The law and governance debate in the European Union

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1. Introduction

For a long time, the word “governance” was used as a synonym for governing, and thus, referred to the process aspect of government. Recently, however, governance has been used as an all-embracing concept capable of conveying different meanings not covered by the traditional term “government.” As opposed to the traditional hierarchical model of government, governance indicates a new mode of government where state and non-state institutions, public and private actors participate and often cooperate in the formulation and implementation of public policy. The developments in the field of governance, indeed, indicate an erosion of territorial, nation-state centred political governance and nation-state constitutionalism.

According to the political scientist Roderick Rhodes, the concept of governance is currently used in contemporary social sciences with at least six different meanings: the minimal state, corporate governance, new public management, good governance, social-cybernetic systems, and self-organized networks. All of these definitions refer to a more cooperative way of governing in which state and non-state institutions, public and private actors, cooperate in the formulation and making of public policy.

The European Commission established its own concept of governance in the White Paper on European Governance (White Paper), in which the term “European governance” refers to the rules, processes, and behaviour that affect the way in which powers are exercised at the European level, particularly with regard to openness, participation, accountability, effectiveness, and coherence. The shift from government to governance has been observed since about the 1970s in Western European countries. In the United States, characteristic structures of governance such as policy networks and independent administrative agencies were created. However, since the United States does not share the European tradition of a strong interventionist state and has always stressed individual autonomy and self-government, the new forms of governance were not perceived as particularly innovative modes of governing.

In the European Union (EU) context, new forms of governance have, indeed, progressively been incorporated into most branches of EU law and policy. Departing from its original administrative reach, EU governance now encompasses the areas of environmental law, health and safety law, and social policy. Governance in its different forms raises novel constitutional and administrative concerns. These developments have attracted a lot of attention both in the political science discourse and, more recently, in the legal one. Even if the legal discourse on governance in the EU still owes much to political scientists, the contribution of lawyers has steadily grown in recent years and developed into an original and comprehensive analysis of the phenomenon. In trying to outline the characteristic features of governance, the analyses of lawyers and political scientists converge to a certain extent. The main features of European governance have been identified as expanded participation of civil society in policy-making and, to a lesser extent, in law-making; co-ordination of action and actors at many levels of government as well as between government and private actors; co-ordination among Member States, rather than uniformity; and

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4 Id. at 1.
6 See generally RHODES, supra note 1.
extended deliberation among stakeholders in order to increase problem-solving capabilities and democratic legitimation.\(^7\)

A common underlying premise for the study of governance in both disciplines is that governance in the EU presents unique features that make any comparison with other political and legal systems—both states and international organizations—difficult. This is due in particular to the fact that, despite its growing power and strengthening identity as a political as well as an economic organization, the EU remains an ambiguous entity that eludes satisfactory definition whether in conceptual, legal, or constitutional terms. The EU stands somewhere between a functionally limited supranational organization and a political community with open-ended objectives.\(^8\) In other words, the EU reflects and contains elements of a special-interest organization, but, as it has evolved and grown, it has developed characteristics, powers, and an institutional form which are those of a more developed, although inchoate and partial, constitutional polity.\(^9\) On the one hand, the EU does not present the characteristic features of a traditional European state since it is without extensive powers of coercion, a hierarchical bureaucracy, and a large welfare budget.\(^10\) On the other hand, the EU has progressively acquired extensive regulatory powers that make it similar to a quasi-federal state.\(^11\)

The discourse of governance reflects this ambiguity since the instruments of analysis themselves are challenged. Governance in the EU cannot be equated with governance developed within a single state nor between a set of sovereign states.\(^12\) Likewise, the distinction between administrative law and constitutional law and between the EU constitutional framework and its administrative organization appears to be blurred in the EU context. The powers and tasks of the EU are shared between different actors and institutions which act at different times as part-executive and as part-legislature, partly as administrators and partly as decision-makers, in all kinds of policy areas from the minor to the most important. There are no administrative actors clearly distinct from legislative decision-makers. European independent agencies, for instance, have begun to proliferate in recent years, yet their role has been circumscribed within the formal framework of the primary decision-making institutions of the Commission and the Council. A vast network of advisory and implementing committees sometimes referred to as “comitology” is similarly linked in complex

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\(^{11}\) Beate Kohler-Koch distinguishes among four different modes of governance: statism, based on majority rule and supported by a dedication to common purposes; corporatism, which includes competing social interests in consensus formation in order to achieve the common good; pluralism, which combines majority rule and the particularistic pursuit of interests; and network governance, which builds on self-interested actors and aims at upgrading common interest by negotiations. She concludes that the EC is best equipped for a network type of government since the Community tends to be a negotiating rather than a hierarchical system. Beate Kohler-Koch, The Evolution and Transformation of European Governance, in The Transformation Of Governance In The European Union (Beate Kohler-Koch & Rainer Eising eds., 1999).


\(^{13}\) See, e.g., de Búrca, supra note 9; Hix, supra note 8, at 54.

\(^{14}\) Hix, supra note 8, at 40.
ways into this framework without possessing autonomous legal powers. Therefore, new forms of governance cannot be easily read through the lenses of the traditional principles of either constitutional or administrative law. On the contrary, they inherently represent a challenge to those categories and tend to escape any attempts at juridification.

For some time, the issue of governance has been overlooked or regarded with skepticism by legal commentators. One of the reasons for such an attitude may be that law has been regarded as the normal form of integration in the EU. Lawyers, in turn, have focused mainly on the study of legislation (assumed to deal with broad principles), rather than with the implementation of EU policies (understood as the mere application of those principles). The dichotomy between legislation and implementation, however, is ill-suited to examine new forms of governance that have proliferated at the intersection between the law-making and law-implementing processes.

The development of the EU, indeed, has been such that important decisions have been delegated to “technocrats”—either bureaucrats or scientific experts—instead of to politicians and according to procedures that do not necessarily allow for the degree of transparency or citizen participation required by a democracy. Since important decisions are placed in the hands of technocrats in committees and outside the range of traditional democratic machinery, legal experts have failed to give these developments close scrutiny. Finally, many regard “soft law” in general, and recent manifestations such as the Open Method of Co-ordination (OMC) in particular, as not being strictly related to their discipline or as being of minor importance and unable to rival in significance, authority, or impact the role of “hard law.”

Consequently, whereas political scientists focus on the necessity of ensuring that governance mechanisms meet the standards of participatory democracy, legal literature tends to address European governance against the benchmark of the legal structures as specified in the EU Treaty or developed in the case-law of the European Court of Justice (ECJ). Likewise, lawyers provide a definition of governance mainly in terms of opposition to classic law-making processes and legislative sources as enshrined in the Treaty. According to Joanne Scott and David M. Trubek, governance includes any major departure from the classic Community Method, whereas “new governance” will include both departures within the Community Method and alternatives to that method. Similarly, Carol Harlow defines governance in terms of opposition to the classic concept of law-making procedures.

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16 Carol Harlow, Accountability And European Governance 168–92 (2002).
18 The expression “soft law”, as opposed to “hard law,” was developed to describe declarations resolutions, guidelines, principles, and other high levels statements by group of states such as the United Nations (UN), the International Labour Organization (ILO), and the Organization for Economic Development (OECD), that are neither strictly binding norms nor ephemeral political declarations. It is recognized that soft law instruments can have some anticipatory effect in shaping new binding international norms and may acquire considerable strength in shaping international conduct. For a definition of soft law in international law, see Daniel Thürer, Soft Law, in Encyclopedia Of Public International Law 452 (Rudolf Bernhardt ed., 1995).
19 The “Community Method” is the expression used for the institutional operating mode for the first pillar of the European Union. Its main features can be summarized as follows: Commission monopoly of the right of initiative; general use of qualified majority voting in the Council; an active role for the European Parliament in co-legislating frequently with the Council; uniformity in the interpretation of Community law ensured by the Court of Justice. The method used for the second and third pillars is similar to the so-called “intergovernmental method,” with the difference that the Commission shares its right of initiative with the Member States, the European Parliament is informed and consulted and the Council may adopt binding acts. As a general rule, the Council acts unanimously.
20 See Scott & Trubek, supra note 7.
of government. Finally, Grainne de Búrca highlights the stark contrast between the traditional EU constitutional model based on a functionally limited system of market liberalization norms and administered by a set of formal EU institutions, and the existence of a complex system of multi-level governance expanding in all policy fields.

Measuring governance against the benchmark of law, legal commentators are either concerned with the constitutional implications of new forms of governance, such as committees and agencies, or with the potential role of instruments alternative to legislation, such as soft law and the OMC. Commentators who look at governance from a constitutional perspective investigate how mechanisms like comitology and the OMC or bodies like European agencies, developed outside the original legal framework established by the Treaties, could fit into the Community institutional framework. Alternatively, they question to what extent this new phenomena could alter or improve the EU institutional balance. Others interpret the rise of committees and agencies as evidence of a fledging European administrative law. Consequently, they advocate the application to committees and agencies of the typical administrative law guarantees, such as clear boundaries of the delegation of powers, transparency, independence of administrative bodies, and access to judicial remedies for those affected by their decisions. Another approach to governance in the EU largely intertwines with the current debate on the development of instruments alternative to legislation or “hard law” and goes under the label of “soft law.” Following the increased recourse to soft law, especially in international law and subsequently in EU law, lawyers have started to question its effectiveness and the possibility of interaction among hard and soft law mechanisms. Given the fact that the legal debate on governance has so far addressed a variety of specific aspects of the phenomenon, this Article aims to provide an account of the “law and governance” debate in the EU. Its objective is to draw attention to the current legal debate on the EU forms of governance and to point out their distinctive features.

Given the scope of the impact of governance on different branches of EU law and policies, a comprehensive account falls outside the scope of this paper. Therefore, it will focus only on three

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21 See HARLOW, supra note 16.
22 See de Búrca, supra note 9.
26 The most comprehensive and updated account of soft law in the EU can be found in Soft Law In Governance And Regulation: An Interdisciplinary Analysis (Ulrika Morth ed., 2004).
of the most developed forms of governance in the EU, notably, the comitology system, the EU independent agencies, and the use of the OMC in the field of social policy. Part II will trace the main steps towards emergence of EU governance from its antecedents to the proposals made in the context of the Convention on the Future of Europe. In Part III, governance as a response to the EU’s regulatory needs will be considered, with particular reference to the comitology system and European independent agencies. In Part IV, the OMC and, in particular, its use in employment and social inclusion policies, will be analyzed. Part V will draw conclusions based upon the above analysis.

In tracing the reasons behind the rise of new governance in the EU, commentators agree on its mainly functional character. Most governance mechanisms have emerged as pragmatic forms of accommodation between emerging needs of the EU and available mechanisms for policy and law-making. A number of specific developments in EU law and policy-making, however, are deemed to spur what has come to be known as the governance agenda. One such development was the introduction of the notion of “subsidiarity” in the early 1990s as a principle governing the exercise of European Community (EC) powers. According to the notion of subsidiarity enshrined in Article 5 of the Treaty on European Union (TEU), the EU does not take action, except in the areas which fall within its exclusive competence, unless it is more effective than action taken at national, regional, or local level. Consequently, this principle requires that decisions remain at the national level when they can or are delegated to social partners when it seems sensible. The principle of subsidiarity is closely related to the principles of proportionality and necessity, which require that any EU action should not go beyond what is necessary to achieve the Treaty objectives.

This policy of restraint and simplification of Community action has been clarified by the Treaty of Amsterdam in a Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty Establishing the European Community (TEC). The Protocol has contributed to flexible solutions and encouraged decentralized experimentation. First, it introduces the systematic analysis of the impact of legislative proposals in terms of competence, proportionality, and subsidiarity. National measures, be they by way of cooperation among the Member States, the use of voluntary codes, or self-regulation, should be preferred. Second, the Protocol suggests the use, where possible, of less binding Community measures such as recommendations. Finally, if EC legislation is necessary, preference should be given to framework directives rather than regulations. This approach has been reaffirmed in the White Paper and, more recently, in the draft Constitution for Europe. The application of the principles of subsidiarity and proportionality favours other methods of regulations over legislation such as the European collective agreements.

Another major development that prompted the emergence of governance was the introduction of a new approach to harmonization coupled with a process of standardization that

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29 See generally Ellen Vos, The Rise of Committees, 3 EUR. L.J. 210, 210–29 (1997); Dehousse, supra note 17; HARLOW, supra note 16; de Búrca, supra note 9; Hix, supra note 5.
30 Grainne de Búrca, Reappraising Subsidiarity’s Significance After Amsterdam 22–23 (Jean Monnet Working Paper 7/1999).
32 The Constitution for Europe provides for enhancement of the subsidiarity principle, in particular by means of an obligation for the Union institutions to inform national parliaments at all stages of the legislative process. The establishment of an early-warning system regarding respect for the subsidiarity principle will enable national parliaments to ask the Commission to review a legislative proposal if they consider that it violates the principle.
was promoted by the Commission as an alternative to the detailed legislative harmonization of the 1980s. The cumbersome and time-consuming nature of the traditional approach to market harmonization was evident already during the 1980s. Harmonization was pursued mainly through the so-called “total harmonisation” which consisted of directives regulating or prescribing all relevant aspects of a certain matter from which the Member States could not derogate except in so far as allowed by the directive itself. This legislative technique, along with the fact that legislative instruments are necessary in Community law just to implement measures, resulted in a gigantic body of legislation, and, in many fields, Community law simply supplanted national legislation.

The call for deregulation and re-regulation in several Member States and the criticism regarding regulation’s excessive quantity, its scarce transparency, and its poor democratic quality led the Community to seek a new strategy to achieve its aim of an integrated internal market. The new strategy was launched by the Commission White Paper on the completion of the internal market in 1985. Drawing upon the Cassis de Dijon ruling of 1979, this White Paper placed great emphasis on the principle of mutual recognition as an effective means of achieving the internal market and reducing the Council’s work load. According to the new approach, the Council and Parliament only had to adopt outline directives, sketching the legal framework and the essential safety requirements for products and leaving the implementation of these directives to the Commission and to committees which are called upon to consult with private European standardization bodies for technical specifications. It also introduced a clear separation of responsibilities between the EC legislator and the European standards bodies within the legal framework of the free movement of goods. While EC directives define the “essential requirements,” such as protection of health and safety, that goods must meet when they are placed on the market, the European standards bodies have the task of drawing up the corresponding technical specifications to meet these essential requirements, compliance with which provides a presumption of conformity with the essential requirements of the directive. Such specifications are referred to as “harmonised standards.”

As a result of both the new approach and standardization, important decisions have been delegated to “technocrats”—either bureaucrats or scientific experts—instead of to politicians and according to procedures that do not necessarily allow for the degree of transparency or citizen

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34 See, e.g., SENDEN, supra note 27.
35 Article 249 of the EC Treaty lists the EC secondary sources, but no distinction is made between legislative and implementing instruments. This distinction, however, was made in Case 25/70, Einfuhrund Vorratsstelle für Getreide und Futtermittel v. Köster et Berodt & Co., 1970 E.C.R. 1161.
38 According to the principle of mutual recognition, if a product is lawfully produced and marketed in one of the Member States there is no valid reason why it can not be introduced into any other Member State and therefore the sale of such products may not be subject to a legal prohibition on the marketing in another state. The Cassis de Dijon judgment is remarkable because it establishes a method by which, even in the absence of harmonization of legislation of Member States, it is still possible to facilitate economic integration.
participation required by a democracy. The two major examples of technocratic governance are comitology and agencies.

These developments suggest that the rise of new governance can be explained in terms of a spill-over effect from the market integration process. In other words, the substantive scope of Community action has expanded beyond the initial goal of establishing a common market. More sensitive policy areas have come within the scope of EU law, including social and environmental policies. The series of developments including the creation of an economic monetary union, the process of enlargement, and, ultimately, the (currently frustrated) project of providing the Union with a Constitutional Treaty indicates that the EU’s objectives have gone beyond the creation of a purely economic community. European market integration has, indeed, produced constraints to Member States in other policy areas that, so far, do not fall within EU competencies.

Fritz Scharpf, for example, has examined the correlation between the constraints imposed on domestic policies by the economic and monetary union and the growth and stability pact and the simultaneous restrictions imposed by internal market law on various kinds of national support measures, such as industrial aid and reservation of public employment that traditionally would have been available to States to counter the adverse effects caused to their economies by the European Monetary Union (EMU). On the one hand, Member States were not allowed to adopt such action in the context of these EU structures while, at the same time, the alternative of shifting power to EU supranational institutions to adopt a centralized industrial policy, social policy, or employment policy in order to counter the powerful effects of economic and monetary union was never seriously considered. These expectations are similar to those experienced by federal nation-states in which the growing integration of a national economy is matched with the adoption of uniform social and environmental Regulations, welfare state policies, and taxes at the federal level.

The EU, in contrast with a proper federal state, cannot legitimately impose uniform rules on divergent problems, institutions, and legacies of the Member States. Furthermore, the strong cultural diversity of Member States and the distinctive national sensibilities underlying the diverse social protection systems, labour law institutions, and educational and health systems makes consensus on a single EU policy in these areas politically inconceivable. Since uniform legislation cannot be the solution, innovative options such as the OMC have been explored. The OMC has a “soft” harmonizing effect, both in policy areas where legislative action at the EU level would not be possible and to enhance coordination among Member States in those areas where legislative EU action is permitted. The OMC, by providing for non-uniform solutions among Member States, responds to the need of preserving a certain degree of diversity within the Union in sensitive areas such as social protection.

New governance systems are also understood as a partial and contested response to the long-standing EU democratic deficit problem. The institutional balance between the Council, European Parliament, and the Commission rests on the twin fold legitimacy of the Member States as represented in the Council and their peoples as represented in the European Parliament. This system, however, is understood to be rather unresponsive to democratic pressures since decision-

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39 See Chiti, supra note 24, at 37.
makers cannot be voted out of office\textsuperscript{42}. New governance procedures, such as the social dialogue, the OMC, and partnerships, seem to strengthen the legitimacy of EU action in some policy areas by improving the participation of social partners and private parties. In conclusion, some of the specific reasons for the way in which governance has emerged and proliferated in the context of the EU relates to specific features of the EU’s economic constitutional framework\textsuperscript{43}.

New governance procedures may also be explained in part as a reaction to certain rigidities of the traditional constitutional model. In addition, governance procedures emerged in the EU as a way of dealing with complex problems under conditions of uncertainty\textsuperscript{44}. This explains not only the emergence of the comitology system in order to face the complexities of reregulation under a single market, but also the expansion of new governance methods in areas such as food safety, health, and environmental protection which are characterized by a high degree of uncertainty and risk regulation\textsuperscript{45}. Finally, governance responds to the need of accommodating diversity among Member States in cases in which uniform solutions would be particularly difficult to reach or undesirable because of cultural diversity or a lack of political consensus.

\textbf{A. The Commission White Paper on European Governance}

The issue of governance was addressed for the first time\textsuperscript{46} in a systematic way with the publication of the White Paper in July 2001. In this document, the Commission attempted to address critics that questioned the EU’s ability to be closer to European citizens, to produce more effective and simplified legislation, to reinforce democracy in Europe, and to consolidate the legitimacy of its institutions.

According to the Commission, governance should contribute to the framing and implementation of better and more consistent policies associating civil society organizations with European institutions. It also entails improving the quality of European law, making it clearer and more effective. The central theme of the White Paper is to evaluate to what extent the traditional Community Method is still the proper method of governance and to explore what new forms of governance should be adopted\textsuperscript{47}.

The proposals for a change are divided into four sections. The first section focuses on improving involvement in shaping and implementing EU policy. The second section aims at improving the quality and enforcement of EU policies. The third section calls for a stronger link between European governance and the role of the EU in global governance. Finally, the fourth section examines the role of institutions. The White Paper addresses different existing forms of governance. It sets out the conditions for the creation of regulatory agencies at the EU level and provides a definition and a generally positive—albeit cautious—review of the various cases in which the Member States had used the “open method of coordination” as a means of achieving convergence between certain national policies. It also promotes openness, transparency, and consultation when making initial legislative proposals and when implementing agreed-upon policy. Likewise, it reaffirms the relevance of the subsidiarity and proportionality principles in order to improve the quality of EU policies. Finally, it promotes the greater use of policy tools such as

\textsuperscript{42} For an overview of the democratic deficit debate, see Paul Craig & Grainne De Búrca, Eu Law. Text Cases And Materials 167–75 (Oxford University Press, 2003).
\textsuperscript{43} See de Búrca, supra note 9, at 814–39.
\textsuperscript{44} See Scott & Trubek, supra note 7, at 1–18.
\textsuperscript{47} Id. at 8.
regulations, framework directives, and co-regulatory mechanisms in order to simplify and speed up the legislative process.

Despite acknowledging the need to revitalize the Community Method, however, the Commission insists on maintaining its central role. According to the Community Method, the Commission represents the general interest and has a monopoly over legislative initiative. It also executes agreed-upon policy and acts as the guardian of the Treaty. The Council and the Parliament are seen respectively as the joint legislature representing Member States and national citizenship. Even if this arrangement is incontestable since it simply mirrors the Community institutional balance as built into the Treaty, the implications that the Commission draws from it have raised criticism. According to the White Paper, the Council and the Parliament’s legislative role should be limited to defining the essential elements of legislative acts in the form of framework directives, and these, in turn, define the conditions and limits within which the Commission performs its executive role. Likewise, the Commission suggests that it is possible to eliminate the comitology committees and replace them with a simple legal mechanism permitting the Council and Parliament to control the actions of the Commission against the principles adopted in the legislation. The centrality afforded the Commission is further evident in the Commission’s submission to the Laeken European Council.

The result of greater use of framework legislation, informal law, and increased Commission control over the implementation of norms is worrisome from a constitutional perspective. The institutional balance of power of the EU would be altered in favour of the Commission at the expense of the Council and the European Parliament. In addition, although comitology committees have been much criticized, they respond to the need of Member States to participate in the definition of the content of delegated legislation. By substituting comitology with legal control by the Council and the European Parliament over the exercise of delegated legislative power, the White Paper proposal will sensibly reduce control over Commission action.

A broader criticism addressed to the White Paper is that it failed to consider a number of substantive problems currently facing the EU and its Member States. A sort of mismatch between the Commission and the EU agenda was apparent in the fact that the crucial developments of the enlargement of the EU to Eastern countries and the consequences of the establishment of the EMU were simply overlooked. The impression is that the Commission is still focused on the objective of further perfection of uniform regulation of the EU even while the EU’s agenda has moved forward. The EU is now called on to deal with common social and environmental concerns as a consequence of the successful integration of the markets. The present challenge, one in which new governance can play a role, is finding appropriate ways to meet common concerns with diversity in areas other than purely market integration.

B. EU governance in the debate on the constitution for Europe

Many of the subjects identified by the public debate preceding the drafting of the White Paper and by the Commission itself in its White Paper were also addressed both in the Laeken Declaration and within the various working groups reporting to the Convention on the Future of the European Union.

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48 Fritz Scharpf ironically notes that the Commission depicts itself as a hero. Scharpf, supra note 41.
50 Craig & De Búrca, supra note 43, at 175.
51 Scharpf, supra note 41, at 2.
Among the objectives of the Convention were the division of competencies between the EU and Member States, the simplification of the European Treaties, the possibility of drafting a Constitution for Europe, and the enhancement of democracy, efficiency, and transparency. Largely owing to the Commission’s communications to it, the Convention took up a number of subjects related to the issue of governance and included special provisions on them in the draft constitutional treaty presented to the European Council in July 2003.

As a consequence, the Treaty Establishing a Constitution for Europe (TCE) contained a few provisions that, for the first time in EU primary law texts, refer to the concept of governance at the EU level (Article I–50.1) and at the global level (Article III–292(2)). Article I–46 enshrines the principle of representative democracy while Article I–47 introduces the principle of participatory democracy, a first for EU primary law texts. Article III–285 introduces, in line with the White Paper, the concept of administrative cooperation among the Member States in implementing EU law. Finally, the Protocol on the Principle of Subsidiarity makes provision for wide-ranging consultation before any legislative act is adopted and the possibility of taking into account the regional and local dimension of any action envisaged. The Protocol states that, for each European framework law, there should be a “subsidiarity statement” in which the Commission appraises the regulatory and financial implications of the framework law for local and regional authorities. The impact of these provisions, however, should not be overestimated.

The relevance given to the issue of governance in the context of the Convention and in the TCE is disappointing. The Presidium, for instance, decided not to uphold a proposal to incorporate the OMC into the draft constitutional treaty. In its place, Article I–14 of the draft Constitution gives the EU general powers to coordinate the economic, employment, and social policies of the Member States, with explicit reference to guidelines in the first two cases. Article I–16 also provides that the EU can take “supporting, coordinating, or complementary action” in a series of other areas, including industry; protection and improvement of human health; education, vocational training, youth, and sport; culture; and civil protection, without harmonizing Member States’ laws or regulations. These measures, however, fall short of the type of cooperation envisioned by the OMC.

Part III of the draft Constitution establishes specific procedures for the coordination of national policies in different areas, incorporating the existing treaty provisions for the Broad Economic Policy Guidelines and the European Employment Strategy. This part of the draft Constitution also provides for the application of key features of the OMC in social policy, research and technological development, public health, and industry without referring to it by name. In these areas, the Commission, “in close contact with the Member States,” is charged with taking “initiatives aimed at the establishment of guidelines and indicators, the organization and exchange of best practice, and

53 For a commentary on the setting up, functioning, and outcome of the European Convention, see generally Jacques Ziller, La Nuova Costituzione Europea (2003).
55 Article I–50(1) reads: “In order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and organisms shall conduct their work as openly as possible.” Id. art. I–50(1).
56 Article III–292(2) reads: “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order: f) to promote an international system based on stronger multilateral cooperation and good global governance.” Id. art. III–292(2).
the preparation of the necessary elements for periodic monitoring and evaluation,” about which the European Parliament “shall be kept fully informed.”

Given the omnipresence of governance in the current developments of EU law and the debate on the legitimacy of Governance from a constitutional perspective, the outcome of the Convention was unsatisfactory for many commentators. While the academic debate on European constitutionalism in recent years may have become more sophisticated and nuanced, in particular in its engagement with social and political theory, the political currency and persistent hold of the traditional frame of reference has been clearly evident in popular debate, in the discourse of political actors, and in the context of the Convention. In particular, the overarching questions of how the problems of governance may be addressed in the context of a renewal of the European Constitutional model, its constitutional dimensions, and its foundations in terms of legitimacy have been largely overlooked. The Convention might have explicitly acknowledged these changes and enshrined the new compromise of experimental governance in the Constitution. Instead, it largely ignored these innovations. While, on the bright side, the Convention avoided any recourse to traditional forms of constitutionalism that might fundamentally obstruct the innovations in EU governance, at the same time, it failed to give them due constitutional form.

2. Governance as a response to regulatory needs: the comitology system and the EU agencies

A. Comitology

One of the major developments in the EU that prompted the emergence of new forms of governance has been the necessity to face the increased regulatory needs and the demand for rapid and expert decision-making in the process of market integration. In order to face the need for increased regulation, implementation, and scientific expertise, the creation of a complex technocratic machine represented by the committee system and by the creation of European independent agencies was incrementally established. Regulation through committees was perceived as an alternative to centralized regulation through agencies on the one hand and to regulatory competition or mutual recognition on the other.

The first committees were created in the 1960s when the Council decided to delegate some discretionary powers to the Commission for the implementation of the EC’s agricultural policy. Two further steps in European integration prompted the expansion of the committee system: the adoption of the internal market program in 1985 and the Single European Act (SEA) in 1987. According to the new legislative strategy set forth in these documents, harmonization was to be achieved by a

61 Zeitlin, supra note 60.
62 Vos, supra note 29, at 220.
relatively small number of European legislative acts that laid down broad legislative objectives and principles, the so-called “horizontal approach.”

The continuous concretization and adaptation of these objectives to new economic and technical developments increased the need for regulatory techniques. Therefore, the SEA amended Article 145(3) of the TEC providing that “Council shall confer on the Commission in the acts which the Council adopts, powers for implementation of the rules which the Council lay down.”

However, in the Comitology Decision of July 13, 1987, the Council specified its willingness to retain implementing powers on sensitive economic and political issues and defined three procedures according to which Committees may operate.

Comitology *strictu sensu* defines those committees composed of national representatives which assist or control the Commission in the exercise of its implementing powers. According to this definition, comitology is part of the Commission implementation function and an expression of the Commission’s delegating authority. The term comitology, however, has acquired a broader meaning to include not only committees which intervene at different stages of the decision making process (the policy–making and implementation committees), but also those that provide the opinion of broad socioeconomic interest groups (interest committees) and scientific expertise and information (scientific committees).

The three types of committees work according to different procedures and have varying levels of legislative control over the Commission. The type of committee assigned normally depends on the policy area being regulated. Advisory committees are generally used when the policy matters considered are not very politically sensitive. Following draft measures by the Commission, the committee delivers its opinion within a certain time limit and “if necessary by taking a vote” (simple majority). The Commission is to take the “utmost account of the opinion delivered” and inform the committee of the manner in which its opinion has been taken into account. Management committees are used for measures relating to the management of the Common Agricultural Policy, fisheries, and the main EC programs. According to procedures for this type of committee, when the measures adopted by the Commission are not consistent with the committee’s opinion (delivered by qualified majority), the Commission must communicate the disagreement to the Council which, acting by a qualified majority, can elect a decision contrary to the Commission. Finally, regulatory committees deal with the protection of the health and safety of persons, animals, and plants, as well as measures amending non-essential provisions of the basic legislative instruments. In this case, the Commission can adopt implementing measures only if it obtains the approval of the committee (voting by qualified majority). In the absence of this approval, the proposed measure is referred back to the Council which makes a decision by a qualified majority vote. However, if the Council does not make a decision, the Commission can adopt the measure provided that the Council does not object by a qualified majority.

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66 This is now Article 202.
70 *Id.* art. 4.
71 *Id.* art. 5.
The 1999 Comitology Decision allows the European Parliament to play a minor role in the comitology procedures. When legislation is enacted under this procedure, Parliament can express its disapproval of measures proposed by the Commission or of actions taken by the Council where the Council goes beyond its implementing authority provided for in the legislation. The Comitology Decision also enhanced the transparency of the committee system to the benefit of Parliament and the general public, making committee documents readily accessible to EU citizens.

In the Report on European Governance published on December 11, 2002, the Commission, however, proposed to amend the 1999 Comitology Decision. Following up the appeal for reform of the comitology procedures made in the White Paper, the Commission suggested that the existing regulatory procedure be revised to include two distinct phases: an “executive phase” similar to advisory committee procedures and a “control phase” where the Commission’s draft measures are considered by both the Parliament and Council. Furthermore, the report recommended that regulatory procedures be complemented with an “urgency procedure” that would allow the Commission to adopt implementing measures even in the absence of approval from the “control phrase.”

Even if formally speaking committees are legitimate bodies which do not interfere with the EC’s established institutional order, from a legal perspective they raise some concerns. Committees have been held to challenge the internal balance among EC institutions and to threaten the overall legitimacy of the EC decision making process. First, according to EU law, when the Council retains implementing authority at the EU-level, such powers should be delegated to the Commission instead of leaving the matter to the Member States. National representatives, however, exert a certain power over the Commission through management and regulatory committees since the Commission can deviate from their recommendations only after having referred its own draft measures back to the Council.

Second, committees have been accused of undermining the transparency of the EU decision-making process. It is argued that the Commission may be tempted to simply follow committee opinions in order to avoid complications and delays caused by a renewed referral to the Council. Democratic scrutiny and public accountability may be frustrated where the Commission’s support for a measure is not strong and the relevant committee does not bear any formal responsibility for acts subsequently adopted. In addition, Community and national competencies may be blurred, and both the Commission and national civil servants may avoid taking full responsibility for decisions. Finally, committee decisions escape the European Parliament’s power of control.

Lastly, the legal debate on comitology emphasizes the existence of other unsettled legal problems. Comitology is somehow meant to transfer risk allocation among Member States from the ECJ to the political instance of decision-making. As argued by J.H.H. Weiler, the ECJ has in practice exercised a risk assessment role for a long time through its application of the principle of proportionality. For example, in the landmark Cassis De Dijon case, the Court held that interests of German consumers would be sufficiently protected by requiring the French liqueur Cassis to carry a

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72 See Comitology Decision, supra note 70.
73 For instance, from 2000 onward, the Commission has published an annual report giving a summary of committee activities during the previous year. From 2001 onward, committee documents are recorded in a public register.
75 For an excursus of ECJ cases on comitology, see Vos, supra note 29, at 220–23. For a more critical appraisal, see generally Joerges & Neyer, supra note 15.
76 See, e.g., Vos, supra note 29
77 See Weiler, supra note 23, at 345.
label displaying its alcoholic content, and Germany’s outright ban of this product was a restrictive measure contrary to the free movement of goods.

Therefore, the Court imposed its own risk assessment as reflected in the label requirement which makes implicit judgments as to what percentage of consumers are likely to be misled, given the limited communicative effect of a label, and what percentage threshold is acceptable. The role of risk assessment is now largely taken up by committees, particularly those which provide scientific evidence and advice to the Commission. Others, however, have pointed out that in politically sensitive areas committees may enhance effective decision-making by overcoming the mutual distrust between Member States which has hindered the realization of the internal market. In health and safety matters for instance, the committees contributed to securing the principle of subsidiarity by compensating for the increased transfer of formal implementation powers to the Commission. Seen in this light, committees represent a system which ensures that the increased transfer of implementing powers to the Community level is accompanied by the evolution of the mechanisms which allow the Member States to retain a degree of influence over the exercise of such powers\(^78\). Committees, indeed, provide concrete mechanisms through which cooperation between all national and community levels can be fostered. Committees have been depicted as peer structures in which the quest for consensus is a prevailing concern. According to Christian Joerges and Jürgen Neyer, committees have contributed to creating a framework for cooperative and deliberative multi-level policy-making in which all participants engage in the search for the common good\(^79\). In this view, committees may contribute to lessening the risk of institutional conflicts and to provide for the smooth functioning of the EU regulatory system\(^80\).

Taking this argument a step further, J.H.H. Weiler maintains that the phenomenon of comitology cannot and should not be brought within the boundaries of EU constitutionalism\(^81\). To begin with, comitology challenges the classical parameters of constitutionalism which requires a clear definition of subjecthood, functions, and powers. These categories are inevitably blurred in the case of committees. First, committees do not only represent the institutions (i.e., the Council and the Commission), but also many interest groups and informal actors.

Second, committees enjoy such a degree of autonomy that they cannot be said to truly represent either the interests of the Member State governments or the Commission. Finally, it seems to be illusory to deny that the scientific evidence they provide does not affect the decision-making process. Therefore, not only can committees not be absorbed into the Constitutional framework, but doing so would mean overlooking and denying their “subversive” potential\(^82\). Taking a more moderate approach, Ellen Vos points out the main deficiencies of committees are procedural in character and have been identified as the lack transparency and the need for review. The manner in which committees are composed and operate depends solely on the goodwill of EU institutions, and, in particular, the Commission. In addition, committees are usually shrouded in secrecy and neither their membership nor their activities are made public. Finally, increasing reliance upon scientific committees has not been balanced by an increase in the significance of the social interest group committees. A more pluralistic composition of committees is desirable to ensure that objective expertise is balanced with more social and economic concerns\(^83\). Therefore, a renewed consideration should be given to whether there is ground for a more wide-ranging consultation of nongovernmental socioeconomic interests during the EU decision-making process within interest

\(^78\) Vos, supra note 29, at 224.
\(^79\) See, e.g., Joerges & Neyer, supra note 15
\(^80\) Dehousse, supra note 17, at 214.
\(^81\) Weiler, supra note 23, at 343.
\(^82\) Id. at 346.
\(^83\) See, e.g., Vos, supra note 29.
committees and committees of national representatives to oversee Commission activities. Ellen Vos also argues that the lack of transparency within committees should be compensated for through the evolution of formal and generalisable procedures\textsuperscript{84}.

In conclusion, even if non-hierarchical governance structures such as committees are useful for the functioning of the common market, it is still premature to say whether committees can effectively respond to this task. Although there is no agreement on the need of giving committees a formal recognition within the EU constitutional setting, commentators agree on the need to improve legitimacy of these procedures by introducing compliance with legal principles and by enhancing procedural transparency and fairness\textsuperscript{85}.

B. European Union agencies

One alternative to regulation through committees is centralized regulation through independent agencies. Like committees, agencies respond to the need for information-gathering, technical expertise, and supervisory flexibility. They do so, however, in a more centralized manner and are more easily analyzed under the well established principles of administrative law. Agencies have gained a growing importance within the EU institutional structure and they function in a number of different areas including vocational training, working and living conditions, health and safety at work, the environment, and anti-racism.

Fifteen bodies currently meet the definition of an EC agency even though a variety of terms are used to describe them (e.g., centre, foundation, agency, office, etc.)\textsuperscript{86}. As autonomous organizations, these agencies are a heterogeneous group united by a single organizational model. The agencies can be divided into four-subgroups based on their activities: the agencies facilitating the operation of the internal market\textsuperscript{87}, monitoring centres\textsuperscript{88}, agencies promoting social dialogue at a European level\textsuperscript{89}, and agencies carrying out programs and tasks on behalf of the EU in their respective areas of expertise\textsuperscript{90}.

Similar to committees, agencies have developed outside the original Treaty institutional framework. Since the TEU does not provide a formal basis for their establishment, agencies are created through secondary legislation enacted mostly on the basis of Article 308 of the TEU. They have legal personality and enjoy a relatively high degree of independence from other institutions. At the same time, the Council and the Commission do play a role in the appointment of the heads of respective agencies, and, in some cases, their financial autonomy may be limited\textsuperscript{91}.

\textsuperscript{84} Id. at 67.
\textsuperscript{85} Joerges & Neyer, supra note 15.
\textsuperscript{86} Although the first agencies were set up in the 1970s, most of them started work in 1994 or 1995, following the decision of the Brussels European Council (October 1993) on the sitting of the headquarters of seven of them. The most recent agencies are the European Food Safety Authority (January 2002), the European Maritime Safety Agency (August 2002), The European Aviation Safety Agency (September 2002) and the European Network and Information Security Agency (March 2004).
\textsuperscript{87} OHIM (Office for Harmonisation in the Internal Market (Trade Marks and Designs)); CPVO (Community Plant Variety Office); EMEA (European Agency for the Evaluation of Medicinal Products); EFSA (European Food Safety Authority), EMSA (European Maritime Safety Agency); EASA (European Aviation Safety Agency), with its headquarters in Cologne (Germany); ENISA (European Network and Information Security Agency).
\textsuperscript{88} EEA (European Environment Agency); EMCDDA (European Monitoring Centre for Drugs and Drug Addiction); EUMC (European Monitoring Centre on Racism and Xenophobia).
\textsuperscript{89} CEDEFOP (European Centre for the Development of Vocational Training), European Foundation for the Improvement of Living and Working Conditions; European Agency for Safety and Health at Work.
\textsuperscript{90} ETF (European Training Foundation); CdT (Translation Centre for Bodies in the European Union), with its headquarters in Luxembourg; ERA (European Reconstruction Agency), with its headquarters in Salonika.
\textsuperscript{91} See Edoardo Chiti, Le Agenzie Europee, Unità E Decentramento Nelle Amministrazioni Comunitarie (2000).
The administrative boards of agencies are usually made up of representatives of relevant organizations, Commission representatives, and European Parliament appointees. One of the main functions performed by agencies is the gathering and provision of specialized information. In other cases, such as the Agency for the Evaluation of Medical Products, the agency has the task of implementing an EC regime which has already been established. Even if most existing agencies do not have a direct regulatory function, they affect the implementation process. Not only do agencies provide technical advice and expertise which is used by the principal policy-making institutions and actors, but they also coordinate the networks of national administrations which implement EC policy. In particular, their informational role is of major importance given the crucial role of information in many aspects of the policy process.

Independent agencies pose unique legal problems that have been deeply investigated from both an administrative and constitutional law perspective. To start with, they challenge the traditional separation of powers since they simultaneously perform both legislative and executive tasks and also have a judicial role. Also problematic is the fact that they enjoy such a degree of independence from other institutional bodies that they have been labelled “a fourth branch of government.” Finally, agencies present problems in terms of democratic accountability since they are sufficiently open to neither parliamentary control nor public scrutiny.

Within the EU context, the diffusion of agencies faces the constitutional limits enshrined in Article 4 of the TEU\(^{92}\) and by the principles developed by the ECJ in the *Meroni* case.\(^{93}\) By listing the institutions operating at an EC level and specifying that each of them must act within the limits of the powers conferred upon them by the TEU, Article 4 seems to impose a general prohibition on the creation of additional organs that could be overcome only by revising the TEU. However, the ECJ adopted a slightly laxer interpretation in the *Meroni* case. The Court held that the Commission could delegate its executive function to bodies not set out in the Treaty, but only under strict conditions. The Commission can only transfer powers that it itself possesses. Independent bodies cannot be given discretionary powers. Consequently, the Commission must exercise supervision over the delegated competencies and will be held responsible for the manner in which it is performed. Delegation should also respect the institutional balance between EU organs.

Such a strict approach to delegation has been confirmed by the White Paper which set out the conditions for the creation of regulatory agencies at the EU level. It reaffirms that the Treaties allow some responsibilities to be granted directly to agencies. This should be done in a way that respects the balance of power between the institutions and does not impinge on their respective roles and powers. Delegation, therefore, is subject to a series of conditions. First of all, agencies can be given the power to make individual decisions in specific areas but cannot adopt general regulatory measures. More specifically, they can be granted decision-making powers in areas where a single public interest predominates and the tasks to be carried out require particular technical expertise (e.g., air safety). Second, agencies cannot be given responsibilities for which the Treaty has conferred a direct power to the Commission, such as in the area of competition policy. In addition, they cannot be granted decision-making powers in areas in which they would have to

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92 Article 4 of the TEU reads: The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council. The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union. Treaty on European Union, Dec. 24, 2002, 2002 O.J. (C 325).

arbitrate between conflicting public interests, exercise political discretion, or carry out complex economic assessments. Finally, an effective system of supervision and control of agencies must be put in place.

The Commission has only slightly modified its approach in the Communication of 2002 which establishes the criteria for the creation of new regulatory agencies, the framework within which they should operate, and the EU’s supervisory responsibilities over such agencies. Not only is the Communication addressed solely to executive and regulatory agencies and not too many existing agencies, but it does not add any changes to the issue of delegation of regulatory powers. According to the non-delegation doctrine, agencies may not be empowered to adopt measures of general applicability. The only exception to a strict application of this principle is that agencies can adopt individual decisions in specific fields of EU law. The non-delegation doctrine is justified on the principle of separation of powers, and it is not accidental that it was originally in the U.S. system. The EU institutional framework, however, is founded on the principle of the balance of powers rather than on the separation between legislative, executive, and judiciary authority. The balance of powers is based on the representation of different social and political groups requiring mutual consent for the exercise of powers. It does not imply an equal allocation of powers among the different institutions. In Giandomenico Majone’s view, such a firm opposition to the delegation of decision-making powers to independent agencies cannot be justified on the basis of the constitutional principle of institutional balance. It is, rather, to be interpreted as the result of a rigid application of the Community Method. The EU is then confronted with the challenge of either preserving the “Community Method” or limiting its scope by delegating rule-making power to independent agencies in order to increase efficiency and credibility. Similarly, Michelle Everson supports the compatibility of agencies with the Treaty. In her view, the impact of the Meroni doctrine should be limited and the Meroni case of 1958 should be placed in the context of the early years of the Community before the institutional and legal framework evolved dramatically. The compatibility of independent agencies with the EU framework ultimately depends on the ability to set up effective mechanisms to ensure their accountability. Agencies can be made more accountable by means of budgetary control, by subjecting them to judicial review, or by exercising control over the appointment of their directors. Likewise, increased transparency in decision-making and broader interest group participation would make these bodies more accountable to the European public.

3. Governance and social policy: the open method of coordination

The OMC is a cyclical benchmarking procedure which coordinates national policy by providing guidance and an assessment at the European level based upon five distinctive elements: the fixing of European Guidelines, the establishment of quantitative and qualitative indicators benchmarks,

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95 For instance, the decisions adopted by The Office of Harmonization for the Internal Market which deals with trademarks and industrial property.
the translation of these guidelines into national and regional policies, a periodic monitoring evaluation, and peer review.98

The Commission outlines the circumstances for using the OMC in the White Paper. First, the OMC must not dilute the achievement of common objectives of the Treaty or the political responsibility of the institutions, and it should not be used when legislative action under the Community Method is possible. In the same way, the OMC should be limited to achieve defined Treaty objectives. In order to ensure their overall accountability, mechanisms for reporting regularly to the European Parliament should be established. In addition, the data and information generated should be disseminated widely and should provide a basis for determining whether legislative or program-based action is needed in order to overcome highlighted problems. Finally, the Commission should preserve its coordinating role.

In the new system of powers created by the Constitution, the OMC method has not been openly recognized.99 The Constitution foresees that a European law or framework law can establish measures to encourage cooperation among the Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches, and evaluating experiences. Even if not clearly named as OMC, this legislative technique actually mirrors its salient features. In addition, according to a general clause created by the Constitution, the Union must, in the definition and implementation of its policies and actions, guarantee proper social protection and combat social exclusion. The inclusion of the Charter of Fundamental Rights in the Constitution for Europe reinforces the social dimension of Europe. While the Charter’s inclusion does not create additional powers for the EU, Member States and institutions are required to respect the Charter when they implement EU law. While the term OMC was coined only in 2000 after the Lisbon European Council summit, versions of this method had already been established in the areas of employment100 and economic policy101 according to the Maastricht and Amsterdam treaties of the early and late 1990s.102

A. The European employment strategy

Promoting a high level of employment has been enshrined as one of the EU’s objectives ever since the Member States committed to treating employment policy as an area of common concern in the Treaty of Amsterdam.103 Employment has become a competence complementing that of the Member States. The Treaty also provides for the incorporation of the objective of achieving a high level of employment in other Community policies. Further, it foresees the establishment of coordination mechanisms at the EU level through the yearly adoption by the Council of guidelines on

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99 See Zeltin, supra note 60.
100 Articles 125–30 on employment policy were added to the EC Treaty by the Treaty of Amsterdam.
101 Articles 98–99 on economic policy were added to the EC Treaty by the Treaty on the European Union.
102 The Treaty of Amsterdam indeed incorporated the Agreement on social policy signed by eleven Member States into the Treaty establishing the European Community, thus bringing a complicated situation to an end. Between 1993 and 1999, there were two distinct legal bases for social policy: the EC Treaty itself and a separate agreement that the United Kingdom had not signed. Now, all the measures are brought together in Title XI of the EC Treaty. The social policy objectives defined in the EC Treaty and included in the text of the Constitution for Europe were inspired by the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers: promoting employment, improving working conditions, proper social protection, social dialogue, workforce training to achieve a high and sustainable level of employment, and combating exclusion.
103 Treaty of Amsterdam, supra note 30, arts. 125–30.
employment compatible with the Broad Economic Policy Guidelines,\textsuperscript{104} the monitoring of their implementation in the Member States, and the communication of recommendations to the Member States.

It was on the basis of these new provisions that the Luxembourg Council, held in November 1997, launched the European Employment Strategy (EES), also known as the “Luxembourg process.” The EES is an annual program of planning, monitoring, examination, and readjustment of policies put in place by Member States to coordinate the instruments they use to tackle unemployment. The Strategy is based on four components: 1. Employment Guidelines which stress common priorities for Member States’ employment policies drawn up by the Commission; 2. National Action Plans (NAPs) for employment which implement the common Guidelines at the national level; 3. a Joint Employment Report which summarizes the NAPs and is used as a basis for drawing up the following year’s Guidelines; and 4. Recommendations where the Council adopts country-specific recommendations by a qualified majority. An advisory employment committee was also created following the ratification of the Treaty of Amsterdam and facilitates the EU’s work of promoting the coordination of national employment and labour market policies.

The priorities of the EES, as defined in the Communication on the Future of the European Employment Strategy of January 2003,\textsuperscript{105} are: to reduce the unemployment rate, to encourage women to enter the labour market, to encourage people who have reached retirement age to stay on in employment, to promote lifelong learning, to promote entrepreneurship, and to tackle the problem of undeclared work.\textsuperscript{106} In 2002, the EES entered a phase of review in order to provide an initial evaluation of the effectiveness of this new approach. According to the five-year review, progress has been made in reducing unemployment. However, the report also noted that economic growth in the EU has been far more employment-intensive than it was in the two prior decades. Therefore, the effects of lower unemployment cannot be necessarily attributed to the EES. Furthermore, the direct impact of specific aspects of the strategy, such as its emphasis on retraining, is controversial, and it may turn out to be less effective than proponents had hoped. At the same time, the impact of EES on promoting policy learning cannot be thoroughly assessed since the necessary information is not available\textsuperscript{107}.

The EES differs from the other forms of the OMC. First of all, unlike the majority of OMC procedures, it has a clear Treaty basis to be found in Articles 125-130 of the TEC. This means that although the guidelines and recommendations are not formally binding, the Member States have committed themselves in the Treaty to a number of the objectives as well as a particular monitoring procedure. Yet, even if the EES is treaty-based, it still builds on soft law measures such as guidelines, recommendations, and indicators benchmarks in combination with other soft governance mechanisms such as peer review benchmarking, network involvement, networking, and partnerships. Secondly, the EES represents an original combination of domestic policymaking and European level cooperation that combines intergovernmental and supranational elements.\textsuperscript{108} Contrary to the OMC model proposed at the Lisbon summit, the EES integrates some supranational

\textsuperscript{104} The Broad Economic Policy Guidelines were introduced by Article 99 of the Treaty of Maastricht with the aim of promoting a coordination process in economic policy.


\textsuperscript{106} The Constitution for Europe has taken this objective and amended it slightly, stating that the Union will work for balanced economic growth aimed at full employment.


\textsuperscript{108} Kerstin Jacobsson, Between Deliberation and Discipline: Soft Governance in the EU Employment Policy, In Soft Law In Governance And Regulation: An Interdisciplinary Analysis 81–102, 99 (Ulrika Morth ed., 2004).
elements, such as the use of qualified majority voting on recommendations and guidelines, and a central role for the Commission as initiator. However, as it emerges from the five-year review, its potential in terms of both reducing unemployment and promoting policy learning has not yet been fully explored.  

B. The open method of coordination and social exclusion

Following the introduction by the Treaty of Amsterdam of the fight against social exclusion as one of the EU’s objectives, the Lisbon European Council of March 2000 asked Member States and the European Commission to take steps to make a decisive impact on the eradication of poverty by 2010. Building a more inclusive EU was considered as an essential element in achieving the EU’s ten-year strategic goal of sustained economic growth, more and better jobs, and greater social cohesion. It is also agreed that Member States should coordinate their policies for combating poverty and social exclusion on the basis of an “Open Method of Coordination.” In the Lisbon Summit Conclusions, it was also underlined that “the number of people living below the poverty line is unacceptable and social exclusion in the Union is unacceptable.” Therefore, it was suggested that steps must be taken to make a decisive impact on the eradication of poverty.

The challenge was renewed on occasion of the Nice European summit meeting in 2000, which endorsed the application of the OMC procedures to the fight against social exclusion. The Member States committed to submitting biennial NAPs developed within the framework of common EU objectives identified as follows: facilitating participation in employment and access by all to the resources, rights, goods and services; to prevent the risk of exclusion; to help the most vulnerable; and to mobilize all the relevant bodies. The application of OMC to the fight against poverty and social exclusion consists of two parts: the process involving the submission of NAPs on the part of Member States and their assessment by the Commission and the Social Policy Committee in a Joint Report of the Council and the Commission; and a multi-annual action program designed to encourage cooperation among Member States. A Joint Report on Social Inclusion was adopted by the Employment and Social Policy Council in its December 2001 meeting.

The report was based on the fifteen NAPs and was the result of rounds of bilateral meetings with Member States and discussion between the Commission itself and the representatives of Member States in the Social Policy Committee. Although the Report was not intended to assess Member States’ policies and their effectiveness but rather to simply identify lessons and good practices from the approaches adopted by the Member States, the weaknesses of the NAPs emerged quite clearly from the Report. Many of these shortcomings were similar to those identified with respect to NAPs for employment in the early rounds of the Luxembourg process. It has been noted, for instance, that the NAPs were often lacking in rigorous evaluation of the implemented

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109 Mosher & Trubek, supra note 108, at 17.
110 Treaty of Amsterdam, supra note 30, arts. 136–37.
policies which made it extremely difficult to identify which measures deserved good practice status. Most policy measures proposed did not include cost estimates, and only a few NAPs moved beyond general aspirations and set specific and quantified targets as a basis for monitoring progress. Finally, the intervention of social partners and representatives of non-governmental organizations seemed to have been limited and no sufficient evidence was provided to assess the effective mobilization of regional and local entities in drawing up NAPs. On the other hand, it is recognized that the NAPs provided a remarkable source of “bottom-up” information on what the Member States perceive as important and well-functioning aspects of their policies. In addition, they prompted the creation or consolidation of monitoring structures and skills at the national level and, consequently, the capability of assessing national policies.

C. Responses to the OMCs

As seen above, there are important differences among the various OMC procedures according to the particular policy area. The periodicity of guidelines differs as well as the specificity of the quantitative and qualitative targets. The most structured OMC procedure is probably the employment policy co-ordination process that is provided for in the EC Treaty while the pensions process, on which it proved far more difficult to reach consensus, is considerably less structured. In addition, the potential threat of sanctions differs. Some OMC procedures have the option to adopt specific recommendations, putting Member States under pressure to comply with the guidelines, while others do not. Finally, from a constitutional perspective, the most relevant difference lies in the fact that some OMC procedures are described or referred to in the Treaty whereas others have been established without any Treaty reference.

Different motivations are at the roots of the spread of the OMCs to such a varied number of EU policies. While the origins of OMCs can be explained as arising out of the need for coordination among legislation of Member States as a result of economic/market integration, at the same time, it was hampered by the unwillingness to shift full power to the EU and the diversity among national systems. The use of OMCs in immigration, asylum, the liberalization of certain services sectors, and the environment can be explained on different grounds. Even if Member States did agree in the Treaty to provide stronger legal powers for the EU, policy-making in these sectors could be impeded or blocked by longstanding lack of consensus among Member States since these are sensitive national policies. In such cases, the OMC is suggested as a viable means to resolve political deadlock and to overcome the lack of consensus on policy issues that have a high domestic political salience and where national perspectives differ considerably on the appropriate response.

The emergence and spread of the OMCs has met very different responses. Some have expressed scepticism both on the participatory nature of the OMC and its capability to adjust to developments. OMC processes have been criticized as lacking transparency and discouraging broad participation by civil society—defects which, if left uncorrected, would limit their contribution to the new constitutional compromise. Others have expressed the fear that OMC’s soft law procedures could subvert existing and future hard EU law that is produced through the classic Community Method and thereby avoid Parliament’s control. Further, the OMC is perceived by

115 For instance, in the context of the pensions OMC, Member States report to each other only every three or four years on how they are including commonly agreed upon objectives in national policy.
117 See, e.g., de Büre, supra note 9.
some as a passing phenomenon and a system to mask the lack of more substantive progress in particular policy fields, relegating policies such as employment, social inclusion, pensions, and health to the uncertain sphere of soft law.

According to others, these objections seem to be both empirically and conceptually misplaced. Conversely, it is pointed out that in more and more policy areas, such as hazardous waste or occupational health and safety, hard law directives increasingly tend to incorporate provisions for completion and periodic revision of standard-setting through soft law OMC procedures. In turn, in most OMC processes, the common objectives play a pivotal role in linking EU policymaking upwards to the core values and goals of the EU as set out in the Treaties and the Charter of Fundamental Rights on the one hand and downwards to more specific programs and practices pursued by the Member States on the other. Consequently, soft law and hard law are seen as complementary rather than mutually exclusive policy tools. It has also been suggested that in order to overcome the deregulatory tendency of the OMC, recourse should be made to fundamental social rights as a hard standard that the OMC process would have to respect even in absence of social regulation.

Fundamental rights may play a programmatic role ex ante in the EES. In turn, the technique of the OMC could be used to developing a real European fundamental rights policy. A theoretically promising response is that OMC procedures for ensuring full and open participation can be reformed by applying to them the same techniques of benchmarking and peer review that inform substantive policy judgments. The growing emphasis within the social inclusion process and, more controversially, the EES on mobilizing all relevant bodies and stakeholders, including social partners, non-governmental organizations (NGOs), national parliaments, and local/regional authorities, supports the practical validity of this view. Others have argued that in order to be effective, OMCs should strike the right balance between too much pressure from above (through Council’s recommendations which would hamper the principle of subsidiarity) and the danger of too little commitment beneath the surface. The soft enforcement mechanisms, such as the pressure coming from the Council, from national public opinion, and from the other Member States, should be coordinated to be strengthened Consequently, both the democratic legitimacy and the practical effectiveness of existing OMC processes could be improved by reflexively applying to its own procedures key elements of the method itself, such as benchmarking, peer review, monitoring, and iterative redesign.

Finally, many have praised OMCs for being a suitable and more effective alternative to traditional forms of law. First, in contrast to common legislative standards, the OMC provides for flexible standards that could arguably lead to regulatory competition and result in a race to the top in terms of social standards. Second, OMC procedures are mainly (although not exclusively) used in areas where as a result of the lack of legislative competence or political will, EU legislation is not a

120 Id. at 224–32; see also Nicholas Bernard, “A ‘New Governance Approach’ to Economic Social and Cultural Rights in the EU, In Economic And Social Rights Under The EU Charter Of Fundamental Rights. A Legal Perspective 247, 263 (Tamara Hervey & JeffKenner eds., 2003)
122 Jacobsson, supra note 109, at 99.
123 Zeitlin, supra note 60.
realistic alternative or might not even be desirable given the diversity of welfare systems. In addition, by requiring national governments to address a common problem, to consider their own policy choices in a comparative perspective, and to expose their performance to peer review and public policy, the OMC may provide opportunities for shaming governments out of policies that would be self-defeating if everybody adopted them. Finally, OMCs seem to provide a form of new deliberative governance of its own where the pursuit of national interests is less dominant than in the Community Method and where cooperation among national administration is encouraged. Hence, the OMC can be seen as one element in a larger emerging system of experimental governance within the EU that blurs the distinction between hard and soft law, allowing decision-making and problem solving for complex, uncertain and domestically sensitive fields of socioeconomic policy and risk-regulation.

4. Conclusion

This Article has sought to provide an overview of the current debate on governance in the EU from the standpoint of EU law. In particular, three of the most developed and long established forms of governance in the EU—the comitology system, the EU agencies, and the OMC in the fields of unemployment and social inclusion—have been examined. Under the broad umbrella term of governance, lawyers place all law-making procedures and legal instruments that are alternative to either the traditional Community Method or to EU legislation listed in the EU treaties. In other words, forms of governance are perceived as a response to the main problem facing the EU, namely the adaptation of the institutional framework to the growing volume and complexity of regulatory tasks assumed by the EU. The process of market integration required an expansion of European regulatory policies. The original division of labour between the EC focusing on economic integration and Members States in charge of social regulation resulted in deregulatory pressures on Member States to eliminate tariff barriers to trade and to achieve the goal of a single market. Deregulation was then followed by a pattern of re-regulation and expansion of EU intervention in areas such as social and risk regulation. These developments have been interpreted as the emergence of a new type of function that can be defined as “political administration” and that is difficult to fit into traditional categories of law. In the context of these forms of governance, the boundaries between law-making and implementation of policy have become blurred. Two of the mechanisms used to face increased regulatory needs were the delegation of regulatory powers to the Commission and to EU independent agencies. Others identify the driving forces behind the rise of governance in the need for reaching non-uniform, flexible solutions and for including a larger number of stakeholders in the decision-making process. This has led to an increased use of soft law mechanisms and to the spread of OMC procedures in several policy areas.


125 Scharpf, supra note 41, at 10.

126 Jacobsson, supra note 109, at 99.

127 Zeitlin, supra note 60.

128 See, e.g., Scott & Trubek, supra note 7.

129 This view is supported by Giandomenico Majone, Christian Joerges, Renaud Dehousse, and Simon Hix.

130 See, e.g., Majone, supra note 97, at 103–22.


132 Dehousse, supra note 17, at 227.
The rise of governance examined against the yardstick of EU law and ECJ case-law has produced extremely varied responses among legal commentators. However, three main approaches can be identified. Some purport that new forms of governance would acquire greater legitimacy and strength once brought within the boundaries of the EU legal order rather than letting them proliferate in an unclear, inchoate manner. According to this view, a modification of the Treaties may be welcomed to allow, for example, the creation of fully authorized regulatory agencies, to eliminate the comitology system, or to include the OMCs within the Constitution. On the other end of the spectrum are those who recognize that some forms of governance are better suited than traditional methods to address novel processes and, consequently, oppose their “juridification” which would undermine their innovative capacity. The majority, however, takes a more moderate approach. While acknowledging the innovative potential of some forms of governance, many recognize that their transparency, accountability, and effectiveness can be improved by applying principles borrowed either from administrative or constitutional law to the hybrid forms of governance. In the first category fall those who maintain that the proceduralisation of governance offers the greatest hope for achieving a more legitimate, more effective system, recommending, for instance, a system of budgetary and parliamentary control over agencies or procedural reform of the committees system. The second category includes those who advocate the application of constitutional principles to governance, such as to ensure compliance of the OMC in social policy with fundamental social rights. Ultimately, there is a broad agreement on the need for complementarity of methods and for the need to endorse a less rigid approach to the classic Community Method in order to progress towards more efficient regulation and to find alternatives.

A final question that remains in the background of the lawyer’s discourse on governance is the relationship, either in terms of a dichotomy or interaction, between soft law and hard law mechanisms. Some believe that in areas such as social policy, it is necessary to have specific standards for social protection enshrined in the Treaty. Others think that it would be better to create broad but mandatory principles at the EU level while leaving a certain degree of discretion to the Member States for implementation purposes. In this case, for instance, the OMC should be combined with hard law mechanisms like framework directives. Even the proponents of complementarity between hard and soft law mechanisms, however, acknowledge that it would be important to delimit the scope of soft law mechanisms in order not to preclude hard legislation where it is needed.


Employment deprivation and poverty: The ways in which poverty is emerging in the course of economic reform in Russia, by N. Tchenina. No. 60. 1993. ISBN 92-9014-545-5.


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