

From government towards governance?

Exploring the role of soft policy instruments

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Abstract

This article assesses whether the use of “soft” policy instruments (such as voluntary agreements and eco-management and audit schemes) can be used as a measure for a deeper underlying change from (environmental) *government* towards (environmental) *governance*. It does so by analysing whether ‘soft’ tools are increasingly replacing “hard” policy instruments (i.e. traditional regulation) in German environmental policy. This article examines the role and function of voluntary agreements and eco-management schemes (i.e. the European Union’s (EU) Eco-Management and Audit Scheme (EMAS) and the International Organization for Standardization (ISO) 14,001 eco-audit scheme) within Germany’s environmental policy tool box. It takes a longitudinal perspective by tracing the origins of these “new” environmental policy instruments and by assessing their use up to the early 2010s. Within the European Union (EU), which has failed to adopt a significant number of EU-wide voluntary agreements, Germany (together with the Netherlands) has adopted by far the largest number of voluntary agreements in environmental policy. However, since the 1990s environmental voluntary agreements have gone out of fashion in Germany. When the EU set up EMAS, Germany initially opposed the scheme, although (together with Austria) it rapidly became its largest user. However, in recent years German corporate actors have shown little enthusiasm for EMAS and a growing preference for the environmentally less ambitious ISO 14,000 standard. If voluntary agreements and EMAS constitute analytical touchstones for governance, then there appears to have been no wholesale uniform shift from *government* to *governance* in Germany. This article details significant constraints which have prevented the wider adoption of voluntary agreements which has come to a halt in Germany and never really took off on the EU level.

Zusammenfassung

Dieser Artikel untersucht, ob „weiche“ Instrumente (z.B. freiwillige Vereinbarungen und Umweltmanagementsysteme) als Maßstab benutzt werden können, um tiefgreifende Veränderungen weg vom *Government* und hin zur *Governance* in der Umweltpolitik aufzuzeigen. Er tut dies, indem er analysiert, ob „weiche“ Instrumente in der deutschen Umweltpolitik zunehmend „harte“ Instrumente (d.h. Gesetzesverordnungen) ersetzen. Konkret untersucht der Artikel, welche Rolle und Funktion freiwilligen Vereinbarungen und Umweltmanagementsysteme (EMAS sowie 14,001) im Werkzeugkasten für Instrumente der deutschen Umweltpolitik einnehmen. Er nimmt eine Langzeitperspektive ein, indem er die „neuen“ umweltpolitischen Instrumente von ihrem Ursprung bis zu ihrer Verwendung in den 2010er Jahre untersucht. Innerhalb der EU liegt Deutschland (zusammen mit den Niederlanden) zwar an der Spitze, was die Anzahl der umweltpolitischen freiwilligen Vereinbarungen anbelangt. Seit den 1990er Jahren sind freiwillige Vereinbarungen in Deutschland jedoch aus der Mode gekommen. Als EMAS auf EU Ebene vereinbart wurde, war Deutschland zunächst gegen dieses System. Deutschland wurde jedoch (zusammen mit Österreich) bald zum größten Nutzer von EMAS. In den letzten Jahren haben deutsche Firmen jedoch weniger Interesse an EMAS und mehr am umweltpolitisch weniger ambitionierten ISO 14,001 Standard gezeigt. Wenn freiwillige Vereinbarungen und EMAS einen analytischen Prüfstein für Governance darstellen, dann scheint es, dass es in Deutschland nicht zu einem vollständigen Paradigmenwechsel weg vom *Government* und hin zur *Governance* gekommen ist. Dieser Artikel zeigt die Zwänge auf, die eine weitergehende Annahme von freiwilligen Vereinbarungen in Deutschland, wo die Verwendung dieses Instrumententypus inzwischen zum Erliegen gekommen ist, und der EU, wo freiwillige Vereinbarungen nie von großer Bedeutung waren, verhindert haben.

1 Introduction

Germany has often been portrayed as a high regulatory state (e.g. Héritier, Knill and Mingers 1996) which has traditionally relied heavily on ‘command-and-control’ regulations that stipulate the best available technology (*BAT – Stand der Technik*) (e.g. Weale 1992b; Wurzel 2002). Knill (2001: 135-163) has argued that the German environmental policy system is characterised by a “static core” that gives preference to interventionist approaches and regulatory rules which “are highly specified and leave comparatively little flexibility and discretion for the administration”. At first sight Germany therefore seems an unlikely country

for the wide use of voluntary agreements and EMAS which are widely considered as relatively flexible “soft” policy instruments.

However, cooperation between governmental and societal actors has been an early goal of German modern-day environmental policy. The relatively ambitious 1971 Environmental Programme stipulated already the cooperation principle (*Kooperationsprinzip*) together with the polluter pays principle (*Verursacherprinzip*) and the precautionary principle (*Vorsorgeprinzip*) (e.g. Hartkopf and Bohne 1983; Müller 1986). According to Hartkopf and Bohne (1983: 114) the cooperation principle is particularly pertinent for the environmental policy sector “[b]ecause in hardly any other policy sector are state and societal actors as much dependent on each other as in environmental policy”. The cooperation principle was meant to encourage cooperation between governmental and societal actors for the following two main reasons. First, to make easier the implementation of consensually adopted environmental policy measures; second, to allow governmental actors to utilise more easily societal knowledge including the know-how of corporate actors on issues relevant for environmental policy measures (Kloepfer 2004: 198-199). However, in practice corporate actors were often highly reluctant to cooperate voluntarily with governmental actors on the adoption of ambitious environmental policy measures.

Most German voluntary agreements were therefore adopted in “the shadow of the law” (Scharpf 1994; see also Lees 2005: 222; Wurzel et al. 2003) or in “the shadow of hierarchy” (e.g. Héritier and Lehmkuhl 2008; Töller 2008a). More often than not they constituted an attempt by corporate actors to pre-empt government legislation by offering a voluntary agreement instead. Environmental voluntary agreements therefore resembled a form of “regulated self-regulation” (Paterson 1989: 284) that fitted well the wider social market economy (*soziale Marktwirtschaft*) doctrine which long has been a central action guiding principle for the Federal Republic of Germany (FRG). It also suited Germany’s moderately active policy style which usually relies heavily on consensus and consultation (Dyson 1982, 1992; Weale 1992). Importantly the traditional German policy style exhibited some corporatist features because most post Second World War German governments have consulted closely both employer groups and unions. However, it is also strongly informed by ordo-liberal ideas according to which the state determines merely the framework conditions (*Ordnungspolitik*) within which market forces reign. Emphasizing both ordo-liberal and state interventionist ideas, Germany’s managed capitalist system developed into a social market economy (Dyson 1982, 1992; Dyson and Goetz 2003; Dyson and Padgett 2005). By contrast, attempts to develop the social market economy doctrine further into a “social and ecological market economy” (*soziale und ökologische Marktwirtschaft*) were less successful.

The social market economy doctrine has been open for both the adoption of traditional command-and-control regulation (which reflected state intervention) and voluntary agreements (which emphasize self-regulation although they are usually adopted in the “shadow of the law”). Importantly, out of those political parties which have formed (coalition) governments in Germany, it has been the Social Democratic Party (*Sozialdemokratische Partei Deutschlands* - SPD) and the Green Party (*Bündnis 90/Die Grünen* - Alliance 90/The Greens) which have emphasized more strongly the need for interventionist environmental policy measures while the Christian Democratic Party (*Christlich Demokratische Union* - CDU), Christian Social Union (*Christlich Soziale Union* – CSU) and in particular the Liberal Party (*Freiheitliche Partei Deutschlands* – FDP) have overall stressed more often the importance of voluntary agreements (for more details see the contribution by Töller in this issue).

Our article uses environmental policy instruments as empirical touchstones for assessing the alleged shift from traditional *government*, which is said to consist primarily of hierarchical top-down “command-and-control” regulations, towards new modes of *governance* that rely more strongly on societal self-organisation. This article assesses whether the use of “soft” policy instruments (such as voluntary agreements and eco-management and audit schemes) can be used as a measure for a deeper underlying change from (environmental) *government* towards (environmental) *governance*. It does so by analysing whether “soft” tools are increasingly replacing “hard” policy instruments (i.e. traditional regulation) in German environmental policy. The empirical findings in this article are based on interviews which we carried out for a larger research project between 2001-2011¹. It proceeds as follows. The next section puts forward a threefold differentiation of environmental policy instruments. An assessment of the role which voluntary agreements play in German and EU environmental policy is presented next. The following section analyses the uptake of EMAS and ISO 14001. The conclusion summarises the main findings and argues that ‘soft’ policy instruments (such as voluntary agreements and EMAS) have not replaced ‘hard’ policy instruments (i.e. traditional regulation). Instead they have supplemented traditional regulation which itself has evolved (i.e.

¹ This article is based on research which was carried out for a much larger project on new environmental policy instruments (NEPIs) in Germany, Austria, the Netherlands, United Kingdom and European Union for which we initially received funding from the Economic and Social Research Council (ESRC) (grant number L216252013). Additional research was subsequently undertaken in Germany with the help of grants from the Anglo-German Foundation (project number 1493) and the British Academy (reference number SG-46048). Interviews were carried out with a wide range of governmental and societal actors in Germany (as well as in Austria, the Netherlands, United Kingdom and in Brussels) between 2001-12.

become “smarter”) by, for example, granting lighter touch regulation requirements for EMAS certified companies.

Studying Policy Instruments

Policy instruments have been studied since at least the Enlightenment era (Hood 2007: 128). German *Polizewissenschaft* already focused on the effectiveness of different policy tools and their interplay (e.g. Hood 2007: 1; Maier 1980). Much of the contemporary literature has also strongly focused on the effectiveness and efficiency of particular policy instruments although there are notable exceptions (see also Töller’s contribution in this issue). For a long time the selection of policy instruments was portrayed largely as a politically neutral technical choice although there are some important exceptions (e.g. Hood 1983; Majone 1976). The only important criteria for the selection of policy instruments seemed to be their effectiveness and efficiency as regards the implementation of government policies. Lawyers often stressed the need for effectiveness and thus usually showed a high affinity with regulations while economists tended to emphasize the importance of efficiency and thus usually favoured market-based instruments.

However, the narrow focus on effectiveness and efficiency as the exclusive selection criteria for policy instrument choices has been challenged more recently (e.g. Bähr 2010; Böcher and Töller, 2007; Hood 2007; Jordan, Wurzel and Zito 2005, 2007). Lascoumes and le Galès (2007: 11) have argued that “[p]ublic policy instrumentation reveals a (fairly explicit) theorisation of the relationship between the governing and the governed. In this sense, it can be argued that every public policy instrument constitutes a condensed and finalized form of knowledge about social control and ways of exercising it”. Different German environmental policy actors have pushed for the adoption of certain types of policy instruments; this was done to achieve political objectives rather than merely technical environmental goals.

The fact that the main German political parties have somewhat different policy instrument preferences has already been flagged up above. Importantly, different government departments have also shown relatively distinct preferences for certain environmental policy instrument types. The ministries responsible for environmental issues –the Interior Ministry (from 1969-86) and the Environment Ministry (since 1986) – initially showed a strong preference for traditional environmental regulation while the Economics Ministry often favoured voluntary agreements over state interventionist regulation. On environmental policy issues Interior/Environmental Ministry officials and Economics Ministry officials

have often perceived themselves as natural enemies (*natürliche Feinde*) (see Wurzel 2002, 2008b) which frequently pushed for the adoption of different policy instruments. The Interior/Environment Ministries has generally favoured traditional regulation over voluntary agreements while the Economics Ministry has often shown a preference for voluntary agreements over traditional regulation.

Party political and departmental preferences are more complicated in respect to market-based instruments. Eco-taxes have been always been supported by the Green Party and, although to a lesser degree, the SPD. Some prominent CDU/CSU politicians and FDP politicians have also supported the use of eco-taxes in German and/or on EU environmental policy. For example, Klaus Töpfer (CDU), who headed the Environment Ministry from 1987-94, strongly pushed for market-based instruments including an ecological tax reform which, however, was resisted by Chancellor Helmut Kohl (CDU) who preferred EU-wide eco-taxes instead. Emissions trading in general and the EU's emission trading scheme (EU ETS) in particular was initially strongly opposed by all German political parties. The Green Party was first to perform a U-turn by supporting a relatively ambitious EU ETS; it was followed somewhat reluctantly by the other main political parties (see Wurzel 2008a).

In this article we differentiate between the following three main types of environmental policy instruments: (1) *voluntary instruments* (including voluntary agreements and eco-management and audit schemes), (2) *market-based instruments* (e.g. eco-taxes and emissions trading) and (3) *regulatory instruments* (i.e. regulation). Elsewhere we have provided a more detailed explanation and justification for our relatively parsimonious threefold typology (see Wurzel, Zito and Jordan 2013); our typology is not entirely free of ambiguities because it can be difficult to establish the exact demarcation between different types of policy instruments. Due to space constraints we primarily focus on voluntary instruments (including voluntary agreements and eco-management and audit schemes) although reference will also be made to regulatory and market-based instruments.

Table 1: Environmental policy instrument types

Types of environmental policy instrument	Important examples
(1) Voluntary instruments	Voluntary agreements and eco-management and audit schemes
(2) Market-based instruments	Eco-taxes and emissions trading schemes
(3) Regulatory instruments	Regulation (including traditional ‘command-and-control’ regulation and innovative smart regulation)

The threefold policy instrument categorisation in Table 1 resembles similar typologies which have been put forward by, for example, Bähr (2010) and Bemelmans-Videc, Rist and Vedung (1997) (for more details, see Wurzel, Zito and Jordan 2013). In their influential book *Carrots, Sticks and Sermons: Policy Instruments and Their Evaluation*, Bemelmans-Videc and colleagues’ focused primarily on the nature of constraint which a particular type of policy instrument exerts within a particular institutional and/or sectoral context: regulations (“sticks”) are highly choice constraining, economic instruments (“carrots”) are moderately choice constraining and informational instruments (“sermons”) are hardly choice constraining. Bemelmans-Videc and colleagues’ threefold classification broadly fits our threefold typology which locates voluntary instruments at the ‘soft’ end and regulations at the “hard” end of the “soft-hard” policy instrument dimension.

In order to be able to understand fully the function of one particular type of environmental policy instrument it is important to assess its role within the context of the wider policy instrument tool box that exists in a particular political system at a given point in time (Jordan, Wurzel and Zito 2005, 2007; Wurzel, Zito and Jordan 2013). Like all EU member states, Germany is strongly influenced by EU laws and policies; this is the case in particular in environmental policy (e.g. Héritier, Mingers and Knill 1996; Knill 2001; Töller 2008; Wurzel 2002, 2004). Clearly member state environmental policies no longer can be understood without taking into account also EU environmental policy. In order to be able to assess the roles and functions of voluntary agreements and eco-management and audit schemes in Germany, it is therefore important to analyse also developments at the EU level.

From Government towards Governance?

Since the 1990s there has been an upsurge in scholarly interest in governance and its associated new modes of governance (e.g. Benz *et al.* 2007; Héritier and Rhodes 2011a; Héritier and Lehmkuhl 2008; Lascoumes and Le Galés 2007; Kassim and Le Galés 2010; Kooiman 1993a, 2003; Rhodes 1996; Risse and Lehmkuhl 2007; Rosenau and Czempiel 1992). Schuppert (2008:14) has calculated that publications on governance rose by a factor of about 20 between 1990-2003. Although there is little agreement about the exact meaning of the term governance, the overwhelming majority of contemporary governance studies argues that governance is associated with governments' declining ability to steer societal actors in a hierarchical top-down fashion through "command-and-control" regulation (e.g. Pierre and Peters 2000: 83-91; Genschel and Zangel 2007; Rhodes 1996; Schuppert and Zürn 2008).

The contemporary governance literature therefore differs from the traditional literature which often treated governance and government as synonymous terms (see Mayntz 2008: 45; Wurzel, Zito, Jordan 2013; Zürn 2008). Finer's (1970) seminal *Comparative Government* constitutes one important example for the interchangeable use of the terms governance and government. Palumbo alluded to the fact that more recently "political analysts have all come to perceive governance as a departure from traditional, state-centred styles of governing" (Palumbo 2010: xiv). Much of the contemporary governance literature has emphasized a strong dichotomy between *government* and *governance*. If the "strong state" characterised the extreme form of *government* in the era of "big government" (Pierre and Peters 2000: 25), then the equally extreme form of *governance* assumes that society can no longer be influenced, let alone steered, by top-down government intervention (e.g. Luhmann 1984; Rhodes 1996). In other words, traditional tools of government (i.e. 'command-and-control' regulation) are said to have been *supplanted* by less interventionist and softer modes of governance (such as voluntary agreements and eco-management and audit schemes).

Environmental policy is a particularly suitable policy sector for a critical analysis of the alleged rise of new modes of governance because it has been widely perceived as inherently *regulatory* in nature (e.g. Weale 1992: 154-182). Moreover, Germany has been widely characterised as a high regulatory state (e.g. Héritier, Knill and Mingers, 1996). If new modes of governance (such as voluntary agreements and eco-management and audit schemes) have supplanted traditional government tools (i.e. "command-and-control" regulation) even in German environmental policy then this would constitute very strong empirical evidence for the alleged shift from government towards governance.

Many governance scholars have claimed that societies in highly developed liberal democracies are evolving from hierarchical top-down *government* structures to new modes of *governance* which rely strongly on self-governance by societal actors. Kooiman (2003: 45) has pointed out that “[t]he variety of instruments used in governance is almost unlimited and will vary from ‘soft’ ones such as information and advice to ‘hard’ ones such as taxes and regulations”. There is no universally accepted categorisation of environmental policy instruments although our above mentioned threefold categorisation, which differentiates between (1) voluntary, (2) market-based and (3) regulatory instruments, is widely accepted. Voluntary agreements and EMAS are usually perceived as “soft” policy instruments while traditional regulations constitute “hard” policy instruments. Voluntary agreements and informational instruments (such as EMAS) are relatively “soft” policy instruments because the degree of coerciveness which they exert is low (although, as will be explained below, voluntary agreements are often adopted in “the shadow of the law”).

Voluntary Agreements

There is a considerable degree of terminological confusion about voluntary agreements. Faber (2001: 38-39) provides a list of more than 12 different German terms which can be found in the existing literature on voluntary agreements including *freiwillige Vereinbarungen* (voluntary agreements), *Selbstverpflichtungen* (self-commitments) and *Absprachen* (agreements). Börkey and Lévèque (1998: 4) list the following English and French terms which have been used interchangeably for the term voluntary agreements: “self-regulation, voluntary initiatives, voluntary codes, environmental charters, voluntary accords,... co-regulation, covenants, negotiated environmental agreements, *accords de branche*, *programme cooperative e volontari*”. In order to avoid comparing apples with pears it is therefore important to use the clearest possible definition for a policy instrument which comes in many shapes and forms.

The OECD (1994: 4) has defined voluntary agreements very widely as “voluntary commitments of the industry undertaken in order to pursue actions leading to the improvement of the environment”. The EU Commission has described voluntary agreements more narrowly as “agreements between industry and public authorities on the achievement of environmental objectives” (CEC 1996a: 5). The European Environmental Agency (EEA) has defined voluntary agreements more narrowly as “covering only those commitments undertaken by firms and sector associations, which are the result of negotiations with public authorities

and/or explicitly recognised by the authorities” (EEA 1997a: 11). Our article relies on the EEA definition.

Table 2: Voluntary Agreements in the European Union’s Member States in the Mid-1990s

Member states	Number of VAs according to the EEA	Number of VAs according to the Commission
Netherlands	107	>100
Germany	93	c.80
Austria	20	25
Denmark	16	16
Italy	11	11
Portugal	10	10
Sweden	11	13
United Kingdom	9	8
France	8	n/a
Greece	7	0
Belgium	6	14
Spain	6	6
Luxembourg	5	5
Finland	2	>2
Ireland	1	1
Total for EU-15	312	>234
EU-wide VAs	n/a	12

Sources: Adapted from EEA (1997: 25-36), CEC (1996: 23-30) and Wurzel, Zito and Jordan (2013: 108).

Table 2 lists the total number of voluntary agreements for the then 15 member states of the EU. The data in Table 2 refers to the mid-1990s which constituted a high point in the adoption for voluntary agreements in many EU member states. Despite some moderate discrepancies between the data from the EEA and the Commission, it becomes clear that the Netherlands and Germany adopted by far the largest total numbers of domestic voluntary agreements in the EU-15 in the mid-1990s. However, if one draws up a ranking order of voluntary agreements based on *per capita* figures, then Germany ends up with approximately 1.5 voluntary agreements - well behind Austria (8.3) and the Netherlands (6.5) (Wurzel, Zito and Jordan 2013: 108).

A key characteristic which all German (and Austrian) voluntary agreements share is the fact that they are legally non-binding (e.g. Böcher and Töller 2007; Töller 2012; UBA 1999; Wurzel *et al.* 2003). This stands in marked contrast to the Netherlands which, from about the early 1990s onwards, adopted primarily so-called covenants (*convenants* in Dutch) which are negotiated agreements that are legally binding and, at least theoretically, enforceable through the courts. Furthermore, unlike the Dutch *convenants* most German voluntary agreements did not stipulate requirements for monitoring by third parties although there are important exceptions which include most of the more recent climate change voluntary agreements.

Early Pioneer Running Out of Steam

Germany (together with the Netherlands) is one of the early pioneers for voluntary agreements in environmental policy. Health-related concerns about car emissions, particularly in large cities, led the Association of the German Automobile Industry (*Verband der deutschen Automobilindustrie* - VDA) to propose a voluntary agreement to reduce carbon monoxide emissions from automobiles in the early 1960s (Wurzel 2002).

German environmental NGOs have generally been highly critical about the use of voluntary agreements and demanded increased transparency, better monitoring and the use of legal sanctions in cases of non-compliance for existing voluntary agreements (e.g. Öko-Institut 1998). Other critics have asserted that voluntary agreements can lead to collusion between industry and government, or even regulatory capture (e.g. OECD 1999, 2003). Within the context of the cooperation principle, Bohne and Hartkopf (1983: 114) already warned that cooperation should not lead to collaboration between governmental and societal actor while emphasizing that it is the state's task to protect the environment (similar Kloepfer 2004: 198). Despite these concerns, German environmental policy witnessed a surge in voluntary agreements in the early 1990s. One important reason for the steep

rise of voluntary agreements was the fact that a Centre-Right (CDU/CSU-FDP) government adopted a coalition agreement in 1992 which gave preference to voluntary agreements over regulation (UBA 1999: 30; see also the contribution by Töller in this issue). A Red-Green SPD-Greens Party coalition government, elected in 1998, showed strong scepticism to voluntary agreements. Initially it accepted a relatively diverse range of voluntary agreements including the renewal of a revised climate change voluntary agreement in 2000. However, Environment Minister Jürgen Trittin (Green Party), who headed the Environment Ministry from 1997-2005, showed little enthusiasm for voluntary agreements and preferred instead either regulation or market-based instruments.

Importantly, the return of another Centre-Right (CDU/CSU-FDP) coalition government in 2009 did not lead to a revival of voluntary agreements in Germany. Industry still favours voluntary agreements while environmental NGOs remain opposed. There are multifaceted reasons for why voluntary agreements have gone out of fashion in Germany (for more details see the Töller contribution in this issue). One important reason is the adoption of the domestic ecological tax reform (*Ökosteuerreform*) in 1999 and the setting up of the EU ETS, which covers most industrial sources for carbon dioxide emissions, in 2003. The ecological tax reform and the EU ETS have left little room for German voluntary agreements in climate change policy, which used to be a particularly dynamic sub-sector for the adoption of voluntary agreements.

German voluntary agreements often govern products; they have been frequently used in the energy and waste sectors. Normally industry agrees voluntarily the phasing out of certain pollutants and/or the reduction in energy use in order to pre-empt government regulation. Many of the voluntary agreements in the transport sector either stipulated goals that were more ambitious than existing EU laws or focused on the early compliance with EU environmental standards such as the introduction of unleaded petrol and low sulphur petrol ahead of the designated deadline.

The publicly most well-known voluntary agreements concern the reduction of greenhouse gas emissions. The Federal Association for German Industry (*Bundesverband für deutsche Industrie* – BDI) and sectoral industry umbrella groups agreed climate change voluntary agreements with the federal government in 1995, 1996 and 2000. However, the 1995 voluntary agreement was widely seen as vague and lacking in ambition. It was therefore supplemented by another, more ambitious, voluntary agreement in 1996 which in turn was updated in 2000. The climate change voluntary agreements have been frequently cited by industry as evidence that voluntary agreements could work even when they involve a large number of actors and complex policy problems. The climate change voluntary

agreements were put forward not only to avoid government regulation (i.e. in “the shadow of the law”) but also to escape significant eco-taxes. The public visibility of the voluntary climate agreements at a time of high public environmental awareness prevented industry from withdrawing from the voluntary climate agreements when the Red-Green (SPD-Green Party) coalition government adopted an ecological tax reform in 1999.

The interest in voluntary agreements extended beyond the federal level as can be seen from the fact that the states (*Länder*) also adopted a substantial number of this policy instrument. The Bavarian environmental pact (*Umweltpakt Bayern*) is one of the most notable *Land* voluntary agreements. It consists of several voluntary agreements which were negotiated by the Bavarian state government and the regional industry umbrella organizations (UBA 1999). The Bavarian Prime Minister, Edmund Stoiber, highlighted the Bavarian pact as a model for the rest of Germany during his unsuccessful bid to become German chancellor in 2002 (*ENDS Daily* 29.7.2002).

Industry generally views voluntary agreements as a viable alternative to traditional regulation while Environment Ministry and Federal Environment Agency (*Umweltbundesamt* – UBA) officials tend to perceive them at best as supplementary tools. In Germany there is a long tradition of state-society agreements which, as was mentioned already above, fit under the rubric of “regulated self-regulation” (Paterson 1989: 284). The number of environmental voluntary agreements adopted in Germany slowed down drastically in the early 2000s. One Environment Agency official (Interview 2010) even argued that “something like a roll back of voluntary agreements” had occurred since the late 1990s. Voluntary agreements have not completely disappeared from the German environmental policy toolbox although their adoption rate has slowed down drastically.

Importantly, as one senior German Environment Ministry official explained (Interview 2008), there has also been a change in the nature of the voluntary agreements adopted in the 2000s. The sparse number of newly adopted German voluntary agreements relate in particular to large public events such as the football World Cup in 2006 and Church conventions (*Kirchentage*). The main goal of these new sub-types of voluntary agreement is the “greening of events” (Interview 2008) rather than the reduction or phasing out of harmful substances which was the classic goal of traditional voluntary agreements.

The European Union's Inability to Make Wide Use of Voluntary Agreements

The EU seriously considered the adoption of voluntary agreements only from the late 1980s onwards; by the 1990s increased demands for less EU legislation were driven by debates about the principle of subsidiarity and increased competition resulting from globalisation (Holzinger, Knill and Schäfer 2006; Krämer 2001: 80). Moreover, the emergence of new policy problems (e.g. climate change) and paradigms (e.g. sustainable development) did not lend themselves easily to traditional regulatory solutions which made voluntary agreements more attractive as possible policy instrument within the EU's environmental policy toolbox (Mol, Lauber and Liefferink 2000; Jordan, Wurzel and Zito 2003).

In 1996, the Commission declared a desire to promote "effective and acceptable" voluntary agreements as a means of supplementing traditional regulation (CEC 1996). However, the Commission's 2002 Communication toned down this ambition when stating that "the European Commission intends to recognise and make use of environmental agreements at Community level [merely] on a selective case-by-case basis. Since the instrument will not necessarily be the most appropriate in all circumstances" (CEC 2002b: 13).

The voluntary agreements by the European, Japanese and Korean automobile industries to reduce carbon dioxide (CO₂) emissions from passenger cars constitutes the most important and well known EU-wide voluntary agreement. In 1999, the association of the European automobile industry (ACEA) and the European Commission agreed a voluntary agreement on the reduction of CO₂ emissions from passenger cars after arduous negotiations (Interview, Commission officials, 2002; EEB 2000). The Commission kept the Environmental Council and the EP, which had demanded ambitious targets, informed about the negotiations. The voluntary agreement set a CO₂ emission reduction target of 140g/km (which amounted to a reduction of approximately 25 per cent) by 2008. Environmental groups criticised what they regarded as an unambitious reduction target (EEB 2000; Taschner 1998). In 2000, the Japanese and Korean automobile industry associations (JAMA and KAMA respectively) put forward a voluntary agreement which used the same reduction target by 2009.

However, in 2007 the Commission concluded that "the voluntary approach has delivered a solid CO₂ reduction but has not been as successful as hoped. Given the slower than expected progress to date, the 120g CO₂/km target will not be met by 2012 without additional measures" (CEC 2007a). The Commission therefore proposed binding EU legislation for a cut of CO₂ emissions from new passenger cars to 120g CO₂/km by 2015 which was

later adopted by the EU and Council (Council of the European Union 2009b). Following fierce lobbying by the European car industry in general and the German car industry in particular, the German Chancellor, Angela Merkel, and the French President, Nicolas Sarkozy, secured more flexible implementation rules and less severe fines in cases of non-implementation than the Commission had proposed (e.g. *Süddeutsche Zeitung* 17.5.2010).

Between 1998 and 2004, only two EU-wide voluntary agreements were adopted in addition to the voluntary agreement on CO₂ emissions with the automobile industry. By 2011 there were only 14 EU-wide voluntary agreements. German voluntary agreements were therefore not replaced to any significant degree by EU-wide voluntary agreements.

Legitimacy, transparency and free rider concerns explain why the uptake of voluntary agreement has remained extremely low on the EU level. Voluntary agreements have to be adopted outside the formal EU decision-making procedures and thus leave the Council and in particular the EP on the sidelines. The EP repeatedly criticised the Commission's desire to increase the usage of EU-wide voluntary agreements which have also been opposed by environmental groups (EEB 2000; Taschner 1998). Importantly, European industry has largely failed to accept the Commission's repeated invitations to negotiate EU-wide voluntary agreements.

Concerns about free-riders, who may gain a competitive advantage within the Single European Market by failing to implement voluntary agreements, transparency issues and the incompatibility of competing national models – such as non-binding German (and Austrian) voluntary agreements and legally binding Dutch covenants – have greatly inhibited efforts by in particular the European Commission to increase EU-wide voluntary agreements.

Voluntary agreements have not been thrown out altogether from the EU's policy instrument tool box. However, since the 2000s, voluntary agreements and EMAS constitute the 'third pillar' for altering societal behaviour (CEC 2007a) rather than an alternative to traditional regulation (and market-based instruments).

Environmental Management Schemes

The idea for EMAS originates from the US in the 1970s. In the 1980s, corporate interest in auditing spread to Europe, facilitated by the International Chamber of Commerce (Malek and Töller 2001: 43). The EU's EMAS defines eco-management and audit as 'that part of the overall management system which includes the organizational structure,

responsibilities, practices, processes and resources for determining and implementing the environmental policy' (Council of the European Communities 1993: 2). The EMAS expects participant organisations constantly to review their environmental impact, create a management system that is accredited by independent environment verifiers, and carry out regular audits (CEC 2001a; Malek and Töller 2001). The EMAS (EMAS I) originally came into force in 1995; it has been revised in 2001 (EMAS II) and 2010 (EMAS III).

The EU's EMAS and the ISO 14001 standard aim to encourage industry to adopt procedures and processes for reviewing their environmental impact. Although their specific requirements differ, EMAS and ISO 14001 both oblige companies to audit the environmental impact of their activities, establish internal environmental monitoring schemes and reduce the negative environmental impact of their activities. Companies registered for EMAS and/or ISO 14001 must provide regular public environmental audit and management statements which they then can use in their public relations material. For reasons which will be explained below, EMAS III incorporated parts of the ISO 14001 requirements to make EMAS more attractive especially for companies which operate globally. EMAS is not widely known outside Europe while ISO 14001 is a globally recognised standard which is used in more than 150 countries (with China, which also has a few EMAS registrations, having by far the largest total number of ISO 14001 registrations).

Although the EU's EMAS and the ISO's 14001 are voluntary policy instruments, market and public pressure may push corporate actors to participate to avoid losing out to competitors. However, for this to happen EMAS needs to be recognised widely by corporations and the general public. The EU regulations establishing EMAS require member states to publicise the scheme and to educate the public about it. However, these requirements have remained very vague. After the revision of EMAS I in 2001, the German government spent significant resources to promote EMAS II. Notable German personalities from politics (including the Environment Minister, Economics Minister, President of the UBA and the President of the EP to name only a few) and other walks of life endorsed EMAS on the website of the German EMAS Advisory Board (*Umweltgutachterausschuß - UGA*) (UGA 2007).

During the EU negotiations which led to the adoption of EMAS I, Germany was initially opposed to the scheme. One reason was that EMAS I reflected core characteristics of the British Standard (BS) 7750, although it also incorporated proposals from other member states including Germany. Compared to BS 7750, EMAS I had, however stronger requirements to

reduce continually the environmental impact and demanded a wider range of information about the environmental performance (Wenk 1995: 6-7).

The German government initially opposed the adoption of EMAS I in the Council of Ministers. German officials insisted that substantive measures of environmental performance had to be written into the EMAS regulation. Environment Ministry and UBA officials were concerned that procedural EU environmental measures (such as EMAS) might lead to a watering down of German substantive standards which were derived from the BAT principle. When faced with the growing support from other member states for EMAS, Germany held out for the principle of economic viable application of best available technology (a somewhat weakened form of BAT), which became part of the ultimate compromise (Taschner 1998: 220).

German policy-makers and corporations were even more critical of the US influence on the international standard being created in the ISO. They saw the resulting ISO 14001 standard as far too lenient (Taschner 1998: 222; Zito and Egan 1998). Compared to EMAS I, ISO14001 was clearly less demanding in terms of its requirements for environmental statements and performance improvements (Interviews 2008; Taschner 1998).

Despite the German government's initially strong resistance during the EMAS I adoption phase, German companies (together with Austrian companies) soon recorded the highest number of EMAS registrations. The implementation of EMAS I caused a heated debate in Germany about who should be responsible for accrediting the third party auditors and the registration of firms. Given the scheme's voluntary nature, industrial associations resisted having the UBA act in both of these roles (Malek *et al.* 2001: 107-108). In 1995 both sides finally agreed that the regional chambers of commerce (*Industrie- und Handelskammern*) would serve as a registration body and the German Accreditation and Admission Association (*Deutsche Akkreditierungs- und Zulassungsgesellschaft für Umweltgutachter GmbH - DAU*), which is owned by the industry associations but overseen by a mixture of stakeholders (including NGOs, trade unions and government), would accredit the auditors. This compromise enshrined the role of industry associations to implement EMAS.

In 2001, the EU revised EMAS I to (1) widen its scope; (2) address significant indirect environmental effects; (3) put greater emphasis on public reporting; and, (4) adopt a new logo (Haigh 2012). EMAS II reflected the fierce competition which ISO 14001 increasingly posed to the EU's eco-management and audit system. One core aim of the 2001 revision was to make EMAS II more easily compatible with the ISO 14001 without, however, watering down its more stringent requirements. The 2001 revision, which became operational in 2004, made it possible for public organisations

(in addition to private actors) to participate in EMAS. In Germany, the UBA became the first public authority to register for EMAS. Nowadays most federal ministries and agencies as well as many state (*Länder*) ministries and agencies are registered for EMAS.

In 1997, a Commission Decision (97/265/EC) had already formally recognized the ISO's 14001 as fulfilling part of the EMAS requirements for industrial sites. This recognition, together with the 2001 revision, temporarily breathed new life into the EU's eco-management and audit system. Although the EU and the German government, amongst other member governments, promoted the fact that EMAS I and II were more environmentally ambitious, ISO 14001 continued to outstrip EMAS even in Europe. This can be seen from Table 3 which charts the uptake of EMAS certifications compared to ISO 14001 certifications in Germany and the EU as a whole.

Table 3: Organisations Registered with EMAS Compared to ISO 14001 Certifications

	EMAS 1997 No. of org.	ISO 1997 No. of org.	EMAS 2005 No. of org.	ISO 2005 No. of org.	EMAS 2010 No. of org.	ISO 2010 No. of org.
Germany	518	100	2,049	4,440	1,408	6,001
EU total	n/a	n/a	3,093	19,998	4,347	45,946 ^(*)

(*) *The figure refers to 2007.*

Source: Adapted from: /ec.europa.eu/environment/emas/documents/articles_en.htm (accessed 22.4.2013), written communication from UBA official dated 8.5.2013 and Wurzel, Zito and Jordan (2013: 97).

Table 4 shows that Germany had the highest total number of EMAS registrations out of all EU member states. However, it ranked only at number four as regards the number of EMAS registered organisations per inhabitants.

Table 4: Top Five Member States for EMAS Uptake in 2010

Total number of EMAS registered organisations in 2010	Number of EMAS registered organisations per million inhabitants in 2010
(1) Germany: 1,408	(1) Denmark: 42.9
(2) Spain: 1,227	(2) Austria: 30.48
(3) Italy: 1,025	(3) Spain: 25.1
(4) Austria: 250	(4) Germany: 16.91
(5) Denmark: 91	(5) Italy; 16.3

Source: Adapted from [/ec.europa.eu/environment/emas/documents/articles_en.htm](http://ec.europa.eu/environment/emas/documents/articles_en.htm) (accessed 22.4.2013) and Wurzel, Zito and Jordan (2013).

Importantly ISO 14001 remained accepted as partial fulfilment of EMAS III. The so-called EN ISO 14001: 2004 environmental management system requirements are an integral part of EMAS III (Annex II of EMAS III). EMAS requires a verification of the environmental management scheme, continuous improvement of environmental performance and public reporting as well as participation. For the European Commission and other supporters of EMAS, ISO 14001 has been seen as a possible stepping stone for EMAS. However, in practice an increasing number of European corporations have migrated from the environmentally more ambitious EMAS to the environmentally less demanding ISO 14001 scheme; this trend is also discernible in Germany. The decline in EMAS registrations by corporate actors has not been compensated for by large government organisations (e.g. ministries and agencies) and other public actors (such as church organisations) starting to register for EMAS as soon as it was opened to public actors.

As can be seen from Table 3, in 1997 518 German companies had registered for EMAS; eight years later there were almost 2,000 sites in Germany registered with EMAS. There was therefore almost a fourfold increase in EMAS registrations in Germany between 1997 and 2005. In 1997 more than five times as many organisations had registered for EMAS compared to ISO 14001. However, by 2013 merely 1,286 sites were registered for EMAS in Germany. This constitutes a decline of 617 sites between 2007 and 2013.

The main reason for the decline of EMAS registrations in Germany is that corporations increasingly adopted the ISO 14001 scheme instead of EMAS.

Over time an increasing number of corporations in Germany and other member states have shown a clear preference for ISO 14001 over EMAS, leading the Commission to contemplate means of boosting incentives and allowing non-EU or EU-associated organisations to join. By 2005, the ISO's 14,001 certifications substantially outstripped EMAS registrations in Germany and Austria which have had the highest number of registrations since EMAS I became operational in 1995.

Neither the two revisions to EMAS I nor the above mentioned public relations campaigns have been able to stem the trend that corporate actors leave the more ambitious EMAS for less demanding but globally more widely recognised ISO 14001. The fact that large public actors (such as ministries, agencies and the churches) have increasingly used EMAS has not compensated for the haemorrhage caused to the scheme by corporate actors deserting it for ISO 14001. Importantly the German federal government has amended important existing environmental legislation (such as the Federal Air Quality Ordinance – *Bundes-Immissionsschutzgesetz – BimSchG*) to allow for lighter touch implementation and monitoring by state (*Länder*) authorities for EMAS registered corporations (UGA 2012). However, many *Länder* governments have failed to make use of it in practice because they do not trust EMAS or do not want to transfer state competences to independent environmental verifiers (Interview 2013).

Voluntary agreements and EMAS as analytical touchstones for the putative shift from government towards governance

As was shown above, no full scale replacement of traditional regulation with voluntary agreements and EMAS took place in either Germany or on the EU level. Instead, traditional tools of government (i.e. regulations) have been supplemented rather than supplanted with new modes of governance (e.g. voluntary agreements and EMAS). Importantly, voluntary agreements have usually been adopted only in the “shadow of the law” or the “shadow of hierarchy” in Germany. Because it had failed to achieve its objectives, the EU's flagship voluntary agreement on the reduction of carbon dioxide emissions from cars was supplanted by EU regulation in 2009. The adoption of voluntary agreements ran out of steam in Germany in the late 1990s and failed to take off in the EU.

Equally significant, EMAS has been combined with traditional regulation and market-based instruments in Germany where light touch inspection regimes and/or reduced eco-tax charges were granted to those EMAS registered firms which adopted energy management plans to reduce their energy consumption. One of the drivers for this combination of different types of policy instruments (i.e. EMAS, regulatory tools and eco-taxes), if

not fusion, was the attempt to stem the haemorrhage of EMAS registrations to ISO 14001, which is an environmentally less ambitious eco-audit and management scheme. Nevertheless, since at least the early 2000s EMAS has been increasingly supplemented, if not supplanted, by such an even “softer” policy instrument (i.e. ISO 14001 registrations) while voluntary agreements have been replaced by traditional regulation and/or market-based instruments.

In order to arrive at a more fine-grained analysis of the interaction between “soft” and “hard” policy instruments and underlying *government-governance* dynamics, it is useful to make use of the institutionalist explanation of change offered by Streeck and Thelen (2005). They have identified the following five analytical categories for assessing gradual transformative institutional change: (1) *displacement* (i.e. slowly rising salience of subordinate change relative to dominant institutions); (2) *layering* (i.e. new policy elements are attached to existing institutions, gradually changing their status and structure); (3) *drift* (i.e. neglect of institutional maintenance resulting in slippage in institutional practice on the ground); (4) *conversion* (i.e. the utilization of old institutions to new purposes); and (5) *exhaustion* (gradual erosion of institutions over time). We argue that these five analytical categories for institutional change can also be used to highlight policy instrument development over time.

Neither voluntary agreements nor EMAS have permanently displaced traditional regulation. Instead, there has been a layering of these soft policy instruments with other policy instruments from the existing policy instrument toolboxes in both Germany and the EU where traditional regulation has remained dominant. Significantly, *displacement* seems to have occurred with regard to the EMAS which has been deserted by corporate actors in favour of the ISO14001. Policy instrument *exhaustion* has affected voluntary agreements in Germany, but interestingly not regulation. The adoption rate of voluntary agreements has been in steep decline in Germany since the late 1990s, suggesting a considerable degree of drift or even exhaustion. The introduction of the ecological tax reform in Germany and the ETS at the EU level rendered obsolete the various climate change voluntary agreements which German industry had put forward. The adoption of these market-based instruments greatly constrained the adoption of new voluntary instruments in German climate change policy.

Our empirical findings suggest that a *layering* of existing policy instruments (or instrument mixes) is the most likely form of incremental transformational policy instrument change that has taken place in German environmental policy since the early 1970s. In this context it is interesting to know that, in the late 1990s, the European Commission seriously considered the possibility of merging the EMAS with the flagging European eco-label

scheme which we have not been able to discuss in this article (see Wurzel, Zito and Jordan 2013). To a much lesser extent, *conversion* (i.e. the redeployment of “old” policy instruments to new purposes) also took place when traditional regulations supplanted voluntary agreements (as was the case for the reduction voluntary agreement for CO₂ emissions from cars which was replaced by EU legislation in 2009).

The big challenge confronting policy makers is to produce policy instrument mixes which simultaneously solve environmental problems while being conducive to economic development and fitting the institutional context of the wider political system (Rengeling and Hof 2001). Elsewhere we have tried to explain the significant transformation of both traditional regulatory instruments and “new” policy instruments in the environmental policy sector in different European countries and at the EU level (see Wurzel, Zito and Jordan 2013).

Conclusion

If voluntary agreements and EMAS constitute analytical touchstones for governance, then there appears to have been no wholesale uniform shift from government to governance in Germany. In the 1990s, almost two-thirds of all EU-wide voluntary agreements adopted in the EU could be found in Germany and the Netherlands (CEC 2002; Wurzel, Zito and Jordan, 2013). However, since the early 2000s, the enthusiasm for voluntary agreements has decreased drastically in Germany (see also the contribution by Töller in this volume; Wurzel, Zito and Jordan 2013).

The use of voluntary agreements theoretically provides an empirical example of the putative shift from government towards governance. However, voluntary agreements have not replaced traditional regulation in Germany. Indeed, the strong regulatory framework found in Germany (and Austria) is essential to understanding the relatively high adoption rate of voluntary agreements until the late 1990s. In Germany, governments have frequently announced their intention to adopt regulation as threat inducements towards targeted corporate actors which subsequently offered voluntary agreements to pre-empt legislation. In other words, German (and Austrian) voluntary agreements have often been adopted in the “shadow of the law” or “shadow of hierarchy”. As was mentioned above, the governance hypothesis would expect a replacement process to occur in which voluntary instruments take on a more important role in the environmental sector. However, this article has detailed significant constraints which have prevented the wider adoption of voluntary agreements which has come to a halt in Germany and never really took off on the EU level.

The institutional context explains differences in approach to voluntary agreement design and usage, but not always to the uptake in the first place. The consensus-based policy style found in Germany partly helps to explain the move towards voluntary agreements. In Germany (and Austria), constitutional constraints prevented the adoption of legally binding voluntary agreements such as the Dutch covenants.

Changes in government coalitions have also had an important impact on the adoption of voluntary agreements. Centre-Right coalition governments in Germany (as well as in Austria and the Netherlands) perceived voluntary agreements as attractive tools to respond to increased competition from the Single European Market and globalisation (see Wurzel, Zito and Jordan 2013). Centre-Left/Green coalition governments were less enthusiastic about voluntary agreements. The role of political parties in government tends to get little attention in the policy instrument literature although there are notable exceptions (e.g. Mol, Lauber and Liefferink 2000; see also the contribution by Töller in this issue). The degree to which the selection of policy instruments by member states and the EU is constrained by global developments (such as the adoption of the Kyoto Protocol) would also deserve greater scholarly attention.

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