CHARACTERISTICS OF REGULATORY REGIMES

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Abstract

The overarching theme of this paper is institutional analysis of basic characteristics of regulatory regimes. The concepts of path dependence and administrative traditions are used throughout. Self-reinforcing or positive feedback processes in political systems represent a basic framework. The empirical point of departure is the EU public procurement directive linked to OECD data concerning use of outsourcing among member states. The question is asked: What has caused the Nordic countries, traditionally not belonging to the Anglo-Saxon market-centred administrative tradition, to be placed so high on the ranking as users of the Market-Type Mechanism (MTM) of outsourcing in the public sector vs. in-house provision of services? A thesis is that the reason may be complex, but might be found in an innovative Scandinavian regulatory approach rooted in the Nordic model.

Keywords: Regulatory Regimes, Path Dependence, Administrative Tradition, Outsourcing, Innovation

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1 Outsourcing – a MTM case

As table 1 below indicates, the use of the Market-Type-Mechanism (MTM) of 'outsourcing' in the public sector is extensive in the OECD area, and give evidence for 'marketize' as a common reform strategy (Pollitt and Bouckaert 2004: 188-193). The mechanism is used most significantly in the Anglo-Saxon countries, and in the Nordic countries more than in the Continental European countries. The OECD ranking shows this relevance to the chosen states. In the table shown I make an exclusive relation to the two administrative traditions.

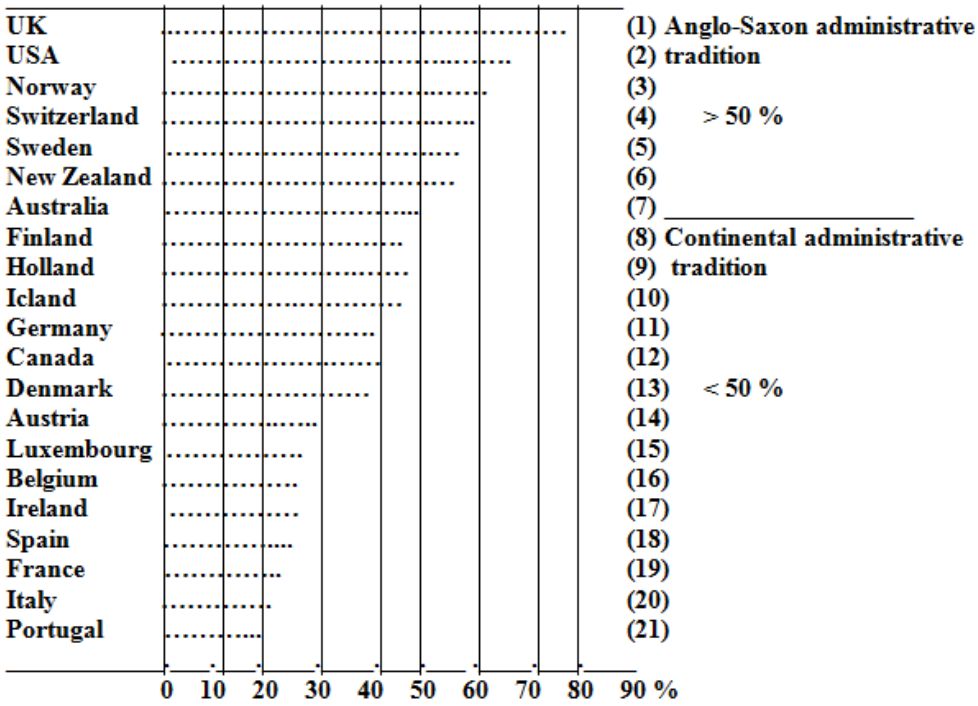
One question is quite insistent in relation to the rankings shown on the table: What has caused the Nordic countries to be placed so high on the ranking as users of outsourcing in the public sector vs. in-house provision; Norway ranks third just behind the USA with an outsourcing degree of 65% and Sweden ranks fifth with an outsourcing degree of 57%? How and why has this MTM developed since the 1990s so that particular these two Nordic countries today should be placed within the traditional market-centered Anglo-Saxon administrative tradition in the services sector?

The two Scandinavian countries traditionally have had a state centralized administrative tradition, and been bound to the continental administrative tradition. Institutional path dependence should therefore have put them on a low ranking in the degree of outsourcing like most of the Continental tradition states. What has happened? Three alternatives exist:

- The EU plays an important role: An adaptation to the EU public procurement directive prevailed in the 1990s, and with a surprisingly extensive use of the 'marketizing' strategy in relation to what the state-centred administrative tradition promises.
- Copying of model: Influenced by Anglo-Saxon reform strategies and by the New Public Management principles the Market-Type-Mechanism of outsourcing became dominant
- Satisfactory modernization: The public administration in especially the tw0 Scandinavian countries Norway and Sweden implemented innovatively satisfactory modernization within their socio-economic tradition and path dependence.

Let us examine this closer.

Table 1. Outsourcing of central government services.
Public purchasing of goods and services vs. in-house provision: OECD countries



Source: OECD 2005; Secretariat Calculation. According to OECD, in 2009, government outsourcing represented on average 10% of GDP in the OECD member countries. Its importance, however, varies significantly across countries, ranging from 2.7% of GDP in Mexico to 19.4% of GDP in the Netherlands. From 2000 to 2009, the share of outsourcing in GDP increased on average 1.5 percentage points in member countries, with the Netherlands and Finland showing the largest increases during this period. In general, Nordic countries rely less directly on non-profits or private institutions to provide services directly to end users but are using the indirectly public procurement way.

2 Innovative administration and regulatory regimes

International regulatory regimes have been defined as 'principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given issue-arena' (Krasner 1983:1). The European Union is such a regime with an institutional development, which has been described as a regulatory form of government and not an interventionist form of government[24] (Majone 1996, 1997, van Warden 1995, Veggeland 2009, 13). G. Majone (1994: 77) describes the upcoming of the regulatory state in the following way:

'Privatization and deregulation have created the conditions for the rise of the regulatory state to replace the dirigist state of the past. Reliance on regulation – rather than public ownership, planning or centralised administration – characterises the method of the regulatory state'.

This means that it is the member countries that have given the EU supranational authority to develop regulations in the form of principles, norms, rules and procedures[25] and to conduct legal control. The regulations are to be implemented nationally and monitored judicially and this means, as sited above, that the 'method' makes the expectation that member states' public and private administrations at all levels get inclined to converge on their areas of responsibility. A harmonization of the administration and service production is pressed forward. Europeanization is another term for the regulatory changes that occur when EU institutions penetrate national and local administrations (Olsen 2004).

The convergence theory is nevertheless disputed by argument and with empirical evidence that regulatory divergence on different levels between national administrations is just as common of a phenomenon (Pierre 2002, Knill 2001, Page and Wouters 1995). This means that there exists a national discretionary scope of action from the implementation of the EU´s many regulations and demands for procedures. Within these scopes of action, new and different organizational solutions and administrative styles develop in the public sector, so that harmonization does not occur, despite the institutional pressure Europeanization implies. It means modernization of the regulatory administrative system,

[24] The EU´s budget for interventionist use is scarcely more than 1% of the member countries joint BNP.

[25] The EU secondary legislation.

bringing along a differentiated domestic path (Pollitt and Bouckaert 2004: 187).

Innovative regulatory administration is discussed in the book 'Debating Governance, Authority, Steering and Democracy' (Pierre (ed.) 2002). Innovative administration manifests generally as processes which generate institutional divergence in spite of Europeanization[26]. Europeanization is generated by the EU´s supranational regulatory regime, which creates and maintains path dependence (Pierson 2004). Path dependence is here understood as something more than having a historical or ideological background which creates a form for 'blind' institutional conditions. The crucial feature of path dependent developments is positive feedbacks (or self-reinforcement) generating deviating solutions. Given this feature, each step in a particular direction makes it more difficult to reverse course (Pierson 2004: 21). A 'path' is created which becomes more and more difficult to break out of over time, due to institutional slowness and due to the fact that reform is costly when systems have settled (see the classical illustration of path dependence in paragraph three below).

This article analyses and discusses innovative public administration within the EU´s regulatory regime, and with relevance for the Nordic/Scandinavian countries through the EU and the EEA memberships. I have as a starting point that this regime practices institutional force and creates path dependence, and therewith to some degree administrative convergence. Further, I will show with a case and empirical data that there exists a national scope of discretionary power within the regulatory universe which the EU represents, and that this manifests as divergence by implementation of the EU´s set of rules. The discretionary power is linked to embedded administrative traditions and paths, and hence re-regulatory innovative action accordingly to some extent predictable.

3 Theoretical approach

Since, I shall analyse innovative regulatory administration within a framework of an expanding and narrowly transparent regulatory regime which is the case of the EU, I lay as a basis that rational choice theories are scarcely applicable in this context. I reject that innovative administration can be perceived as 'policy analysis', such as Friedman (1987) defines in his book 'Planning in the Public Domain'. Rational choice and policy analysis approaches require actors with full overview of the reasons and effects of plan initiatives and administrative reform, consequently a conception about 'the economic man' (refer to Amdam and Veggeland 1998). This approach became first and foremost developed and linked to the analysis of the Weber bureaucracy and the interventionist state's planning reform in a national setting. The approach had its limitations then in such analyses and indeed to a larger degree now in the analysis of the regulatory state in the framework of Europeanization.

I am not able to find a reason to choose a theoretical approach which builds on a condition about innovative administration as an administration which maximizes effectiveness by using competition and Market Type Mechanisms (MTM) in the public sector, i.e. by minimizing (privatization and contracting out) and marketizing (use of MTM and NPM) public sector (Pollitt and Bouckaert 2004: 188). Such MTM and NPM theories have this approach when they analyse innovation in the public sector (Veggeland 2004). This approach has also been in wide use in the OECD´s recommendations to their member countries since the 1980´s, which identified MTM and NPM as the best strategies for 'modernizing' the administrative system (OECD 2005).

In this paper, I will apply new institutional theory and enable elements from it to represent my analytical instruments.

- I see innovative administration as 'satisfactory institutional modernization' regarding adaptation to the EU regulatory regime within the discretionary scope of action existing at national and local levels.
- I define 'satisfactory modernization' as institutional change in the form of reinterpretation and translation of the EU regulations predicated on the distinctiveness of public sector provision, and the need to strengthen rather than dilute this sector (Pollitt and Bouckaert 2004: 187).
- The EU enforced institutional and regulatory modernization generates an administrative path and further the birth of new path dependence. The occurring path dependent processes are maintained and strengthened by positive feedbacks (as described in paragraph 3 below).
- The regulatory state related satisfactory modernization does not occur randomly, but rather within embedded national administrative traditions and path dependency which exist (Knill 2001).

I refer to J. March and J.P. Olsen's (1989) 'logic of appropriateness' in my understanding of which form the innovative administration acquires when it is submissive to an international regulatory regime. This 'logic' is rather simply described as such:

'In this view (logic of appropriateness), actors confronting a given situation do not consult a fixed set of preferences and calculate their actions in order to maximize their utility, but look to socially constructed roles and institutional rules and ask what sort of behavior is appropriate in the situation' (Pollack 2005:23, underlined by me).

Public administration as an actor becomes confronted with the EU´s regulatory authority and judicial control towards current societal areas, by supranational surveillance when regulations are implemented. This means that national administration sometimes must implement EU regulations which are in accordance with there politics, for others this

[26] See paragraph 4 for a closer definition of the term Europeanization.

creates conflicts and goes against tradition and current administrative traditions (Wallace 2005). One thinks that this creates a base for national policy and administration which is mentioned as 'politics for blame avoidance' (Weaver 1986); one accepts fully the EU regulations which arise. With criticism, the EU is referred to as the cause and responsible source, and is surprised when one´s own politics is criticized. In this way, maximum political benefits can be resulted by using the EU as the scapegoat. This is an element in the convergence theories about Europeanization processes and implies the expectations regarding full adaptation of public administration to the EU´s regulatory regime. Instead of developing a new and innovative administration which is anchored in a deliberative national value debate[27], the administration and implementation becomes a closed technocratic question of legality to avoid criticism and political responsibility. As mentioned, since the 1980´s, modernization and renewal of the public administration have often been synonymous with the implementation of the NPM and MTM principles in the public sector (refer to for ex. Cassese 2003, Pollitt and Bouckaert 2004).

In my understanding and contextual definition of innovative administration, the breaking process needs to be brought in. Breaking processes between on the one side national historical and social administrative traditions and the institutional path dependence these have developed, and on the other side the path dependence EU institutionalised regulations and Europeanization processes create (Rosamond 2000). No clear institutional form for administration and implementation comes from this. Rather, it results in an administrative satisfactory path which continues nationally as long as it is strengthened with positive feedback.

4 Classical illustration of path dependence

Below is a classical illustration of path dependence which relates to mathematical probability calculations[28], but highlights my approach to innovative administration and modernization in the framework of the EU regulatory state.

In a game, we have a container which holds one blue ball and one red ball. In the game, you choose from the container one of these balls and place it together with a ball of the same color. Let us say that the first one you select is blue. The next time you take one there is now two blue and one red, and the odds of what you select the third time is two to one. Again a blue one is selected, and the odds to select a blue one next time are three to one, and this is how the odds continue. Is the tendency that the blue balls are selected in increasing majority, and only with one and another red ball now and then, path dependence is created connected to drawing of the balls. Path dependence increases the likeliness that the blue ball is selected the next time. Path dependence develops over time as processes of positive feedbacks/self-reinforcements.

We also observe by the illustration that for development of the self-reinforcement linked to blue – or red ball- path dependence that the early random characteristics are very important. In the game you selected blue balls, and path dependence was established, in other words established in relation to an alternative path dependence linked to red balls. Later in the game, similar characteristics will not have the same effect on the further development of the path dependence of the blue or red direction. Late in the game, let us say with carrying out 100 selections, that the simple selection will only have a marginal effect for the outcome of the winning path dependence in the game. Gradually increasing possibilities for victory display themselves as feedback.

In my approach to innovative administration, I perceive the choice of EU membership or EEA membership as the first decisive selection in the game of path dependence. I relate to P. Piersons (2004) analysis of institutional path dependence in public administration in this connection. Pierson shows how positive feedbacks are a necessary condition for the extension of path dependence, and the time dimension plays a role and makes it more difficult to choose an alternative path. He writes:

'Each step along a particular path produces consequences that increase the relative attractiveness of the path (positive feedbacks) for the next round. As such effects begin to accumulate, they generate a powerful cycle of self-reinforcing activity' (2004: 18) and further he says: 'Once a particular path gets established, however, self-reinforcing processes are prone to consolidation or institutionalization. Critical junctures generate persistent paths of political development' (2004: 51).

This is also my understanding: Innovative administration in the regulatory state does not occur spontaneously or by coincidence. It prevails in the breaking of path dependency which the EU regime establishes along national paths. The EU generates institutional path dependence through the large number of judicial acts the Union introduces. But these acts also induce a new scope of pressure for change in national administration, because critical junctures arise. These critical junctures become arenas for innovative administration and satisfactory modernization, through re-regulation and change. The EU umbrella of harmonization pressure is maintained through Surveillance Authorities. The innovative national diversity is maintained by the legitimacy of the administrative tradition and the attractiveness of the modernized paths (Pierson 2004).

[27] In the EU related to the 'Open Method of Coordination'.

[28] P. Pierson (2004) also uses this illustration in his contextual connection.

5 EU/EEA regime: Administration between legality and legitimacy

Based on our earlier definition of international regulatory regimes, and freely translated, the EU/EEA regime becomes consequently:

"… An international regime, which based on …"principles, norms, rules and decision-making procedures impose conditions on Nordic member states as actors, and creates expectations about convergence in relation to other European member countries in the agreement areas"…".

Through its legislation, the regime transforms its expectations about convergence of public administration and its institutional structure and manner of operation in the entire area[29]. For EEA countries such as Norway and Iceland, it is EU´s secondary legislation and not the treaties which are binding, and which can be said represent the regime (Veggeland 2005). This secondary legislation is made up of four main types, and is described as decrees, directives, resolutions and not binding recommendations:

Decrees: These are in their entirety directly binding for the member countries. They have an unambiguous judicial character, and are enacted immediately when they are decided.

Directives: These join the EU member countries– and also the EEA member states in the areas with which the agreement defines – to the objectives with the resolutions which are decided on and which acquire status as directives. But each state determines itself which form the directive shall have in the national legislation and how and with which instrument it shall be set into operation. This last point provides a scope of action which some member countries central and local authorities take advantage of better than others, in the significance that they realize the objective but interpret the directive differently. They re-regulate within the directives institutional framework (van Gerven 2005). In this way, they take advantage of a national scope of action which makes it possible to pay attention to differences when concerning administrative traditions and embedded path dependence. (Knill 2001).

Resolutions: These have a limited area of effect, for example for individuals, a business, an institution or one of several member states, and therefore make up a large quantity of statutes. They are only binding for those they pertain to, but have a universal effect for similar cases within the community.

Recommendations: These are not binding for member countries, but can still have significance towards the development of institutional convergence and harmonization. Larger member countries may implement recommendations in their administrations and thereby create a path which places pressure on smaller countries.

Decrees are the most direct form of EU law - as soon as they are passed, they have binding legal force throughout every Member State, on a par with national laws. National governments do not have to take action themselves to implement EU decrees. They are different from directives, which are addressed to national authorities, who must then take action to make them part of national law, and decisions, which apply in specific cases only, involving particular authorities or individuals.

In 2011, the total number of judicial acts registered in the law of the EEA country of Norway is more than 6000; for EU member countries this represents 2/3 of the EU total judicial acts. More than 30 % of Norwegian judicial acts are adopted or change as a consequence of EU law regime.

We can assume that a public administration´s legitimacy can become pressed and sometimes threatened by the demand of legality, in other words to fulfill expected implementation and monitoring acceptance (Veggeland 2005, Lavenex and Wallace 2005). Above, I mentioned 'politics for blame avoidance' as an aspect of this. The European Commission and the EFTA´s agency ESA represent the respective monitoring authorities regarding Nordic EU and EEA member states. For the national states it is a matter of building an administration with institutional ability and capacity to act as innovative executives[30] of EU´s set of rules, but within a legal framework. On the other hand, and an important part of innovative administration´s legitimacy, is that it is still anchored in national democratic decision-making processes and 'good governance' values in general (Rothstein 2006).

This paper focuses repercussions which manifest in Nordic public administration in the wake of the EU´s general supranational regulatory regime. The EEA expands the geography so that the EU regime´s impact area also includes three non-member countries[31]. This means that the national states societies within the entire EEA area in varying ways and to varying degrees 'Europeanize' (Olsen 2004). We can say that the Europeanization establishes external framework conditions which go against the institutional path dependence national framework conditions for renewal and innovation. In our relation, this means that public administration is set under transitory pressure from the EU regime´s secondary legislation in the form of both direct and indirect impacts.

In reality, this legislation creates many administrative paths which cross each other, and which are not always consistent. The paths have a crossroads where opportunities of choice arise and scope of action is manifested (van Gerven 2005). The

[29] Presently, a total of 28 states.

[30] The administration´s implementation of the EU´s directives do not need to follow a 'rational choice' or a 'coercion' logic, but rather a logic and understanding linked to the attainment of 'appropriateness' (March and Olsen 1989).

[31] Norway, Island and Liechtenstein.

challenge lies in finding this scope of action. It makes innovative administration with its proactive orientation towards satisfactory modernization rather than a reactive adaptation or a not legal dismissal. (Graver 2005, Veggeland 2005).

6 Europeanization of the administration

EU as an international regime and supranational authority influences and reforms member states and EEA countries at all levels, from national to regional and municipal levels; 'Europeanization' processes are taking place. Through time and in various settings, the term Europeanization has been defined in a number of ways. (Olsen 2003:334). Theory and knowledge development today relating to Europeanization is linked to how political, economical, social and cultural processes at the EU level influence general national and society development in states joined to the EU/EEA. And beyond that, in the EFTA state of Switzerland which only has trade agreements with the Union, development shows that at least the legislation for competition is becoming more and more harmonized with the EU´s.

Contextually three mechanisms define Europeanization of the public sector (Olsen 2004, Claes and Førland 2004:153):

- Penetration of European level institutions and legislation into national and local administration, and by which new path dependence is generated.
- Modernization of the administrative system encouraged by the desire to optimize national interests within the EU/EEA framework which also require corresponding adjustments to the political system, but in the framework of domestic traditions and paths.
- Innovation through learning and exchange of ideas, models and knowledge, and through contact and teamwork within the EU system. Europeanization of the administration in this framework constitutes constructive conjuncture of old and new knowledge paths as favourable condition for innovative preferences and actions.

Penetration: Power, authority and legitimacy are needed in order to penetrate national and local administrative systems and realize Europeanization. This means that penetration occurs on the basis of a role as "principal", in contrast to the role as "agent", or rather the one who is penetrated. As a supranational authority, the EU has a role as legal principal, while the member countries are agents in the role as proactive or reactive executives. The member countries have voluntarily established the EU, but have therewith undertaken a general obligation to follow the EU´s legislation and the decisions of the European Court of Justice[32]. National administrations are exposed to a significant pressure to act as an adaptation agent to achieve legality, and not as an innovative agent who creates divergence between the EU/EEA countries by satisfactory modernization; new paths and dependence are created.

Modernization: National administration evaluates its scope of action, opportunities and limitations within the EU´s legislation and set of rules, and in relation to the EU´s different financial instruments. In the areas where scope of action exists, the administration can choose to follow the EU´s strategies and procedures to avoid processes becoming ambiguous and that complexity increases. This means that it chooses a role as a reactive agent with adaptation as a value and a norm. For example, this may occur when public administration chooses the strategy of marketize. The administration is reorganized and exposed unnecessarily to the EU´s legislation for competition by instituting as many market type mechanisms (MTMs) as possible (Pollitt and Bouckaert 2004: 187). A choice about satisfactory modernization could have prevented this. It means borrowing new ways of doing things from the market sector in a modest and selective way, and in the framework of domestic administrative traditions and paths.

Innovation: Europeanization through innovation occurs in the conjuncture between national authorities and administrations on direct and indirect communicative and learning contact within the EU system. Policy translated and implanted in national administration may be seen as a copying act but may very well instead be determined as a public innovation. A number of studies, anchored in constructivism as a theory, (Rosamond 2000), point out that Europeanization of the national state does not just prevail as regulatory pressure (Sandholz 1993). There is given evidence for that EU institutions shape not only the behavior, but also the preferences and identities of individuals and member governments' (Pollack 2005:23).

Besides knowledge, also preferences and identities will constitute basic conditions for innovative action. Part of these conditions is the notion of communicative confrontation, i.e. constructive confrontation between the old and the new ways of thinking and doing things (Fagerberg, Mowery and Nelson (eds.) 2005). In the context of the EU Lisbon strategy since its launch in 2000, the 'Open Method of Coordination' has been such a communicative way to develop the policies of the member states innovatively through multilevel deliberation.

The points demonstrated must not be misunderstood. Ideas and conceptions of innovation and modernization which pre-exist in the EU system do not need to have their origin in the Union. The OECD strategies for modernization of the public sector, where the focus is on the use of MTM and NPM principles, can be mentioned here as an examples (OECD 2005). Conceptions of this type can be traced back to theories and reform strategies with

[32] This also concerns Norway and Iceland as members of the EEA.

Anglo-American origin and administrative traditions (Veggeland 2004, 2007).

7 Re-regulation

The national administrative effects of the EU legislation vary from one political area to another. Let us take a look at the area where Europeanization is most evident and articulated. The EU´s politics is generally most prominent as regulatory politics[33], and not as distribution politics. The scarcely comprehensive and direct distribution and redistribution politics in the EU is rather linked to a relatively limited budget[34] (Woolcock 1996, Veggeland 2003). In many ways, the EU´s regulatory politics is different from what we know as traditional national regulatory politics in a mixed economy, or what is referred to as the 'old regulatory politics'. This traditional regulatory politics is to a large degree occupied with market regulations, by defining the conditions for companies to achieve access to the market, and to operate in the market under specified competitive conditions. It is especially important to prevent the creation of monopolies and oligopolies in the market (Austvik 2002).

The new regulatory politics is a renewal politics with 're-regulation' as an institutional instrument, and which occurs in the coolant of de-regulation (Majone 1997). Re-regulation is organized to prevent negative externalities which arise as a result of competition to market activities, in other words unintended negative conditions on society and nature. Re-regulation attempts to achieve a politically controlled new administration and a path dependence which gives positive feedbacks. We can say that de-regulation adapts to market driven innovation and renewal, while re-regulation represents public innovation in the regulatory state.

Re-regulation means that earlier regulations are replaced or revised, or that a new administrative area is placed under an alternative regulatory scheme. (Scharpf 1999). The regulatory state searches through re-regulation to create satisfactory solutions and positive feedback processes. Some examples of these administrative areas for extensive new re-regulation in the EU are within environmental protection, the labor environment, health and social services, consumer protection, food safety, anti-discrimination, veterinary practices and conditions[35], sustainable regional politics, and so on (see for ex. Morgan (2004) on the Welsh re-regulation of the directive for public purchasing: Only local bidding rounds and contractors were political argument for sustainable regional development, and a premise to promote competitiveness in the EU area. (Veggeland 2005).

The direct effect of the EU´s de-regulation politics on national administration is that agreements and sets of rules which prevent free movement in the EU´s single market, are not legal. European regulation has, for example, liberalized the labor market and imposed member countries in the EU and the EEA free movement of labor. The service market is liberalized with a ban against discrimination of foreign job applicants and executors of the bidding rounds[36]. Road transport is liberalized, and there is a ban against refusing foreign transport carriers to perform their services in a home market. At the same time, there is no demand for a national administrative reform in these areas to correct negative effects that may result. In this respect, foreign labor, service producers and transport carriers have to submit to national laws and national administration for the respective areas of society (Woolcock 1994). This often creates deep setting cross-border extended conflicts, with the EU´s 'service directive' as a well-known example[37].

Re-regulation presumes political objectives, and therewith an innovative administration which can develop 'satisfactory' solutions. In the EU´s legislation, there are concrete decisions and demands for reforming and restructuring sets of rules and administration based on the objectives which the directives indicate. Member countries need to bring their administrations within these areas into 'satisfactory' accordance with the European regulatory model which is evident implicitly in the legislation. Varying national and local regulatory traditions and basic values can freely be respected if they satisfy the objectives of the directives. Therefore the term 're-regulation' is used for this type of regulation. When re-regulating, then national interpretation and translation acts matter (Veggeland 2006, 2007).

There is pressure from the EU to fulfill certain supranational objectives also in other areas than what the legislation for competition indicates. This can be, for example, to fulfill minimum values, procedures and threshold values (such as relating to environmental politics, food safety and so forth). This may go against national administrative traditions and their administrative paths. The national states are being challenged (Olsen 1997, Ferrera 2000).

[33] EU is called a 'regulatory authority' (Majone 1997).

[34] A fraction larger than the Norwegian state budget in 2005, or a fraction more than 1% of the EU countries joint BNP.

[35] The Veterinary agreement as part of the EEA agreement is known to Norwegian administration as a different type of re-regulation in these areas.

[36] The so called 'Bolkestein' (service) directive has created debate, and a compromize in 2006 was agreed in the EU parliament regarding the protection of labor with demand for the same rights for social safety and wage rates. The directives are still causing debate, and are not resoluted. My point therefore does not change.

[37] The service directive creates free movement of services in the inner market. Conflicts have arisen due to different national administration of services, interpretation of public services, social welfare services, and social security schemes.

8 European administrative traditions

Divergence theories relating to Europeanization are concerned with these infringements between national administrative traditions and the new path dependence which the EU generates. They point out that administrative development and organization varies largely between the EU member countries, in spite of over national legislation and a legality pressure for harmonizing and adapting public administration to a vaguely defined European model. They are searching for an explanation about how divergence develops within regulatory regimes such as the EU (Knill 2001, van Gerven 2005).

A rough division goes between: A) The Continental state centered public administration and rule controlled bureaucracy which characterizes founder member countries such as Germany and France. B) The Anglo-Saxon market oriented regulatory state and incentive and result managed administrations, represented by Great Britain as the forefront country in Europe (Knill 2001:59-117). Different national understandings and administrative traditions in the member states result in various adaptations to and translation of the European model policies, with significant effects on how the public sector is organized domestically in each states (Veggeland 2004). Hence, in the European integration process these traditions bias disputes. This occurs because it is difficult to reach consensus regarding important policy issues[38], and because innovative administration as national policy translation and innovative implementation creates divergence. Divergence therefore goes hand in hand with convergence in the public sector, the latter as defined by Krasner (1983). This is observed empirically by the different formulations of the national organizational solutions and institutional arrangements.

Alternative choices at all levels occur under the umbrella of different administrative traditions based on different paths of ethical principles, understanding and conditions and is dependent upon the political scope of action. Let us examine these traditions more closely.

It is common to make a division between 'negative' and 'positive' integration in economical theory. The terms are in no way meant to represent anything normative nor do they refer to economical processes as such. They refer to public policy which aims at expansion of the economical area in addition to the existing national borders, in other words deregulation and administrative control across borders (Tinbergen 1965, Scharpf 1999:45).

About negative and positive integration in the EU/EEA Fritz Scharpf (1999: 45) writes interestingly:

'In this sense, negative integration refers to the removal of tariffs, quantitative restrictions, and other barriers to trade or obstacles to free and undistorted competition. Positive integration, by contrast, refers to the reconstruction of a system of economic regulation at the level of the larger economic unit…. While all measures of negative integration should probably be classified as being market-making, measures of positive integration may be either market-making (e.g. if divergent national product standards are being 'harmonized' in order to eliminate existing non-tariff barriers to trade) or market-correcting (e.g. process-oriented regulations of working conditions or pollution control)'.

Negative integration: From the Scharpfian elaboration it can be assumed that negative integration and its market-making measures constitute a foundation for innovation and renewal in the private sector through 'creative destruction' in Schumpeter significance.

Positive integration: Positive integration and its market-correcting measures constitute conditions for innovation and modernization in both private and public sector; as market-making measures they count in the former sector while the market-correcting measures, the process-oriented (re)-regulations, work in the latter sector.

Re-regulation: Re-regulation through innovative administration corrects the market by dealing with process- orientated regulation and administration organized to improve for ex. hygiene, working environments and social safety, condition for small and medium seized businesses (SMBs), pollution control etc.

Political Europe marks the distinction between market-making and market-correcting measures in the European integration. There is an ideological front line for conflict, between those who are not supporters of public interventions (supporters of the markets "invisible hand" and new liberalism), and for those who are supporters of state intervention (the supporters of the economist J. M. Keynes' theories about an active state, socialists and social democrats). This frontline becomes effective in the EU´s integration approach as an internal conflict anchored in different national administrative traditions regarding views on the function of the state apparatus (Knill 2001:61-84).

An Anglo-Saxon public administration tradition exists with an understanding of the state´s power as primarily an equal part in relation to other societal actors and a protector of – an organizer, a mediator – for market actors. Public administration shall not involve itself actively into actors' dispositions, regardless if these actors are from the private or public sectors (Knill 1999, Veggeland 2005). Expressed in a metaphor, public administration benefits from do 'steering without rowing'. (In Great Britain, the term 'the state' is not used. One does not say 'the British State', but rather 'the British Government').

[38] Jf. Disagreement in 2004/2005 about protective or competitive exposure to "services of general interest", and about the service directive regarding the welfare rights of the workers in "foreign" employer countries.

Contrary, the Continental public administration tradition exists with strong focus on the state power as the superior authority and protector of other societal actors. In this tradition, the state intervenes institutionally and financially and involves itself directly and actively in society steering based on conventional foundation by showing a special responsibility to ensure citizen rights and services which have a general significance. A basis for this is the judicial state's principles (German 'Rechtstaat') (Schmitter 2000).

For many market liberalists, negative integration is the most significant of European integration, in the same manner as de-regulation. Positive integration is only acceptable to the degree that it serves the purpose of market-making, or formulates and implements statutory provisions, which prevent competitive discrimination in the market.

Contrary from an interventionist perspective negative integration becomes evaluated problematically if not succeeded by the establishment of legal surveillance and control. The purpose is correcting the market, or re-regulation is used as a steering instrument (Scharpf 1999). Historically, the interventionist Continental tradition has been strong in the EU due to the founder position of Germany and France. In the 1990´s, the balance in the EU, as in the OECD area in general, became displaced by the Anglo-Saxon tradition with increased emphasis on new liberalism ideology, and the use of NPM and MTM principles in the service sectors within the public sector.

The background for what we are focusing on is the EEA negotiations at the beginning of 1990 between EFTA countries and the EU about an agreement for access to the EU´s inner market. The EEA agreement was entered into, but Sweden, then an EFTA country, instead became an EU member in 1994 while Norway continued as an EEA country. The EEA agreement included the EU´s supranational set of rules and directives regarding public purchasing of products and services. Procedures and an upper limit of Euro 200 000 (NOK 1 600 000) were established for such purchases. Purchases for lower values did not require competition and bidding administration. Purchases over this value were included in the directive, and therewith placed under legal surveillance (from the EFTA agency ESA for Norway´s part).

At that time, both introduced a re-regulation, which was influenced by the EEA agreement. Norway and Sweden set the upper limit for bidding much lower that what the EU regime required; respectively NOK 200 000[39] and SEK 200 000. The decision resulted in a much more extensive use of bidding administration and outsourcing than if the EU´s marginal value for public purchasing had been applied. This partly explains their high ranking in table 1. The decision was legal because the EU directive had no decisions against lower national limits for biddings and competition, and therefore the directive could be interpreted freely (Veggeland 2005).

Was this an adaptation or an innovation within the supranational regulatory regime, and what about the regulators´ legitimacy in relation to administrative traditions? One could be sceptical and presume that it was the result of a political error in both countries: 'the value difference' was overseen because the focus was on the quantity 200 000. It seems unreasonable. Instead one must assume that we see an example of both modernization and innovative administration in the implementation phase of an EU regulation. Furthermore, there is reason to believe that the decision in the two countries was driven by path dependence, positive feedbacks and political legitimacy.

The re-regulation was an innovative transfer and translation of the basic EU public procurement directive. A politically prioritized re-regulation and not a market creating re-regulation were introduced (Scharpf 1999). The EU regulation was targeting market-making, while the national re-regulations with the lower threshold values for bidding rounds and outsourcing were a competitive regulation with another market-making objective. Internationally, this is called 'regulatory competition' (Woolcock 1996, Sharpf 1999: 84-121) and has the political objective to twist the market.

In our context the re-regulation had this effect: Small and medium sized businesses (SMBs) with lesser capacity and investment capability were given an opportunity to participate as bidders, to win bids and become contractors. The low threshold values made it of little interest to large national and international firms to participate in the bidding rounds. Within the Scandinavian tradition the administration took advantage of the scope of action that prevailed in the conjuncture between the EU´s regulatory and national regimes. Besides, in general, Nordic countries rely less on non-profits or private institutions to provide services directly to end users.

In conclusion of these case examinations, it appears that for each passing year and as evidenced in other OECD countries (OECD 2002), negative developments became over time manifested to an even larger degree. Increased transaction costs appeared in the wake of re-regulation to low threshold values for the use of bidding administration. Over time path dependence brought about new areas of use in a self-enforcing process and increased the volume of outsourcing. This agrees with what P. Piersons (2004) shows in his analysis, which is referred to above. Negative feedbacks occurred as the years progressed, mostly in the form of strongly growing[40] transaction

[39] In 2005, the amount was increased to NOK 500,000 by the government.

[40] Exponentially increasing transaction costs with increasing number of actors involved in the administrative process is examined by Fritz Scharpf (1997).

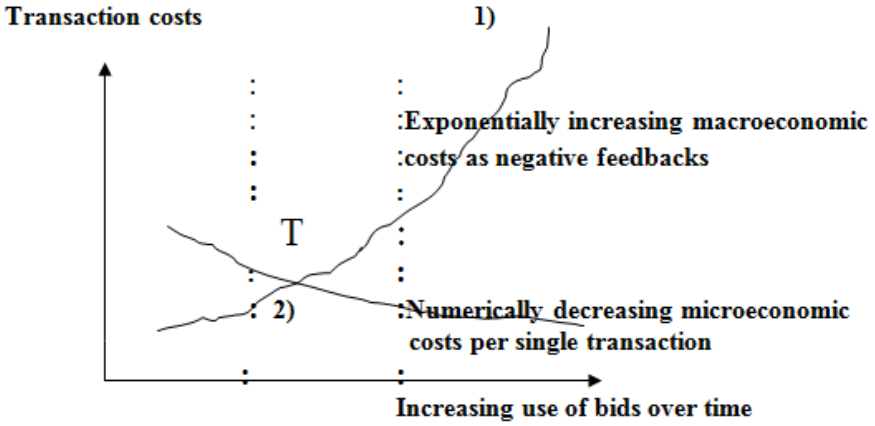
costs (exponential). Both private businesses and public administrations experienced this as a result of activity fragmentation and from the number of actors involved.

Transaction costs and private businesses: The many companies who participate as bidders invest in the preparation work of the bid, but only one company becomes the contractor in practice. For the many other bidders, the investment in principle is lost. Employment is created, but not earnings.

Transaction costs and the public sector: The administration invests significant resources in the preparation work of the bid, to administrate the bidding rounds, evaluate the offers, write the many contracts, and finally to conduct controls that the contracts are complied with (Beetham et al. 2002, Veggeland 2004, 2005). Employment is created in the public sector, but since administration's budgets in principle are a certain size, the transaction costs affect the central operations negatively, in other words the service production.

The problem with increasing transaction costs and the increasing use of outsourcing in the public sector can be shown in figure 2:

Figure 2. Transaction costs by increasing the use of outsourcing in the public sector



Curve 1) in figure 2 shows the exponentially increasing transaction costs with the increased use of outsourcing in the public sector as described above. The development in the municipal economy is an example of the development perspective. The purchase of municipal products and services resulted in splitting up of the operation when small bids increase in number over time. This also resulted in an increased use of resources in the preparation of bids and contracts, and in administration, reporting and control, and increasingly more actors becoming involved in this type of work. When the municipalities first started out with outsourcing, it is reasonable to assume that the transaction costs of this type were at a low level, with insignificant effects for the budget or other operations. Dominance of positive feedbacks was the administration´s experience during the first years, by saving with purchases, and learning and competence rising amongst the employees. The negative feedbacks through transaction costs became dominant and experienced later as fig. 2 shows, possibly after several years (OECD 2002).

Curve 2) shows numerically declining costs per single transaction by increased use of bids over time. The basis for this is not the general perspective behind curve 1), but the individual bid which consequently increases numerically in quantity over time. It is assumed, and there is evidence for that the bid makes the individual public purchase cheaper, for ex. in municipal administration. There is also reason to assume that transaction costs with the individual bid is largest in the starting phase due to lack of experience with this type of administrative form and perhaps with the need to hire external expertise (OECD 2005: 132 – 139). Over time, experience is acquired and competence is built up. The time it takes to prepare a bid decreases, and thereby reduces the transaction costs in a numerical sense over time. Positive feedbacks dominate and are experienced by the administration, as fig. 1 shows, until the general transaction costs begin to be tangible. They begin to affect tight budgets of the core service sector operation.

Fig. 2 at one point shows that the two curves cross each other and a type of balance point is created with the use of outsourcing as administration. A T-point is established in fig. 1. In my definition of innovative administration, this T-point makes up the point which we can say makes up 'satisfactory´ modernization. In the regulatory state, the administration must conduct itself to this point regarding outsourcing and find a balance between in-house provision of services and the use of the MTM of outsourcing. Chris Pollitt and G. Bouckaert believes and writes that the Nordic countries act properly (2004:189): 'The Nordic countries …….. aim for modernizing, with some modest marketizing'.

Empirical evidence given for the importance of the T-point in general and the troubles it generates when underestimated is to be found in the OECD report 2002: 22. It is documented that use of outsourcing in the public sector which involves extensive institutional fragmentation and large transaction costs, besides control problems, has ended in the member countries which were analysed: Of European countries were Great Britain, Sweden, The Netherlands, Spain, Germany and France.

Related to our case, Norway has had negative effects as a result of the pressure from negative feedbacks on regulatory change relating to outsourcing. In Norway, the national threshold value for bidding through public purchasing was re-regulated in 2005 to NOK 500 000 by the Bondevik II government. This was done by a government who ideologically stood for market liberalism and competitive exposure in the public sector as 'a goal in itself' (Veggeland 2004). However, it did not stop there. The Stoltenberg II government announced at their start a re-regulation and this government wanted a much higher threshold value before the use of outsourcing in the public sector. Possible full adaptation to the EU´s purchasing directive with this much higher threshold value was mentioned. Ideologically, this was less surprising because the reasoning was less use of competition mechanisms in the public sector and a more complete administration to reduce transaction costs. The suggestion about this policy and re-regulation was shortly thereafter withdrawn.

A 'satisfactory' modernization was preferred. The upper limit before bidding and bidding rounds for public purchases was kept at NOK 500 000, the reasoning was linked to the importance of SMBs participation and the employment issue. The Curve 1) of fig. 1 shows that transaction costs will for a period get a somewhat lower growth from fewer bids and the administration will come somewhat closer to the T-point.

9 Some conclusions

With empirical data and case examination, I have tried to draft terms and assumptions which were introduced regarding innovative administration and 'satisfactory' modernization. The outsourcing case does not disprove my assumptions on national innovative administration in regulatory regimes as an administration which implements re-regulation; which is bound by administrative path dependence; which is generated by positive feedbacks; which is not developed randomly; which uses 'scope of action'; which arises in conjunctures between the EU/EEA set of regulations and the national translation of these regulations.

With limited empiricism, I have tried to expose these aspects of innovative administration. The game with the blue and red balls in paragraph three is an illustration of how path dependence is established and can be understood in a mathematical perspective. The coloured balls early in the game are decisive for generating blue or red path dependence. Towards the end of the game, each draw becomes less significant and decreasing risk gives positive feedbacks. We allowed the blue balls to create the path dependence.

This naturally occurs in a much more complex manner in politics and administration than as indicated by example in this game. Transferred to our case in paragraph seven, Norway´s and Sweden's entry into the EEA agreement was the first founding characteristic. Therewith the EU directive for public purchases was at the same time adopted, with its threshold value, bidding schemes and outsourcing. This was the decisive characteristic for the further generation of a path dependence which Norwegian and Swedish administrations had to follow and find a scope of action within and by which it had to relate innovatively to.

Heavy path dependence in public administration can only be broken down when sufficient negative feedbacks arise. The EU plays an important role: A Scandinavian adaptation to the EU public procurement directive prevailed in the 1990s, and with a surprisingly extensive use of the 'marketizing' strategy in relation to what the state-centered administrative tradition promises.

Influenced by Anglo-Saxon reform strategies and by the New Public Management principles the Market-Type-Mechanism of outsourcing became dominant in Scandinavia.

The public administration in especially the two Scandinavian countries Norway and Sweden implemented innovatively satisfactory modernization within their socio-economic tradition and characterised by Nordic model path dependence.

In this context, the modernized Scandinavian welfare state model, the Nordic model, is in focus as a blend of the Anglo-Saxon and the Continental model (EPC 2005, Veggeland 2007).

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