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European Governance: Negotiation and Competition in the Shadow of Hierarchy*

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Abstract

This article argues that the 'nature of the EU beast' is neither unique nor captured by a particular type of governance. Like its Member States, the EU features a combination of different forms of governance that cover the entire range between market and hierarchy. The analysis of this governance mix reveals several characteristics of the EU that have been largely overlooked in the literature. First, the EU relies heavily on hierarchy in the making of its policies. Its supranational institutions allow for the adoption and enforcement of legally binding decisions without the consent of (individual) Member States. Second, network governance, which systematically involves private actors, is hard to find. EU policies are largely formulated and implemented by public actors. Third, political competition has gained importance in European governance. Member States increasingly resort to mutual recognition and the open method of co-ordination where their heterogeneity renders harmonization difficult. The article shows that the EU mainly governs through inter- and transgovernmental negotiations and political competition between states and regions. Both forms of public-actor-based governance operate in the shadow of hierarchy cast by supranational institutions. This governance mix does not render the EU unique but still distinguishes it from both international institutions and national states.

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Introduction

The European Union (EU) used to be considered a unique system of multi-level governance that cannot be compared to any other form of political order we are familiar with at the national or international level (Puchala, 1972; Wallace, 1983; Caparaso, 1996). Political scientists have shown a remarkable creativity in developing new concepts to capture the *sui generis* nature of the EU, describing it as a 'new, post-Hobbesian order' (Schmitter, 1991), 'a post-modern state' (Ruggie, 1993; Caparaso, 1996) or 'a network of pooling and sharing sovereignty' (Keohane and Hoffmann, 1991). In recent years, students of the EU have started to adopt a more comparative approach. The governance literature appears to be particularly attractive for studying the political institutions and policy processes in the EU by offering concepts that can equally be applied to international institutions and national states.[1] The EU has been widely conceptualized as a system of 'network governance' (Kohler-Koch, 1996), where the authoritative allocation of values is negotiated between state and societal actors (Kohler-Koch and Eising, 1999; Ansell, 2000; Schout and Jordan, 2005).

This article, by contrast, argues that the EU's 'nature of the beast' (Risse-Kappen, 1996) cannot be captured by one particular type of governance. Like its Member States, the EU features a combination of different forms of governance that cover the entire range between market and hierarchy. The analysis of this governance mix reveals several characteristics of the EU that have been largely overlooked in the literature. First, the EU heavily relies on hierarchy in the making of its policies. Its supranational institutions allow for the adoption and enforcement of legally binding decisions without the consent of (individual) Member States. Second, 'modern' (Kooiman, 1993), 'co-operative' (Mayntz, 1998) or 'network' (Rhodes, 1997) governance, which systematically involves private actors in the policy process, is hard to find. EU policies are largely formulated and implemented by governmental actors. Third, political competition has gained importance in European governance. Member States increasingly resort to mutual recognition and the open method of co-ordination where their heterogeneity renders harmonization difficult. Thus, the EU is characterized less by network governance and private interest government than by inter- and transgovernmental negotiations, on the one hand, and political competition between Member States and subnational authorities, on the other. Both operate in a shadow of hierarchy cast by supranational institutions.

[1] For a comparative politics approach, which studies the EU as a political system, see Hix (2005).

In order to develop this argument, the article proceeds in three steps. Section I presents a typology that is based on a broad concept of governance as institutionalized forms of political co-ordination. It draws on the classical distinction between market, hierarchy and networks as governance structures but complements them with a second, procedural dimension that focuses on the modes of social co-ordination. Moreover, rather than treating the different forms of governance as ideal types, the typology explores possible combinations as we find them both within and beyond the nation-state. Section II uses this typology to study the structures and processes of European governance. The analysis will show that EU policies are largely formulated and implemented in multiple overlapping negotiation systems that can be described as multi-level policy networks. Yet, network relations that span across sectors and levels of government are not unique to the EU, but constitute a core feature of modern statehood (Scharpf, 1991; Benz, 2001; Leibfried and Zürn, 2006). Besides, like its Member States, the EU can rely on a strong shadow of hierarchy cast by supranational institutions in adopting and implementing its policies. The key difference between the EU, on the one hand, and the modern state and international politics, on the other, lies in the subordinate role of private and public interest groups in the EU negotiation systems, which are largely dominated by governmental actors, who act as authoritative decision-makers rather than mediators or activators. While forms of private self-regulation or public–private co-regulation abound in the Member States and in global politics, we hardly find such forms of network governance at the EU level. Instead, political competition has gained in importance, particularly since the introduction of the open method of co-ordination and the application of the principle of mutual recognition in areas outside the internal market. The article concludes by discussing two challenges posed by the specific governance mix in the EU: the 'problem-solving gap' and the weakness of private actors in EU policy-making.

I. Governance and EU Policy-Making

The *governance* concept has made quite a career, not only in European Studies but also in other areas of political science (Schuppert, 2005; Bevir, 2006; Enderlein *et al.*, forthcoming). It would go beyond the scope of this article to provide an overview of the (European) governance literature.[2] This section builds on existing concepts and develops a governance typology that allows for a comprehensive classification of European governance forms and

[2] See Bache and Flinders (2004); Kohler-Koch and Rittberger (2006); and Hooghe and Marks (2001).

their systematical comparison with other political systems on the national and international level.

Following the work of Renate Mayntz and Fritz W. Scharpf, governance is understood as institutionalized modes of co-ordination through which collectively binding decisions are adopted and implemented (Mayntz and Scharpf, 1995; Mayntz, 2004; Scharpf, 2000). Thus, governance consists of both structure and process. Governance structures relate to the institutions and actor constellations while governance processes are modes of social co-ordination by which actors adjust their behaviour.

Governance as Institutionalized Rule Structures

Research on governance usually distinguishes three different types of institutionalized rule structures: hierarchy, market (competition systems)[3] and networks (negotiation systems).[4] These are ideal types that differ with regard to the degree of coupling between actors. Hierarchies are based on an institutionalized relationship of domination and subordination that significantly constrains the autonomy of subordinate actors (tight coupling). In negotiation and competition systems, the formal relations between actors are equal. While they may differ with regard to their bargaining power, no actor is subject to the will of the other. The institutions of competition systems do not provide for any structural coupling. Actors have full autonomy to co-ordinate themselves through the mutual adjustment of their actions. Negotiation systems are characterized by loose coupling. Social co-ordination is based on mutual agreement. Unlike in formalized negotiation systems, the symmetrical relations of networks are not defined by formal institutions, but constituted by mutual resource dependencies and/or informal norms of equality.[5]

Institutions define the degree of coupling and regulate actor constellations by allocating resources to actors and specifying their access to decision-making and implementation arenas. Thus, institutions bestow upon public

[3] In the political science literature, markets are not regarded as governance since they are a 'spontaneous order' (Hayek, 1973) that leaves 'no place for "conscious, deliberate and purposeful" effort to craft formal structures' (Williamson, 1996, p. 31). Yet, market mechanisms can be institutionalized to co-ordinate actors' behaviour through competition (Benz, 2007). This article uses the concept of competition systems to describe the institutionalization of market-based modes of political co-ordination.

[4] The governance literature has identified other forms of social order, such as clans (Ouchi, 1980) and associations (Schmitter and Lehmbruch, 1979; Streeck and Schmitter, 1985). Like networks, this article conceptualizes them as negotiation systems (see below).

[5] Networks are then informal, i.e. non-formalized negotiation systems (Marin and Mayntz, 1991). The literature discusses other characteristics of networks, including actor constellations that equally involve public *and* private actors (Mayntz, 1993) or relations based on trust, which favour problem-solving over bargaining as the dominant action orientation (Scharpf, 1997, pp. 137–8; Benz, 2001, p. 171). However, such a narrow concept of network governance is flawed both in theoretical and empirical terms (Börzel, 1998).

actors the power to impose decisions unilaterally, even though they refrain from invoking their hierarchical authority when acting in negotiation and competition systems. Public actors can also define and modify the institutional rules of negotiation and competition systems, thereby shaping actor constellations (Mayntz, 1995, pp. 156–60; Scharpf, 1997, pp. 36–50). Finally, public actors have an institutional mandate to pursue the public interest. While they may be guided by their self-interest, public actors have to justify their actions and face sanctions for rent-seeking or corrupt behaviour (Scharpf, 1991, p. 630; Scharpf, 1997, pp. 178–83).

While political hierarchies are confined to public actors, negotiation and competition systems may vary in their actor constellations. *Inter- or transgovernnmental*[6] *negotiation systems* consist of public actors only, who may come from different policy sectors and/or levels of government. *Intermediate negotiation systems* bring together public actors with representatives of business and/or societal interests (Mayntz, 1993; Scharpf, 1993). They are often referred to as 'co-operative' (Mayntz, 1998), 'modern' (Kooiman, 1993) or 'network governance' (Rhodes, 1997; Eising and Kohler-Koch, 1999).[7] *Private negotiation systems* do not include public actors. They take the form of 'private-interest government' in associations (Streeck and Schmitter, 1985) or so called 'private regimes' as they have emerged in international politics (Cutler *et al.*, 1999; Cutler, 2003; Hall and Bierstecker, 2002).

Not only private actors compete for the provision of public goods and services in competition systems, e.g. when they are contracted out. Public actors, such as state universities, often participate in *political competition*. *Regulatory* or *tax competition*, by contrast, is exclusively confined to public actors (states, regions, municipalities), since only they hold the competencies for setting collectively binding regulations and taxation (Benz, 2001, pp. 171–3; Benz, 2007).

Governance as Modes of Social Co-ordination

Political decisions can be adopted and implemented by hierarchical or non-hierarchical co-ordination. Hierarchical co-ordination usually takes the form of authoritative decisions (for example, administrative ordinances, court decisions). Actors *must* obey. Hierarchical co-ordination or direction (Scharpf, 1997) can, hence, force actors to act against their self-interest (Scharpf, 1997,

[6] Drawing on Keohane and Nye, transgovernmental negotiation systems are defined as a 'set of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments' (Keohane and Nye, 1974, p. 43).
[7] Some authors reserve the concept of governance for informal networks and formalized negotiation systems between public and private actors, which have been recently also referred to as 'new' modes of governance (see Héritier, 2003).

p. 171). They may be either physically coerced by the use of force or legally obliged by legitimate institutions (law). Note that even majority voting entails a genuine element of hierarchical co-ordination since it imposes the will of the majority upon the minority (Scharpf, 1997, pp. 155–6).

Non-hierarchical co-ordination, by contrast, is based on deliberate compliance. Conflicts of interests are solved by negotiation. *Voluntary agreement* is either achieved by negotiating a compromise and granting mutual concessions (side-payments and issue-linkage) on the basis of fixed preferences (bargaining), or actors engage in processes of non-manipulative persuasion (arguing), through which they develop common interests and change their preferences accordingly (Benz, 1994, pp. 118–27; Risse, 2000).

Co-ordination in competition systems is also non-hierarchical. Actors compete over meeting certain performance criteria, to which they adjust their behaviour accordingly (Benz, 2007). They are largely motivated by egoistic self-interests. However, they pursue a common goal or some scarce resources of which they wish to obtain as much as possible by performing better than their competitors. *Political competition* induces actors to contribute to the provision of collective goods and services by pursuing their self-interests. Unlike under private competition, their performance is evaluated and rewarded by institutionally defined criteria legitimized by public authorities.

In sum, while being analytically distinct, governance structures and processes are inherently linked since institutions constitute arenas for social co-ordination and regulate their access. It is important to keep in mind that governance structures do not determine but rather promote specific modes of co-ordination. They provide a 'possibility frontier' (*Möglichkeitsgrenze*), which does not support institutionally more demanding modes (Scharpf, 1997, pp. 46–9). Thus, hierarchical co-ordination is not feasible in negotiation or competition systems. The latter also preclude the use of non-hierarchical modes of bargaining and arguing.

The Combination or Embeddedness of Institutionalized Rule Structures

The institutionalized rule structures and their modes of co-ordination are ideal types that hardly exist in reality. Rather, we find combinations, both within and beyond the state (Benz, 2001, pp. 175–202). Such *governance regimes* (Benz, 2001) or *governance mixes* are different combinations of ideal types, embedding one in the other by making one subordinate to the other ('shadow').

The three types of negotiation systems are often embedded in hierarchical structures. In the modern state, public and private actors almost always negotiate under a shadow of hierarchy. This is also true for political competition systems, since public actors usually set the legal rules of the game and

intervene to prevent market distortions or correct outcomes that violate public interests. In a similar vein, hierarchies and negotiation systems can operate in the shadow of the market. New Public Management, for instance, seeks to place public administrations in a political competition for good performance with each other and/or with private organizations (Benz, 2007). Likewise, states or regions may compete in setting business-friendly regulation or taxation in order to attract economic investments and avoid competitive disadvantages, respectively (Héritier, 1994). The institutional framework for political competition may not only be set by hierarchies but can also be negotiated. Thus, the World Trade Organization shapes the conditions for regulatory competition among states in the same way as international regimes, such as the Kyoto Protocol, the Non-Proliferation Treaty and the UN Anti-Torture Convention, set important parameters for state regulation in the field of environment, security or human rights.

Embeddedness implies a ranking between the different institutionalized rule structures. The dominant rule structure sets or changes the rules of the game for the subordinate rule structure and entitles actors to intervene in order to correct or substitute policy outcomes. As a result, the primary rule structure casts an institutional shadow which has a significant influence on the behaviour of actors in the secondary rule structure.

This article argues that the EU cannot be captured by one particular form of governance. While all three ideal types of governance – hierarchy, negotiation and competition – are present in the EU, they are hardly found in isolation. Rather, the EU features different combinations of governance forms, among which inter- and transgovernmental negotiation systems and political competition in the shadow of hierarchy are the most prominent ones.

II. European Governance: Negotiation and Competition in the Shadow of Hierarchy

The following analysis draws on the governance typology of Fritz Scharpf (Scharpf, 2001; Scharpf, 2006), which, however, focuses on public actors and neglects the embeddedness of governance forms. In order to identify the governance mixes in the various policy sectors, I take the formal institutions prescribed by the Treaties as a starting point. They determine which actors – (supra/sub-) national public vs. private – have access to the EU policy process and to which modes of co-ordination they can resort (Figure 1). Since a comprehensive mapping would be beyond the scope of this article (Börzel, 2007), the following section focuses on identifying ‘possibility frontiers’ for different governance mixes.

Figure 1: Forms of European Governance

institutionalized rule structures	Hierarchy			Negotiation System		Competition System
modes of co-ordination	hierarchical (asymmetrical influence)			non-hierarchical (mutual influence)		Non-hierarchical (mutual adjustment)
	Authoritative Decision			Agreement via Bargaining or Arguing		Competition
governance mix (embeddedness)		negotiation in the shadow of hierarchy	competition in the shadow of hierarchy		competition in the shadow of negotiation	
actors						
public	supranational centralization (supranational/ hierarchical mode)	supranational joint decision-making - majority - unanimity (joint decision mode)	mutual recognition	intergovernmental co-operation (intergovernmental mode)	open method of co-ordination – governmental	regulatory/ tax competition
public-private		private self-co-ordination in the shadow of hierarchy		network governance	open method of co-ordination – intermediate	
private				private interest government		
	forms of governance (institutionalized forms of political co-ordination) in the EU					

Source: Author's own data.

The Long Shadow of Supranational Hierarchy

Supranational Centralization: Hierarchical Co-ordination

Unlike modern states, the EU lacks a legitimate monopoly of force to bring its Member States into compliance with European law (Caporaso and Wittenbrinck, 2006). Yet, the supranational institutions of the EC Treaty provide ample possibility for hierarchical co-ordination. *Supranational centralization* reigns where supranational actors have the power to take legally binding decisions without requiring the consent of the Member States. Thus, the European Central Bank (ECB) authoritatively defines EU monetary policy (Art. 105 ECT). The presidents of the national central banks are represented in the ECB Council. However, they are not subject to any mandate by the Member States (Art. 108 ECT). In competition law, the Commission can conduct investigations against cases of suspected distortions of competition caused by Member States (for example, by state aid) and anti-competitive practices of private actors (for example, cartel formation), impose sanctions and take legal recourse to the European Court of Justice (ECJ) (Art. 82 ECT; Art. 88 ECT). The Commission enforces competition rules set by Articles 81, 87 ECT and a series of directives and regulations, which have been adopted by qualified majority in the Council (since the Amsterdam Treaty). In case of public undertakings, it can also adopt legally binding regulations without the consent of the Member States if privileges of public undertakings constitute a major obstacle to the completion of the single market (Art. 86 para. 3 ECT). The Commission has only invoked these powers as a regulatory lever to shape markets once, when it sought to break open national monopolies in the

telecommunication sector (Schneider, 2001; Schmidt, 1998). However, it alluded to the possibility of using Art. 86 ECT several times when Member States and public undertakings were unwilling to negotiate a subsequent liberalization of the energy sector (Matlary, 1997; Schmidt, 2000; Eberlein, 2008). This shadow of supranational hierarchy is reinforced by the power of the Commission to bring infringement proceedings against Member States violating the principles of free and fair competition (Héritier, 2001).

Finally, the European Court of Justice (ECJ) can bind the Member States against their will by interpreting European law. This form of *supranational centralization* is not confined to market-making regulation (Scharpf, 2001). With the dynamic interpretation of the Treaties in its case law, the ECJ has expanded European regulation beyond negative integration. For instance, the ECJ empowered the EC to enact social and environmental regulations at a time when the Member States had not yet bestowed the EC with the necessary competencies (McCormick, 2001). In a similar vein, the ECJ established the principle of state and damages liability for violations of European law that requires the Member States to provide financial compensation for damages caused by breaches of European law (Craig, 1997). While ECJ case law is a direct form of *supranational centralization*, it also has a significant indirect effect by casting a shadow of supranational hierarchy on inter- and transgovernmental negotiation systems. This is particularly the case for the unilateral removal of national regulatory standards used by the Member States as non-tariff barriers to the freedom of goods and services. The shadow of supranational hierarchy provides an important incentive for public and private actors to agree on a subsequent deregulation at the national level, which may give rise to re-regulation at the EU level (Héritier, 2001). An interesting example is the impact of ECJ case law on national tax regulation (O'Brien, 2005; Radaelli and Kraemer, 2008) and public health policy (Graser, 2004), since the EU has only limited competencies in these two areas. If the Member States wish to adapt their national regulations to European requirements of the freedom of services and capital, they will have to negotiate in the shadow of competition created by supranational centralization (double shadow).

In sum, the EU entails institutionalized rule structures which offer the Commission, the European Court of Justice and the European Central Bank ample opportunities for hierarchical co-ordination. Supranational centralization gains even more relevance by casting a strong shadow of hierarchy, within which the Member States negotiate to reach agreements, mostly – but not exclusively – on market-making policies. ECJ case law, in particular, increasingly interferes with market-correcting and welfare state policies. At the same time, the Commission and the ECJ operate in the shadow of

intergovernmental negotiations as the Member States, as the 'Masters of the Treaties', can change the rules of supranational centralization and exempt certain areas from the reach of the ECJ. If the constitutional level of EU meta-governance is also taken into consideration, we find a threefold embeddedness of institutionalized rule structures.

Supranational Joint Decision-Making: Negotiation in the Shadow of Hierarchy

The shadow of hierarchy cast by supranational centralization is significantly enlarged in the areas subject to *supranational joint decision-making*, in which the Council decides by qualified majority voting and supranational institutions set the rules for implementation. This applies to almost all policies under the First Pillar but also to the framework decisions under the Third Pillar (Art. 35 para. 1 EUT). In other words, the core areas of EU policy-making are embedded in hierarchical structures constituted by majority rule and the enforcement powers of the Commission and the ECJ. Supranational hierarchy provides the institutional framework for inter- and transgovernmental negotiation systems, which dominate the supranational policy process. While the Community Method grants the Commission and the European Parliament a significant say, EU decision-making is still dominated by the Council. The Committee of Permanent Representatives, numerous Council working groups as well as the expert committees of the Commission prepare legal proposals and execute Council decisions (comitology). These formalized negotiation systems are embedded in transgovernmental networks, which span across several levels of government and stages of the policy process. The networks help supranational, national and sub-national public actors to co-ordinate their interests informally and reach agreements through the exchange of resources and arguments.

The shadow of supranational hierarchy generated by majority rule in the Council significantly influences the dynamics and outcomes of inter- and transgovernmental negotiation systems (Tsebelis and Garrett, 1997; Tsebelis, 2008). On the one hand, the perceived 'threat' of a majority decision in the Council increases the willingness of governmental actors to come to an agreement.[8] On the other hand, inter- and transgovernmental actors have to make sure that their agreements are likely to stand scrutiny by the Commission and the ECJ. The parameters set by their interpretation of European law are not always oriented towards mere market liberalization and free

[8] This also applies to the 'Luxembourg Compromise', which ended the Empty Chair Crisis in 1966. While it established a strong norm of consensus-seeking and significantly mitigated the recourse to formal voting under the qualified majority rule (Heisenberg, 2005; Hayes-Renshaw *et al.*, 2006), the shadow of the vote provides a powerful incentive for the Member State to reach a consensus (Golub, 1999).

competition but may also support market-correcting policies (Héritier, 2001). The 'dual mechanism of anticipated reactions and the fleet in being' (Scharpf, 1997, p. 200) is particularly prevalent in the single market but also has an impact on other policy sectors, such as the environment, social policy and tax policy (Héritier and Eckert, 2008; Smismans, 2008; Radaelli and Kraemer, 2008).

The shadow of supranational hierarchy even reaches inside the Member States. In principle, they are responsible for the implementation and enforcement of EU decisions. Yet, the supremacy and direct effect of European law casts a legal shadow of hierarchy that can make the Member States act against their political will. The European Commission as the Guardian of the Treaties has the right to bring legal proceedings against any Member State that violates European law. The ECJ yields the power to authoritatively settle the case (Art. 226–8 ECT). Competition policy is subject to similar procedures (Art. 82; 88 ECT). The Member State governments, of course, can avoid hierarchical co-ordination by defying the ECJ – the EU has no coercive powers by which it could force its Member States into compliance. Yet, it would constitute a serious breach of European law. Furthermore, domestic courts and enforcement authorities have to execute ECJ judgments. This is particularly the case under the preliminary ruling procedures (Art. 234 ECT), where domestic courts refer cases of conflict between national and European law to the ECJ to settle the issue.

Delegated and Regulated Self-Co-ordination: Private Self-Co-ordination in the Shadow of Hierarchy

Even under the shadow of supranational hierarchy, EU policy-making is dominated by inter- and transgovernmental actors. Private actors are consulted at the different levels of government throughout the entire EU policy process. Yet, they rarely enjoy a seat at the negotiation table. And, unlike in the 'negotiating state' (Scharpf, 1993), the Commission and the Council have rarely delegated regulation to private negotiation systems.

The Social Dialogue is the most prominent form of *private self-co-ordination in the shadow of supranational hierarchy* (Art. 138–9 ECT). In selected areas of social policy, the social partners have the right to conclude agreements which can be turned into European law (Falkner, 1998). Moreover, the EU cannot take legal action without consulting the social partners. If the latter abstain from collective bargaining, however, the EU is free to legislate. While this form of Euro-corporatism is unique, the negotiation procedure under the Social Dialogue has hardly been invoked (Rhodes, 2005). Despite qualified majority voting in the Council, Member States still

appear too diverse to agree on EU legal standards (Streeck, 1996). In the absence of a credible shadow of hierarchy, employers so far have had little incentive to negotiate with the trade unions. Moreover, the social partners themselves have faced problems in reaching agreement among their members since industrial relations are still organized along national lines (Falkner, 2000). The European Employment Strategy and the Lisbon Process, both based on the open method of co-ordination (OMC), were an attempt to deal with the ideological divisions and sovereignty disputes among the Member States, which have blocked both the negotiations in the Council and among the social partners (see below).

Other forms of delegated or regulated private self-regulation are equally rare. While voluntary agreements at the national level abound, they have been hardly used by European business organizations to prevent EU regulation. If at all, they are found in the area of environmental and consumer protection (Calster and Deketelaere, 2001; Héritier and Eckert, 2008). Voluntary agreements are negotiated without the participation of Commission, Council and Parliament. They have, however, to conform to certain parameters formulated by European legislation (Bailey and Brink, 2002).

Technical standardization is another example of private regulatory activities under the hierarchical supervision of supranational actors. EU technical standardization is mostly voluntary since supranational harmonization of health and security standards is confined to national regulations concerning the public interest (Gehring and Kerler, 2008). For other areas, the Council has delegated the task to develop technical standards to three European private organizations – CEN, Cenelec and ETSI (Vos, 1999). The technical standards are not legally binding but are subject to a 'conformity assumption', which, however, only applies if the Member States do not voice objections during the comitology procedure. The standardizing organizations have – with the exception of ETSI – only one representative per Member State. Since national standardizing organizations are not always private, self-regulation is not only regulated by the EU and subject to the control of the Member States through comitology (Vos, 1999, p. 307). It involves mostly public actors.

This also holds for other areas of risk regulation, where regulatory networks have emerged in response to liberalization and privatization in the single market. These market-making processes require some form of re-regulation at the EU and the national level to ensure fair competition and in order to correct or compensate for undesired market outcomes. Since the Member States have been reluctant to transfer regulatory powers to supranational institutions, particularly in the area of economic regulation, market-creating and market-correcting, competencies are usually delegated to independent regulatory agencies or ministries at the national level (Coen and

Héritier, 2006).[9] To fill the 'regulatory gap' at the EU level, national regulatory authorities have formed informal networks to exchange information and develop 'best practice' rules and procedures to address common problems (Eberlein and Grande, 2005; Coen and Thatcher, 2008). We find these networks in an increasing number of sectors, such as pharmaceuticals (Gehring and Krapohl, 2007; Permanand, 2006) and foodstuff (Krapohl, 2007; Vos, 2000), but also beyond risk-regulation, including competition (Wilks, 2005), public utilities (Eberlein, 2003; Dehousse, 1997), financial services (Mügge, 2006; De Visscher *et al.*, 2008) or data protection (Newman, 2008), and law enforcement (Lavenex, forthcoming). While these regulatory and operational networks may be open to the participation of private actors (for example, providers and consumers), they are transgovernmental rather than transnational in character (Levi-Faur, 1999; Eberlein and Grande, 2005; Humphreys and Simpson, 2008), the Florence Electricity Forum being a rare exception (Eberlein, 2003). Moreover, even if the Member States have not delegated regulatory competencies to the EU, transgovernmental networks operate under the shadow of supranational framework regulation, which 'regulates the regulators' (Eberlein and Grande, 2005, p. 98) by setting minimum requirements for the regulatory regimes in the Member States (McGouwan and Wallace, 1996; Levi-Faur, 1999).

Mutual Recognition: Regulatory Competition in the Shadow of Hierarchy

The shadow of supranational hierarchy becomes weaker if the Council decides by unanimity and the co-decision or co-operation procedure does not apply. In these cases, the institutionalized rule structures resemble inter- and transgovernmental negotiation systems as we find them under the Second and Third Pillar (see below). Where the Member States wish to co-ordinate under the shadow of supranational hierarchy but have been unable to agree on a harmonization of their national policies and on granting the EU the necessary competencies, respectively, the *principle of mutual recognition* has provided an alternative mode of governance.

Each market can be conceptualized as a hierarchically regulated competition system. What is special about the European market is the *principle of mutual recognition* as a form of supranational competition rule that does not have to rely on the harmonization of national regulations (Fiorella and Schioppa, 2004). It was established by the ECJ in 1979 with its seminal *Cassis de Dijon* decision and constitutes the framework for a moderate

[9] European agencies, such as the European Agency for the Evaluation of Medicinal Products, usually form part of regulatory networks. However, unlike their national counterparts, they lack major regulatory powers, including rule-setting, implementation and dispute settlement (Keleman, 2002; Coen and Thatcher, 2005).

regulatory competition between the Member States in the shadow of supranational hierarchy (Sun and Pelkmans, 1995, pp. 68f.). European law mandates the opening of national markets and generates competitive pressure not only on domestic companies but also on public regulation within the Member States. In a nutshell, the principle of mutual recognition allows high-regulating countries to maintain their regulatory standards but prevents them from using those standards as non-tariff trade barriers. A good produced in one Member State has to be granted access to the markets of any other Member State, even if the product standards are higher in the importing than in the exporting Member State. The access can only be denied if compliance with the higher standards is in the imminent public interest of the receiving country. Such a decision is subject to judicial review by the ECJ. Thus, while fostering competition, the principle of mutual recognition constrains the dynamics of a race to the bottom by requiring that states (implicitly) agree on minimum standards. It thereby significantly expands the shadow of supranational hierarchy under the First Pillar since the dismantling of non-tariff barriers does not require the consent of the Member States – unlike the harmonization of national standards at the EU level.

This form of 'horizontal transfer of sovereignty' (Nicolaidis and Shaffer, 2005) has been increasingly invoked under the Third Pillar, for example, in the area of asylum and immigration policy or criminal law, where the national regulations of Member States are too divergent to allow for agreement in the inter- and transgovernmental negotiation systems (Schmidt, 2007). Unlike in the single market, however, the principle of mutual recognition is not to facilitate the removal of non-tariff barriers but, on the contrary, to help establish market correcting policies (Lavenex, 2007). It may sound cynical to conceive of asylum seekers, migrants and criminals as undesired market outcomes, but the completion of the single market does indeed create a need for co-ordination in the area of internal security and immigration. The removal of border controls, envisioned already by the Schengen Treaty of 1985 and made European primary law with the Amsterdam Treaty (Art. 61–9 ECT), renders the control of illegal immigration and trans-border crime extremely difficult. The functional interdependence between market integration and internal security has led to a spillover effect as a result of which significant parts of the Third Pillar have been subsequently transferred into the First Pillar. For sensitive areas, such as police and judicial co-operation in criminal matters, the principle of mutual recognition serves as a functional equivalent for supranational joint decision-making. The principle of mutual recognition facilitates cross-border law enforcement since different national standards with regard to criminal codes can no longer obstruct judicial co-operation between Member States (Lavenex, forthcoming). The absence

of the supranational shadow of hierarchy, however, has significant (normative) implications, which resemble the asymmetry between positive and negative integration in the single market (Lavenex and Wagner, 2007). Mutual recognition facilitates the co-ordination of national security policies on the 'lowest common denominator'. While Member States can maintain higher standards to protect the civil liberties of their citizens, these may be undermined by the police and judicial co-operation in criminal matters. The European arrest warrant is a case in point. As long as they cannot agree on a harmonization at the EU level, the principle of mutual recognition allows the Member States to circumvent their national standards (Lavenex and Wagner, 2007). Under the exchange of personal data regime in EUROPOL, for instance, a Member State could request data that it may not be allowed to collect under its own laws. This is particularly problematic if the data were collected by a Member State that has not ratified the Convention on Data Protection of the European Council. Moreover, the ECJ has no power to monitor compliance in the Member States. Unlike in the single market, the Treaties so far do not contain any provisions that would allow supranational institutions to interfere with policing competencies operating under inter- and transgovernmental co-operation and mutual recognition. Finally, the principle of mutual recognition requires that Member States trust each other in maintaining and controlling equivalent regulations (Schmidt, 2007; Lavenex, forthcoming). Such trust is less likely to emerge in policy areas that are highly politicized by redistributive or normative conflicts among (increasingly heterogeneous) Member States. It remains to be seen to what extent the principle of mutual recognition in the Area of Freedom, Security and Justice will result in a regulatory competition undermining the individual rights of EU citizens.

Regulatory and Tax Competition

There are areas of competition between the Member States that are neither regulated by supranational institutions nor placed under the shadow of inter- and transgovernmental negotiation systems (on the latter see below) or operate outside any political co-ordination by the EU. Instead, Member States adjust their social and tax policies in order to avoid competitive disadvantages and gain competitive advantages, respectively (Scharpf, 2001, pp. 7–8). While *regulatory competition* in the single market has been mitigated by supranational institutions (Sun and Pelkmans, 1995; Radaelli, 2004), market integration has given rise to a rather unmitigated *tax competition*, particularly in the area of corporate taxation (Radaelli, 1995). The ECJ has not seen any legal reason to allow national corporate taxation to interfere with the freedom of movement and capital, and the Member States have been unable to agree

on tax harmonization to stop the competitive race to the bottom (Ganghof and Genschel, 2008; Genschel, 2002).[10] They did, however, adopt a code of conduct against harmful tax competition which shall ensure fair competition among the Member States (Radaelli, 2003). It remains to be seen whether the Member States will manage to achieve some regulation of tax competition through political co-ordination at the informal level (Radaelli and Kraemer, 2008). The developments in justice and home affairs shed serious doubts that political competition without a supranational shadow of hierarchy can contain the progressive dismantling of national standards.

Inter- and Transgovernmental Co-operation and the Myth of Network Governance

Inter-/Transgovernmental Co-operation: Negotiation between Public Actors

Member State governments have no or only limited formal decision-making powers under supranational centralization and supranational joint decision-making. The opposite is true for inter- and transgovernmental co-operation under the Second and Third Pillar. The (European) Council usually decides by unanimity and shares the right of initiative with the Commission. The Parliament is at best consulted and the ECJ has only limited power of judicial review (Art. 35 para. 6 EUT). The areas of inter- and transgovernmental co-operation, which the Member States explicitly sealed against the shadow of supranational hierarchy, largely correspond to the ideal type of (public) negotiation systems. European decisions rest on the voluntary co-ordination of Member States (unanimity or consent) and often do not have legally binding character (*soft law*). They are prepared and accompanied by inter- and transgovernmental networks, which act free from the shadow of hierarchy. This is not only true for the Second and parts of the Third Pillar, but also for selected areas under the First Pillar (parts of social policy, macroeconomic and employment policy, research and development, culture, education, taxation), in which the EU has no or only very limited competencies and the influence of the supranational troika (Commission, Parliament and Court) is severely restricted. Moreover, a new form of transgovernmental negotiation system or 'state-centred multi-level governance' (Levi-Faur, 1999, p. 201) has emerged, again under the First Pillar, in which national authorities co-ordinate their regulatory activities, although they still operate under some shadow of supranational hierarchy (see above) and are not necessarily controlled by their governments. Where the shadow of supranational hierarchy is

[10] Arguably, the savings directive and the use of state aids could be seen as an example of producing market-making policies by using supranational hierarchy (Radaelli and Kraemer, 2008).

absent, Member States have increasingly resorted to the *open method of co-ordination* (OMC) in order to generate the necessary co-ordination at the EU level.

Open Method of Co-ordination: Political Competition in the Shadow of Inter- and Transgovernmental Negotiation

OMC was first applied in EU employment policy. It emerged as a 'new mode of governance' to implement the so-called Lisbon Strategy, which the European Council adopted in 2000 in order to promote economic growth and competitiveness in the EU (Armstrong *et al.*, 2008). The OMC has allowed for the co-ordination of national policies in areas where Member States have been unwilling to grant the EU political powers and additional spending capacity, particularly in the field of economic and social policy (Hodson and Maher, 2001; Daly, 2006). In the meantime, the OMC has travelled beyond Lisbon and is applied in justice and home affairs (Caviedes, 2004; Lavenex, forthcoming), health policy (Smismans, 2006), environmental policy (Lenschow, 2002; Holzinger *et al.*, forthcoming) and tax policy (Radaelli and Kraemer, 2008). The OMC works through inter- and transgovernmental negotiations, in which the Member States strike voluntary agreements on joint goals that are not legally binding. In order to realize these goals, the Member States develop national action plans whose implementation is monitored and evaluated on the basis of common indicators. The Member States compete for best practices that are to trigger processes of mutual learning. Thus, the Member States enter in a sort of political competition where they compete for the best performance in reaching joint goals. By outperforming other Member States, they gain a competitive advantage in attracting or keeping economic activities. The OMC is in principle open for the participation of non-state actors. Yet, in practice, it has largely taken the form of inter- and transgovernmental negotiations with hardly any involvement of private actors, either in the formulation of joint goals at the EU level or in their implementation at the national level (Hodson and Maher, 2001; Héritier, 2003; Armstrong, 2003; Rhodes, 2005, pp. 295–300; Borrás and Jacobsson, 2004, pp. 193–4; Büchs, 2008). This is not too surprising since it is precisely the intergovernmental and voluntaristic nature that makes the OMC an acceptable mode of policy co-ordination for the Member States in sensitive areas.

Network Governance: Negotiation between Public and Private Actors

Formal and informal EU institutions often provide for the consultation of economic and societal interests by the Commission, the Parliament and the representatives of the Member States. In some cases, the Treaties even allow

for the participation of non-state actors in EU negotiation systems on an equal basis. Most prominently, the partnership principle in structural policy explicitly requires the involvement of private actors in inter- and transgovernmental negotiation systems. The Treaties prescribe the involvement of the social partners – beyond the consultation of the Economic and Social Committee – for the management of the European Social Fund. Their representatives are members of the management committee, in which the Member State governments are represented as well, and which is chaired by the European Commission (Art. 147 ECT). There are also several EU regulations specifying the partnership principle and providing for the participation of the social and economic partners at the various stages of programming under the Social and the Regional Development Funds (1260/99/EC: Chapter IV, Art. 8). Moreover, a recent regulation extends the partnership principle to include civil society (1083/2006/EC). The extent to which private actors are actually involved is contested in the literature and varies significantly across the Member States. The concept of multi-level governance emerged from studies of structural policy, but it has focused on the role of local and regional governments (Marks, 1992; Hooghe, 1996; Bache and Flinders, 2004; Bachtler and Mendez, 2007). Private actors have hardly been systematically considered. It seems that economic and social partners still have a marginal role compared to national, regional and local governments. Furthermore, while the partnership principle may seek to encourage the building of intermediate negotiation systems, they would always operate in the shadow of hierarchy, since private actors do not have a formal say in the decisions taken. Nor has the state reduced its role to 'a partner and mediator' (Kohler-Koch, 1996, p. 371) or 'broker' (Ansell, 2000, p. 310). Governmental actors have largely defended their position as the central policy-makers (Anderson, 1990; Rhodes, 1997). In any case, there is certainly not enough empirical evidence to speak of *network governance* in structural policy.

The same is true for the informal level, where we find a vast variety of interactions between EU decision-makers, both national and supranational, and (trans)national representatives of economic and societal interests (Christiansen and Piattoni, 2003; Peterson and Bomberg, 1999). However, in order to qualify as network governance, these informal relations would have to be stable over time and engage non-state actors on 'a more equal footing' (Kohler-Koch, 1999, p. 26), rather than merely being arenas for the exchange of views and resources. Moreover, governmental actors would act as brokers or managers of the networks rather than as authoritative decision-makers (Kohler-Koch, 1996, p. 371; Eising and Kohler-Koch, 1999, pp. 5–6; Ansell, 2000, pp. 310–1). There are only a few institutionalized rule structures in the EU that meet these criteria.

Private Interest Government: Negotiation between Private Actors

Private interest government as the ideal type of private negotiation systems is as rare as its public-private counterpart of network governance. Private actors may co-ordinate themselves without having a mandate from, or being under supervision of, supranational institutions. The EU is crowded with a multitude of private actors, representing both civil society and business. They have organized themselves at the EU level in umbrella organizations (Greenwood, 2007a). The so called Euro-groups have the possibility to take binding decisions for their members, for example, by adopting codes of conduct, negotiating voluntary agreements and monitoring compliance, but they seldom have embarked on collective action – and if they do, the shadow of hierarchy looms. Few EU-level voluntary agreements have been negotiated to avoid stricter EU regulation (Héritier and Eckert, 2008). Rather than engaging in private interest government, business and civil society organizations focus on individual and collective lobbying of decision-makers, both at the EU and the national level (Eising, 2007; Coen, 2008). The emergence of private interest government is further impaired by European peak associations and umbrella groups being organized around and often divided along national lines, which in turn renders consensus between its members difficult.

Conclusions

This article argues that the EU cannot be captured by a specific type of governance. Rather, the EU features combinations of different governance forms. The analysis of the governance mix reveals several characteristics of the EU system of multi-level governance that have been largely overlooked in the literature. First, the EU certainly constitutes a multi-level negotiation system. However, it operates under a strong shadow of hierarchy cast by supranational institutions. Supranational centralization and supranational joint decision-making dominate the First Pillar and increasingly reach into justice and home affairs. Thus, hierarchy is much more prevalent in the EU than usually suggested by the literature. Second, network governance is hard to find in the EU. Private actors do play a role but political decisions are largely taken and implemented by inter- and transgovernmental actors. Member State governments do not monopolize EU policy-making but share powers with the European Commission, the European Parliament or (trans-) national regulatory authorities. Yet, public actors remain the central decision-makers and implementers of EU policies. The EU is governed in, rather than by networks, and these networks are not only managed but clearly dominated by inter- and transgovernmental actors. Third, political competition is

complementing inter- and transgovernmental negotiations as a mode by which the Member States seek to co-ordinate their policies. The principle of mutual recognition and the open method of co-ordination have gained importance in an ever more heterogeneous EU, where harmonizing national policies by supranational centralization and supranational joint decision-making is increasingly difficult.

Conceptualizing the EU as a specific mix of different forms of governance does not only allow for a more nuanced analysis of its nature. It also makes the EU look less unique and facilitates comparison with other governance systems entailing different combinations of hierarchy, negotiation and competition across different levels of government. The comparison with international regimes and organizations, on the one hand, and modern states, on the other, also allows us to identify two major puzzles students of European governance will have to tackle.

The first puzzle relates to the governance functions that the EU can effectively perform. The EU governs the largest market in the world. The combination of negotiation and competition in the shadow of hierarchy provides a comprehensive regulatory framework that has successfully prevented and corrected market failures. Yet, particularly in (re-)distributive policy areas the Member States have not been willing to resort to supranational joint decision-making and supranational centralization in order to counteract politically undesired outcomes of the single market. At the same time, EU market integration impedes the Member States in maintaining such functions (Scharpf, 1996; Ferrera, 2003). The single currency largely deprives the Member States of their major instruments for national macroeconomic stabilization, while the Maastricht convergence criteria put serious constraints on state expenditures. Softer modes of governance (intergovernmental negotiations and competition) are unlikely to respond to this 'European problem-solving gap' (Scharpf, 2006, p. 855). Attempts to use the OMC for institutionalizing Member State co-ordination in areas such as taxation of mobile capital, employment or social policy, where the heterogeneity and political salience of Member State preferences prohibits supranational forms of governance, pale in the light of the redistributive effects of supranational centralization in monetary policy, on the one hand, and political competition with regard to taxes and labour costs, on the other. The principle of mutual recognition only contains the progressive dismantling of national standards if it operates under the shadow of supranational hierarchy. This is particularly the case for highly politicized issues. Redistributive or normative conflicts are hard to solve without the possibility of resorting to authoritative decision-making. The dilemma of European governance may be that 'soft' forms appear to require a shadow of supranational hierarchy to address policy

problems, which the Member States refuse to make subject to 'hard' supranational forms of governance in the first place.

The second puzzle refers to the limited role which private actors play in EU policy-making. While networks are important for the formulation and implementation of EU policies, they are often dominated by governmental actors. Private self-regulation and private interest government are equally rare. The dominance of public actors distinguishes European governance from both governance within and beyond the state. The governance literature has identified two conditions for the emergence of private and intermediate negotiation systems: a strong state (shadow of hierarchy) and a strong society (autonomous and resourceful private actors; see Mayntz and Scharpf, 1995, pp. 21–3; Mayntz, 1993, p. 41; Mayntz, 1995, pp. 157–63). Even if the EU lacks coercive power, supranational actors have significant capacities for hierarchical co-ordination. Moreover, forms of private self-regulation and public-private co-regulation abound in international politics – in the absence of any hierarchy (Cutler *et al.*, 1999; Cutler, 2003; Albert *et al.*, 2000; Hall and Bierstecker, 2002).[11] The shadow of hierarchy can therefore hardly explain why the EU has not developed any significant forms of network governance or private interest government. The organizational weakness of private actors appears to be a more promising explanation. While the number of transnational interest groups in Brussels is constantly on the rise (Greenwood, 2007a), they do not appear to be strong enough to engage in collective action required for private self-regulation or co-regulation. Their weakness is due to the heterogeneity of interests and a strong orientation towards domestic concerns as the main access point to the EU policy process (Eising, 2007; Greenwood, 2007b). Finally, Member States have little incentive to involve private actors systematically in the policy process. Proponents of intergovernmentalist approaches to EU policy-making have argued that Member States have delegated national policy competencies to the EU level in order to increase their autonomy *vis-à-vis* domestic interests (Milward, 1992; Moravcsik, 1998). The Commission, in turn, takes advantage of private actor resources to increase its action capacity. At the same time, however, the Commission seeks to preserve its autonomy and has little interest in extending the involvement of private actors beyond consultations (Obradovic and Vizcaino, 2007). Against this background, it seems likely that the executive dominance in the EU will prevail, which has significant implications for the effectiveness and legitimacy of European governance. Even if the Lisbon Treaty comes into force, it will not change the nature of the EU as a

[11] The 'shadow of anarchy' (Mayntz and Scharpf, 1995, p. 25) may indeed explain the difference between the EU and the international level.

predominantly inter- and transgovernmental negotiation system complemented by political competition among the Member States, both operating in the shadow of supranational hierarchy.

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