions to its energy agenda: the security of supply and the climate change challenges. It resulted in an official “Three energy pillars” doctrine where the achievement of the internal market is only one of the three fundamental targets. As we have seen before, it is impossible that no strong feed back loops develop between the three pillars with many contradictions to be seen and further rearrangements to be needed.

The ability of institutions, society and market players to react, to adapt, to understand, to foresee, to decipher, to discover, etc. is clearly becoming a key factor –if not The key factor- of the European network reform policy.

Therefore at least four pieces of theory are still to be built.

- 1° Which market infrastructures are critical to create new markets in formerly monopolized network industries and why? What is the set of feasible alternatives to create them? Are future market trajectory dependent of their birth regime?
- 2° How numerous institutions act and interact to push the market infrastructure building agenda while been
 - a- constrained by the existing institutional frame at three levels (national; bilateral with neighbouring countries; bilateral or multilateral with European Commission and European institutions
 - b- constrained by their existing endowment of resources, knowledge, rights?
- 3° Given 1° and 2° what is a logical reform strategy for each the various market players (like incumbents, new entrants, network operators, market operators, groups of consumers and input providers)? Knowing that 1° and 2° factors are not necessarily exogenously given and can be influenced by market players, how market players allocate their influence resources on 1° and on 2° (at the national and at the EU level) to serve their particular reform strategies at each stage of the industry reform?
- 4° A particular combination of 1°, 2° and 3° produce a certain “governance architecture” of the reform which frames the system evolution like in a post-Williamsonian world “à la North”. However a reform trajectory of that size and speed is really very demanding vis-à-vis human resources and human interaction. It implies that the reform process does not only rely on its “formal” governance architecture. It also depends of the “pure” cognitive or cooperative capability and process permitting to continuously or sequentially explore and “re-institutionalize” the unknown, the uncertain, the unforeseen, the non-individual, the group, the collective. It is an extended dimension of the reflexive governance that economists, even duly “institutionalists”, are not familiar with yet. It has to be the forefront of our research effort.

1.2.2-The Governance of Digital and Information Networks (WP13)

[Coordinator: EconomiX/U.Paris X/ Participants: EconomiX/U.Paris X, UPF/Barc].

The main objective of this WP is to deepen the analysis of the regulation of digital networks and industries. Besides the on-going research on governance, regulation and power phenomena on the Internet (expected publication of a book in 2011), the research on digital intermediaries has been deepened, essentially by analyzing competition among platforms and the various strategies they can take. In 2009-2010 the main effort has been put in the organization of two workshops held in Paris in January and June (details in the appendix). Both workshops gathered a group of distinguished scholars who have advanced our understanding of the digital economy in recent years. The goal of the workshop was to share and discuss different conceptions of digital business models to understand how new markets are built thanks to complex interactions between service providers, users and public authorities. Digital services are especially interesting because they mix for-profit and non-for-profit initiatives as well as public and self-governance efforts. The workshops should result in a symposium in an international journal.

1.2.3-Intellectual Property Rights, Incentives to Invent, to Accumulate Knowledge and to Circulate Intangibles (WP15)

[Coordinator: U.Siena/ Teams Involved: U.Siena, EconomiX/U.Paris X]

The work of the Siena Unit was conducted according to the methodology that distinguishes the overall approach adopted by the Institutional Frames for Markets subnetwork of the RefGov project. In particular, research was guided by the belief that, to understand economic activities relating to knowledge production and the circulation of intangibles, as it is the case for other domains of economic activity, it is necessary to take into consideration:



- the organization of markets;
- the organization of competition;
- the management of externalities.

This approach implies that an understanding of more or less spontaneous innovation activities as well as of any instance of knowledge production requires both an in-depth assessment of the impact of public institutions on the production and circulation of intangibles and an analysis of how private instances of self-regulation and private institutions more generally may influence economic outcomes. In addition to this, the Siena Unit has proceeded from a two-fold assumption. On one side, it has adopted the view that to understand knowledge production it is necessary to broaden the perspective beyond the institutions more narrowly connected to the innovation system by including in the analysis, for instance, public institutions such as antitrust institutions and general issues of private contracting. On the other side, it has included in its research the analysis of specific sectors, so as to ensure that results could go beyond broad theoretical statements. A common element linking most of the analyses produced for the RefGov project, and one that is relatively novel in the context of the analysis of incentives to the production of intangibles is the adoption of a perspective that emphasizes the specific nature of innovative investments and their implications for both public and private orderings. Adopting this view has required an in-dept analysis of the issues that emerge both with specific regard to IPRs-related contracts and in more general contractual agreements.

The impact of public institutions on the organization of markets, competition and on the management of externalities

- The main finding achieved by the Siena Unit with regard to the question of whether public institutions and regulations in the multiple domains affecting knowledge production have a positive impact on the ability of economic agents to efficiently organize and manage the production and distribution of intangibles is that the current asset of the intellectual property system has caused significant tensions in terms of aggregate investment at the international level, international patterns of productive specialization and organization of knowledge production. Pagano and Rossi's work (2009) connects these tensions to the recent economic crisis, arguing that some of the roots of the present crisis may be found in the present institutions of the knowledge economy. IPRs have acted as 'super-tariffs', raising the cost of investments for countries that had neither abundant cheap labour nor high amounts of intellectual property resources. Moreover, IPRs may have later exerted negative effects even on IP-rich firms, as the proliferation of conflicting rights has led firms to increasingly inhibit each other's investments. They find that the resulting investment strike has manifested itself as a saving glut and has mainly affected the USA in a situation aggravated by inadequate regulations.

- The distortions highlighted by Pagano and Rossi (2009) in terms of aggregate investment have been further explored by Belloc and Pagano (2010), that have shown that IPRs affect the patterns of international specialization. In particular, they empirically find that the amount of intellectual assets protected by IPRs that a given country owns in a certain sector positively affects the investment opportunities the same country is able to exploit in the same sector, while, simultaneously, the higher is the country's investment effort in a given sector, the more intense is its patenting in that sector.

- Pagano and Rossi (2010) focus on the micro-level impact of IPRs on the organization of work within firms, finding that the knowledge economy is characterised by a *property paradox*: the intensive use of a non-rival capital good like knowledge should imply that small scale production should be highly competitive and a world of open markets of workers-owned firms should prevail. By contrast, firm size as well as traditional forms of capitalist ownership show little sign to undergo a substantial change in contemporary knowledge-intensive economies.

This set of contributions suggests the opportunity to redress the balance between the public and the private sphere in the intellectual property context, by adopting both short-term measures such as, for instance, patent buyouts, and longer term ones as an increase in the space attributed to Open Science. This may alleviate the negative consequence of the crisis, if

adopted along with monetary policy interventions, financial regulations and standard Keynesian policies.

- Pagano's (2008) work on cultural globalization, institutional diversity and the unequal accumulation of intellectual capital broadens the perspective beyond formal and public institutions, analyzing how incentives to innovation depend not only on the design of intellectual property systems but also on the institutional environment and on the effects produced by globalization on it.

- Belloc (2010) also considers the impact on innovation performance of institutions different from the IPRs system, highlighting the links between corporate governance and innovation. He shows empirically that stronger shareholder protection may depress, rather than encourage, the most valuable corporate productions, because it enables small and diversified shareholders to play opportunistic actions against undiversified stockholders, after specific investments are undertaken by the company; innovation activity, largely based on specific investing, is particularly exposed to this problem.

- A further form of intervention that may contribute to mitigate some of the drawbacks associated to the present working of public institutions for the protection of intangibles (and particularly the IP system) is given by antitrust remedies. Castaldo and Nicita (2007) analyze the case for mandatory access to intellectual property when it is defined as an essential facility by antitrust authorities. By analyzing the main European antitrust cases involving intellectual property as an essential facility, they identify a test aimed at distinguishing essential facility-based IPRs. Manganelli, Nicita and Rossi (2010) take a broader view on antitrust tools by analyzing the multi-level nature of the European competition policy system and highlighting the associated trade-offs.

- Antonio Nicita and Giovanni Ramello (2007) analyze the evolution of Copyright laws and policies through the lenses of optional law theory. They identify the conditions under which Copyright protection turns to be an exclusionary device enacted by dominant firms to preserve their market power, especially in network and media industries. A different problem concerning media industries is highlighted by Nicita and Rossi (2008) that analyze the recent evolution of property rights fragmentation for audiovisual contents in Europe and the policy options faced by regulatory authorities at the European level to promote the development of new media industry. Similar regulatory issues are dealt with in the book by Nicita, Ramello and Silva (2008) *The New Television: Economics, Rules and Market*.

More positive conclusions are reached with regard to the working of the IPRs system in a different sector, the biotechnology sector. Focusing on a specific aspect of IPRs, Magazzini, Pammolli, Riccaboni and Rossi (2009) empirically demonstrate the positive role of patent disclosures in increasing R&D competition in pharmaceuticals. However, the analysis is rather narrow, and does not consider the hypothesis of alternative structures of incentives in the sector.

- Other analyses performed by the Siena Unit focus on broader theoretical notions or on a broader view of the institutional factors that may influence the production and distribution of intangibles. Some works are devoted to the analysis of property rights systems in general and have allowed to reach interesting conclusions with regard to the presently debated issue of whether intellectual property should be analogized to property on tangibles or not. Along these lines are two papers by Nicita, Rizzolli and Rossi (2005) that find in the notion of property incompleteness the common element linking property on tangibles and on intangibles, and a paper by Nicita and Rizzolli (2006) that suggests some guiding criteria on the compared efficiency of property rules versus liability rules in a setting in which property rights are incomplete.

- Other works focus on the working of contractual mechanisms. Nicita and Vatiello (20XX) analyze the meaning of transaction costs when the cost of strategic competition is taken into account, showing how the trade-off between overinvestment in specificity and contractual safeguards applies. Nicita and Sepe (2010) show that the assignment of authority decision matters in optimal contract design with bilateral specific self-investments.

The impact of private orderings and collective frames on the organization of markets, competition and on the management of externalities

- Important results have been reached by the Siena Unit with regard to the issue of private orderings. Particular attention has been devoted to private orderings in the software sector, due to the peculiar importance they have gained in recent years through the diffusion of the Open Source software phenomenon. The latter phenomenon has been analyzed from multiple angles. On one side, Basili, Nicita and Rossi have analyzed through a formal model the interplay between intrinsic and extrinsic motivations, by introducing intrinsic motivations in standard principal-agent model. The analysis shows that, if developers' intrinsic motivation is sufficiently high, paying developers to work on OSS projects allows the firm to induce a desired level of workers' effort at a lower cost compared to the standard case of monetary incentives and sanctions coupled with costly monitoring.

- A further important aspect of the OSS phenomenon has been analyzed by D'Antoni and Rossi (2007), that have found an efficiency-based explanation for the massive adoption by OSS developers of a category of licenses that is particularly restrictive in terms of the future ability of both licensors and licensees to exclude third parties from access to their copyrighted software code. This result casts doubts on the idea that greater appropriability of innovations is invariably associated to greater incentives to invest in its development - a tenet of most of the literature on intellectual property and innovation.

- The result obtained with regard to the Open Source Software domain is generalized by D'Antoni and Rossi (2010), who build a general model that identifies the conditions under which it might be in the interest of innovators to build up a private ordering consisting of an ex-ante commitment not to exclude third parties from access to their intellectual assets. This general model encompasses various instances of collective knowledge creation, including the generation of scientific knowledge under the system of "Open Science", some forms of Research Joint Ventures, Open Source Software etc. The public and private dimensions of the management of intangibles are brought together in the analysis performed by Brousseau and Rossi (2009) where an attempt is made to provide a unified framework for the analysis of the governance of intellectual property resources, starting from methodological assumptions drawing on both New Institutional Economics *stricto sensu* and a broader institutional approach that allows to encompass the analysis of private orderings along with that of markets and formal and informal institutions within the notion of "intellectual property regime". The analysis highlights the main characteristics and trade-offs involved by the adoption of different intellectual property regimes, linking them to the relevant features of knowledge domains.

1.2.4-The Collective Governance of Quality (WP14)*

[Coordinator: U. Oviedo/Teams involved: U. Oviedo, Adis/U.Paris XI, UPF/Barc].

The objective of the IFM sub-project in the RefGov project was to provide a systematic analysis of the interplay between governmental regulations and self-regulations in the building of institutional framework for markets. Within this general objective, the aim of the Workpackage 14: *The Collective Governance of Quality* was to analyze the provision of quality, departing from private-ordering solutions. Particularly, we tried to show how the quality problem is solved in different transactions and to assess those solutions and their implications for regulation purposes. Then, we started analyzing different types of solutions based on self-regulated mechanism (as for example retailing chains) to understand how safeguards and incentive systems are articulated to deal with asymmetric information problems and to reach homogeneous quality throughout their chains. Second we analyzed the whole diversity of mechanism employed by economic agents to solve quality problems (i.e. the governance of quality) in different transactions and we offer some intuitions about the rationality of their choice.

1) The analysis of contracts

The operative objective is here twofold: we analyzed private contracts (franchise and outsourcing contracts), first, to understand their mechanism of coordination and motivation

and, second, to show that their quality services provision serve as benchmarking reference for solving public-private relationship.

a) How the provision of incentives is articulated in network contracting.

Several studies were conducted here. Main works and results (published):³

- López Fernández, B. & López-Bayón, S. (2010): "Delegation and Autonomy in Franchising". In M. Tuunanen, G. Cliquet, G. Hendrikse, J. Windsperger (Eds.), *New Developments in the Theory of Networks: Franchising, Alliances and Cooperatives*, Springer Verlag (In press).

The requirements of standardization under the common trademark to preserve homogeneity constrain franchisees from fully using their human capital. As a result, they cannot fully exploit the profit opportunities from their knowledge of local conditions. This paper provides evidence on this problem by analysing the determinants of delegation of decision rights in franchise relationships. We suggest that the franchisor chooses the level of delegation to leverage the intangible assets of the franchisees and the franchisor and, simultaneously, to preserve the value of the brand name. While the empirical literature on franchising has studied these effects separately, we consider them together in a model on decentralization. The results show that the franchisee's autonomy varies negatively with the franchisor's intangible assets and brand name and positively with the inter-firm trust and the franchisees' intangible assets. Finally, autonomy also varies negatively with the specific investments of the franchisees.

- López-Bayón, S. and M. González-Díaz (2010): "Indefinite contract duration: Evidence from electronics subcontracting", *International Review of Law and Economics*, (forthcoming).

This paper examines factors explaining the choice of an indefinite duration for inter-firm contracts from the transaction cost perspective using a sample of subcontracting agreements in the Spanish electronics industry. We particularly consider the impact of the classical transactional attributes, such as specificity and uncertainty, along with other governance mechanisms, such as contractual completeness and relational governance, on duration clauses. The results show that the probability of signing an indefinite duration contract is related positively to the specificity of the activity and negatively to the degree of completeness of the contract and the uncertainty regarding future demand. Contrary to some classical arguments, these findings suggest that an explicitly long-term contract is not always needed to protect against contractual hazards. Indefinite-duration contracts may also provide protection while improving the flexibility to adjust the relationship to the changing environment.

b) How the provision of quality services is facilitated within a retailing chain and how this private ordering solution could be exported to other governmental concessions (transport sector). Main Work and results (published):

- González-Díaz, M. and M. A. Montoro-Sánchez (2010): "Some lessons from incentive theory: promoting quality in bus transport service concessions", *Transport Policy* (forthcoming).

In this paper we highlight that service quality is an important problem in many bus transport service but hardly any transport authority has tried to improve the concession contract to solve this problem. Grounded on the complementarities between different mechanisms of control and on the similarities between franchise and concession contract, we propose to imitate market-oriented solution from private franchise chain to increase operators' concerns about service quality. They use the threat of losing rents or quasi rents to stop franchisee opportunism. Similarly, we propose to link the renewal of concession contracts to an operator' administrative reputation which is based on consumers' perception of service quality. We offer several details about the implementation of this incentive system.

³ The rest of researches are still as working papers but they have been submitted to different scientific journals for publication. This information is shown in the periodic reports.

2) The governance of quality

We first studied the present situation and tried to offer a map of the different situations to focus on particular problems later on. Main researches and results (published): ⁴

- Fernández-Barcala, M, M. González-Díaz and E. Raynaud (2010): "Manufacturing Quality: The Diversity of Institutional Solutions and their Interactions in Agrifood Markets", in E. Brousseau and J.M. Glachant (eds.), *Manufacturing Markets: legal, political and economic dynamics*, Cambridge University Press, forthcoming.

We explain how to manufacture products' quality. We understand by manufacturing products quality all the institutional operations that are necessary for being able to defined and differentiate products related to particular characteristics or attributes and for enforcing the exchange of the promised set of attributes. We review, first, the main mechanisms used in order to obtain products' quality and then we disentangle alternative "families" of quality devices and rank them on a "public / private" continuum. More importantly, we analyze the interactions among these devices by describing some of their complementarities. We end with an attempt to operationalize the analysis by matching quality attributes and institutional solutions.

- Fernández Barcala, M. and M. González-Díaz (2006): "Brand Equity in the European Fruit and Vegetable Sector: A Transaction Cost Approach", *International Journal of Research in Marketing*, 23 (1), 31-44.

We link both marketing and transaction cost economics (TCE) literature to explain factors determining brand equity from the buyer's perspective. We argue that TCE offers an appropriate framework for understanding the value added by each brand name. We claim that brand names are more valuable by buyers when contractual hazards (opportunism) in the transaction are higher. Results from an exploratory analysis of fourteen EU fruit and vegetable brand names indicate that the price premium (as a proxy for the brand equity) will be greater when the brand name addresses less informed parties and when search/measurement costs are substantial. Furthermore, consumers seem ready to pay a higher price premium for co-branded products. We consider this as an indicator that each brand name is specialized in guaranteeing different attributes and that they complement each other.

- Fernández-Barcala, M., M. González-Díaz and J. Prieto-Rodríguez (2010): "Hotel Quality Appraisal on the Internet: A Market for Lemons?", *Tourism Economics*, forthcoming.

Potential guests have difficulties for obtaining reliable ex ante assessments about hotels because of the adverse selection problem. Consumers now have a new source of information about hotel quality: information providers on the Internet. The key question is the degree of reliability of this information. Two types of Internet information providers can be distinguished: those that also sell the assessed services (sale-websites) and those that do not sell services (advice-websites). The former obtain their income via fees, while the latter obtain their income via advertising (number of accesses). It is argued that the advice-websites' information is more reliable than that of sale-websites because the latter suffers from a misalignment of incentives coming from the inverse relationship between incomes/rewards and the quality of the report. Our results show that sale-websites (fee financing) provide an assessment of the quality of their hotels which is on average 7% higher than the assessment of advice-websites (advertisement financing). This difference increases significantly with the hotel category, with up to a 9% increase for five-star hotels. It is also shown that systematic differences exist in the quality appraisal between both information providers. The main implications for tourists and hotel managers are outlined.

1.2.5-Behaviours, Contractual Practices and the Legal Environment (WP16) [Coordinator: UPF/Barc / Teams Involved: U.Siena, EconomiX/U.Paris X, UPF/Barc].

⁴ The rest of researches are still as working papers but they have been submitted to different scientific journals for publication. This information is shown in the periodic reports.

The objectives of the IFM sub-project in the RefGov project are: (1) to assess the theoretical framework concerning the interaction between public and private orderings with particular reference to the emergence of economic and legal norms and to the comparison between most European Legal systems (in Italy, France, Spain and Germany) and the Common Law systems (US, UK); (2) to analyze the specialization advantages and costs of the decentralization of rule making to courts, describing the essence of the common and civil law, and stating our hypothesis concerning their structures and evolution, also in a context of endogenous preferences; (3) to analyze the efficiency of private orderings in a context of dynamic competition, with reference to the trade-off between contract enforcement and ex-post competition and to apply the theoretical insights to the analysis of the rules applied in Competition Laws at European and National levels with specific reference to vertical restraints; and (4) to assess the property of public enforcement by analyzing the criminalization of the civil law through the lenses of the economics of law enforcement, the analysis of strategic behaviors of public and private agents and more generally the debate on efficiency of common law and civil law.

These objectives have been attained through the following researches and publications, classified here according to the objectives and mentioning only the main achievement in each of the areas:

Interaction between public and private orderings

In his article on traditional institutions in the Italian Alps (CASARI, Marco, "Emergence of Endogenous Legal Institutions: Property Rights and Community Governance in the Italian Alps," *Journal of Economic History*, 2007, 67, 1, 191-226) Marco Casari examines changes in institutions that protected property rights in the Alps between the thirteenth and the nineteenth century and, in particular, alternative management systems adopted for the common pastures and forests in about 200 communities. Over time, private-order institutions in the form of charters replaced informal arrangements sustained by the long-run interaction among villagers. He shows that, although costly to run, the charters accomplished several tasks that increased resource use efficiency.

Emergence of norms

In an article forthcoming at *Economic Journal* (ARRUÑADA, Benito (forthcoming), "Protestants and Catholics: Similar Work Ethic, Different Social Ethic," *The Economic Journal*), Arruñada develops two hypotheses about economically-relevant values of Christian believers, according to which Protestants should work more and more effectively, as in the "work ethic" argument of Max Weber, or display a stronger "social ethic" that would lead them to monitor each other's conduct, support political and legal institutions and hold more homogeneous values. Tests using current survey data confirm substantial partial correlations and possible different "effects" in mutual social control, institutional performance and homogeneity of values but no difference in work ethics. Protestantism therefore seems conducive to capitalist economic development, not by the direct psychological route of the Weberian work ethic but rather by promoting an alternative social ethic that facilitates impersonal trade.

Vertical restraints

The main achievement in this area is the paper published at *The Journal of Law and Economics* by Zanarone (ZANARONE, G., (2009), "Vertical Restraints and the Law: Evidence from Automobile Franchising," *Journal of Law and Economics* 52, 691-700), where he shows that, after a 2002 European regulation prohibited the use of dealer exclusive territories, automobile franchise contracts in Italy introduced price ceilings and standards on verifiable marketing and service inputs, such as advertising and salespeople. The contracts also imposed quantity floors, a practice already in use before the regulatory change. The introduction of standards suggests that, consistent with a view of vertical restraints as coordination mechanisms, manufacturers used exclusive territories to induce desired dealer services and, once prohibited, switched to alternative contractual devices to achieve this goal. The introduction of price ceilings despite free intrabrand competition also suggests car manufacturers tried to prevent some dealers from "gaming" the quantity floors by selling to other dealers' customers, while charging monopolistic prices at their own location.

Empirical comparison of legal systems

In a path-breaking critique to World Bank's Doing Business project (ARRUÑADA, Benito (2007), "Pitfalls to Avoid when Measuring the Institutional Environment: Is 'Doing Business' Damaging Business," *Journal of Comparative Economics*, 35(4), 729-47), Arruñada revises the accepted wisdom in institutional comparative analysis. It emphasizes that many of the actions inspired by DB have focused on reducing the initial costs of setting up the firm, disregarding the more important role of business registers as a source of reliable information for judges, government departments and, above all, other firms. This reliable information is essential for reducing transaction costs in future dealings with all sorts of economic agents, both public and private. The priorities of reform policies should therefore be thoroughly reviewed, stressing the value of the legal institutions rather than trivializing them, as is often the case.

These ideas are applied in his forthcoming work on property registries (Arruñada, Benito (forthcoming), "Property Titling and Conveyancing," in Henry Smith and Ken Ayotte, eds., *Research Handbook on the Economics of Property Law*, Research Handbooks in Law and Economics Series (Series editors: Richard Posner and Francesco Parisi), Edward Elgar) to perform a more sensible comparison of European titling systems.

Comparison of common and civil law

In a series of three papers published at *Review of Law and Economics*, the *Handbook of Law and Economics* and the *WU J. of Law and Policy* (see, for all, Arruñada, Benito, and Veneta Andonova (2008), "Common Law and Civil Law as Pro-Market Adaptations," *Washington University Journal of Law and Policy*, Vol. 26, pp. 81-130), Andonova and Arruñada show that in the development of the Western legal system, cognitive departures are the main determinant of the optimal degree of judicial rule-making. Judicial discretion, seen here as the main distinguishing feature between both legal systems, is introduced in civil law jurisdictions to protect, rather than to limit, freedom of contract against potential judicial backlash. Such protection was unnecessary in common law countries, where free-market relations enjoyed safer judicial ground mainly due to their relatively gradual evolution, their reliance on practitioners as judges, and the earlier development of institutional checks and balances that supported private property rights. In our framework, differences in costs and benefits associated with self-interest and lack of information require a cognitive failure to be active

Decentralization of rule making to courts

In an experiment which is the object of a Working Paper submitted to *Economic Journal* (ARRUÑADA, Benito and Marco CASARI (2010), "How Enforcement Institutions Affect Markets," *Universitat Pompeu Fabra, Economics and Business Working Paper Series 1031*, revised April 2010), Arruñada and Casari study anonymous market interactions in the presence of "judges". Our transactions resemble anonymous credit transactions where "lenders" can give loans and "borrowers" can repay them. When borrowers default, judges are free to enforce repayment but are themselves paid differently in each of three treatments. First, paying judges according to lenders' votes maximizes surplus and the equality of earnings. In contrast, paying judges according to borrowers' votes triggers insufficient enforcement, destroying the exchange opportunities and producing the lowest surplus and the most unequal distribution of earnings. Lastly, judges paid the average earnings of borrowers and lenders achieve results close to those based on lender voting. The experiment employs a steps-of-reasoning argument to interpret the performances of different institutions. When voting and enforcement rights are allocated to different classes of actors, the difficulty of their task changes, and arguably as a consequence they focus on high or low surplus equilibria.

The efficiency of private orderings

Previous analysis has showed that traders may opt for specific technologies with no joint productivity advantage as a way to commit themselves to trading jointly, but only when long-term contracting is infeasible. Ellman's paper "Specificity Revisited: The Role of Cross-Investments," (*Journal of Law, Economics, and Organization*, April 2006, vol. 22(1), 234-257) proves that asset specificity can also be optimal (since it relaxes the budget balance

constraint) in settings with long-term contracting. Traders will opt for specificity when one trader makes a cross-investment and either (1) this cross-investment has a direct externality on the other trader, (2) both parties invest or (3) private information is present. The specificity (e.g. from non-salvageable investments, specific assets and technologies, narrow business strategies, and exclusivity restrictions) is equally effective regardless of which trader's alternative trade payoff is reduced. Specificity supports long-term contracts in a broad range of settings - both with and without renegotiation. The theory also offers a novel perspective on franchising and vertical integration

The trade-off between ex ante and ex post enforcement in impersonal exchange

Economic development requires not only strong property rights, so that investors feel secure enough to invest, but also low transaction costs, so that economic agents can trade impersonally and thus reach specialization advantages. This poses a tradeoff. If the law strictly protects property rights on a resource by making it necessary to have owners' consents before they can be altered, it raises the costs of trading. In particular, acquirers suffer more information asymmetry and will be afraid of losing their acquisition against former rightholders, so will tend to trade less. Conversely, if the law protects innocent acquirers by granting them priority, former rightholders may fear dispossession, so will be less inclined to invest and specialize. Institutions supporting modern markets must overcome this tradeoff by protecting acquirers while preserving an element of consent by property rightholders. In his forthcoming book (Arruñada, B., *Foundations of Impersonal Exchange: The Theory and Policy of Contractual Registries* (under contract), University of Chicago Press, Chicago), Arruñada first develops a theory of contractual registries that explains their rationale as an essential part of the institutions that make impersonal trade feasible. By answering the fundamental question 'why are registries valuable?' the theory provides a solid grounding for analyzing the validity of policy-supporting arguments and current reform efforts in the two areas of business formalization and property titling. The book thus helps answering the two key policy questions: When are registries valuable and How should they be organized?

The economics of law enforcement

In a pioneer article published at *Journal of Economic Behavior and Organization* (GAROUPA, Nuno, "Optimal Law Enforcement and Criminal Organization, 2007, *Journal of Economic Behavior and Organization*, vol. 63 (3), pp. 461-474) Nuno Garoupa studies the organizational consequences of product illegality. According to its results, severe punishment reduces the dimension of a criminal network, but it might augment the effectiveness of its members. Smaller firms are easier to manage, and consequently fewer mistakes are committed, which in turn diminishes the likelihood of detection. Hence, a less severe enforcement of the law could be considered in order to achieve optimal deterrence. We also show that the allocation of sanctions between employer and employees is not unimportant as previous literature indicated.

Strategic behaviors of public and private agents

In an article with A. Ogus at *J. of Legal Studies* (GAROUPA, N. & A. OGUS, 2006, "A Strategic Interpretation of Legal Transplants", *J. of Legal Studies*, vol. 35 (2), pp. 339-363), Nuno Garoupa provides a strategic explanation for the spontaneous convergence of legal rules that nevertheless, in many instances, falls short of unification across jurisdictions. We identify a free-riding problem and discuss its implications for legal integration. We argue that countries hesitate to adapt their laws to those of another jurisdiction because they hope to free ride on efforts toward convergence. Unification (by transplant) and harmonization (by convention) of legal rules emerge as obvious corrective interventions to a coordination failure, thus solving the free-riding problem. However, unification and harmonization could also be serious policy mistakes either because convergence is absent owing to very high costs of importing and

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⁵ Selection, see full list on the website

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	<p>Gabriele Britz, Organisation und Organisationsrecht der Regulierungsverwaltung in der öffentlichen Versorgungswirtschaft, in: M. Fehling/M. Ruffert (Hg.), <i>Regulierungsrecht</i>, Tübingen 2010, § 21, p. 1148-1199.</p>
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