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**The Distinction and Normative
Interdependence between
'Government' and 'Governance':
The EU as a Regime of Governance**

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The Distinction and Normative Interdependence between ‘Government’ and ‘Governance’: The EU as a Regime of Governance

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Governing in Europe has taken more open, dynamic and informal shapes than the traditional notion of constitutionally based government conceptually covers. New styles of governing have been summarised by the rather modern notion of ‘governance’ or ‘new governance’. As governance goes beyond legally based styles and methods of governing, a systematisation is necessary. This paper intends to provide a systematic account of the contemporary governance debate, arguing that there is a lively interdependence between governance and government. The emergence of governance is therefore relevant for the understanding and development of constitutional law since governance complements and interacts with constitutionally based styles of governing. Still, however, both styles are clearly distinguishable according to their institutional characteristics. After an introduction, the paper will first consider the difference between governance and government. This will include an argument for the normative character of governance as governance creates inclusive institutional spaces below and beyond European constitutional law. As those spaces are responsive towards the normative preferences of their participants and the normative goals of constitutional settings, a merely descriptive-political notion of governance would not be sufficient. The argument leads to a legal-theoretical view on governance, taking place under, but also beyond, the ‘shadow of hierarchic government’. Those considerations will be applied to governing in the EU, both in the ‘multi-level’ and ‘multi-actor’ dimensions. With the support of some examples of policy making within both dimensions and drawing from the previous theoretical foundation, it will be argued that the EU is a regime of governance in lively interdependence with traditional notions of government.

1. Introduction

Fritz Scharpf’s question ‘Governing in Europe: Effective and Democratic?’¹ formulates a key issue of legitimacy of policy and decision-making in the EU. Policies are not accepted only because of their substantive content. Designing policies from scratch, regardless of their addressees’ needs, is destined to fail². Therefore the result of a decision-making process cannot be legitimate if modes and procedures of policy-delivering do not involve those who are affected by the decision. Even a pure majority rule can be unsatisfactory. According to Scharpf’s analytic distinction, ‘input legitimacy’ is crucial for supporting ‘output legitimacy’ and therefore for well-functioning governing³.

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- 1 F Scharpf, *Governing in Europe: Effective and Democratic?* (OUP, Oxford 1999).
- 2 Z Bańkowski, *Living Lawfully: Love in Law and Law in Love* (Kluwer Academic, Dordrecht 2001) 96; LL Fuller, *The Morality of Law* (2nd ed YUP, New Haven 1969) 38.
- 3 Scharpf (n 1) 7-14. This differentiation has raised criticism which will be addressed *infra*, para. II. 3. b) (2). Indeed, his categorisation should rather be taken cautiously in an analytic sense, but largely, ‘input’ and ‘output’ coincide, cf P Westerman, *Governing by Goals: Governance as a Legal Style* (2007) *Legisprudence* 51-74, at 61-2 *et passim*.

The legitimacy of governing the EU therefore very much depends on the input side of delivering policies. Some see severe deficits and therefore diagnose a 'legitimacy crisis'⁴. The EU is far from being a state with a *demos* which could allow the classic constitutional rule of the majority over the minority⁵. As the EU primarily derives its powers from sovereign Member States, it has been growing as an integrative polity, based on negotiations, differentiation and diversity. Discussing governing modes in the EU, and even a constitutionalisation of the EU, has to take this structural particularity into consideration⁶.

Modes of legitimate governing can range from hierarchic to heterarchic, from using prescriptive legal instruments to leaving discretion in realisation of certain aims and from using binding 'hard' law to relying on less or non-binding 'soft' law⁷. On those scales, the concepts of government and governance can be distinguished. Once governance and government have been situated at the respective ends, interdependencies will be worked out. What the concepts of government and governance mean, where they are different, and in how far the EU is possibly a regime of governance rather than government will be discussed in the following sections.

2. The Concepts of Government and Governance

Before asking whether the EU should be understood as a regime closer to governance than to government, a conceptual definition of both is necessary. Both are modes of governing, understood as collectively drafting and implementing agreed policies with relevance to common goods⁸. It is important to examine which actor governs (institutional aspect) and which instruments the actor uses (instrumental aspect) according to the two distinct modes of government and governance.

A. Government

Government can generally be defined as a classic style of decision-making, conducted by the executive within a constitutional framework. Government means the authoritative implementation of agreed

4 Cf MA Pollack, 'Theorizing EU Policy-Making' in: H Wallace, W Wallace and MA Pollack (eds), *Policy-Making in the European Union* (5th ed OUP, Oxford 2005) 17-49.

5 JHH Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision* (1995) 1 ELJ 219, 223 et seq. Critical of and in strong opposition to authoritarian notions of a ethnic homogeneous '*demos*' in E Kennedy (tr), C Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press, Cambridge (Mass) 1988) 9 SD Scott, *Constitutional Law of the European Union* (Longman, Harlow 2002) 151. For an institutionally created '*civic demos*' N McCormick, *Questioning Sovereignty* (OUP, Oxford 1999) 144. 'General public' instead of a '*demos*': Commission (EC), *European Governance* (White Paper), COM(2001)428 final, 25 July 2001, 11.

6 C Joerges, '*Integration through De-Legislation? An Irritated Heckler*' in: European Governance Papers (EUROGOV) No. N-07-03 <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf>, 16.

7 P Craig/G De Búrca, *EU Law, Text, Cases and Materials* (4th ed OUP, Oxford 2008) 144-66.

8 TA Börzel '*Informelle Politik in Europa*' in W Kaiser et al (eds) *Netzwerke in European Multi-Level Governance* (Böhlau, Vienna 2009) 27-38, at 31.

public policies⁹. For that purpose, the method of government relies on the institution called government which means political leadership and a bureaucratic administration to ensure the necessary expertise¹⁰. The classic notion of government is centralistic and hierarchic: as a government is supposed to execute a legitimate will, it is responsible for handing down binding and prescriptive decisions from the top to the bottom. Finally, the boundaries of government are territorial as within its territory, a government's capacity to deliver policies is all-encompassing¹¹.

Institutionalised positions of actors within a constitutional framework are a necessary condition for government as a mode of decision-making. By that, it exercises certain techniques which are classically connected with its role. At least three can be distinguished: binding and enforceable law (*imperium*), use and distribution of wealth (*dominium*), and information and persuasion (*suasio*)¹². Classic legal scholarship has put an emphasis on the association of government with the use of techniques of *imperium*¹³.

In the European context, there is no unique terminology of concepts which meets the features of government. Government relating to the EU has to be understood as an equivalent to 'hierarchical governance'¹⁴, 'old governance'¹⁵ and the 'classic Community method' (CCM) which regards the European Commission as the central governing institution within the decision-making procedures the EC Treaty provides¹⁶.

B. Governance

The notion of governance is broader and calls for a more open definition. Governance in the European context will be treated as an equivalent to the lively debated 'new governance' which, as a mode of governing, has been situated between domestic and international policy making, being more open than government¹⁷.

9 J Shaw, J Hunt and C Wallace, *Economic and Social Law of the European Union* (Palgrave Macmillan, Basingstoke 2007) 30.

10 G Drewry, 'The Executive: Towards Accountable Government and Effective Governance?' in: J Jowell and D Oliver (eds), *The Changing Constitution* (5th ed OUP, Oxford 2004) 287.

11 A Héritier, and D Lehmkuhl 'Introduction: The Shadow of Hierarchy and the New Modes of Governance' in *idem*, *The Shadow of Hierarchy and the New Modes of Governance*. Special Issue JPP (CUP, Cambridge 2008) 1-17, at 1-2.

12 K Yeung, *Regulating Government Communications* (2006) 65 CLJ 53, 72-4.

13 Yeung (n 12) 72.

14 Craig/De Búrca (n 7) 146.

15 In contrast to governance. E.g. S Smismans, *New Modes of Governance and the Participatory Myth*, European Governance Papers (EUROGOV) No. N-06-01 <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-06-01.pdf>.

16 Art. 251, 252 EC. Cf also Commission (EC) (n 5) 8 and J Scott and D Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union* (2002) 8 ELJ 1-2. – A similar approach to solve this terminological problem is provided by K Armstrong, 'Governance and the Single European Market' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford 1999) 745-89, at 746-7.

17 TA Börzel 'European Governance – Markt, Hierarchie oder Netzwerk?' in G Folke Schuppert et al (eds) *Europawissenschaft* (Nomos, Baden-Baden 2005) 613-41, at 616.

First, in the ‘polity and ‘politics dimension’¹⁸, governance puts less emphasis on legally embedded institutions which produce decisions. Governance, thus, is institutionally inclusive and variable. As a multitude of legal and non-legal public and private actors is involved¹⁹, governance is a polyarchic²⁰ concept of decision-making. The institutional framework of governance is relatively open and flexible, stabilised by heterarchical ‘policy networks’ as coordinative systems²¹. Rather than being determined by territorial boundaries, governance is sectoral, shaped by spontaneous claims of formulating policies from the outside of constitutionalised decision-making procedures²².

Second, the outcome of governance processes (the ‘policy dimension’²³) and the processes themselves are flexible and wide. Governance is about managing a community’s affairs by inclusion of and interaction between public authorities, citizens and groups²⁴. The ways in which the aim of managing a community can be achieved are neither institutionally nor legally prescribed. The process of governance is characterised by open and game-like interactions with interdependent actors involved in negotiation systems. There is basically autonomy from official institutions, as the networks are self-organising²⁵.

The notion of governance can thus still be well described by deliberative²⁶ or social constructivist²⁷ approaches. Deliberative theorists stress the informality of decision-making. The process is dominated less by formal rules and formal voting than by good arguments which finally lead to a consensus, in other words a ‘collective decision’²⁸. Social constructivist theorists emphasise the meaning of the involvement of individuals, not necessarily state actors²⁹, within a certain institutional environment. By

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- 18 O Treib, H Bähr and G Falkner, *Modes of Governance: A Note Towards Conceptual Clarification*, European Governance Papers No. N-05-02, <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-05-02.pdf>, 9.
- 19 Börzel ‘European Governance’ (n 17) 618-9 distinguishes public-private networks from purely private, societal networks and public intergovernmental networks.
- 20 J Cohen and C Sabel, *Directly-Deliberative Polyarchy* (1997) 3 ELJ 313-42.
- 21 J Peterson, ‘Policy Networks’ in: A Wiener and T Diez (eds), *European Integration Theory* (OUP Oxford 2004) 117-35, at 119-20. Cf Börzel ‘Informelle Politik’ (n 8) 29-30.
- 22 Cf Héritier/Lehmkuhl (n 11) 1-2.
- 23 Treib/Bähr/Falkner (n 18) 7.
- 24 UN Development Programme (1997) ‘*Governance for Sustainable Human Development*’, para. 1 and TG Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges* (2000) 21 Third World Quarterly 795, 797-8.
- 25 RAW Rhodes, *The New Governance: Governing without Government* (1996) 44 Political Studies, 652, 660. Cf recently TA Börzel, *Governance without Government: False Promises or Flawed Premises?* Berliner Arbeitspapiere zur Europäischen Integration, forthcoming (2009) 3.
- 26 Cohen/Sabel (n 20); Joerges (n 6) 14-18; Pollack (n 4’) 36-45.
- 27 T Risse, ‘Social Constructivism and European Integration’ in: Wiener/Diez (n 21) 159-76. Critically objecting that this approach is not based on falsifiable hypotheses A Moravcsik, *Is Something Rotten in the State of Denmark? Constructivism and European Integration* (1999) 6 JEPP, 669, 670-4.
- 28 Cohen/Sabel (n 20) 313, 321. Preferring a constitutional document as a basic consensus prior to any discourse SD Scott (n 5) 154.
- 29 A focus on public actors is put by intergovernmentalists like e.g. A Moravcsik, ‘A Liberal Intergovernmentalist Approach to the EC’ in: S Bulmer and A Scott (eds), *Economic and Political Integration in Europe: Internal Dynamics and Global Contexts* (Blackwell, Oxford 1994) 29, 36 and functionalists like EB Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957* (SUP Stanford 1958).

cooperative and polyarchic interaction the behaviour and preferences of the actors are formed and changed³⁰.

This demonstrates that governance describes a concept which, by definition, is more open than government. The processes of governance are governed by spontaneous modes, agreed by the actors involved, and there is no determination regarding the participants of the process. Despite even heavy criticism within the European context³¹, governance provides a responsive mode of governing which allows otherwise unarticulated political, economic and societal needs to be taken into consideration possibly better than classic modes of governing can do.

3. Interdependencies between distinguishable modes

Government and governance are thus clearly distinguishable. Government primarily relies on institutions which authoritatively use legally based instruments for autonomously deciding on public affairs within a territory. Governance, instead, primarily relies on inclusive procedures without legally determined actors, modes and instruments. Rather, deliberation, spontaneity and self-construction dominate.

This purely heterarchic notion has recently been relativated. It has been re-emphasised that governance operates in the ‘shadow of hierarchy i.e. legislative and executive decisions’³². The ‘shadow of hierarchy’ is related to the unilateral action of public authorities and can, for example, appear in the shape of threats or public campaigns to regulation and tightening control mechanisms, thereby putting incentives to entering into disciplined self-regulation³³. Beyond that, self-regulation on common goods takes place in the public arena and is, as such, only conceivable as making use of public empowerment, facilities and infrastructures to be effective³⁴. Although the EU has established hierarchic, quasi-constitutional structures³⁵, it might, however, go too far to claim a causal dependency of heterarchic governance on hierarchic government³⁶. Whereas it is true that private self-regulation takes place with reference to public authority, governance still creates autonomous spaces beyond rather than merely under hierarchic shadows. Second, governmental institutions are not the only actors which create incentives for self-regulation, as the reference to NGOs and markets shows³⁷. For other societal factors

30 *Risse* (n 27) 160-1, 166-71.

31 Extensively V Hatzopoulos, *Why the Open Method of Coordination Is Bad For You: A Letter to the EU* (2007) 13 ELJ 309, 316-37.

32 See, earlier, F Scharpf, *Games Real Actors Play. Actor Centered Institutionalism in Policy Research* (Westview Press, Boulder 1997) 202; recently *Héritier/Lehmkuhl* (n 11) 1; cf A Héritier and S Eckert, ‘New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe’ *ibid.* 113-38, at 114, 123 et seq.

33 *Héritier/Eckert* (n 32) 116.

34 *Héritier/Eckert* (n 32) 117-8. With a stronger notion *Börzel*, *Governance* (n 25) 5.

35 *Börzel* ‘European Governance’ (n 17).625-30.

36 Cf *Börzel*, *Governance* (n 25) 2, 7.

37 *Héritier/Eckert* (n 32) 116.

inside and outside governance procedures empirical evidence would have to be considered³⁸. Finally, the intensity of hierarchic governing may differ as government can be inclusive towards less hierarchic modes of governing. In particular, the latter aspect is a matter of degree and the regulative sector. In the end, this rather suggests a complex interdependence than a unilateral dependence of governance on government.

3. The Different Normativities of Government and Governance

This does not, however, diminish the need for a clear analytical distinction between governance and government³⁹. Both have different origins in terms of their legitimacy, as shown above. That difference is continued in the normativity of government and governance.

The normative substance of government results from the constitutional framework which sanctions and limits institutional competences to act by ‘secondary rules’⁴⁰. In contradiction, governance is not directly guided by ‘hard’ competences and constitutional constraints. It is rather indirectly connected to constitutional structures. Reaching beyond government, governance creates a complementary space of policy making. Should governance not be able, in turn, to deliver policy results, constitutionalised actors are legitimised to intervene through traditional modes of government. Territorial and sectoral governing thus entangle: the intensity of intervention differs relative to the failure of self-governing networks to achieve desirable standards⁴¹. Such interventions are, however, still relative to policy sectors rather than territories, and space for self-regulation remains. In particular, self-sustaining networks ensure a long-term credibility, stabilising and placing a counter-weight against changing political preferences of constitutionalised actors⁴². The ‘shadow of hierarchy’ does have ultimate, though diffuse, boundaries⁴³.

38 Cf, however, *Börzel*, Governance (n 25) 11.

39 Again *Héritier/Lehmkuhl* (n 11) 2-3.

40 Cf HLA Hart, *The Concept of Law* (OUP, Oxford 1961) 79. A similar notion of ‘*Kompetenznorm*’ can be found at H. Kelsen, *Reine Rechtslehre* (2nd ed Franz Deuticke, Vienna 1960) 152-4.

41 Cf *Héritier/Lehmkuhl* (n 11) 8-9.

42 Cf *Héritier/Lehmkuhl* (n 11). Their argument refers to the claim of ‘time inconsistency’ of G Majone whose conclusions against deliberative democracy themselves are not beyond doubt: see, e. g., ‘Theories of Regulation’ in idem (ed), *Regulating Europe* (Routledge, London 1996) 28-47 and *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance* (2001) 2 EUP 103-22, at 105-8.

43 This could possibly solve the paradox of double weakness *Börzel*, Governance (n 25) discloses: the weaker the state, the higher the need for self-regulation; but with the lack of government, governance will prove to be ineffective. Her underlying thesis (*ibid.*, 12-13) can be interpreted positively: the more inclusive government itself is towards less-hierarchic styles of governing, the more diffuse the boundary between government and governance thus is, the more likely is effective heterarchic self-regulation beyond the shadow of hierarchy.

Those interdependencies suggest a first, larger, conclusion: governance is normative⁴⁴. As governance takes place within constitutionalised arenas, it is not possible to distinguish government and governance alongside the categorisation ‘descriptive’ and ‘normative’, thereby doubting the normative character of governance⁴⁵.

A. Governance: A merely descriptive concept?

The first argument, doubting the normativity of governance, is related to the contrast between governance and government. Whereas governance is a mode of governing, inclusive towards multiple actors and formulating open procedures, government is the classic style of governing, relying on constitutionally defined procedures and actors⁴⁶. One might therefore put the argument that governance cannot be programmed by any legal or constitutional framework as its procedures and outcomes are unpredictable⁴⁷. Although the processes themselves may take place under certain normative settings such as, for example, transparency and accountability⁴⁸, there are no rules which can prescribe in detail how governance processes should work. It is the description of governance, and not any process of regulation, which generalises the concept of governance and makes it comprehensible.

The second argument refers to the differentiation between inputs and outputs of governing⁴⁹. It could be argued that governance primarily addresses descriptive input structures which are open and inclusive in both procedural and institutional terms. Due to those open procedures, the normative outputs of governance are relatively open as well. There is no normative determination since policy outputs are subject to the participants’ choice. By participating in drafting policies, they first introduce knowledge and thereby make up an epistemic community and, secondly, introduce their needs. Instead of being normatively bound, they act autonomously. In fact, governance therefore seems to decouple normative ‘policies’ from descriptive ‘politics’.

The conclusion would be as follows. It is the description of governance and not any normative premise which generalises the concept of governance and makes it comprehensible. Because governance therefore is politics rather than law and allows for free disposition, governance comprises an ‘is’ and not an ‘ought’. Without any further normative premise, an ‘is’ cannot evolve to an ‘ought’⁵⁰, and governance therefore remains a descriptive concept which does not contain propositions about

44 Cf M Hahn ‘Power Beyond the Constitution? The Emergence and Evolution of “Governance” Networks in the EU – Normative Value and Limits’ in H Morgan et al (eds) *Perspectives on Power: an Inter-disciplinary Approach* (Cambridge Scholars, Cambridge 2009), forthcoming.

45 See, however, *Shaw/Hunt/Wallace* (n 10) 33: ‘descriptive tool’; *Smismans* (n 15) 5 with reference to *Commission* (n 5) 10, contrasting descriptive governance with the normative ‘good governance’.

46 For the concept of the ‘Classic Community Method’ cf *Scott/Trubek* (n 17) 1-2

47 *Joerges* (n 6) 8.

48 *Ibid.*

49 *Scharpf* (n 1’) ch. 1.

50 Cf just R Alexy, *A Theory of Legal Argumentation* (Clarendon, Oxford 1989) 183.

desirable properties of governing. In order to confirm this, it could be argued that there is a differentiation between governance and 'good governance'. By including this in the White Paper⁵¹, the European Commission introduces normative attributes to governance: 'good' is associated with desirable qualities such as, for example, openness, participation and accountability. Since governance, however, merely describes political procedures, the normative attribute 'good' is not necessarily related to the concept⁵².

B. Arguing in favour of the normativity of governance

The descriptive argument fails since it does neither take into account the intertwining of politics nor their legal premises which make up the 'shadow of hierarchy' as worked out by *Héritier*.

(i) Normativity of the frame

The autonomous sphere of governance and the 'shadow of hierarchy' are allocated within the same normative frame which is, ultimately, the European constitutional framework. Any constitutional framework contains principles and policy goals⁵³. Both governance and government serve the same European integrative normative ends. For *goals* determine outcomes⁵⁴. The policy outcome is therefore not subject to the totally free and spontaneous choice of inclusive procedures on the part of the participants. Their deliberations are rather oriented towards those goals whose interpretation mirrors a normative consensus, acceptable to the participants in the deliberations of governance. In order to remain acceptable, this consensus needs to be re-organised continuously⁵⁵.

(ii) Normativity of preferences

This leads to a second argument in favour of the normativity of governance. It is not possible to separate the constitutional frame from the market-like interactions of actors driven by their own preferences within the normative frame⁵⁶. There is a double normativity: both the objective goals of European integration and the subjective normative preferences of the participants determine policy results. It is not possible to split governance procedures into normative goals and descriptive political

51 *Commission* (n 5) 10.

52 *Smismans* (n 15) *ibid*.

53 Art. 3 EC, but also the policy objectives in relation to constitutional-legal competences: Art. 11, 13, 32 EU; Art. 12(2), 13, 14, 36, 37(2)[2], (3), (4), 42, 44, 61-3, 66, 67(2), 71, 81-3, 129, 135, 161, 166, 175 EC.

54 *Westerman* (n 3) 54 et seq., 61-2.

55 *Westerman* (n 3) 63. To J Habermas, *Contributions to a Discourse Theory of Law and Democracy* (tr by William Rehg, Polity Press, Cambridge 1996) 97-104, normative discourses are oriented towards and take place before the background of an ethical consensus.

56 As it is not possible to separate a market order from its normative frame, in *F Hayek's* words *cosmos* (see *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, vol. 1: Rules and Order (TJ Press, Padstow 1973) 35-54), cf N MacCormick, *Spontaneous Order and the Rule of Law: Some Problems* (1989) 1 RJ 41-54 (42-5).

performance. Therefore, it is not possible to split governance into a descriptive part ('input' structures), and a normative part, 'output' performance, as *Scharpf* does. Although government and governance are conceptually distinct, doing justice to their normativity means taking into account their normative connection as well; which, to a large degree, arises from their political connection as found by *Héritier*⁵⁷.

(iii) Normative institutional arrangements

Third, outcomes are not necessarily substantial policies. Any *procedural arrangement* reached by participants is an 'outcome' in the preliminary stage before any substantive policy has been agreed at all. Even the necessary limitations on the choice and number of participants meeting in governance procedures are an outcome: who participates in drafting policies is directly relevant to the substance of achieved policies.

Conceiving governance procedures as completely open and normatively undetermined is only possible in the very first hypothetic moment before any outcome has been reached. As an analytic category, *Scharpf's* distinction between input and output is useful for understanding different aspects of the legitimacy of policy-making, but one has to bear in mind that this distinction ceases to exist as soon as stakeholders meet and introduce an issue for deliberation. Open, public and broad participation do not mean normatively undetermined participation.

It is therefore better to regard the results of governance generally as *institutional arrangements*⁵⁸. They create rules which the participants in the process agree to obey. As such, they create 'diachronic information'⁵⁹. By setting up normative institutional arrangements, governance deliberations continuously refer back to the momentary normative information given by procedural rules and the constitutional law of a polity. Simultaneously, they create new normative references. The normativity of governance is self-generated. The degree of autonomously-created normativity increases with the autonomy of the actors from constitutionalised institutions. Governance is therefore a tool for creating a dynamically evolving network of momentary and diachronic information. The participants' will is continuously translated into normative arrangements which can take both legal and non-legal informal shapes.

Institutional arrangements create *institutional ethics*⁶⁰. Participating in governance procedures means entering into a non-legal but normative framework whose function and ethics are determined by achieving agreed substantial policies through deliberation based on participatory and democratic

57 Cf on the interdependence between political reality and legal normativity in depth M Morlok, *Was heißt und zu welchem Ende studiert man Verfassungstheorie?* (Duncker & Humblodt, Berlin 1988) 34-9, 64-81.

58 M Morlok, *Informalisierung und Entparlamentarisierung politischer Entscheidungen* (2003) 62 VVDStRL 37-84, at 51; N MacCormick, *Institutions of Law* (OUP, Oxford 2007) 14-20.

59 N MacCormick, *Institutions, Arrangements and Practical Information* (1988) RJ 1, 73-82.

60 Cf *Bañkowski* (n 2) 157 et seq.

procedural values. On the one hand, individual participants are committed to those goals; while on the other hand, in order to be accepted, institutional arrangements need to be adaptive towards individual normative views and to include them in the institutional ethics of governance.

Finally, the substantial policy results of governance can create *new normative goals* towards which it is desirable that policy-making be oriented and back to which later procedures will refer⁶¹. This is not only the case in the macro-dimension in which, for example, revisions of the Treaties have introduced new goals into Art. 3 EC (and its previous equivalents) after deliberation procedures. Rather, within the micro-dimension of governance deliberations, intermediate goals can be agreed which will guide the following deliberations.

C. Intermediate conclusion

The argument demonstrates that a normative value can be attributed to governance, such as the aim to produce better policy outcomes through openness, deliberation and participation. This comes very close to the properties of ‘good’ governance, and in consequence, the differentiation between ‘good governance’ and governance is less sharp than it appears to be⁶². In conclusion, a normative point of view confirms the underlying idea of the ‘hierarchical turn’ in current political science. Beyond that, it demonstrates that the ‘hierarchical turn’ is incomplete: heterarchic and hierarchic arenas with their genuine systemic logic intertwine in a way which can be described as ‘relative autonomy’⁶³. They do not, however, coincide, leading to the ultimate hierarchy of government.

4. Intermediate Results of the Analysis

Government and governance conceptualise different modes of achieving binding policies in relation to common goods. They can be distinguished in terms both of their institutional setting and the actors involved. The classic notion of government is more closely connected to constitutional law, encapsulating goals, rights and central organisational principles⁶⁴. They thus differ in terms of their institutional shape. Government is situated more closely to constitutional competences, procedures and limits, whereas governance creates a non-legal institutional space whose normativity is self-defined and self-developing with reference to and within the functional limits of constitutional law as described by

61 See further *Risse* (n 27) 159-76.

62 See also with compelling arguments *Westerman* (n 3) 52.

63 The concept stems from *MacCormick*, *Institutions* (n 58) 249-61. Their idea is transferrable to the institutional context of governance as neither actors nor bodies are insulated from each other or their framing institutional contexts.

64 Examples of the *acquis communautaire* beyond the primary law of the Treaties: Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 293/84, *Les Verts v. European Parliament* [1986] ECR 1339. Art. 191 EC (political parties) with European Parliament and Council, Regulation (EC) 2004/2003. See also the procedural provisions in Council of the European Union, Decision of 28 June 1999, 1999/468/EC, [1999] OJ L 184/23, amended by Council of the European Union, Decision of 17 July 2006, 2006/512/EC, [2006] OJ L 200/11 (Comitology).

the ‘shadow of hierarchy’. Governance thus is not unlimited, although it is broader and deeper than government in terms of institutions and actors. Both the diversity of the EU and its limited constitutional-legal competences provide a fruitful ground for the use of governance as a mode, complementary to government.

5. The EU – A Regime of Governance?

In the light of the analysis of the differences and intertwining of government and governance, the question must now be asked how far the EU more closely resembles the notion of governance. To answer that question just by stating that the EU does not have a constitutionalised government does not take account of the complexity of the issue. Even though the EU has a diversity of rules for making decisions with different dominant actors and institutions and yet also has a network structure⁶⁵, it has always used modes of government, and descriptions of governing in the EU were very close to that concept.

A. Historic developments of governing and the classic Community method (CCM)

Originally, functionalists very much relied on modes of government to achieve the complete integration of Europe in the end, with the Commission as a moderator and with strong governments in the Member States legitimated by a rule-bound framework consisting of the ‘Treaties’⁶⁶. Their notions can be seen as one origin of the ‘Community method’⁶⁷. Later, this interpretation experienced criticism from liberal intergovernmentalist scholarship, as the model left aside elements of bargaining and coordination⁶⁸ and therefore did not stick to the premise that the EU is built on sovereign Member States⁶⁹.

However, intergovernmentalism does not go beyond the existing institutional framework of the EU. Although cooperative, it is not a synonym for governance. The approach is limited to the interaction of European institutions and constitutionalised governments which use the techniques of *imperium*, *dominium* and *suasio*. This is the starting point for criticism from both an external and an internal perspective.

Viewed externally, non-governmental actors are excluded. This causes high domestic costs⁷⁰. An alternative is the idea of ‘post-sovereign governance’⁷¹: as state governments have eventually lost

65 Peterson (n 21) 117.

66 Haas (n 29).

67 Pollack (n 4) 17.

68 Moravcsik (n 29) 29, 54-5.

69 *Ibid.* 31-5.

70 See even *Ibid.* 60 et seq.

71 W Wallace, 'Post-sovereign Governance: The EU as a Partial Polity' in: *Wallace/Wallace/Pollack* (n 4) 483-503. Cf also *MacCormick, Questioning* (n 5) 132.

sovereignty to the EU and are themselves constrained by their domestic constitutions, they cannot be regarded as the only actors to articulate political and economic needs at the EU level⁷². This even leads to a new dimension of subsidiarity. The question is not if ‘the objectives of the proposed action cannot be sufficiently achieved by the Member States’⁷³ but rather, if they can be sufficiently achieved by citizens, groups, NGOs and stakeholders.

Viewed internally, intergovernmentalism leaves aside the democratic deficit the EU suffers. Even though governments are democratically legitimated to act, intergovernmentalism in practice causes a lack of parliamentary scrutiny, both of the European and the national parliaments. The solutions offered for that deficit include both parliamentarisation⁷⁴ and constitutionalisation⁷⁵ of the EU as well as a ‘deliberative turn’⁷⁶ and constructivist models⁷⁷. The former two are more formal and can be seen as attempts to advance the Community method to a higher degree of democracy and scrutiny. The latter two go beyond formality.

Recent developments of re-emphasising hierarchies cannot directly be attributed to one of the groups. Mirrored against the first two rather hierarchic notions, a hierarchic-heterarchic interplay seems to be conceivable, but also recent literature does not finally solve the question of democratically legitimated inputs⁷⁸. Mirrored against the latter two notions, the more recent work demonstrates that no deliberation can be insulated from a frame, involving hierarchies. Without the frame, as outlined empirically⁷⁹ and normatively⁸⁰, governance deliberations would lack both a reference and an incentive to be performed.

A synthesis seems to be the most sensible approach: governance therefore presupposes deliberation, relative to and interacting with a normative frame which provides for the possibility of hierarchic governing and oriented towards consensual goals. With the aid of this background, it will be argued that the EU actually is a regime of governance, both under and beyond the ‘shadow of hierarchy’.

This can be exemplified by the Classic Community Method (CCM). The CCM is usually associated with governing modes which very closely resemble government. It relies on the institutionalised procedures in Arts. 251 and 252 EC, and on the distribution of powers among the Commission as the

72 *Wallace* (n 71) 494.

73 Art. 5(2) EC.

74 Cf *Weiler* (n 5) 233-5.

75 *SD Scott* (n 5) 154.

76 *Pollack* (n 4¹) 42-5; see also *Joerges* (n 6) 17.

77 *Risse* (n 27).

78 Cf *Börzel*, *Governance* (n 25); *Héritier/Lehmkuhl* (n 11) 2, 10-11 do involve issues of legitimising hierarchies between principals and agents, but the normative question how desirably to integrate hierarchic relations with democratic frameworks and their design should be deepened as well as the issue of the shape the boundary between hierarchy and heterarchy and the structure of the hierarchic sphere. This cannot be explored here.

79 In particular *Héritier/Eckert* (n 32).

80 Above, II. 4.

initiator of legislation, the Council as legislator with the involvement of the Parliament (co-decision in Art. 251 EC, cooperation in Art. 252 EC), and the ECJ in safeguarding the rule of law (Art. 220(1) EC).

However, this does not mean that the CCM is hierarchic in a one-directional sense. EC law does not override domestic law as domestic law is merely disapplied in a case of collision⁸¹. Second, institutionalised procedures do not preclude a variety of policy outcomes, as framework directives⁸² or the incorporation of soft legal instruments such as options of non-compliance with standards in EC law⁸³ demonstrate. The CCM has therefore been supplemented by alternative regulation modes⁸⁴. They have emerged against the background of the existence of a classic style of governing. Again, there is an evolutionary interrelation between government and governance. The CCM is the legally regulated core of EU policy making and therefore the core of the government mode, however enriched with elements of governance.

B. *Government and governance in the EU*

The considerations thus far with regard to the EU as a polity, combined with the discussion of the relationship between government and governance as outlined above, suggest that the EU largely applies modes of governance which reach beyond government and therefore the frame of the CCM. Governance is able to shift territorial boundaries in both dimensions⁸⁵. This can be examined in a 'multi-actor' (horizontal) and a 'multi-level' (vertical) dimension⁸⁶. Although this categorisation is not beyond any doubt⁸⁷, it will be used here as an analytic differentiation in order to exemplify the modes of European governance.

81 Since *Costa v ENEL* (n 64).

82 E.g. Water Framework Directive (European Parliament Council Directive 2000/60/EC of 23 October 2000 [2000] OJ L 327). Instructively A Hinarejos, *On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?* (2008) ELJ 620-634.

83 European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, art. 9 (3). Cf J Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO* (2004) 13 EJIL 307, 314.

84 *Commission* (n 5) 11-21. Cf *Scott/Trubek* (n 17) 2-3: 'New Old Governance'.

85 *Héritier/Lehmkuhl* (n 11) 4.

86 Terminology from J Scott, *European Regulation of GMOs: Thinking about Judicial Review in the WTO* in: J Holder, C O'Conneide and M Freeman (eds), *Current Legal Problems 2004* (OUP, Oxford 2005) 119-20.

87 The distinction between the 'multi-actor' and the 'multi-level' dimension refers to the notion of 'multi-level' constitutionalism which suggests that Europe has developed a structured order, cf I Pernice, *Multi-Level Constitutionalism and The Treaty of Amsterdam: European Constitution Making Revisited?* (1999) 36 CMLRev 703-50 and I Bache and M Flinders, *Multi-Level Governance* (OUP, Oxford 2004); *Pollack* (n 4') 39-41. The notion, however, stems from federal contexts with at least stabilised constitutional hierarchies and cannot fully explain the associative character of Europe as genuinely situated between federalism and international treaties. It might therefore be more viable to pursue the notion of a 'constitutional commonwealth' (*MacCormick, Questioning* (n 5) 104) or constitutional association (*A v Bogdandy, The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty* (2000) 6 Colum J Eur L 27-54, at 28: a 'Verfassungsverbund') and therefore to replace the notion of levels.

(i) The multi-actor dimension (the horizontal)

The horizontal or multi-actor dimension relates to the participation of multiple actors in EU policy-making at the EU level. Again, it has to be stated that just one particular institutional setting is not necessarily connected to either modes of governance or government. Therefore, the mere existence of a multitude of actors in a decision-making process does not lead to the assumption that governance methods are applied. Rather, the substance of some examples for horizontal governing has to be examined with regard to the distinction between government and governance.

(a) *Classic mode: Intergovernmentalism*

Even though an exclusive focus on participation of state actors has been criticised as too narrow to approach governing in the EU, intergovernmental action dominates the practice of certain policy areas.

The first example is the EU budget procedure. Under Art. 272 EC, the Council and therefore the Member States play a dominant role in adopting the budget. The Lisbon Treaty improves the position of the European Parliament, but does not change the *status quo* of implementing the revenues structure which means that this remains subject to intergovernmental bargaining⁸⁸. Even though there is an ongoing public consultation on the budget review,⁸⁹ a far reaching structural reform remains in the hands of the Member States.

The second example is the price regime of the Common Agricultural Policy (CAP). The basic structure of this policy area has traditionally been dominated by Member States and has been executed by regulations rather than directives⁹⁰.

Third, within the second and third pillar of the EU, strong indications of intergovernmental action can be found as well⁹¹. In the area of Common Foreign and Security Policy (CFSP), Art. 23 EU provides for the Council as the unanimously deciding body (and for Police and Judicial Cooperation in Criminal Matters (PJCC), since the Amsterdam Treaty Art. 36 EU provides for the establishment of a committee which consists of 'senior officials'). While strengthening Commission and Parliament, Member States' coordination has been institutionalised⁹².

88 In consequence, the UK rebate remains. On that see the elaborate Commission (EC), *Technical Annex. Financing the European Union. Commission Report on the Operation of the Own Resources System*, 14 July 2004, COM(2004) 505 final vol. 2, 15 *et seq.*

89 Commission (EC), *Reforming the Budget – Changing Europe. A Public Consultation Paper in View of the 2008/09 Budget Review*, 12 September 2007, SEC(2007) 1188 final.

90 Cf E Rieger, 'Agricultural Policy. Constrained Reforms', in: *Wallace/Wallace/Pollack* (n 4^o) 161-90 and *Peterson* (n 21) 130.

91 *Shaw/Hunt/Wallace* (n 9) 36.

92 T Kostakopoulou, 'Security Interests, Police and Judicial Cooperation' in: J Peterson and M Shackleton (eds), *The Institutions of the European Union* (2nd ed OUP, Oxford 2006) 232-51, at 238.

All those examples are examples of cooperative governmental action. They illustrate the assumption⁹³ that intergovernmentalism is a mode of governmental management. The first two policy areas are managed by governmental techniques of *dominium*, since wealth is distributed and redistributed. PJCC fits best in the category of *imperium*, while CFSP belongs to all three categories. Intergovernmentalism as a governing mode therefore very closely resembles government.

(b) New mode: Comitology and agencies

However, new modes of governing emerged as complementary to the CCM and intergovernmental cooperation. The EU has established a system of committees which perform advisory, management and regulatory functions⁹⁴. Commission and subordinated committees, which consist of representatives of Member States and experts, exercise delegated powers of the Council⁹⁵. They need not necessarily be exclusively subordinated to the EU⁹⁶. The procedural arrangements which govern the reality of those committees vary on an issue-by-issue basis, and comitology has been regarded as an area of technocratic deliberative democracy, as it largely involves national actors instead of European officials⁹⁷.

A more stabilised way of advising and preparing regulatory decisions such as technical standardisation or safety regulation is the implementation of agencies. An example may be provided by the EFSA⁹⁸. Legally, agencies such as this are subordinated bodies without legal powers. However, the stability of their personnel, their budget and the fact that they are part of a network of European and national authorities protect them against political influences and therefore give them a powerful position⁹⁹. Inclusive agencies which prepare policies can avoid the later necessity of enforcement, e.g. based on Art. 226 EC¹⁰⁰.

The delegation of legislative power raises legal issues, in particular concerns about democratic accountability and the rule of law¹⁰¹, in more general terms about the appropriate balance between

93 Above, text after n 69.

94 Cf the Comitology Decisions: Council of the European Union, Decision of 28 June 1999, 1999/468/EC, [1999] OJ L 184/23 (Comitology Decision), amended by Council Decision of 17 July 2006, 2006/512/EC [2006] OJ L 200/11.

95 *Pollack* (n 4') 34.

96 The European Committee for Electrotechnical Standardization (CENELEC), for example, serves both the EU, the EFTA and affiliate states, cf General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Organisation at <http://www.cenelec.org/Cenelec/Code/Frameset.aspx>.

97 *Joerges* (n 6) 8; *Pollack* (n 4') 44.

98 European Food Safety Agency. Its scientific committee and panels prepare non binding, however weighty opinions on food safety regulation in the EU, cf European Parliament and Council, Regulation (EC) 178/2002 of 28 January 2002, [2002] OJ L 31, art. 28. Cf *Scott* (n 5) 120.

99 *Joerges* (n 6) 12.

100 *SD Scott* (n 5) 121.

101 YV Avgerinos, *Essential and Non-essential Measures: Delegation of Powers in EU Securities Regulation* (2002) 8 ELJ 269-289, at 271-2.

principals and agents¹⁰². Despite those concerns, these delegation mechanisms can be regarded as recognised tools of governance. Although both the framework of comitology and the implementation of agencies are legally rooted, they allow for the inclusion of non-legal styles and the consultation of external scientific knowledge. Especially agencies, which are not formally public authorities, create a network of knowledge which the EU can resort to rather than commanding a hierarchic administrative structure. In turn, comitology and agencies are a useful example of developing the constitutional frame of Europe towards more responsive governing mechanisms.

(c) New mode: The Open Method of Coordination (OMC)

As going further beyond the frame of law and traditional governing modes, the ‘Open Method of Coordination’ (OMC) has been introduced to achieve the aims of the ‘Lisbon Strategy’, a holistic agenda to become ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’¹⁰³. Since this requires advanced integration in economic, social and environmental policies, the CCM has been considered as incomplete and largely ineffective in terms of reaching those aims for two reasons. The first one is the lack of EU competences for binding instruments¹⁰⁴. The second one is the character of the EU as a post-sovereign integration project whose integration is still incomplete and which moves beyond intergovernmentalism¹⁰⁵. The aim is to integrate policies in the whole range of economic, social and environmental policies, and there have to be inclusive, integrative methods of policy implementation rather than authoritatively binding, redistributive and persuasive instruments of government. Even though there is an ‘empirical deficit’ due to the varied nature, complexity and methodological differences of the OMC, relatively stabilised operation processes in certain policy areas of the OMC can be observed, e.g. the European Employment Strategy (EES), EUROCITIES or Expert Groups on Gender and Employment (EGGE)¹⁰⁶.

The basic idea of the OMC therefore closely resembles governance. It is more open for societal and scientific expertise than classic regulation modes. The Commission plays a coordinative role, and key

102 *Héritier/Lehmkuhl* (n 11) 9-14.

103 Council of the European Union, *Conclusions of the Presidency to the Lisbon Summit*, Bulletin EU 3-2000, para. I.5.5, I.7.7; Commission (EC) (n 5) 21-23 and Commission (EC), *The Economic Costs of Non-Lisbon*, SEC(2005) 385, 15 March 2005. As an example, Commission (EC), *Industrial Relations in Europe. Industrial Relations and Industrial Change* (Self-published, Luxembourg 2004).

104 *Scott/Trubek* (n 17) 7.

105 Therefore critical A Moravcsik, 'Federalism in the European Union: Rhetoric and Reality' in K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, Oxford 2001), 161-87, at 163-5.

106 J Zeitlin, 'The Open Method of Coordination in Question', in J Zeitlin and P Pochet (eds), *The Open Method of Coordination in Action. The European Employment and Social Inclusion Strategies* (2005) 19-36, at 26-7 and P Pochet, 'The Open Method of Coordination and the Construction of Social Europe', *ibid.* 37-82.

elements of the OMC process are monitoring, benchmarking, interactive reporting¹⁰⁷ and evaluation. The OMC shall be applied on a case-by-case basis; there are no fixed rules for OMC processes. It is part of a holistic approach towards more effective policy delivering, which also, although not necessarily, relies on a process of regulation whose foundations have been broadened¹⁰⁸. This shows that in theory as well as in practice ‘soft’ and ‘hard’ modes of governing are complementary¹⁰⁹. The presence of government does not preclude governance and vice versa. Neither of both is conceivable as autonomous within, on the one hand, a rigid constitutional frame and a normatively unbound political sphere on the other.

The idea of non-binding, voluntary policy delivering is not entirely new¹¹⁰. However, the OMC features two important differences to former flexible regulatory modes: it is not just a provision, but a process, and, in achieving certain policy goals of the treaties, it favours the diversity of Member State regulations and mutual learning rather than uniform harmonisation¹¹¹. It is no more, but at the same time no less than a flexible ‘cookbook of recipes’ for a range of policy areas¹¹².

(ii) The multi-level dimension (the vertical)

Although the EU has originally derived its powers from sovereign Member States, it can be regarded as making up a genuinely supranational polity. As far as the EU can be considered as the ‘top’ of a vertical ‘multi-level’ system¹¹³, it constitutes a supranational ‘level’ with independently acting institutions, above national and regional levels of decision-making and policy delivering¹¹⁴.

(a) Government: top-down legislation

Again, an appropriate starting point for the discussion of the vertical dimension of governing the EU is an ‘old mode’ of governing, namely the CCM. Its instruments are those listed by Art. 249 EC. Art. 249(2)-(4) EC describe as binding instruments regulations, applicable directly in all Member States (2), directives, addressed to Member States who have discretion in form and methods of

107 Zeitlin (n 106) 22. Cf for the Member States' reports 2006 http://ec.europa.eu/growthandjobs/key/nrp2006_en.htm and Commission (EC), *Economic Reforms and Competitiveness: Key Messages from the European Competitiveness Report 2006*, 14 November 2006, COM(2006) 697 final.

108 For more flexible approaches to regulation cf *ibid.*, 18-21 and better inputs cf *ibid.*, 11-18. See also for alternative modes of regulation (self-regulation, co-regulation) European Parliament, Council and Commission, *Interinstitutional Agreement on Better Law-Making* of 16 December 2003, [2003] OJ C 321, no. 16-24.

109 Cf the discussions above and A Sapir et al, *An Agenda for a Growing Europe. The Sapir Report* (OUP, Oxford 2004) 183-94.

110 Cf Council of the European Union, *A New Approach to Technical Harmonisation and Standards*, Resolution of 7 May 1985, [1985] OJ C 136.

111 S Regent, *The Open Method of Coordination: A New Supranational Form of Governance?* (2003) 9 ELJ 190-214, at 191.

112 *Craig/De Búrca* (n 7) 153.

113 See, however, n 87.

114 *Pollack* (n 4') 39-40.

implementation (3), and decisions, which regulate individual situations (4). All three instruments are classic instruments of government (category *imperium*), as they are authoritatively set, irrespective of the discretion in implementing directives.

The use of those instruments depends on competences provided by the Treaties, in compliance with the principle of limited powers, as Arts. 5(1), 7(1) EC provide. With the exception of exclusive competences, the EU powers to act are basically limited by subsidiarity and proportionality, as provided by Art. 5(2), (3) EC. Apart from powers concerning regulations for particular policy areas, important powers for the harmonisation of the common market are provided by Arts. 14, 95, 308 EC.

In the vertical dimension, the CCM involves all levels in implementing, transposing, enforcing and amending legislation. Although this is not a completely hierarchic process and although the EU just derives powers from Member States, the CCM in the vertical dimension is a classic example of legislation from the top down and therefore for government.

(b) Governance: Bottom-up networking

Also in the vertical dimension, modes of governing can be identified which reach beyond binding law, implementation and enforcement of legislation or at least combine forms of government and governance in an integrative way. As a supranational integration project, the EU very much depends on the involvement of states and regions in decision-making, but beyond those public actors it also requires in particular regional private stakeholders. There is a growing interdependence between state and non-state actors at all levels¹¹⁵. If integration is really taken seriously, there also have to be vertical networks which cross the levels of European policy delivering. This is the notion multi-level governance¹¹⁶ describes: EU, Member States, sub-states and stakeholders together can act and adjust their policies positively towards realising subsidiarity. Experimental policy making in the vertical dimension helps to realise the principle¹¹⁷. It is therefore appropriate to keep in mind the crucial role of the regions and regional stakeholders in EU governance processes, in particular within the Lisbon Process and the OMC¹¹⁸.

115 *Bache/Flinders* (n 87) 4. Cf art. 138, 139 EC and M Jachtenfuchs and B Kohler-Koch, 'Governance and Institutional Development', in: *Wiener/Diez* (n 21) 97-115, at 102.

116 *Pollack* (n 4') 39-41.

117 CF Sabel and J Zeitlin, *Learning from Difference: The New Architecture of Experimental Governance in the European Union*, European Governance Papers (EUROGOV) No. C-07-02 <http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf>, 12-3.

118 A Scott, *The (Missing) Regional Dimension of the Lisbon Process*, Scotland Europa Discussion Papers No. 27 (2005), <http://www.scotlandeuropa.com/PUBLIC%20SITE/Scotland%20Europa%20Papers/Paper%2027%20Reg%26Lisbon%200905.pdf>, p 5.

(c) *Legal implementation of positive approaches to subsidiarity*

Those considerations are connected to a notion of subsidiarity which goes beyond the concepts of subsidiarity and proportionality in Art. 5(2), (3) EC. Those provisions have to be understood more in negative terms, as a limit on competences rather than the positive basis for action towards the idea of subsidiarity¹¹⁹. Subsidiarity can provide more effective decision-making as it is in the Community's interest to provide more space for lower level actors¹²⁰.

In Art. 3b(3) TFEU, the Treaty of Lisbon will provide for the involvement of national parliaments in EU decision-making processes according to a consultation procedure¹²¹. This basically gives national parliaments the possibility of carrying out an *ex ante* 'alternative check' – an idea rooting back to the failed draft of a Constitutional Treaty in 2004¹²².

Even seemingly strict legal procedures already work towards a positive realisation of subsidiarity, for example in the European court system. The ECJ enjoys the ultimate interpretive authority as far as the law of the European Union is affected¹²³. However, in terms of interpreting law, there is bottom-up pluralism. Although the ECJ claims to exercise ultimate decision-making rights, it contributes to an interpretive discourse with national courts functionally and cooperatively involved as Community courts¹²⁴. Domestic courts are involved in the bottom-up procedure of requesting a preliminary ruling under Art. 234 EC¹²⁵. Indirectly, private individuals, who are parties in cases with relation to EC law, benefit from this procedure¹²⁶.

Even though strict and binding judicial decisions resemble the *imperium* category of government, domestic courts play an integrative role at the bottom end of the EU legal community by 'gluing' EU and domestic law together and making EU law come alive within the domestic legal order¹²⁷. This interactive way of further developing law contains important elements of governance, however, still not conceivable without the presence of formalised government.

119 Cf Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paras 102-103, 107: art. 5(2) EC as a limit to measures based on art. 95 EC (Tobacco Advertisement).

120 *Craig/De Búrca* (n 7) 148, 156.

121 Protocol on the Application of the Principles of Subsidiarity and Proportionality, *ibid.* which insofar develops further the homonymous Protocol to the Treaty of Amsterdam, cf *Craig/De Búrca* (n 7) 155.

122 Commission (EC), *Annex to the Report from the Commission "Better Lawmaking 2004" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (12th Report)*, 21 March 2005, SEC (2005) 364, p. 20.

123 Art. 234 EC, cf Case 66/80, *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR 1191, para. 11; Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para. 17.

124 BVerfGE 89, 155 [Maastricht Decision], at 175. Cf Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415, paras. 16-21; cf *Craig/De Búrca* (n 7) 449-52.

125 Cf *Craig/De Búrca* (n 7) 461-5 et seq.

126 As far as Member States provide the constitutional right to the legally appointed judge, the parties of the domestic case may even claim this right if the domestic court has an obligation to refer the case to the ECJ by Art. 234(3) EC, cf Case '*Solange II*', BVerfGE 73, 339, at 366-371.

127 A Stone Sweet, *The Judicial Construction of Europe* (OUP, Oxford 2004) 21.

(d) *Political participation of sub-state actors*

In terms of the political participation of sub-state actors, the focus will lie on the two examples of the Structural Funds and the Committee of the Regions (CoR), established by the Maastricht Treaty.

The Structural Funds had been implemented to promote the development of economically weak regions in Europe¹²⁸. It is therefore an instrument for the redistribution of wealth and, apparently, suits well the government category of *dominium*. That would, yet, require that the EU, namely the Commission, redistributes wealth merely in a top-down way. This is not, however, the case. Structural policy itself is dynamic and closely connected to the permanently changing economic and social needs of regions and regional actors. It is therefore very much in the interest of regions and regional private actors to participate and to enter into a dialogue with the European level in order to benefit from structural promotions. From the EU perspective, on the other hand, regional intervention, close to the economic needs of citizens and enterprises, is the best way to achieve cohesion within the EU¹²⁹. This exemplifies why the involvement of economic and social partners as well as sub-state and local authorities in planning, decision-making and implementation is closely connected to economic and structural funds policies. Policies are designed by and for regional actors through partnership¹³⁰. Although criticism may be raised over the Commission's choice of public and private partners due to possible tensions with consistent and well organised policies¹³¹, the practices of the structural funds illustrate how input advantages of governance can be activated.

Regional participation also takes place in the CoR. It consists, according to Art. 263(1) EC, of 'representatives of regional and local bodies'. The idea was to strengthen regional and local actors within the EU decision-making process by comitology, but with a political, not a technocratic body¹³². It may express opinions where it 'considers such action appropriate'¹³³. However, the CoR performance appears weak, as it itself pleaded for a stronger involvement of the regions in the Lisbon process¹³⁴, whereas the regional dimension of Lisbon and the OMC was not even mentioned in the 'Kok Report' on the Lisbon strategy¹³⁵. A structural deficit of the CoR is that it has no legal powers, but is directly connected to the constitutional framework. Within governance networks which are rather indirectly

128 Cf in detail D Allen, 'Cohesion and the Structural Funds' in *Wallace/Wallace/Pollack* (n 4') 213-241.

129 *Ibid.* 216.

130 Council Regulation (EC) 1260/1999 of 21 June 1999, [1999] OJ L 161/1, art. 8(1). Cf J Scott, 'Regional Policy: An Evolutionary Perspective' in *Craig/De Búrca* (n 17) 625-52, at 640-4.

131 *Allen* (n 128) 232.

132 C Jeffrey, 'Social and Regional Interests: The Economic and Social Committee and the Committee of the Regions' in: *Peterson/Shackleton* (n 92) 312-30, at 314-5.

133 Art. 265(4) EC.

134 Committee of the Regions, *Resolution on Revitalising the Lisbon Strategy* of 5 July 2005, [2005] OJ C 164/91, para 9.

135 W Kok *et al*, *Facing the Challenge: The Lisbon Strategy for Growth and Employment*, November 2004, available at http://ec.europa.eu/growthandjobs/pdf/kok_report_en.pdf.

connected to law, a lack of legal powers is harmless, as long as other actors involved cannot resort to legal powers either. Within hard legislation processes, however, the CoR is in a weak position. On the other hand, that means that the CoR can be a tool of multi-level-governance if the regions fully use its possibilities within informal and networking governance process¹³⁶.

6. Results and Conclusion

Both in the horizontal and in the vertical, it could be shown that governing modes which resemble only government do not mirror the reality of EU policy making. On the contrary, an essential range of EU policies is designed by modes of governance, at least in combination with government modes, if not replacing them.

The EU is a regime which more closely resembles governance than government since governance is a crucial complementary to classic modes of constitutionally based governing. The EU could not, as shown, deliver economic and social integration without involving local communities, regions, authorities, courts, citizens and enterprises together with Member States and their governments. As an integrative and inclusive entity, the EU very much has to – and does – rely on integrative and inclusive ways of governing which closely resemble governance.

The theoretical distinction between governance and government is significant and should be maintained. The distinction particularly refers to incorporation in constitutional-legal settings. Whereas rules of government directly result from legal guidance, governance creates and observes procedural rules rather informally, however still indirectly informed by the constitutional-legal frame.

This distinction does not preclude the practical observation that there is an interdependence between the two, as exemplified in this article. Governance takes place under the ‘shadow of hierarchy’ and beyond. Governance is normative. Its normativity is the more self-generated; the more autonomous governance networks are from classic governmental institutions. Governance appears complementarily to constitutional structures and to government as a traditional style. It can increase the effectiveness of government and of policy delivering in general. Yet, it does not deprive government of its traditional role and ability to achieve policies.

Even though governance is not a magic formula for the right answer to the question ‘Governing in Europe: Effective and Democratic?’¹³⁷, it is at least part of the answer. Legitimacy of governing does not have its seeds merely in the power of hard law, but very much, as the broad application of governance in the EU shows, in the soft power of integrative and acceptable ways of policy-making.

136 *SD Scott* (n 5) 15.

137 *Above*, n 1’.

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