The Open Method of Coordination (OMC): And its Future in Europe?

A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

2013

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School of Law
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<tr>
<td>AGE</td>
<td>The European Older People’s Platform</td>
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<td>BEPGs</td>
<td>Broad Economic Policy Guidelines</td>
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<tr>
<td>CAMON</td>
<td>Comprehensive Cancer Monitoring Programme</td>
</tr>
<tr>
<td>CCM</td>
<td>Classical Community Method</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>COREPER</td>
<td>Committee of Permanent Representatives</td>
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<tr>
<td>CPMP</td>
<td>Committee of Proprietary Medicinal Products</td>
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<tr>
<td>CoR</td>
<td>Committee of Regions</td>
</tr>
<tr>
<td>DG Sanco</td>
<td>Directorate General for Health and Consumers (European Commission)</td>
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<tr>
<td>DDP</td>
<td>Directly-Deliberate Polyarchy</td>
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<tr>
<td>DPT</td>
<td>Transversal Policy Document on Social Inclusion</td>
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<tr>
<td>EAC</td>
<td>Europe Against Cancer</td>
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<tr>
<td>EAPN</td>
<td>European Anti Poverty Network</td>
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<tr>
<td>EAPSI</td>
<td>European Association of Public Sector Pension Institutions</td>
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<tr>
<td>ECOFIN</td>
<td>Economic and Financial Affairs Council</td>
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<td>ECPC</td>
<td>European Cancer Patients Coalition</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EES</td>
<td>European Employment Strategy</td>
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<td>EMA</td>
<td>European Medicines Agency</td>
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<td>EMEA</td>
<td>European Medicines Evaluation Agency</td>
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<tr>
<td>EMCO</td>
<td>Employment Committee</td>
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<td>EO</td>
<td>European Ombudsman</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EPC</td>
<td>Economic Policy Committee</td>
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<td>EPF</td>
<td>European Patients Forum</td>
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<tr>
<td>EPHA</td>
<td>European Public Health Association</td>
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<tr>
<td>EPSCO</td>
<td>Employment, Social Policy, Health and Consumer Affairs Council</td>
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<tr>
<td>EUROCARE</td>
<td>European Cancer Registry</td>
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<tr>
<td>EWAC</td>
<td>European Week Against Cancer</td>
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<tr>
<td>FEAD</td>
<td>Fund for European Aid to the Most Deprived</td>
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<tr>
<td>FEANTSA</td>
<td>National Organisations Working with Homeless</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade 1994</td>
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<td>GMO</td>
<td>Genetically Modified Organisms</td>
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<td>IA</td>
<td>Impact Assessment</td>
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<tr>
<td>MAC</td>
<td>MEPs Against Cancer</td>
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<td>NAPs</td>
<td>National Action Plans</td>
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<td>NCA</td>
<td>National Competent Authority</td>
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<td>National regulatory Agencies</td>
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<td>NRPs</td>
<td>National Reform Programmes</td>
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<td>NRSSPIs</td>
<td>National Reports on Strategies on Social Protection and Social Inclusion</td>
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<td>NRS</td>
<td>National Strategy Reports</td>
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<td>OMC</td>
<td>Open Method of Coordination</td>
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<td>OMC SPSI</td>
<td>Social Protection and Social Inclusion</td>
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<td>PSCI</td>
<td>Programme for Social Change and Innovation</td>
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<tr>
<td>QM</td>
<td>Qualified Majority</td>
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<td>QMV</td>
<td>Qualified Majority Voting</td>
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<td>SCAN</td>
<td>Sustainable Commodity Assistance Network</td>
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<td>SGP</td>
<td>Stability Growth Pact</td>
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<td>SEA</td>
<td>Single European Act</td>
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<td>SPC</td>
<td>Social Protection Committee</td>
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<td>SPS</td>
<td>The Sanitary and Phytosanitary Agreement</td>
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<tr>
<td>WP</td>
<td>White Paper</td>
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ABSTRACT
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This thesis will begin with the presumption that the classical integration theories such as dual intergovernmental/supranational paradigms have lost their strength as they fail to understand the EU in its own right, and do not possess the ability to explain the phenomena of governance structures (namely the modes of governance) requiring the need for a new governance paradigm.

Instead of utilising the European Parliament the turn to governance was accredited by the White Paper on Governance.\(^1\) The Paper advocated for the adoption of the principles of openness, accountability and participation, for civil actors to become directly involved in the decision-making process. However methods such as the OMC have threatened the overall level of general political input and democratic oversight into its procedures. Therefore this thesis will argue for the ways that procedurally new governance mechanisms could be reformed through the development of the governance paradigm in which governance structures such as comitology, agencies, networks may be utilised and through the combined interaction of soft (OMC) and hard laws (directive).

The thesis will aim to propose a governance paradigm in healthcare (through agencies, networks and comitology) which could be utilised rather than the OMC. The suggestion is to employ other experimental modes of governance as the OMC healthcare did not develop extensively unlike the OMC SPSI. The reason for this was that the OMC health and long-term care was not adopted until 2004 and then more or less immediately streamlined in 2005 to the Social OMC which contained the three strands namely pensions, social inclusion and protection and healthcare. Hence the thesis will consider the three strands under the umbrella Social OMC and provide suggestions for reform. This left a gap for healthcare governance in the EU, which the thesis suggests could be filled through the governance paradigm. The thesis will suggest that as the new modes employed through the governance paradigm have their limitations, the way forward for the OMC is through combined governance. Combined governance requires a hybrid interaction between hard and soft law and further the new modes of governance can be fused together and allow hybrid interactions. This notion will be represented substantively through the Organs Directive as the collaboration of the directive and action plan presents a hybrid format (combined governance). Secondly my proposal of the ‘integrated model’ may be utilised when applying the Organs Directive. The integrated model presents a fusion of the three governance structures the OMC, comitology and agencies. In the case of the Organs Directive it presents a ‘hybrid within a hybrid’.

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Dedication

For my family, as without their support and belief, the completion of this thesis would have not been possible.

Acknowledgment

I am so grateful to Dora Kostakopoulou, who has been an endless source of information and kindness. I cannot thank you enough for all your help and feedback throughout the continuation of this project. Also thanks to Kirsty Keywood and Nuno Ferreira who provided me with plentiful feedback. Jackie Boardman at the PGR office also helped immensely to ensure that timely completion could take place.
Introduction

Aims of the Research

The Open Method of Coordination (OMC) was devised in 2000 by the Lisbon European Council in order to make the EU the most dynamic economic area in the world. This aim intensified the debate in the EU on the new modes of governance, which have once again become the topic of discussion through the new Europe 2020 Strategy. This study addresses the future of the OMC at the EU level by using social inclusion and healthcare as case studies. The fundamental aim is to assess the future of the Social OMC as a tool of governance following the recent economic crisis and the introduction of Europe 2020. This is a legitimate concern as at the time of writing it is acknowledged by the Commission that ‘the Europe 2020 Strategy is part of the European Semester’. The European Semester acts to bring together the reporting mechanisms of the Stability and Growth Pact (SGP) and the Europe 2020 goals. It ensures that the National Reform Programmes (NRPs) include the Europe 2020 integrated guidelines. This puts to question the fate of the Social OMC, since the Commission Document on the Platform against Poverty (EPAP) claims that the Social OMC has been integrated within Europe 2020. This mainstreaming of the Social OMC within Europe 2020 is also supported through the requirement of the Member States to report on Guideline 10 within their NRPs. However the Commission has remained silent on the future of the Social OMC following the revised OMC processes in 2012 by the Social Protection Committee.

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5 The European Semester is initiated by the Commission via the Annual Growth Survey, which details the priorities for the Member States. The annexed Progress Report provides an assessment of the Member State’s steps taken in order attain the Europe 2020 targets. These are discussed at the Spring European Council. The NRPs are submitted and then the Commission provides the proposals. The Council then provides an assessment of the reports taking in account the Commission’s input. Finally, the Council concludes by the adoption of Country-specific recommendations.
6 COM (2010)758 final 16 December 2010. The European Platform against Poverty and Social Exclusion: A European Framework for social cohesion and territorial cohesion. The integration of the Social OMC within Europe 2020 is supported through Guideline 10 which contains the objective to promote social inclusion and combat poverty.
At is appears ‘the Social OMC is in a state of flux’; hence, the thesis will aim to provide recommendations to strengthen the Social OMC rather than abandon it. In addition the significance of new governance remains in its potential to enhance democratic input within the EU as initially the OMC was praised for its democratic potential. Instead of utilising the European Parliament the turn to governance was accredited by the White Paper on Governance. The Paper advocated for the adoption of the principles of openness, accountability and participation, for civil actors to become directly involved in the decision-making process. However, methods, such as the OMC have threatened the overall level of general political input and democratic oversight into its procedures. This thesis will suggest ways that procedurally new governance mechanisms may be subjected to scrutiny and review.

In order to make the above propositions, this thesis will focus on the primary questions, such as: What methods are included under this new governance? Which criteria should be adopted to assess these new governance methods; Why does the turn to governance within the EU require the need to place significance to these methods? Why is there a need to dwell on the new modes of governance like the OMC when they are soft law and do not lead to hard law? Moreover, I will argue that when new governance is examined, not only is the law explored but also the ways in which it is constantly reforming, refining and evolving. New governance methods have enabled coordination external to the traditional constitutional structure of the EU treaties, and are interacting continuously with traditional methods.

The study will highlight challenges and positive features of the inside or procedural understanding of the law and governance relationship. The main argument I will make is that the inside position views new governance methods such as the OMC as an internal response to the EU’s changing social and political processes rather than an extra-legal development. In such circumstances, legal and political concepts such as rule

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of law and accountability are reformulated. But such an approach may also be criticised on the ground that the inside approach may allow the dominance of executive institutions and undermine democratic institutions.

I aim to discuss governance as an intra-legal concept under three headings namely reflexive law, proceduralisation, and experimentalism. The three approaches highlight the various types of functional and territorial complexities within which the OMC Social Protection Social Inclusion (SPSI) has to operate in. It is important to examine how beneficial the procedural framework is in the areas where the OMC is utilised. Moreover, it is crucial to assess whether or not the assumptions of the OMC as an experimental or procedural regime have any strength to them. Secondly, there is a need to investigate whether the theoretical approaches have normative percussions. Is the procedural rationale operating sufficiently to revitalise traditional norms such as accountability, democracy and the rule of law while providing descriptive codes, or does it face tensions? I will analyse the OMC in the light of these queries and will evaluate the OMC SPSI under a particular analytical arrangement. This arrangement contains certain features. The central question is whether or not these features are prominent in the OMC SPSI? This arrangement will be tested to determine the weaknesses of the inside approach, and my argument in this context will be that the OMC exists of all the features that it was tested against, but has opposing procedural values and tends to promote the hierarchies that it was intended to eliminate.

Following the uncertainty with the current status of the Social OMC and both theoretical and empirical analysis of the Social OMC, the study will propose a governance paradigm which will be tested in healthcare through which agencies, networks and comitology which could be utilised as governance structures rather than sole reliance on the OMC. The suggestion is to employ these experimental modes of governance as the OMC healthcare did not develop extensively unlike the OMC SPSI. The reason for this was that the OMC health and long-term care was not adopted until 2004 and then more or less immediately streamlined in 2005 to the Social OMC which contained the three strands namely pensions, social inclusion and protection and healthcare. Hence the thesis will consider the three strands under the umbrella Social OMC and provide suggestions for reform. This left a gap for healthcare governance in the EU, which the thesis suggests could be filled through the governance paradigm. The
thesis will suggest that as the new modes employed through the governance paradigm have their limitations, the way forward for OMC is through combined governance. Combined governance requires a hybrid interaction between hard and soft law and further the new modes of governance can be fused together and allow hybrid interactions.\(^{11}\) I will propose substantively this notion through the Organs Directive, as the collaboration of the Directive and Action Plan presents a hybrid format (combined governance).\(^{12}\) Secondly I suggest the use of an ‘integrated model’ that may be utilised when applying the Organs Directive. The integrated model formulated here presents a fusion of the three governance structures the OMC, comitology and agencies and I demonstrate it on a substantive basis through the Organs Directive. In the case of the Organs Directive a ‘hybrid within a hybrid’ is presented. The aim of these proposals is to fill the gap in the literature as Farrell starts the discussion in this area by providing an analysis on the substantive elements of the Organ Directive, and mentions that the priorities within the Action Plan maybe met through the OMC.\(^{13}\) I further the theoretical discussion by highlighting that the OMC and Directive present combined governance of soft and law. Additional hybrid interactions may be also visible through the integrated model which comprises of a fusion of the other experimental modes of governance.

**Contribution to the existing literature**

The turn to governance agenda presented a way forward from the Member States intergovernmental self-interest and bureaucratic centralisation. The first part of the literature provided definitions on new governance in contrast to the Classical Community Method (CCM)\(^{14}\); this was also done through the White Paper on Governance.\(^{15}\) The new modes of governance included the OMC, comitology,

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\(^{14}\) This method defined in the White Paper of Governance COM (2001) 428 (page 8) provides the Commission with a major role in policy-making and the EP has increasingly gained influence. The Council adopts formally the legislation by QMV or unanimity. During this procedure the Commission and the EP may utilise expert opinions, this would include receiving input from the comitology committees in order to allow effective compliance at the national level.

regulatory agencies and social dialogue promoted the interaction of different levels of
governance. These methods are considered to be soft law; they were seen not to
damage the EU’s institutional structure. Heritier and Scharpf argued the paper tiger
thesis, by suggesting that the OMC’s soft nature would allow Member State’s to resist
compliance with its obligations in comparison to the requirements that are laid out
through hard law for the functioning of the internal market. Meanwhile, Zeitlin
claimed that the new modes of governance allow Member States to achieve common
objectives without the need to compromise on their autonomous organisational
structures. However, both claims presented contradictions as on one hand new
governance methods were seen to encourage participants to agree to common cognitive
solutions without applying pressure on them, and yet if the new modes of governance
were successfully achieving their set outcomes, this would mean that they are not as soft
as they seem. Its success would undermine the idea that it could escape parliament’s
scrutiny because it is complementary to hard law. Therefore, this thesis will argue that
the very idea of the OMC as soft law should not let it avoid extensive legitimacy
challenges; rather, possible actions are suggestions for the EU institutions and the
Ombudsman.

Trubek et al have presented a conceptual discussion on hybridity through their
suggestion that the old and new methods are combined in the areas of employment and
macro-economic coordination. In the case of employment there is a hybrid combination
of ‘hard’ anti-discrimination and health and safety directives with the ‘soft’ monitoring
and reviewing procedures of the EES. In this instance, there is a functional distinction
between law and governance. The directives are utilised to provide general principles
and the objectives can be achieved in soft law coordination. Soft law provides

\[16\] Page 8-9. COM (2001) 428 Final
\[17\] Page 654-656. Scharpf, F. (2002). The European Social Model: Coping with the Challenges of
Reinventing European and International Governance. Lanham: Rowman and Littlefield. Scharpf refers to
the OMC as a ‘paper tiger’ suggesting that it is weak both in its results and against hard law in
comparison to the SGP which can has can sanction non-complying states.
\[19\] Trubek and Trubek.(2005) ‘hard law and soft law in the construction of Social Europe: The role of the
OMC.11 European Law Journal 3;Trubek, D Cottrel, P and Nance, M. Soft law, hard law and European
governance and legal regulation: Complementarity, Rivalry and Transformation.13 Columbia Journal of
European law 3.
monitoring and the benchmarking structure for anti-discrimination resulting in a greater commitment from the Member States.²⁰ In the second area of macro-economic coordination, there is a hybrid combination of the soft Broad Economic Policy Guidelines that operate in correlation with the hard rules that were set to provide sanctions and definitions for the excessive deficits. These rules have been further strengthened by the legislative package brought out in by the Commission in 2010.²¹

The study is not aware of literature proposing hybridity through the Organs Directive as it is suggested here. The study is also in a unique way claiming the operation of the integrated model which is suggested operates by the fusion of multiple experimental modes of governance. The addition of the governance paradigm which utilises networks, agencies, comitology in healthcare is a unique feature within the literature as it aims to encourage other experimental modes of governance with healthcare rather than the sole reliance of the OMC as an experimental mode of governance.

The governance vision further progressed with the development of the theoretical models ranging from Sabel and Zeitlin’s American model of democratic experimentalism to Gunther Teubner’s vision of reflexive law which supported the idea that in the EU the OMC type methods were capable of achieving regional integration.²² Despite not having the involvement of a democratic sovereign, new governance methods utilised a variety of actors in the decision-making process, allowing democratic input in circumstances where the legitimacy of the popular will was questionable.²³

The problem with the theoretical models was that they lacked support through empirical evidence and testing.²⁴ The closest they ventured in to empirical testing was to evaluate the level of best fit between the theoretical models and the information provided by EU institutions on the OMC. The danger was that if the new governance discussion was

²¹ The functional division is between the multilateral procedure (under Article 121 TFEU) and the excessive deficit procedure under Article 126 TFEU. The most recent proposal strengthened the sanctions to be applied under the procedure. COM (2010) 525 final. Proposal for a Regulation ‘On the Effective Enforcement of Budgetary Surveillance in the Euro Area.
viewed from a particular theoretical perspective then it could result in trying to make the practice fit the theory rather than vice versa.

The second issue was that in its efforts to account for how governance was changing law or establish a meaning for legality there were inconsistencies and tensions. This thesis will argue that democratic experimentalism faced the same issues and concerns. The primary concern relates to participation, as discussed in this thesis experimentalism requires direct participation to provide representation and political accountability that would have otherwise been provided by the popular sovereign. Questions are also raised in relation to who is participating, as if the sample is large it may have an adverse effect on policy making, if it is too small then it may only represent a section of the society. While the theories place a reliance on participation they provide very little guidance on who is selecting the participants, this is also a dilemma faced by the OMC as the selection of participants is done by executive actors.

There are also problems with the relationship of stability and the theories. Experimentalists argue that fast changes in the modern society undermine static legal standards therefore there is a need to formulate laws to make them more adaptable to changing environmental conditions. Hence, a need exists to allow greater participation of actors to achieve rules on a dynamic basis but not compromise their democratic character. The tension within the theories is that they promote flexibility and efficiency alongside legitimacy and legality. The dilemma argued by the thesis is that flexibility may result in retaining a malleable attitude in the consultation of the democratic institutions. Thus, these inner tensions within the governance project required not just choosing parts that correlated with a particular account of legal evolution and discarding the other elements.

Following these gaps in the research this thesis will add new grounds to the current literature by carrying out an in-depth study of the new modes of governance on a micro level. The intention is to establish a dialectical relationship between the theory and practice, whereby the successful and failing practical applications can allow the theoretical models through which they have been understood to be analysed or re-

examined. Secondly, the thesis aims to evaluate critically the OMC as its critics such as Kroger claim that the OMC is irrelevant and only provides solutions to satisfy the eager social concerns and displays a neo-liberal threat to the European welfare state. The critical turn to new governance is inspired by Kennedy as he perceives governance as a project concerned with constructing maps in relation to deducing the legal and political power in societies. He emphasises the dangers in this mapping exercise as firstly the new governance literature ‘continues the intellectual practice I call as if pragmatism-writing and speaking as if things had been designed by a benign spirit responding to general needs and expressing general will?’ Are we aiming to ‘explain’ new governance? Or are we aiming to implant it into the original paradigms and templates? A critical approach would allow a more reflexive awareness of the potential bias present in the post-national developments. The other dilemma is that the mapping exercises may conceal the political choices that new governance can bring about. The preference of the using an indicator, procedural framework or soft law may in fact be representing the advancement of certain techniques, procedures and policy choices. For example, in the case of the OMC, the use of indicators presents the preference to a certain social model, the deliberation by chosen policy experts and ability to conceal the conflicts between substantive materials which can be acknowledged in the open. The outcome to these deliberations is that the thesis will present reforms for the OMC through administrative law procedures including the involvement of the European Parliament (EP), the use of the Social Impact Assessment and the European Ombudsmen in order for EU citizens and their representatives the opportunity to evaluate both procedurally and substantively the goals set for new governance.

28 Ibid Pp 3-4.
Methodology

Due to the nature of the subject matter and its potential scope, this thesis cannot be limited to methodologies applicable to only one discipline. As mentioned previously, the concept of new governance involves exploring outside the law but also the manner in which EU law has evolved. In this respect the study will be interdisciplinary and will benefit from the disciplines of law, social science and political science. If the study were limited to the use of legal methodology, it would ignore the contributions of the political theories such as the theories of European integration mentioned in Chapter One; Directly-Deliberative Polyarchy (DDP), reflexive law and proceduralisation mentioned in Chapter Three.

Consequently, this study will approach the issues from a broad perspective by merging ideas, contributions and methods from these other disciplines. In this regard the main contribution will be from law, political science and from social science. The methodology used is therefore a normative theoretical study drawing on legal theory and political science approaches to the study of new governance. The study will involve an analysis of case law, an analysis of political theories and an analysis and application of findings from research conducted within the social sciences.

The study will utilise the case studies of social exclusion and healthcare.\(^\text{30}\) The selection of social exclusion as a case study will demonstrate that the EU has limited competences in employment, but none in the field social exclusion.\(^\text{31}\) Chapter Four will demonstrate that the OMC SPSI provides subtle encouragement for Member States to adhere to targets through its dynamic and participatory potential. As social inclusion and social protection policies have linkages with other national and EU policy fields, the OMC SPSI becomes an essential illustration for the effectiveness and legitimacy of the OMC. As mentioned previously, the health case study will show that as the OMC has democratic deficits the other experimental modes may be utilised through the governance paradigm.

\(^{30}\)Page 13. The definition of a case study is “……an empirical enquiry that investigates a contemporary phenomenon within its real life context…….” Taken from Yin, R.K. (2003). Case Study Research: Design and Methods. Sage Publications.

\(^{31}\)Article 137(2) EC of The Nice Treaty and Article 153 TFEU dismiss legislation in these fields.
In the healthcare chapter, I use the organs case study, because Article 168(4)(a) TFEU supports the adoption of minimum harmonisation measures to set high standards of quality and safety of human biological materials (namely blood and organs). The case of organ donation and transplantation remains a sensitive area of legislation and involves ethics-based concerns, (e.g whether or not organ donation should be voluntary/ the method of consent utilised at the national level). I highlight through the organs case study the Commission has taken a broader approach and employed both traditional (through formally adopting the Organs Directive) and new governance mechanisms (utilising the OMC, networks, and agencies) in an attempt to achieve a gradualist consensus between the Member States and the key stakeholders. The Directive and Action Plan set out substantive and procedural rights (‘the rights approach’), providing a road map to address the priorities that the OMC is expected to achieve. The substantive elements of the directive include key aspects such as quality and safety standards for organs; donor and recipient protection in the transplantation process; the obligations of the competent authorities, particularly with regards to information exchange; and the requirements for organ exchange with third countries as well as European organ exchange organizations. Member States and the Commission have reporting obligations. The procedural obligations include requirements from the Member States to set out operating procedures, which should establish a framework covering the key procedures such as consent requirements, identity of the donors, and tracing the donors. The procedures are designed to ensure that the Member States establish institutional structures to increase organ procurement rates. These procedures contain requirements for facilitating information exchange and networking between national competent authorities, with a view to strengthening cooperation and ultimately increasing the efficacy of the OMC (which is operating under the Action Plan).

The study will also draw on elements of qualitative comparative research methodology. This will be evident as the theoretical models in Chapter Three will be compared with each other and tested through their application within the EU in particular the OMC. Laepulle highlights that the most favourable way to test a theory is to compare it with others. As he claims:

‘To see things in their true light we must see them from a certain distance as strangers, which is impossible when we are studying phenomenon of our own country. This is why comparative law should be one of the necessary elements in the training of all those who are to shape society.’

Comparative analysis will also be applied in Chapter One as the European theories of integration are assessed comparatively in order to establish that a new governance paradigm was required as conflicts existed between the legal and political dimensions of the EU systems, due to the enactment of hierarchy, coupled with the development of constitutional principles such as direct effect, supremacy and pre-emption. However, the Council being non-hierarchical and apparently intergovernmental has remained the dominant political body of the system.

The study will also benefit from using the historical method. This is visible in Chapter One, in which a historical account is provided of the European theories of integration. This is done to map out the deficiencies with them in order for us to turn to governance in order to evaluate the new modes of governance and, thereby, develop a new governance paradigm in healthcare in which the OMC did not have a major impact. Secondly, the thesis marks the historical developments of the theoretical models in Chapter Three. This is done to then further evaluate their possible use within the EU and the OMC.

**Overview of the Thesis**

My discussion is based in three stages over the course of the five chapters. The first stage constitutes Chapter One and Two. The second stage consists of Chapters Three and Four. The final stage is built on Chapter five. During the first stage in Chapter One, I examine the extent to which the existing theories of European integration could help us understand the emergence of new modes of governance and in particular the OMC. I claim that the classical integration theories such as intergovernmental/supranational paradigms have lost their strength as they fail to understand the EU in its own right. Intergovernmentalism is far too broad and does not possess the ability to explain the

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phenomena of governance structures (such as OMC, comitology, agencies and networks), thereby requiring a new governance paradigm.

The failure of the theories led to the development of the governance approach to EU integration. Chapter Two will depict the origins of the governance approach in comparative politics and EU studies. A discussion will be provided on the governance structures namely the new modes of governance (which are comitology, OMC, agencies and networks) supported by the theories reinforcing these new modes (deliberative supranationalism, DDP, and the regulatory state). The findings will be utilised as the theoretical background for developing the governance paradigm in Chapter Five.

In the second stage of the discussion I proceed to consider the theoretical and empirical contributions of the OMC SPSI/Social OMC. The analytical aim of Chapter Three is to evaluate the relation between law and governance. The initial literature established that the OMC and new governance should be perceived distinctly to law. However, in reality hard and soft law may not be conceptually different but linked together. This hybrid relationship will be discussed within Chapter Five through the Organs Directive which demonstrates a combination of hard and soft law. It will be argued that the turn to governance is not a divergence from law; rather it is an internal response of the legal system to the political and social processes. This inside approach will be further discussed through the three inside theories namely proceduralisation, democratic experimentalism and reflexive law. Experimentalism and proceduralisation aim to enhance the law’s democracy and responsiveness, while reflexive law highlights the functional gaps between policy-making systems which are separate and yet depend increasingly on each other. The thesis will demonstrate that although the three approaches need to be evaluated jointly to conceptualise the OMC type processes; however, each of these model faces inner inconsistencies and tensions. Therefore the OMC SPSI (including policies relating to health and pensions) will be analysed to determine the extent that the inside approaches can explain the OMC.

Following the theoretical and empirical analysis of the OMC SPSI, I argue in Chapter Four that, despite achieving success through increasing the participation of actors the OMC has not managed to increase public scrutiny and review. The European executives control the funds and possess the ability to select who is vocal within the national
reporting cycles. The chapter will provide reforms to the OMC by utilising existing administrative remedies, and further suggest that the lack of transparency and access to the courts requires the developments of remedies through use of the EP and the Ombudsman. Finally, suggestions will be made to Europe 2020 Strategy in order to aid the strengthening of the Social OMC.

In the final stage of the discussion the benefits of the Community Method are visible in Chapter Five through the codification of the case law via the Patient’s Directive.\(^\text{34}\) The Directive has offered so much more as it creates an impact beyond the area of cross border. This is achieved by developing an excessive structure of cooperation in the field of healthcare. It encourages the cooperation between Member States in matters of healthcare and supports the development of reference networks. The networks will be organised and developed on a voluntary basis. The networks are to be formulated with the objectives of pooling and spreading expertise, encouraging benchmarks and promoting best practices both in and outside the networks. These networks may lead to the use of soft law in particular flexible OMCs as the Directive does not specify any indicators. The networks, pooling and sharing of information may lead to the “Europeanizing of healthcare”.

Following the discussion on the achievements of the traditional methods, and the recognition for the need of the EU to sustain and bolster the Community Method. It is acknowledged that the inflexibility of the Community Method led to the EU turning to the new forms of governance. The previous chapter focused on the use of the OMC SPSI and proposed changes to strengthen the OMC method. However in terms of healthcare, the OMC healthcare 2004 was streamlined in the Social OMC therefore it did not develop on its own rather it was amalgamated within the Social OMC. Therefore I propose a governance paradigm which would apply in healthcare. It comprises of the utilisation of governance structures stipulated in Chapter One namely policy networks (based on the fluidity and flexibility referred to networks), comitology (supported by the theory of deliberative supranationalism) and agencies (based on the theory of the regulatory state).

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\(^{34}\) Directive 2011/24/EU on the application of patient’s rights in cross-border healthcare.
In the application of network governance on a substantive level I propose that the European Cancer Network may provide a network model for future health policy development. The lessons I suggest from the fight against cancer are that new governance based policies offer a number of routes forward for the EU’s emerging health governance agenda. The use of bottom-up dynamics and the creation of patient and expert networks value EU involvement as a potential method to make healthcare systems more efficient and effective. I propose that the use of the network model may be used within the Health Strategy 2008-2013. The uses of agencies are examined as an alternative mode of governance to the OMC. The role of agencies (as a mode of governance) in particular the European Food and Safety Authority (EFSA) and European Medicines Evaluation Agency (EMEA) now known as the European Medicines Agency (EMA), will be explored in this section. However it has to be noted that even though agencies have autonomy, they are made subject to several powers of the Commission, limiting their scope and authority. Finally comitology will be discussed through the inspection of the GMO (genetically modified organisms) committees. These governance structures have their limitations namely that they are soft law therefore I propose that if certainty is required we turn to a combination of ‘hard’ and ‘soft’ law mechanisms.

The final part of this Chapter will examine the Organs Directive\textsuperscript{35} which I propose could be regarded as a form of hybrid governance and used within healthcare other than the OMC. The European Commission published its paper in December 2008 containing its policies within the Action Plan on Organ Donation and Transplantation (2009-2015) (the Action Plan).\textsuperscript{36} The Plan looks at the need to improve quality and safety, increase organ availability and make organ transplantations more efficient with the EU. The Plan came with the legislative proposal which has now been adopted. The Organs Directive which is now legally binding and will complement the Plan. Hence, there will be a hybrid combination of hard and soft law operating together. The Directive will deal with organ exchange between Member States, promoting standardisation to facilitate patient mobility, as well as ensuring the health and safety of potential of organ recipients. It is hoped that the Plan will deal with gaps left by the Directive (such as details on


\textsuperscript{36} Commission of the European Communities, Communication from the Commission: between Member States (COM(2008)) 819/3 .
allocation). Secondly, I propose the ‘integrated model’ to be utilised when applying the Organs Directive. The integrated model presents a fusion of the three governance structures the OMC, comitology and agencies. In the case of the Organs Directive it presents a ‘hybrid within a hybrid’.
Chapter One

The Demise of the Classical Theories of European Integration: Heading Towards a New Paradigm.

1.1 Introduction

As the title of this chapter suggests, I argue that the classical integration theories such as the dual intergovernmental/supranational paradigm have lost their strength as they fail to understand the EU in its own right. Intergovernmentalism is far too broad and presents a naïve branch of the EU studies. It does not possess the ability to explain changes in the dynamics of European integration or the phenomena of governance structures (of which include the OMC, comitology and agencies and networks). At the same time, the long-debate on governance has not managed to produce a new paradigm nor a general theory of governance. The aim of the chapter is firstly, to examine the theories of European integration and to provide a descriptive analysis of the theories of integration. Secondly, highlight their inadequacies in exploring the polymorphous dynamics of European integration. I argue that there is a need to devise a paradigm of governance specific to the regulatory structures that are outside the Classical Community Method (CCM), these are namely the networks, OMC, agencies and comitology.

1.2 A Glance at the Theories of European Integration

Federalism or the federal idea has evolved over several centuries long before the emergence of the modern state in Europe. The term federal originates from the Latin term foedus which means covenant, compact, bargain or contract. This formal agreement is devised between the partners on the basis of mutual reciprocity. The basic

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idea is that the partners will take decisions that will benefit the members in general and will not make decisions that will harm the members. Federalism has been associated with state building and national integration. It is considered as a system that can bring together separate territorial units in order to build a new form of union of states and people. The aim of this union is to preserve the distinct interests and cultures.

There is a firm conceptual distinction between federalism and federation introduced originally into the mainstream literature by Preston King. Federalism can be perceived as political ideology, which contains a mix of identities and interests that are connected through a combination of historical, cultural, social, economic, ideological, intellectual and philosophical factors. These concepts endorse the federation’s original raison d’être. Federation is defined as ‘an institutional arrangement, taking the form of a sovereign state, and is distinguished from other such states solely by the fact that its central government incorporates regional units in its decision-making procedure on some constitutionally entrenched basis’. Their relationship is complex, but instantly a federation cannot exist without some matching variety of federalism.

In Europe, the federalists were active through the Congress of Europe. The Congress gave rise to the European movement, a broad-based national federation of groups who aimed to bolster European integration. In 1948, the Group aspired to a European Union or federation, which would consist of its own institutions, a common market, monetary union, and a charter of human rights linked to a European Court. The most influential federalist document to come through the war years was the Ventotene Manifesto of 1941. It was devised by Altiero Spinelli and Ernesto Rossi. However, it was not implemented as the European nations regrouped themselves and rejected federation as a way to European unity. In the 1950s the federalists had a great impact on the European Defence Community and the European Political Community. Monnet, the first President of the Supranational High Authority of the European Coal and Steel Community

38 Ibid.
40 Page 77. King.
(ECSC) believed that a political strategy supported by small economic benefits would lead the way to a federal Europe.\textsuperscript{43}

Another important strand of federalism exists under the label of Proudhonian federalism. It encapsulates a variety of political and sociological ideas based upon the notion of a European society and the dispersion of federalist values across the established boundaries of European states. It involves the dignity of the human person and it supports a high searching critique of advanced capitalism. It revolves around bringing the political authority to human beings. This is done by citizen participation in decision-making processes. The upshot of this personalist federalism is that it is a sophisticated way of looking at European integration, but has retained its ideological effectiveness.\textsuperscript{44}It was followed by federalists such as Emmanuel Mounier and Robert Aron.\textsuperscript{45}

Another notable federalist David Mitrany in his contribution a ‘Working Peace System’ looked to provide universal rather than regional answers.\textsuperscript{46} A central composition of his work was to oppose nationalism and the territorial organisation of power, as he saw it as a threat to world peace. He opposed the divisive organisation of states within the international system, and encouraged peaceful community building at national levels which does not replace nationalism at the EU level.

Mitrany acknowledged the perplexities of federalism. He argued that ‘problems which now divide the national states would almost all crop up again in any territorial realignment: their dimensions would be different but not their evil nature’.\textsuperscript{47} Secondly he agreed on cooperation in order to achieve better outcomes. However it would not be of any sense to bind this cooperation to a territorial authority. As the federalist solutions were limited either territorially or ideologically there was no guarantee that the

\textsuperscript{44} ibid page 2.
\textsuperscript{46} ibid.
necessary consensus would be achieved to create the new constitutional framework which the federation requires.\textsuperscript{48}

Mitrany acknowledged that there were differences between political/constitutional cooperation and technical/functional cooperation. He stated that ‘our aim must be to call forth to the highest possible degree the active forces and opportunities for cooperation, while touching as little as possible the latent or active points of difference and opposition’\textsuperscript{49} He supported the use of technical international organisations that would perform collective welfare tasks. The function to be performed would determine the type of organisation best suited for its realisation. This technical self-determination would result in there not being a need for any fixed constitutional division of authority and power, to be allocated in advance.\textsuperscript{50} Mitrany feared that a political/constitutional approach would hinder progress, whilst cooperation through technical/functional organisations would allow for ‘lasting instruments’.\textsuperscript{51}

With considerable ambiguity, Mitrany argued that the ‘growth of new habits and interests’ as result of functional cooperation would lead to the decrease in ideological divisions.\textsuperscript{52} In the context of EU integration Mitrany’s functionalism had an influence in the development of the ECSC. The key elements of the functionalist method were adopted by focusing on technical, sector specific integration and establishing a territorial organisation. Yet the pooling of resources within the ECSC as a step towards a federation was against Mitrany’s ideas.

Subsequently, functionalism faced many challenges as it seemed rather naïve to accept that a clear division could exist between technical/functional issues and political/constitutional issues. Consequently, Haas argued that there were flaws between technical, non-controversial, economic issues on the one hand and political issues on the other. Economic integration, however defined may be based on political motives and harbouring political repercussions.\textsuperscript{53} On a similar tone to functionalism, Haas’s neo-
functionalism also highlights the significance of technocratic decision-making, cumulative change and learning processes. However, neo-functionalism acknowledges the prominence of supranational institutions and the role of organised interests. Neo-functionalists limit integration by regions whilst functionalists do not limit integration to any territorial area.

One of the major contributions of the neo-functionalist theory within EU policy making was their conceptualisation of a “Community Method” of policy making. Haas set out the neo-functionalist theory of regional integration in his work ‘The Uniting of Europe’. This resulted in a further spillover process in which the supranational actors create pressure for further integration. Haas suggested that at the supranational level the Commission would encourage the transfer of loyalties and brokering bargains among the Member States as to upgrade the common interest. At the subnational level Haas claimed that there would be interactions between the interest groups in an integrated sector with the international organisation charged with the management of their sector. Over time these groups would benefit from the additional integration and then ultimately transfer their loyalties from the national government to the new centre. As a result of this spillover neo-functionalists predicted that sectoral integration would become self-sustaining and formulate a new political body with its heart in Brussels.

Webb describes the central elements of this original Community method as fourfold:

a) Governments accept the Commission as an appropriate bargaining partner and expect to play an active role in formulating a policy consensus.

b) Governments interact with each other with a commitment to problem solving and negotiate methods to achieve collective decisions.

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55 Ibid.
56 Ibid.
58 Ibid.
59 Ibid.
c) The Commission, Governments and other participants in the process are responsive to each other’s requirements, and do not make unacceptable demands. All the parties are willing to make short-term sacrifices and in return expect of long-term gains.60

d) Unanimity is the rule. Negotiations continue until all objections are overcome. The issues are related in a process of continuous process of decision-making.61

This Community Method was reviewed in 1965 through the Luxembourg Crisis which highlighted the prominence of state sovereignty. The EEC which had been expected to move to qualified majority voting (QMV) undertook most of its decision-making through unanimity. During this phase the Council was seen as an ineffective collective institution, as the system of national vetoes protected the sovereignty of Member States. The unanimity voting in the Council lessened the Commission’s legislative powers. The Commission was doubly hamstrung because the small volume of legislative power of the Council provided the Commission with few opportunities to utilise its bureaucratic discretion for the implementation of policies afforded to it through unanimity. The economic recession led to the rise of new non-tariff barriers to trade among EC Member States. In addition the Committee of Permanent Representatives (Coreper) an intergovernmental body of Member-State representatives began taking a prominent role in making decisions to formulate policies.

Neo-functionalists view integration as a process rather than an outcome. They agree that integration allowed the expansion of regional institutions. Haas defined integration as:

‘The process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions posses or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones’.62

60 Ibid.
61 Ibid.
62 Page 16 Haas. (1958)
By viewing integration as a process, neo-functionalists differed from intergovernmentalists who prefer to focus on isolated events (treaty negotiations). They perceive regional integration to be characterised by multiple, diverse and changing actors who are not restricted to the domestic political realms but also interact with bureaucracies and external frontiers. The Community is viewed as a creature of elites without the role of public opinion resulting in a consensus favouring European integration and within it the economic growth is uninterrupted as prosperous societies focus on achieving wealth than socialist or religious ideals.

The neo-functionalist concepts of change are embedded in the notion of spillover. In short the term is used to describe the event of further integration. It claimed that integration was fuelled through increased functional economic independence. The idea is that some sectors are so interdependent that the integration of one sector at the regional level is only possible if other sectors are integrated. The term ‘functional spillover’ was utilised later on to illustrate the functional-economic rationale for further integration.

Haas also pointed out that integration within a certain sector leads to the appropriate interest groups to transfer their powers to the European institutions. Presumably they find benefits from their regional experiences, and thus these interest groups will agree with further integration. Neo-functionalists also argue that the need of national elites to achieve European solutions would result in a shift, increasing the expectations towards the EU institutions. This integrative pressure from national elites has been labelled as political spillover.

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It is noted that the concept of spillover relates to the assumption that the continuous economic growth would be beneficial for Member States. Also, the slowing down of the integration process and the shift in the intergovernmental process can be attributed to the worsening of the economic climate. Unfortunately, under less favourable conditions, Member States have been defensive and not willing to take the Community option.\(^{69}\)

Neo-functionalism was seen as out of date in the 1970’s, however some of the most recent approaches bear similarities with neo-functionalists. Sweet and Sandholtz provide their theory of the ‘supranational governance’ approach which highlighted the role of ‘transnational exchange, EU rules and supranational institutions’.\(^{70}\) Their suggestion is that cross-border transactions create a need for Community rules, provided by the EU institutions. The transfer of the power to the EU is unbalanced and is dependent on the requirements for a given area of concern. They shift away from early neo-functionalists by making any predictions on ‘whether actors’ loyalties and identities eventually will shift to the European level and by placing a greater importance to intergovernmental bargaining in the context of EU politics’.\(^{71}\) This theory has been criticized for favouring supranational institutions and focusing on a limited part of the empirical analysis.

Schmitter sought to revise the old neo-functionalist theory, and pointed out that the external factors may act to facilitate and could also delay the integration process. He looked to the Court of Justice of the European Union (CJEU) to make contributions to the assertion of EU supranationality. The model consists of ‘initiating cycles’ which the EU has gone through followed by ‘priming cycles’ which account for the changing dynamics of Member States in between decision cycles.\(^{72}\) Schmitter rejects the theory of ‘automatic spillover’. He suggests conceptions such as: (1) ‘spill around’, this refers to the existence of functionally specialised intergovernmental institutions;(2) ‘build up’; this occurs when Member States provide greater authority to the supranational

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institutions without increasing the scope of their mandate;(3) ‘muddle about’; this means that national actors aim to maintain regional cooperation without making any changes to situations and finally (4) ‘spillback’; Member States taking back the commitment which they agreed to. I would agree with the first suggestion as this would allow those specialised institutions to enhance EU proposals without disturbing the whole realm of policy making or allowing other institutions ways for abuse of power.

Neimann revised further the neo-functionalist framework. Starting from neo-functionalism he broadens the ontological approach from a soft rational choice towards a more inclusive ontological approach by incorporating soft constructivism. He explores countervailing forces as being stagnant (heading towards standstill) or opposing (heading towards spillback). Two such forces are accommodated in the revised neo-functionalist framework. Firstly there is ‘sovereignty consciousness’ which includes actors who oppose delegating sovereignty to the supranational level and is linked to national traditions identities and ideologies; and secondly, domestic constraints and diversities illustrate the limitations of national governments due to constraints by actors such as interest groups and lobby groups or structural limitations such as the Member State’s economy in the domestic political system. Niemann developed the definitions for the concept of spillover. Functional spillover was broadened to cover to more than economic linkages. Internal functional pressures capture pressures for increased cooperation within the same sector are made more definitive and advanced as an explanatory tool. Cultivated spillover was broadened to include an integrative role of the CJEU, European Parliament (EP), and Council Presidency. The political spillover which included the roles of non-governmental elites now included interest groups. The social spillover which was before included in political spillover, now is separated with better explanations for socialization processes and reflexive learning.

73 Page xvii. Haas. (2004). In the ‘Uniting of Europe’: Politics, Social and Economic Forces. 1950-1957. 3rd Edition. Notre Dame, IN: University of Notre Dame. Xiii-Ivi has hinted that the new developments in international relations and political theories means that neo-functionalism ‘can become part of a respectable constructivism’ and that neo-functionalism can be considered as part of constructivism. Constructivism will be discussed later in this chapter. It is epistemology (how can we know something?) rather than ontology (what is the nature of things?) that distinguishes more radical from more moderate constructivists. 74 Ibid.

The intergovernmentalist school of integration theory is associated with Stanley Hoffman’s view that the nation state was obstinate, not obsolete. He suggested that bargaining and consensus techniques are mere refinements of intergovernmental diplomacy. Hoffman emphasised the importance of the national governments within the global system. The national governments were provided with the role to promote the interests of their peoples to the best of their abilities within an adversarial world system. He argued that the importance of regional politics (such as the process of integration) was far less important to national governments than ‘purely local or purely global’ concerns. Within the global international system ‘regional systems have only a reduced autonomy’. Secondly, Hoffman highlighted the contingent nature of any transnational cooperation. While ‘extensive cooperation is not ruled out’ there ‘would be no assurance against a sudden and disastrous reversal’. Hoffman claimed that national governments were more obstinate than obsolete in the process of EU integration.

Hoffman highlighted the limitations of the functional method. He criticised the logic of integration implicit in the Monnet method, which was subsequently incorporated into Haas’s neo-functionalist approach. Hoffman argued that the logic of diversity took preference and which would set limits to the ‘spillover’ anticipated by the neo-functionalist approach. Hoffman claims that in areas of concern on a national level, the national governments were not willing to be compensated for their losses by achieving in other areas. In essence some issues had more importance than others. The national governments would retain stringent control over areas where their integral interests were at stake.

The EU’s institutional structure is viewed as a dependent variable for intergovernmentalists who focus on Treaty bargaining. This structure considered as facilitating credible commitments to integration. Conversely, the supranationalists, perceive EU institutions as actors as opposed to dependent variables. The Commission,

78 Ibid page 896.
79 Ibid page 897.
80 Ibid page 885.
81 Ibid page 882.
CJEU and Parliament perform actions that affect the direction of EU integration.\textsuperscript{82} The supranationalists appear to have a reliance on general neo-functionalist concepts such as spillovers. Hence overall the supranationalists differ from intergovernmentalists in the how they attach importance to the Member States and treat the EU institutions.

Moravcsik\textsuperscript{83} suggested a liberal intergovernmentalism model, a three-step model; which is a combination of: (1) a liberal theory of national preference formation with,\textsuperscript{84} (2) an intergovernmental model of EU level bargaining; and\textsuperscript{85} (3) a model of institutional choice emphasising the role of international institutions in providing credible commitments for national governments.\textsuperscript{86}

In the first stage the national executives of the government highlight their national interests. The liberal intergovernmental model treats the state as a unitary actor. It assumes that domestic political bargaining, representation and diplomacy generate a consistent preference function.\textsuperscript{87} The state preferences are not fixed and vary among states across time and issues according to issue-specific societal interdependence and domestic institutions. This issue-specific model is based on substantive elements. In areas related to the economy the model of national interest generally looks to achieve a balance between the producers’ interests (insider business and workers), the tax payers and those interested in regulation.\textsuperscript{88} In non-economic areas (i.e. foreign policy) the economic element is not so crucial when the issue-specific model is considered.

In the second or intergovernmental stage national governments provide their preferences to Brussels. Contary to neo-functionalists, who emphasised the hard bargaining power of the Commission and Council, supranational organisations, such as the Commission, have no influence over the decision-making procedures. Liberal intergovernmentalism aims to analyse the efficiency of bargaining and the distribution of gains from

\textsuperscript{84} Ibid page363.
\textsuperscript{85} Ibid page364.
\textsuperscript{86} Ibid page 364.
substantive cooperation among states whose preferences have been explained.\(^8^9\) The data in the ‘The Choice of Europe’ highlights strenuous bargaining in which threats of veto proposals, to block financial side payments and to form alternate alliances including the exclusion of non complying governments. Those states that obtained the most from economic integration were the most flexible and compromised the most to realise those gains.\(^9^0\)

Finally, Moravcsik initiated a theory that the EU Member States adopt particular institutions pooling authorities through QMV or delegate sovereignty to supranational actors in order to increase the credibility of their mutual commitments.\(^9^1\) Therefore the sovereign states seeking to cooperate among themselves are susceptible to deviate from their agreements. Moravcsik argued that the EU’s notable intergovernmental agreements including the 1957 Treaties of Rome and the 1992 Treaty on European Union did not conclude because of supranational entrepreneurs or unintended spillovers from earlier integration. Instead, they resulted from a gradual process of preference convergence among the most influential Member States which managed to strike bargains and gave side payments to smaller less influential states.\(^9^2\)

 Needless to say, the liberal intergovernmentalism theory was also heavily criticised. As Moravcsik’s assumptions were accepted but there were disputes to whether intergovernmental bargaining was a correct analogy of the EU policy process. Rational choice institutionalists also claimed that liberal intergovernmentalism was devised as a theory of grand bargains not everyday decision-making. Its scope is limited to a small area of policy making in which institutions undertake a minimum role.\(^9^3\)

Historical institutionalists claim that liberal intergovernmentalism places the focus only on conscious intergovernmental decision-making at Treaty-amending moments. Hence it does not consider the many undesired consequences that may take place due to the treaty amendments. These consequences are different to redress, as domestic, societal

\(^{8^9}\) Ibid.
\(^{9^1}\) Ibid page 4.
and international actors would have adapted to the new circumstances at many costs. These claims are due to two dynamics. At first because of the drift in national preferences, prior bargains maybe hard to obtain if there are sudden changes in the national preferences such as the changes in government. Secondly, there may be drifts occurring in the functions of the institutions. The supranational organisations may also act to strengthen their own anatomy and increase their influence within the EU. This may cause unexpected constrains on governments. If such spillover is the main method of integration, then the fear is that EU’s long-term path will only be devised through intergovernmental decisions.

Three institutionalist theories developed in the 1980s and 1990s. The first being rational choice institutionalism, which was developed to explain the effects of the US Congressional institutions on legislative behaviour and policy outcomes. Early rational-choice models of US legislative behaviour, which depicted legislative politics as a series of simple-majority votes among the Congressional representatives. Shepsle pointed out that the congressional institutions especially the committee system could determine legislative outcomes. The Congressional institutions could produce ‘structure induced equilibrium’, by allowing some alternatives and by structuring the voting power and the veto power of various actors in the decision-making process. Shepsle looked at the problem of equilibrium institutions, which determine the ways actors choose or design institutions to achieve mutual gains and the changes experienced by these institutions overtime.

The rational choice approach to institutions further developed and looked at the power to set the agenda of congressional committees, which can send draft legislation to the floor making it easier for amendments. Further developments examined the principal-agent models of Congressional Delegation to regulatory bureaucracies and the courts. They have created problems for the conditions under which legislative principals are able to control their respective agents. Epstein and O’Halloran devised a ‘transaction-

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\(^{97}\)Ibid.
cost approach’ to the design of political institutions to minimise the transaction costs associated with the formulation of public policy.

Historical institutionalism focused on the impacts of institutions over time. The ways institutions can affect the behaviours of the actors who established them. Pierson argued that political institutions are determined by what economists call ‘increasing returns’. They create opportunities for actors to support the institutions and to adapt them with changing circumstances. The institutions in existence may stay in equilibrium for long periods despite political changes. A vital role for the timing and sequencing in which small and contingent events take place at critical junctures early in a sequence mould events that occur later; and the path-dependence, in which early decisions provide incentives for actors to bolster institutional and policy changes inherited from the past, even when these outcomes are inefficient.

Path-dependence as studied by Pierson looks to understand EU integration as a process which unfolds with time. Pierson argues that despite the initial role of the Member States governments in the design of the EU institutions and policies, the Member States may not be able to control the subsequent developments of institutions and policies. This may occur due to four reasons; the first being that Member States may agree to EU policies that lead to a long term loss of national control in turn for electoral votes; secondly unintended losses can occur due to the institutional choices, the Member States may not able to mitigate these losses; thirdly Member States may be left with the acquis communautaire of the previous goverments and fourthly the EU institutions and policies may be locked in due to their resistance to change.

Social institutionalists and constructivists perceive institutions to include informal norms and conventions as well as formal rules and claim that such institutions ‘constitute’ actors, shaping the way in which actors view the world. The sociological accounts assume that people act according to a ‘logic of appropriateness’ aspiring from their institutional environment as they map out their preferences and select the

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100 Ibid page 32.
101 Ibid page 32.
102 Ibid page 33.
appropriate behaviour for a particular institutional environment. The sociological institutionalists and constructivists look to examine the process by which the EU and other institutional norms are diffused and shape the preferences and behaviour of actors in national and international politics.

Constructivism as described by Risse is based on a social ontology (norms, institutions, practices etc.) which insists that human agents do not exist independently from their social environments and its collectively shared systems of meanings. Constructivists insist on the mutual constitutiveness of social structure and agents. Ruggie states that:

‘At the bottom, constructivism concerns the issue of human consciousness: the role it plays in international relations, and the implications for the logic and methods of social enquiry of taking it seriously. Constructivists hold the view that the building blocks of international reality are ideational as well as material; that ideational factors have normative as well as instrumental dimensions; that they express not only individual but also collective intentionality; and that the meaning and significance of ideational factors are not independent of time and place’.

Constructivists understand institutions to include formal and informal norms. Actor preferences are therefore endogenous to institutions and individuals. Their identities are shaped and reshaped by their social environment. Authors, such as Thomas Christiansen and Antje Wiener, argue that the EU institutions shape up the behaviour, preferences and identities of individuals and Member State governments. Moravcsik, however, argues that constructivists have not made significant empirical impacts within the study of European integration. He argues that constructivists make broad claims and that they need to test their hypotheses. But of course, their hypotheses cannot be tested like their rationalist counterparts.

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Christiansen et al claim that the constructivist approach used in examining European integration is not developed intensely, despite the great possibilities of a number of approaches which have been, or could be, utilized in the analysis process. The integration theory has not diverged beyond the traditional debate between liberal intergovernmentalism and supranationalism/neo-functionalism. This is coupled with observing theories with comparative approaches and the treatment of European integration as new forms of governance, on the other. These developments leave integration theory as a three-cornered race between sui generis, international relations and comparative approaches that provide different models of analysis depending on the various assumptions about the nature of the integration process. This does not clarify the line between rational and constructivists approaches.

Christiansen et al point out that the study of integration will be enhanced if the constructivist project involves itself in critically examining transformatory processes of integration rather than solely progressing the rationalist debate between intergovernmentalists (implicitly assuming that there is no fundamental change) along with the comparativist ideas (implicitly assuming that the change has already occurred).

Christiansen et al propose three ways in which constructivism can have an impact on studies of European integration: a) development of theories; b) construction of framework of analysis; c) meta-theorizing. The development of theories would be imperative for constructivists. The theories could be used in different frameworks of analysis to develop understanding of aspects of European integration. Finally, structuring theory may be used as a research strategy, as it can open doors where other theories fail to materialise.

The constructivists’ theory of analysis could be applied to the study of the formal rules of the integration process. There is also the need to understand the nature of the European polity as an increasingly bound arena for social interaction. The EU is

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110 Ibid page 537.
111 Ibid. page 538.
certainly not based on exclusive set of norms and commonly practiced rules; it is structured via the aquis communautaire. The interaction between institutional norms and political action as an aspect of integration has made an impact to the political analysis of the EU. In relation to the institutional norms there has been the introduction of a constructivist or sociological variety of neo institutionalism which is applied in Chapter Five during the course of the discussion on the case law of the CJEU. Following the descriptive discussion on the theories of integration, the remaining focus of the Chapter will be to highlight the failure of these theories to explain the changes in the dynamics of European integration or phenomena of the governance structures.

1.3 The Death of Methodological Nationalism

The existing approaches to examining European integration and constitutionalisation are related to the conflicts between the intergovernmental and supranational contexts. These two dimensions have been conceptualised as representing law and politics. These conflicts can be seen from the 1960’s onwards with the emerging tensions between the legal and political dimensions of the EU systems. This was due to the enactment of hierarchy; the growing utilisation of the constitutional principles such as direct effect, supremacy and pre-emption which were developed by the CJEU. However, the Council being non-hierarchical and apparently intergovernmental has remained the dominant political body of the system.

The past two decades have witnessed a decrease in this asymmetry, due to the institutional advancements in the political sphere, such as the increase of majority voting, the expansion of the European Parliament (EP) competences through the use of the co-decision procedure and finally the transformation of the European Council as a

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113 Case 26/2 Van Gend en Loos v Nederlandse Administratie der Belastingen ECR 1 1963.
114 Case 6/64 Costa v ENEL. ECR.585.1964
115 ERTA Case 22/70 Commission v Council ECR 273. 1971
117 Although the Council operates on a horizontal level, within its internal structures there are several groups operating on a complex scale therefore the institution changing the institution in such a way that it now cannot be seen as an intergovernmental phenomenon. Page 14.Schafer, G.(2000). ‘Linking Member States and European Administration-The Role of Committees and Comitology’ in Andenas, M and Turk, A (eds). Delegated Legislation and the Role of Committees in the EC. The Hague: Kluwer.
de facto central body of the EU. These developments have been reinforced by the constant addition of the number of new EU policy areas, thereby weakening the earlier notions of the EU as just an economic government reliant on an ordo-liberal economic constitution. 118 Both dimensions have now attained a sufficient amount of semi-hierarchisation as an adequate amount of hierarchy has been established; none of the dimensions have reached a final step as the CJEU does not have the competence-competence and the Member States have remained the commanders of the Treaty.

The theories based on the intergovernmental/supranational definitions are contested because the EU structure is perceived in its own right. Therefore, the EU cannot be appropriately interpreted by the application of concepts that were devised within the context of the European state building processes in early times. 119 This view intensely demotes the classical approaches as they are dismissed because they are derived from old European semantics, and they do not have the required analytical strength for existing in the contemporary EU. The state-centred approach of the theories implies an application of the nation-states concepts to the EU. Intergovernmentalists rely on the Member States as the genesis of the EU, while supranationalism with its federalist ideas is aiming for the creation of a European State. Hence the inherent modern view of a state is the fundamental point of departure for both dimensions. Both perspectives are Heglian as they prescribe the to the world view which found its highest form of expression in Hegel’s Philosophy of Right. 120 Therefore the perception of the state is barely different among both the schools. In its purest form intergovernmentalism begins with the impression that states are territorially based and are hierarchically-based units


120 Hegel argued for the containment of the functionally differentiated society within the form of the modern territorially delineated union state, and a limitation of the adverse effects of functional differentiation, especially the problem of social exclusion, through a stratified corporatist system aimed at stabilising the relationship between the social classes. Hegel understood this stratified system as an explicitly modern phenomenon insofar as it reflected the class structure of emerging industrial society rather than feudal forms of stratification. Page 14. Kjaer, Pl. Between Governing and Governance. Hart: Oxford and Portland, Oregon. Modern systems theory argues against this and that it is impossible to consider the modern functionally differentiated society as an organic entity. This perspective implies that only one legal and political system is in place and various subnational and political systems exist on the basis of territorial forms of differentiation within globally operating functional systems. Bernett, S. (1998) Hegel after Derrida. London: Routledge.
centred on the key differentiation between state and society. Liberal intergovernmentalism the latest advancement of intergovernmentalism disregards the assumption that states are unitary actors.\textsuperscript{121} This makes intergovernmentalism very similar to neo-functionalism which provides the theoretical framework of the supranationalist federalist vision, as neo-functionalism assumes the existence of pluralist states consisting of a multiplicity of actors, while remaining fundamentally bound to the idea of the state since its aim is to build a European State.

The intergovernmentalist theories are based on the presumption that the Member States have authority as they are the Masters of the Treaty; this presents a very naïve illustration of the dynamics of European integration. It is far too reliant on the Member States ability to supervise the internal activities relating to integration and constitutionalisation processes. Hence, intergovernmentalism has been utilised by political scientists as legal scholars are more aware of the restrictions that arise due to the signing of the Treaty.\textsuperscript{122} Intergovernmentalism cannot account for qualitative changes such as the rise of the EP, neither can it describe the shift away from integration and towards constitutionalisation and the establishment of a legal hierarchy within the EU. On the other hand, the existing modifications of supranationalism cannot be seen as genuine theories. Weiler’s analysis of legal supranationalism is clear but does not provide satisfactory accounts on how these developments were possible.\textsuperscript{123} Neo-functionalism is the theoretical base for classical federalism which is a simplistic normative vision in itself. Neo-functionalism has the capacity to develop a macro-perspective on the dynamics of European Integration, and contrary to intergovernmentalism, it highlights that integration for the sake of integration has been the core of the EU development. Neo-functionalists, however, cannot determine why functional spillovers that are observed by the technocratic structures lead to political spillover and the making of an EU state, or why this state should be a democratic state. It also implies a teleology since it gives the impression that European integration will lead to the establishment of a state. As the normative ultimate goal is the establishment

of a state. A descriptive theory should have the capacity to provide details of integration, and the processes of disintegration and not merely highlight those events that support a specific normative objective.\textsuperscript{124} This is not done by neo-functionalism which was sought out in during the 1950’s, 1960’s and 1980’s as, at that time the advancements pointed towards the rapidly increased integration. This was not the case during the 1970’s or 1990’s at which time future developments were not apparent.\textsuperscript{125}

The most vital reason for the failure of the earlier theories is that the EU has over the past decades witnessed the expansion of governance structures known as the new modes of governance such as comitology, agencies and the OMC, these will be further dealt within Chapter Two. They are referred to as ‘new’ although the comitology procedures have been around in the EU since the 1960’s, and agencies have been established since the 1970’s.\textsuperscript{126} Likewise the features of the OMC have been long established within the EU before the entrance of the policy tool in 2000 at the Lisbon Summit. The new feature of these structures is that there is the recognition that these are not merely transnational norms but are here to stay. They are now observed as integral features of the EU and not merely as simple additions to the institutional triangle. The mutual feature of governance structures is their heterarchial nature which does not adhere to Kelsian-style legal hierarchy followed by the Member States or the Weberian style-organisational hierarchy which is seen as the traditional way to organise hierarchy in the EU.\textsuperscript{127}

The increased acknowledgement that governance structures have become permanent structures within the EU stresses the need not to achieve the Heglian unity of society through the state at the EU level. Rather, the governance structures are perceived as ‘misfits that cannot be thoroughly understood within the framework of the

previous theories. It is against this backdrop that raising questions on the distinction between hierarchy and heterarchy or governing and governance and whether this might represent a new basic distinction becomes relevant.

It is acknowledged that the EU must be seen as a sui generis concept and not merely as an advancement of the nation-state. This shows that the previously applied theoretical frameworks are now problematic. The structures of the existing academic disciplines act as obstacles that do not allow adequate concepts to be developed that describe the EU. The inability of the exiting theories to interpret coupled with conceptual inconsistencies together with the subsequent damage of conceptual evolution by the nation-state disciplines of law and political science has encouraged the emergence of a hybrid sub-discipline in the form of European-studies.

This sub-discipline has affirmed the concept of governance as its base. The concept of governance can be linked as far back as the 1930’s when the foundations of corporate governance were devised. In 1992 the concept was introduced in the international relations discipline, thereafter it was applied to various objectives in law and social sciences. It was utilised as an ideological concept reinforcing the base for a minimal state and as a tool for obtaining ‘good governance’ in the international sphere; also incorporated in the new public management literature that looks to describe political administrative structures as socio-cybernetic systems or as self-organising networks. It is only with the EU research that the ‘turn to governance’ has been seen to illustrate an intrinsic break with the nation-state. However, the governance concept has not developed enough for the emergence of a paradigm. After a decade of European governance studies a general theory on governance has not be derived and the concept is still in immaturity. Rather what are available are generic details of the EU as a system of multi-level governance. These have combined with a large number of governance

\[128\] Ibid.
\[129\] ‘Sui generis’ means that the EU is not comparable with any other existing structure.
\[131\] Ibid.
concepts relating different aspects of the European structures.\textsuperscript{134} The governance research which shifts away from a political science viewpoint this choice is evident in the problematic division between a focus on politics, polity or policy.\textsuperscript{135} The governance theories do not desire to explain the origins of integration or constitutionalisation came about, rather shift the focus on how the system is operating when it is already in existence. Hence, governance studies have failed to explain the overall logic of the operation of the European system. There have been barely any attempts to identify the logic which has resulted in the existence of this phenomenon. Hence the emerging governance paradigm has not successfully produced an alternative rather it has merely incited a further crisis for the old paradigm.

The exception to this analysis is the attempt to combine governance research with insights from various forms of new-institutionalism especially historical institutionalism.\textsuperscript{136} Historical institutionalism alters the perspective on EU integration. Rather than promoting external demands it prioritis the internal dynamics of the political and legal institutions and processes. Historical institutionalists claim that institutions have evolutionary histories and have an autonomous memory. Hence they produce their own procedures providing a forum for developing ideas which can be transformed in to policy initiatives. Historical institutionalists argue that increasing levels of autonomy and internal dynamics of the EU institutions are central forces which determine the will towards increased competence transfer.\textsuperscript{137}

The current state in governance research is not untypical. While formulating his paradigm for modernity, Hagel advanced the concept of spirit. The concept provided a forum whereby he could introduce his distinctions and logic to allow himself to

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differentiate the concept of the spirit and establish concepts which adapted to his study of the modern society. The universal concept was empty which provided a point of departure for them to reach their objectives on evaluating the modern society. Therefore, the next stage was to conduct studies of the different aspects of the modern society which would then be utilised as a prototype on which to base his objectives to then develop general theories of society. In connection to this example, governance research has progressed through two out of the possible three steps. The first being the generic concept of governance has come alive which delineates a new universe but remains an empty concept. The second being the development of partial concepts along with empirical studies that were conducted, what is missing is taking the decisive step heading towards a general theory. However, this also explains the resilience towards old intergovernmental/ supranationalist paradigm, as Kuhn points out that ‘once it has achieved the status of paradigm a scientific theory is declared in valid only if an alternate candidate is available to take its place’.

A new paradigm has not emerged due to the absence of a general theory, just as governance research remains close to the disciplines from which it has emerged from. Despite the perceived break with the old paradigm governance literature is still entrenched in nation-state semantics. In the governance debate Treib, Bahr and Falkner argue that the governance debate is concerned with ‘the role of the state in society’. However, the main issue is that the EU is not a state just as the persistent reliance on the state/society distinction highlights support towards the Heglian perspective in so far as the state/society distinction is the base for Hegel’s efforts to describe the possibility of an identity-based world. This highlights that the existing work on European integration has not taken adequate notice of the changes within social theory moving from the emphasis on identity to a focus on difference.

On a normative basis, the debate has aimed at adjusting nation-state norms with the European norms. There have been endeavours on alleviating the legitimacy problem of the EU which has developed due to the increasing imbalance between the legislative

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and executive branches at the EU level and the bypassing of the institutional arrangement through governance structures such as comitology and the OMC. The EU’s Byzantine institutional structure raises questions with regards to transparency and complexity. Further, Weiler points out that the previous economic constitution creates a bias supporting liberal ideas.  

Joerges and Neyer’s theory of deliberative supranationalism is an illustration here to the fact that they depart from the assumption that comitology is an institutional response to the tensions between the intergovernmentalist and supranational elements of the EU. However, deliberative supranationalism is seen as a parasite latched to the dual intergovernmental/supranational paradigm. Joerges and Neyer are thereby progressing on a theoretical context, which opposed the argument they put forward concerning the possibility of legitimacy in its intentions and objectives through deliberation outside the context of the hierarchical institutions. Therefore the theory of deliberative supranationalism begins to lose its grounds. This theory needs to be able to detail the evolution of integration, the logic of guiding the shift from integration to constitutionalisation and the rise of the governance structures such as comitology, the OMC and agencies. This type of normative theory can only be achieved by adding these descriptions.

1.4 Conclusion

The discussion in this chapter focused on the early phase of European integration a study which was dominated by forces and actors that contributed to the development of the Euro-polity. This is not say that no achievements were made, as Morsavick’s liberal intergovernmentalist analysis was one of them. However the study of European integration has subsequently become part of normal politics therefore it needed to take in to account political theory, electoral theories, policy analysis, interest group behaviour. Consequently, this became larger than one coherent field of study. The

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debate between neo-functionalism and intergovernmentalism continues but the ability to act as structuring force has been lost. The governance approach, which is the focus of Chapter Two, has become the alternative to the classical theories as it focuses on the effects, problems and development paths of governance in Euro-polity.
Chapter Two

Out with the Old and in with the New: The Emergence of Governance.

2.1 Introduction

The previous chapter focused on the early theories of integration and examined their key concepts and ideas. By comparing and contrasting them we observed that they failed to acknowledge the developments and paths of European governance. This led to the development of the governance approach to European integration. The aims of this chapter will be to firstly depict the origins of the governance concept in comparative politics and the features of the governance in EU studies. A discussion will be provided on the concepts of governance, which will be followed by outlining the governance structures, namely the new modes of governance (which are the OMC, comitology, agencies, and networks) and the theories supporting these new modes. The major themes highlighted will include an enquiry into how EU governance arrangements have revolutionised national systems of governance and secondly how can policy problems be resolved at the level of the Member State by utilising governance arrangements extends beyond outside the state. This will be utilised as the theoretical background for developing my governance paradigm in Chapter Five.

2.2 Conceptualising Governance

Despite a variety of definitions and conceptualisations in existence, Pierre attempts to provide two comprehensive meanings of the governance concept. The first being ‘the empirical manifestation of state adaptation to its external environment as it emerges in (the) late twentieth century’.\footnote{Page 3. Pierre, (2000). Introduction: Understanding Governance. In Pierre, J. (eds). Debating Governance, Authority, Steering and Democracy. Oxford: OUP.} Governance is perceived both as a process and a state allowing private and public actors to participate towards regulating societal relationships. Governance differs from government as governance promotes decision-making on a non-hierarchical basis with the inclusion of public and private actors, while
government advocates for hierarchical decision-making and the use of public actors. Secondly, governance is referred to as the ‘conceptual or theoretical representation of (the) co-ordination of social systems’. Pierre highlights that this definition exhibits a state-centric view as it relates to the steering capacity of the state and its institutions, along with the private actors. It also focuses on the coordination of actors, whether it is private, public, formal or informal and private/public collaborations. The notion of ‘good governance’ may also be added to the conceptualisation of governance. The term good governance gained popularity since the 1980s as it was utilised by the World Bank. The benchmark of good governance grew as it included legitimacy which was retrieved from the democratic mandate devised by those in power, the rule of law, better market competition and the participation of NGOs. The NGOs were involved in creating the policies requested by the locals but encourage civil society input. In the EU the idea of good governance became notable through the White Paper on European governance, which established principles such as coherence, participation and effectiveness in order to achieve good governance. The Commission’s definition of ‘European Governance’ is normative as it states:

‘The European Commission established its own concept of governance in the White Paper on European Governance in which the term refers to rules, processes and behaviour that effect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence’. 

In the field of comparative politics when governance is examined the questions raised refer to how and why success can be achieved in a complex society to create various

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147 Ibid Page 3.
central mechanisms of control and coordination. The state theories were heavily determined by Talcott Parsons and Niklas Luhmann as they moved from the functionalist approach towards steering as a process which is not associated with the actions of the influential actors. The use of steering focused the debate towards the argument to dismiss the belief that state actors are the main actors in policy-making and that there are distinctions between steering subjects and objects. Instead of the central administration utilised command and control legislation, open and cooperative tools for governing were encouraged. In order to promote the effectiveness of national policies decision-making processes utilise horizontal cooperative forms of policy-making ranging from the interaction of public, state, non-state, private actors to policy networks. In this co-operative state there are no clear distinctions between steering objects and subjects. In Germany the governance turn was influenced by the financial crisis of the state and led to the adoption of new instruments of governance and public sector reforms. The ‘ideological shift from politics to the market’ was signified by the Thatcher and Regan governments. Therefore governance ‘signifies a change in the meaning of government, referring to a new process of governing or a changed condition of ordered rule: or the new method by which society is governed’.

2.3 The ‘Governance Turn’ within the EU

The ‘governance turn’ ‘look(s) at the impact of the Euro-polity on national and European policies and politics’. In contextual terms during the 1980’s and 1990’s, to policy cycles and networks were utilised in order to assess policy implementation in the EU. On an empirical basis the SEA and the single market significantly increased the EU’s policy-making competences. This led to European integration being confronted by questions related to government, governance, policy-making and coordination. In

summary, the EU version of the governance turn contains elements of international relations as it divulges in the patterns and diversity of policy implementation and the actors involved. Secondly, it demonstrates the various angles of system transformation at EU and national level and its impact on democratic accountability and problem-solving capacity. Both elements will be focused on later in the chapter.

The Classical Community Method (CCM) as mentioned in Chapter One, is considered as one of the main features of EU governance. Scharpf names this method as ‘just decision mode’.\(^{161}\) This method provides the Commission with a major role in policy-making and the EP has increasingly gained influence. The Council adopts formally the legislation by QMV or unanimity. During this procedure the Commission and the EP may utilise expert opinions, this would include receiving input from the comitology committees in order to allow effective compliance at the national level.\(^{162}\)

Another important feature of EU governance is its multi-level nature. This was devised by Marks as a ‘system of continuous negotiation among nested governments at several tiers’.\(^ {163}\) Multi-level governance advocates decision-making to be achieved at various levels and that Member States are not given with the sole authority for policy-making, rather decision-making is evident at national, subnational and supranational levels. In order to achieve a generic theory for multi-level governance, Hooghe and Marks claimed that governance is interconnected. They stated:

‘while national arenas remain important arenas for the formation of national government preferences, the multilevel governance model rejects the view that subnational actors are nested exclusively within them. Instead, subnational actors operate in both national and supranational arenas…….National governments ….share, rather than monopolize control over many activities that take place in their respective territories’.\(^ {164}\)


Hence, multi-level governance highlights that actors function interdependently at various territorial levels, even though governance relates to non-hierarchical forms of policy making for example dynamic networks, which collaborate public and private authorities.¹⁶⁵

The multi-level dynamics of the EU polity coupled with the increased significance of private actors give rise to network governance.¹⁶⁶ In network governance the state changes form to an activator, as it not connected on the vertical or horizontal levels. Network governance aims to solve problems rather than ‘individual utility maximisation’.¹⁶⁷ A final feature of governance is political contestation. The EU manages to encroach national policy-making by causing a reduction in the policies available through supranational delegation.¹⁶⁸ However, the EU remains under-politicised because on a large scale the EU issues are set aside in the context of national elections and the EP elections are perceived as ‘second-order contests’.¹⁶⁹

If the impact of the regulatory state on governance is examined it can be argued that Majone’s attempt at characterising the EU as a regulatory state is an important element of the governance turn literature.¹⁷⁰ This assumes that the EU is capable of conducting the traditional functions of political systems. One of the arguments for this is that the creation of the internal market also required regulatory input to rectify market failure, encourage completion and remove trade barrier. The other is that limited legitimacy is required for regulatory policy-making, as the distributive effects are not initially known.¹⁷¹ The private and social actors prefer the use of regulatory instruments. The intergovernmentalists underscore the state-centred approach while weak intergovernmentalism points to the public actors, Member States and the EU institutions

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having control. Meanwhile, supranationalism claims that organised private interests influence supranational organisations such as the CJEU. This process exhibits advancements in administrative and functional differentiation as the Commission is reliant on the expertise provided by the policy networks. There is broad acceptance that policy networks are influential in agenda setting resulting in governance with networks, even though the decisions are made at the hierarchical level.

There is a constant need for regulation and the demand is not always met. Scholars, such as Heritier, identify a performance crisis of EU governance. This has resulted from the achievements of European integration which now have a bearing on national activities including areas such as employment, migration, education. The variations in the national regimes and the diversity of preferences among national actors the ‘one-size-fits all’ approach cannot be applicable; hence the new modes of governances were devised in order to combat this dilemma.

The new modes of governance were a response to the deadlock in Community decision-making. This progression of the scholarly discourse is closely interrelated with the OMC. The major characteristics of the new modes of governance are that they are reliant on soft law and move away from the traditional methods. The advantage of soft law is that it does not entail the use of sanctioning mechanisms in the event of non-compliance. Secondly, the negotiations in decision-making take place between various levels among the public and private actors; the Member States retain choice in policies. Thirdly, as the actors are present in defining policy goals and instruments there is no separation among steering objects and subjects.

The new modes of governance do not provide solutions for everything as the effectiveness and problem-solving capacity are dependent on the types of actor

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involved. Heretier points out that ‘redistributive policies’ and ‘deeply entrenched’ problems are not the best candidate for the application the new modes. Yet ‘distributive, coordinative, network goods problems as well as diverse, discrete and high complexity/uncertainty issues are more amenable to a treatment by new forms of governance’. 177

The governance turn also introduced a new perspective in policy-making, which was to investigate the aftermath of the transformation of the EU and national governance in particular the effectiveness in policy-making and democratic legitimacy. The questions raised are: what the repercussions of these new forms of governance in relation to the problem-solving capacities of political systems? Does the multi-level governance undermine governability?

In observing the first theme regarding the problem-solving capacity or dimension of EU governance, the formulation of EU legislation is linked with the distinction between negative and positive integration. 178 Negative integration leads to actions that remove barriers to trade or undistorted competition. Positive integration looks at the advancement of a system of economic regulation at the level of the larger unit. 179 Scharpf points out that negative integration has been the ‘main beneficiary of supranational European law’. 180 The Court and Commission have reconstructed negative integration into a forceful mechanism that aims to remove national barriers and distort free movement within the EU.

In contrast the ability for supranational actors to bring about positive integration is more challenging as measures need approval from the European Parliament, and the Council. This limits the EU’s capacity to achieve a consensus among the involved actors. There are effective remedies but only if they are of national interest, social and economic policies that impact costs of production and offering little product quality are more likely to be rejected. 181 Actor centred approaches coupled with the institutional fragmentation, no clear hierarchies, fluidity are conditions suited for problem-solving.

181 Ibid. Pp 107-16.
The EU’s poly-centric system of governance brings about deliberation. This is another problem-solving mode which has cooperation friendly orientation and invokes a high problem solving capacity.\textsuperscript{182}

If governance above the state is acceptable then the legitimacy based on outputs is adequate. This argument raised by Majone is that decision-making should be transferred to regulatory agents that should be excluded from the influence of parliaments and majoritarian politics. As regulatory politics formulate the major part of the EU’s policy outputs, there is a need to politicize the Commission, for example the EP is provided an enhanced role than the Commission.\textsuperscript{183} This perspective faces two main criticisms. Firstly, high levels of performance can be linked with output legitimacy only if ‘the people’ and the experts refine the policy objectives. Secondly, authors, such as Hix, dismisses the issue that ‘the EU is a glorified regulatory agency’ or a fourth branch of government like regulatory agencies in the domestic sphere such as central banks, telecom agencies.\textsuperscript{184}

The regulatory state concept supports the output side of democratic legitimacy. Multi-level governance looks at the input side and has the potential to increase the democratic equality. The imminent concerns of multi-level governance are that authority is shared between supranational and national institutions. Moreover, the jurisdiction between the executive and the Parliament varies; these reasons have an effect on democratic accountability.\textsuperscript{185} Secondly, the shift from hierarchy towards informal procedures and networking allows extensive input and impinges on the democratic principles of political accountability.

In the European multi-level governance the executive impinges on different levels of jurisdiction in comparison the territorial reach of the parliaments is not so wide. In a ‘penetrated system of governance’, democratic representation and political

accountability become defective when they are utilised through national parliaments.\textsuperscript{186} National parliaments have tried to enforce more influence but are engrossed in a ‘negotiation-accountability’ dilemma.\textsuperscript{187} Harsher control over governments lowers flexibility and prosperity in Council and Parliament negotiations. The national parliamentarians may not utilise their veto powers and thereby informally making their governments accountable. It makes accountability of representatives very hard therefore lowers the democratic accountability of representatives mechanisms. Thus, despite the importance of parliaments within the EU the system does not affirm to the standards of democratic accountability.\textsuperscript{188}

The distinctiveness of multi-level governance is apparent on a vertical level through various levels of government, but it is also visible at the horizontal level, where ‘public and private actors have a shared responsibility for resource allocation and conflict resolution’.\textsuperscript{189} Heritier points out that on an empirical basis there is evidence to show that network governance opens up new interests and ideas, but there are concerns in relation to the participatory governance element, as there are no guarantees in relation to the equal access between all actors, the involvement of private actors are still a distance away from promoting EU democracy.\textsuperscript{190} The flaws of network governance are further troubled by the multi-level characteristics of EU governance as ‘the relations between actors involved ………..are not sufficiently exposed to public scrutiny or to the scrutiny of the legitimate, democratic, and representative bodies’.\textsuperscript{191} Hence, this may risk violating democratic governance.

The Rhodes Model on policy networks is mostly utilised within the context of EU governance. This model assumes that three variables exist, which determine the type of

\begin{flushright}
188\ Ibid page 101.  \\
\end{flushright}
policy network that will exist within a specific sector.\textsuperscript{192} The first variable is concerned with the stability of the networks. The questions raised are whether or not the same members dominate the decision-making procedures? or is the membership fluid to allow actors to participate depending on the specific policy measure under discussion. The second variable is concerned with whether or not the network allows the participation of outsiders and a range of actors. The final variable considers the resources available to the network. The main consideration at this stage is whether or not the network members can function independently or if they are reliant on the resources of the other members.

There are a range of networks in existence, varying from tight integrated policy communities function on a single mind and produce collective actions to loosely affiliated networks that face difficulties in mobilising as a collective. The internal structure of policy networks will determine the policy outcome. Policy network analysis is used in the EU policy-making environment. The aim is to determine which interests, national or supranational, dominate bargaining within transnational networks. The answer is achieved by examining the extent of involvement of the politicians and senior public officials, and the autonomy of the supranational institutions in the given sector (are the Commission/EP/CJEU dependent on funding from national and private actors?).

The Rhodes model is compatible with other models, for example the concept of the ‘epistemic communities’, devised by Haas to evaluate how policy-making can become dominated by networks or professionals with expertise.\textsuperscript{193} Haas argues that if the EU governance is perceived as a multi-level system in which policies are formulated after a standard sequence taking place which includes making certain decisions. It is appropriate, therefore, to expect competition between epistemic communities and advocacy coalitions at the subsystemic level (space) and at the policy shaping stage (in time). They compete to gain control and steer the policy networks, in particular in the areas in which they are active members. The epistemic communities and advocacy


coalitions may form alliances, if they desire to shift the policy agenda in the direction of radical policy change.

Policy network analysis is best deployed with other theoretical accounts of EU politics or policy-making. At first, its subsystematic policy-making account is compatible with intergovermentalist or neo-functionalist accounts of decision-making at the highest political levels. Policy network analysis also shares compatibility with the institutionalist ideas, particularly the views which focus on deciding the ultimate policy choices for the EU’s institutions.\textsuperscript{194} Secondly, the notion that sector-dedicated self organised networks are responsible for a large portion of EU governance is compatible with the notion that the EU functions on the basis of network governance. Whereby, political actors look to problem-solving as the core of politics and the setting of policy-making are defined by the existence of highly organised social sub-systems.\textsuperscript{195}

Networks are utilised at various levels, regionally and globally. However, the advancement at the EU level is more complicated. Therefore Ladeur points out that ‘the EU is an avant-garde structure with respect to the development of polycentric and heterarchial structures’.\textsuperscript{196} Another distinct element of networks is that they eliminate the distinctions between public and private spheres. The task of the networks is to combine the public and private elements in order to stabilise relations between the political and administrative systems and to other systems that they relate to such as the economic system. The aim of networks acting between the private and public spheres is to allow interactions between the private and public spheres. These networks are therefore, aimed at allowing self-regulation by the private parties and the public authorities that are participating take a supervisory role.\textsuperscript{197} Borzel argues that networks may be perceived as a particular form of governance.\textsuperscript{198} They have emerged as a new mode of governance. To consider networks as a form of governance they require mutual

\textsuperscript{197} Ibid.
interactions between the public and private actors and they need to allow the participation of stakeholders.\textsuperscript{199}

It has to be pointed out that policy network analysis does not constitute a theory of political economic integration. Intergovernmentalism and neo-functionalism as theories were designed to predict the path of European integration. But as argued in Chapter One neither of them can predict the outcomes that arise from this process. Network analyses focus on one or more of the three arguments. Firstly, the structure of the policy network has an impact on the outcomes achieved by the network. The EU policy outcomes are determined by the level of integration between the policy-specific networks and the level of mutual dependence between the actors.\textsuperscript{200} Secondly, the idea of the EU as quasi federal polity gives rise to network governance. Federalism can be applied to reconcile competing values which cannot take place through adopting strict hierarchies or market structures, rather reconciliation can be achieved through the negotiations of informal networks.\textsuperscript{201} Thirdly, the EU contains legitimacy and management deficits. The legitimacy deficits are because of concerns with transparency, clarity of rules and the need for judicial review to govern the informal bargaining procedures within the EU policy networks.\textsuperscript{202} The technical discourse of supranational policy-making is the reason for why networks of government officials and experts are less scrutinised than at the national level. There is a need for the EU policy networks to be designed effectively in order to tackle the legitimacy problem.\textsuperscript{203} The management deficits arise because there are not enough incentives available for actors in non-hierarchical networks to invest in management capacities to ensure coordination.

Having outlined the main features of network governance, it is now imperative to point out the three main criticisms of policy network analysis:

1. Policy network is a useful metaphor but not a model or theory unlike institutionalism, intergovernmentalism and constructivism. Nevertheless theory

building requires building on metaphors which abstract from reality, and point
the analysts towards variables that determine outcomes. Network analysis points
to observing officials, lobbyists and experts.\textsuperscript{204}

2. Policy-making in the EU is too fluid, uncertain and overpopulated with a range
of interests for the existence of stable networks. However it has to be noted that
the stability of membership is a variable and not an assumption of policy
network analysis. The EU may prefer to ensure the use of loosely integrated and
fluid networks more often than stable policy communities. The loosely
constituted networks often provide better channels of communication than
tightly integrated policy communities. More generally in such a non-hierarchical
system the physical presence and the cultivation of relationships are critical to
ensure that their personal interests are achieved.\textsuperscript{205}

3. Policy network analysis lacks a theory of power. It neglects the power of EU
actors. Network analysis looks at different sets of institutional actors in systems
where multiple actors are provide with power. It contends that the EU system
produces outcomes that cannot be explained exclusively by recourse to the
mediation of national preferences, as is sometimes claimed.\textsuperscript{206} Policy network
analysis is pitched at the subsystematic level of decision-making and thus
compatible with macro-theories of politics such as pluralism, elitism and
Marxism. In the EU’s case the level of power is focused at the subsystemic level
is dependent on which EU policy sector is being observed. For example, a
considerable amount of power is delegated at the subsystemic level for
determining the Common Agricultural Policy (CAP) but less power resides at
this level for the Common Foreign and Security Policy (CFSP). Therefore policy
network analysis is better able to inform us how the CAP is determined than
how the CFSP is determined.\textsuperscript{207}

Having said all this, it is also noteworthy to point out that policy networks analyses
have had a significant impact on European integration. There is a great variety between
EU policy networks because a diverse set of arrangements are needed for the EU to
overcome obstacles and allow cooperation in different policy fields. Benz in particular

\textsuperscript{204} Jordan and Schout. (2006).
\textsuperscript{206} Ibid page 117.
\textsuperscript{207} Ibid Page 117.
favours network governance as a particular mode of governance ‘between hierarchy and markets’. Hierarchy is characterised by rigid links between constitutional links and markets by no coupling at all. Networks are therefore better suited to the highly fragmented and decentralized institutional structure of the EU. Governance by networks has its flaws. Networks being can be seen as insular policy communities with vested interests and lacking transparency. However network governance can help to assist the EU’s continuity in policy outcomes and the EU’s capacity for innovation.

2.4 Decisional Outsourcing

The EU has a long way to go before it can provide constitutional structures that frame society. The concept of institutional balance acts as to ensure the EU’s legal order but not the legal order of the Member States. The EP has brought about a significant change in the EU’s qualitative functioning; the major principles overlooking its operation have barely been altered over the years as institutional balance remains the basis of its mechanism. The Council, Commission and the CJEU have maintained the structure which was developed by the merger of the Communities in 1967. These are small changes in comparison to the expanding EU integrative activities over the years. The institutional balance idea was imposed by the Member States in order to allow the operation of a functional based organisation with restricted responsibilities. It thus acts to hinder the institutional adaptation of the classical institutional structure in expanding policy areas. The main feature of modern society is functional differentiation, by power sharing the EU acts against the world rather than reflecting the functionally differentiated structures of society that it has developed from. In an institutionalised sense therefore the EU act holistically which conducts itself in a de-holistic world. A fundamental discrepancy exists between the EU’s archaic pre-modern institutional structure and the risk regulatory function that it operates in.

The development of governance structures must be understood against this backdrop. Governance structures can be seen as responses to the functional needs related to the handling of increased social complexity. Social complexity is defined as a ‘paradoxical

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208 Benz (2003).
unity of multiplicity, which implies an imperative need for selection in the sense that not all elements of a given social structure can relate to all other elements of that structure at the same time. Governance structures are seen as a response to a major asymmetry between the functional demands for European actions and the capability to accommodate these demands within the under-differentiated structure of the EU. This arises from the increased workload and resources required to manage EU policies from the 1960s onwards. Hence the capacity deficit of the EU has led to the need to adopt resources outside the existing institutions through governance structures. The capacity deficit has three dimensions. Firstly, the EU has a low level of cognitive resources which can be utilised on a territorial level. This has an impact in relation to gathering information and the ability to react. In order to formulate regulatory measures, information is required on the development of societal processes, along with recognition of the obstacles. The EU has to merge with national administrators who possess information on their own jurisdictions and with private actors. The private actors meet a functional need which the EU institutions would not be capable of obtaining themselves. This illustrates why lobbying is an important element in the EU when compared to the Member State situation, as Member States have greater resources they do not need to compensate for information deficits through alliances with private actors.

Secondly, the EU does not have sufficient control mechanisms. It has to rely on the Member States administrations to carry out implementation and compliance. This functional need requires the EU to establish institutionalised relations with the Member State administrations in order to ensure that they implement EU law and guarantee compliance. Thirdly, the limitations on EU competences regarding treaties promote the use of the governance structures within the EU. This is because these structures can be potentially utilised to avoid the tasking Community Method decision-making procedures and expand the EU’s integration activities beyond the scope of the treaties.

The delegation of discretionary powers to independent regulators has also been used as a route to establishing policy credibility. The delegation of these discretionary powers to independent institutions can be viewed as a strategy aimed at minimising the trade-off

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between short-term political interests and long-term solutions to functional dilemmas. These reasons for delegation point the fact that governance structures can be perceived as reflexive structures, supported by the EU in order to compensate for its structural deficits. The mutual interests between the institutions and the actors are required in order to establish such structures.\textsuperscript{212} The EU is penalised when it seeks to offset its own deficiencies through governance structures, an example of this is the heavy influence exercised by Member States administrations and private actors on the outcome of EU decision-making or by losing competences to regulatory agencies. In order to eliminate this trade-off between mobilising external resources and safeguarding the EU’s autonomy the Commission has sought to Europeanise external actors, that to engage with pan-European trade associations and lobby groups rather than with nationally organised associations. It has also provided support for the development of pan-European networks of Member States administration. This is visible in the area of comitology and the networked agencies.

These forms of Europeanisation are possible because there is a functional need which provides an environment within which the Europeanisation strategy, consciously developed by the Commission can prosper. When these functional needs emerge, the Member States are faced with alternatives. They can either support reforms of the classical institutional structure and the community method in order to furnish these needs within the EU’s traditional governing structures, as the continued treaty revision procedures partly do, or they can support the outsourcing of decisions to various forms of governance structures such as comitology, agencies and the OMC.

The notion of decisional outsourcing refers to much more than the formal delegation of competencies. Looking at the OMC it implies the Europeanisation of areas that it applied to, yet there has been no formal delegation of competences. In the case of agencies and comitology the delegation implies more than delegation, it is implies a de facto recognition of the autonomy of the structures to which the competences are delegated. Some governance structures such as comitology utilise a high degree of discretionary powers. The governance structures tend to refine policy areas in way which produce fewer options for further policy development as prominent choices are

made at the early stages of development. The delegation of competences always leads to uncontrollable areas which can release forces that posses surprising viability as highlighted by the growth of comitology and the OMC. Each act of delegation implies release of forces that are not controlled by the Member States and obtain results to which the Member States have to respond to later. Therefore governance structures have developed a degree of complexity which means that a complete withdrawal of competences delegated to the governance structures would lead to the collapse of the EU system. The aim will be to discuss these governance structures also known as the new modes of governance, since their use was encouraged by the Commission in its White Paper on Governance.

2.4.1 Comitology

In the 1960s the EU began the task of harmonising the measures of the Common Agricultural Policy.213 The Council did not have the adequate resources available to conduct the work required for the routine management. The Member States were hesitant to provide further powers to the Commission, therefore in 1962 the first management committees were created with Member State representatives who provided opinions on the implementing measures proposed by the Commission. The Commission was provided the possibility to override the opinion by QMV in the case of a negative opinion. Through the 1960s the number of management committees grew resulting in them becoming permanent by 1969.

In 1968 regulatory committees were introduced, in which the Commission was only allowed to implement measures that were positively approved by the committee by QMV, and the matter would be referred to the Council in the case of any disapprovals. The Commission maintained the right of implementation if the Council failed to take action within the set time frame (safety-net procedure). In relation to veterinary policy,

food stuffs and plant health the double safety-net procedure was introduced. This allowed the Council by a simple majority vote to prevent the Commission from the adoption of the measure if the Council had failed to make the decision.

Despite facing criticisms from the EP for neglecting its supervisory function, comitology steadily grew after the launch of the SEA. This was because the SEA ensured that further competences were conferred to Commission, unlike before where the Council could confer complementary competences to the Commission.214 This presented the background for the first Comitology decision in 1987 which established the existing structures and the three general procedures with the exceptions.215 The first of these procedures is the advisory committee procedure in which the committee consisting of Member State representatives chaired by the Commission provides opinions which the Commission is obliged to take. The second is the management committee procedure in which the Commission submits draft measures to the committee consisting of Member State representatives and chaired by the Commission. If the Committee does not approve the measure by QMV then the issue is referred to the Council which may reach a different understanding within a certain time limit. The Commission may postpone the application of the proposed measure for a month and the Council acting under QMV is entitled to reach a different decision within that period. Alternatively, the Commission may postpone the application of measures for a maximum period of three months and the Council can, again by QMV make a different decision within that period. The third is the regulatory committee procedure which contains Member States representatives under a Commission chair. The Commission drafts the measures and the Committee will deliver its opinion on a QMV basis. If the Committee does not agree with the Commission the measure must be submitted to consideration by the Council. If the Council does not act with a specified time of three months the measure will be adopted by the Commission under a QMV. The Council can change the decision within the time frame on a simple majority.

The Commission and the EP showed their disapproval of the procedures because the Member States would more than often opt for the second variant of the regulatory

committee system. The EP applied steady pressure on the Council and Commission for its inclusion within the procedures. This resulted in the 1998 Plumb-Delors agreement, which promoted the Commission to send all legislative proposals simultaneously to the EP and the committees. The Maastricht Treaty provided the EP with the co-legislator status for the creation of the co-decision procedure. The EP attained equal responsibility with the Council for the delegation of powers in relation to implementation within these policy areas and the opportunity to jointly decide on the type of comitology procedure that should be applied. This was followed by the second Comitology decision adopted in 1999.\textsuperscript{216} This decision stipulated that the management procedure was reserved for measures relating to the Common Agricultural Policy, Common Foreign Policy and budgetary policies. The regulatory procedure was reserved for measures regulating technical standards, animal and plant health. The advisory procedure could be applied everywhere it was deemed appropriate. The second Comitology decision altered the regulatory committee procedure deeming it not possible for the Council to reject proposals by simple majority. There was also the requirement for the access to documents in order to boost transparency. The EP’s position was also strengthened as it would now regularly receive information on the proceedings of the committees. The EP may reject proposals if it deems the Council and Commission to be in breach of their allocated powers.

The third Comitology Decision was adopted in 2006.\textsuperscript{217} This introduced changes to the regulatory procedure and the EP. It strengthens the Commission position as the EP and Council need to provide reasons for rejecting the Commission opinions. The continued expansion of the Comitology reflects the increased complexity of the EU due the continuous integration processes which has made it more challenging to process the workload with the classical institutional structure. The Community structures are further faced with structural deficits in terms of cognitive resources. The Commission is particularly dependent on the possibility of mobilising external resources in terms of knowledge and information on the practicalities of implementation and harmonisation.

Comitology did bypass the EP initially; however this was unintentional as the EP at that time did not have the relevant competences. However, it did overcome institutional constraints to the extent that comitology decisions have to be altered in to legislative proposals if comitology did not exist, this would activate the Community’s complex legislative procedures. Having discussed the comitology procedure the discussion will focus on agencies that were also mentioned as a mode of governance in the White Paper.218

2.4.2 Regulatory Agencies

Agencies have been in existence in the EU since 1975. Agencies are different in nature but share similarities such as having a management board, Member State representatives and a mandate which allow the development of guidelines and programmes.219 The Commission has control over executive agencies through its representatives. All the agencies with the aid of their relative committees are required to perform technical, scientific or managerial tasks. There are four types of agencies: these are quasi-regulatory agencies (e.g., EFSA, EMA), monitoring agencies (e.g., EEA, FRA), social dialogue agencies (e.g. EUROFOUND), and executive agencies (e.g., CdT, ETF).220

The social dialogue agencies such as EUROFOUND established in the 1970s, came into existence in order to assist the EU’s social dimension without impinging on Member State competences.221 The Second wave was encouraged by two developments. The first was the finalisation of the internal market in 1992 which raised the need for utilisation of resources in order to bridge the gap between the lack of resources of the Commission and Council and the regulatory tasks which had been Europeanised. Quasi-regulatory agencies were devised in areas which related to the internal market, and they provided complex technical assessments in order to assist the community institutional structure or the comitology procedure. The extended insufficient cognitive resources also contributed to the development of agencies. This has been the case with monitoring

agencies which collate information for decision-making and assist in coordination processes and mutual learning between Member States. The need to avoid institutional constraints in decision-making is not relevant for the establishment of agencies as the discretionary power is held by the comitology procedure and the classical institutional structure. Rather than establishing regulatory agencies that possess discretionary power, the agencies act as network secretariats which provide the existing policy networks with information. Social dialogue agencies also provide forums for sharing information and network management. They allow exchange of information between the Member States, social partners and the European institutions. These activities can be seen as a means of persuasive policy-making. The executive agencies provide technical advice as they utilise resources which the Commission may not possess.

The additional reason for the need for agencies relates to ‘credible commitment’. One way to secure policy credibility is to enhance the functional differentiation between risk assessment and risk management. Risk assessment is responsible for collating information and risk management deals with policy making, in the example of the EMA, which is further discussed in Chapter Five, the risk assessment is delegated to the Commission, while the risk management is conducted by the comitology procedure and the community institutional structure with the intention to increase political credibility. The EFSA which is further detailed in Chapter Five was part of the generic attempt to overhaul the risk regulation in the food stuff sectors. Majone highlights the credibility issues in relation to regulatory governance. The solution would be sought out by delegating powers to European independent agencies implanted in transnational regulators and international organizations. The networks could be more accomplished networkers and made to be in accordance with subsidiarity, accountability and efficiency.

Sandholt refer to ‘the logic of institutionalisation’ as placing rule making the core of EU regulatory governance. The regulatory success of an EU agency is determined on its ability to set the terms of the debate by the regulatory agenda. This authority to set the

222 Ibid page 105.
terms rests with the law governed polity. The issues of concerns are usually related with the agencies interaction with informal networks, which cause them to be unnecessarily busy, and this does not enhance the EU regulatory governance.\textsuperscript{225}

2.4.3 The Open Method of Coordination (OMC)

In view of the development of globalisation and the opportunities arising out of new technologies, the European Council at its March 2000 meeting identified a series of weaknesses in relation to economic indicators, long term structural unemployment, a poor employment rate and under-development of the service sector. The European Council defined what it saw as “a new strategic goal for the next decade to become the most competitive and most dynamic knowledge based economy in the world, capable of sustainable economic growth with more and better and greater social cohesion”.\textsuperscript{226} The aim of the Lisbon strategy was to encourage the advancement of information technologies and establish a climate for innovation by speeding up the removal of service provision and the liberation of the transport and energy markets. The task was to modernise the European Social Model (ESM) by increasing employment, and modernising the social protection systems in order to combat social exclusion. This was an ambitious program, which entailed the reconciliation of economic competitiveness with social concerns.

The symbolic value of the OMC is that after the investment in the monetary union it was important for left of centre governments to show their commitment to social issues. Therefore the EU began attempting to develop a method, which took its vocabulary from the EMU (common objectives, peer review, peer control) without relying on the threat of exclusion that turned Maastricht into a rigorous framework. This led to the introduction of the OMC through the Amsterdam Treaty in order to ensure a balance between the social and economic activities of the Union.\textsuperscript{227}

Although the OMC was launched at the Lisbon Summit in 2000, its origins lie in the hard fiscal provisions and the soft provisions of the EMU. The EU developed the OMC

\textsuperscript{225} Sandholtz and Sweet(1998) European Integration and Supranational Governance. Oxford.OUP.
\textsuperscript{227} Page 8 Dehousse.(2002).
its experience through its involvement in the coordination of national economic and especially employment policies during the 1990s. In relation to the former Articles 98 (New Article 120 TFEU) to 104 EC (New Article 126 TFEU) together with the protocol on the Excessive Deficit Procedure, the Protocol on the Convergence criteria and the SGP introduced rules for budget control and established procedures for the surveillance of national fiscal policies.\(^{228}\) The Member States decided to uphold certain convergence criteria in the form of benchmarks, e.g. a strong government budgetary position with budget deficits that should not exceed 3% of GDP and a public debt ratio of no more than 60% of GDP.\(^{229}\) If the SGP is not complied with then the Council could make a recommendation and issue formal sanctions.\(^{230}\) In the context of economic policy coordination, a multilateral surveillance system was created to guarantee that the national economic policies would not undermine EU economic policy objectives and the monetary objectives for the members of the EMU. The Broad Economic Policy Guidelines (BEPGs) set up a framework for the “soft” co-ordination of economic policies laying out the main objectives and substituting the stringent requirements of the “hard” monetary policy provisions with peer pressure.\(^{231}\) Hence it can be said that the OMC is based on the hard fiscal procedures regarding national fiscal policies and the soft coordination process regarding national economic policies.

Hatzopoulos\(^{232}\) states that the OMC should be viewed as a multi-level process of governance incorporating four levels. Firstly, the Council agrees on the general objectives offering guidelines. Secondly, the Council of Ministers select quantitative/qualitative indicators of national practices. The indicators are chosen via Commission proposals. These indicators are then incorporated into measures and the so called National Action Plans (NAPs). Finally, there is mutual evaluation and peer review between the Member States.

\(^{228}\) Council Regulation (EC) 1466/97 on the Strengthening of the surveillance of budgetary positions and the surveillance and co-ordination of economic policies, 7 July 1997, OJ 2.8.97 L209/1; Council Regulation (EC) 1467/97 on Speeding up and Clarifying the Excessive Deficit Procedure, 7 July 1997, OJ 2.8.97, OJ 2.8.97 L209/6

\(^{229}\) See Article 2 of the Protocol on the Convergence Criteria stated in Article 109 of the Treaty establishing the European Community.

\(^{230}\) Dehouse.(2002).

\(^{231}\) Article 99 EC.

Multilateral surveillance is reliant on peer review, which involves multi-level monitoring and evaluation of national policies by other governments. It is aimed at bringing states to adhere to certain standards and implementing best practices through international comparisons. As there are no means of sanctions any impact on national governments has to result from mild pressure of having to justify the action in the light of a the evaluations in relation to the compliance of this action with the set joint goals.233

One of the major advantages of the mutual exchange, comparisons and analysis of the policies between the Member States is that it allows for an enhanced understanding of each other problems. This is a rather delicate process that nonetheless has visible effects. One effect is a kind of osmosis-a diffusion of ideas, a better comprehension of country policies by responsible officials in other Member States, and the anticipation of a more sympathetic response by others to these policies (and vice versa).234 This calls for regular contacts that also foster mutual appreciation and trust. The evidence from the participants in OECD meetings suggests that this intangible element has given them much better insights and has influenced their thinking.235

The new mode of governance constituted open participation, exchange of policy ideas, use of benchmarking, exchange of best practice and cooperation within a multi-level framework of governance. This process is defined in general terms by the European Council, is structured in more detail by the Commission and the Council and implemented under the supervision of the executive of the European Union and in most cases ad hoc committees. As the OMC lacks sanctions mechanisms, the Member States face a moral constraint rather than legal restraint. Thus the OMC can be seen to be the ‘means of spreading best practice and achieving greater convergence towards the main EU goals’. 236

234 Ibid.  
The effectiveness of multilateral surveillance depends on establishing peer pressure and persuading reluctant actors to participate. Schafer\(^{237}\) highlights six elements that characterize this mode of policy making. They apply to all the four surveillance procedures:

- Definition of legally binding common goals;
- Exclusive national implementation;
- Monitoring and reporting by the Secretariat including bilateral contracts;
- Multilateral discussion (peer pressure);
- Country specific recommendations (non enforceable);
- Publication of results (public pressure)

The OMC has become one of the main tools in social policy making with formal processes in 2001-2003 for social inclusion, pensions and healthcare. In March 2000 the European Council extended the use of the OMC in areas such as research/innovation, information society/e-Europe, enterprise promotion, structural economic reform, and education and training. The OMC has been used by the European social partner organisations to monitor and follow up the non-binding framework agreements at both cross-industry and sectoral levels as recommended by the European Commission’s High Level Group on Industrial Relations.\(^{238}\) The OMC processes have been nominated by the Commission for monitoring and aiding existing legislation in fields such as immigration, environmental protection, disability, health and safety and fundamental areas where the EU has very limited powers. These various OMCs have been classified from “weak” to “strong” by reference of three criteria which are related to the choice of the common guidelines; the sanctions that could be imposed and finally the roles provided to the variety of actors.\(^{239}\) Accordingly, there is no such thing as one OMC; there are as many OMCs as there are policy areas.

\(^{237}\) Page 82. Schafer.(2006).
\(^{239}\) Page 312. Hatzopoulos.(2007).
The Lisbon Summit acknowledged that a decentralised approach would be taken in accordance with the principle of subsidiarity\(^{240}\) in which the European Union, the Member States, the regional, local levels, civil society and social partners would take an active role. In relation to the OMC the Commission stated that it is used on a case to case basis. The use of guidelines could be backed up by the National Action Plans (NAPs) employment and social exclusion. It can complement the programme based legislative approach and operate at the European level where there is little scope for legislative solutions. However, the Commission was clear that the use of the method must not affect the institutional balance or distort the objectives of the Treaty. It should not exclude the European Parliament from the process and that it needed to operate to compliment the Community action not substitute it.\(^{241}\)

At the Lisbon Summit it was also agreed to hold an annual European Council meeting every spring in order to monitor the progress followed by Lisbon. Consequently at the Laeken Summit the Council allowed for a European Social Affairs Summit before the Spring European Council Summit.\(^{242}\) The European Council in Goteborg further invited Member States to produce their own national sustainable development strategies and establish national consultative processes. The European Council with the Commission set up a monitoring and review system. The Commission would represent an annual synthesis report on the headline indicators.\(^{243}\) Furthermore, a level Forum was held in Brussels in June 2000 to access the Luxembourg, Cardiff and Cologne processes as it was agreed that there was a high degree of consent on the Lisbon strategy.\(^{244}\)

\(^{240}\) Subsidiarity is under Article 5 (3)TEU Treaty of Lisbon, which states that: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather by reason of the scale or effects of the proposed action be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down by the Protocol on the application of the principle of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.


\(^{242}\) Presidency Conclusions of the European Council, Laeken 14 an 15 December 2001 page 7 para 23.


\(^{244}\) Presidency Conclusions of the Santa Maria Da Faria Summit 19-20 June 2000 para 20.
As mentioned before OMC was defined by the Portuguese Presidency at Lisbon and afterwards in terms closely modelled on the European Employment Strategy as involving a specific ensemble of elements:\(^{245}\)

- Fixing guidelines for the Union combined with specific timetables for achieving the goals that they set in the short, medium and long term;\(^{246}\)
- Establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practices;\(^{247}\)
- Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;\(^{248}\)
- Periodic monitoring, evaluation and peer review organised as mutual learning processes.\(^{249}\)

In the short term Featherstone pointed out that soft coordination at the EU level failed to affect hard politics because ‘the empowerment of the EU is limited in nature: it lacks precision; sufficient temporal discipline and the costs of non compliance are too low. These features create a weak advantage in the face of the domestic impediments’.\(^{250}\) He stated that ‘instead of restructuring a bargaining game on distributional issues affecting core interests, the EU stimulus was probably more evident at the cognitive level……in terms of policy style’. Therefore the ‘Government’s ability to choose the social model is more constrained by entrenched privileges at home than market pressures from the EU’.\(^{251}\)

The OMC has allowed the EU to diffuse in areas where the treaties do not anticipate common policies. Employment and social protection are vital sectors for all


\(^{246}\) Ibid.

\(^{247}\) Ibid.

\(^{248}\) Ibid.


\(^{251}\) Ibid at Page 747.
governments as economic structures whilst the tax system allows governments’ margin for manoeuvre. Therefore a political majority’s ability to stay in power will depend on the mastering of such instruments and therefore not willing to give up control. The common disciplines in these areas have been accepted for various reasons. One of them being that the existence of monetary union has acted as a catalyst. The margin of manoeuvre has been reduced to the existence of the Stability Pact. The long term viability of social protection systems has become a major concern in some European countries. The fear of decentralising in the area of social protection has encouraged the introduction of mechanisms to ensure co-ordination between Member States. The reasons to justify minimum convergence are of two types: firstly, unemployment and an ageing population and secondly, the adverse effects of excessive competition between Member States. Therefore, utilizing flexible coordination appeared as a compromise between the EU’s aspiration for action and the Member States’ desire to maintain a degree of control over their political future.

At the first glance the OMC seems to comply with subsidiarity as it is considered to being more inclusive, through allowing the participation of stakeholders and interested parties. However, the introduction of the Protocol 2 of the Treaty of Lisbon has resulted in the increased use of soft law. This added workload makes it harder for national parliaments to constantly monitor the terms of references and practices. The use of indicators, benchmarks and peer reviewing provide a degree of accountability for the decisions taken under the OMC. However, its main concerns lie with it allowing different levels of participation for Member States. The Scrutiny Committees seem less concerned with proposals for policy coordination, which are concerned with a small group of Member States.

The fact that the OMC does facilitate participation of multiple stakeholders in policy making does support input legitimacy. The Commission does not have monopoly on the proposals, but due to the intensive stakeholder input the national parliaments cannot still adequately monitor the OMC. The parliamentary control set by the scrutiny procedures

\[\text{Protocol 2 of the Treaty of Lisbon allows national parliaments to exert some control over the legislative process. Subsidiarity monitoring occurs through a collective exercise, as if the national parliaments secure the relevant thresholds then the Commission has to reconsider the legislative proposal. For a detailed discussion on subsidiarity monitoring see Cygan, A. (2013). Accountability, Parliamentarism and Transparency in the EU. Edward Elgar: Cheltenham.}\]
seem less relevant as it is the civil servants who formulate the policies. It is argued by Cygan that the main reason for the limited participation in the scrutiny of the OMCs is that national parliaments do not receive enough information from their governments, and it is then for the national MPs to request the documents.\textsuperscript{253} The Barroso Commission’s initiative requires the consultation documents to be sent to the national parliaments, however national parliaments have limited time and resources and therefore prefer to prioritise time for reviewing hard law proposals.\textsuperscript{254} National parliaments need to be encouraged to devise internal scrutiny mechanisms to ensure accountability of the OMC, the increased use of the OMC should not allow the possibility of a new democratic deficit and competence creep. National parliaments may maximise the accountability and transparency of any reviews they make under the OMC by developing scrutiny techniques and processes for information gathering. This would support the underlining purpose of the OMC, which was to provide new ideas to civil servants and national politicians to improve policy formation.

The issue of democratic deficit is a major institutional concern following the expansion of the OMC. Although the OMC promotes policy coordination through the use of soft law, it is open for the national parliaments to scrutinise the policy co-ordination, but as mentioned earlier it is not realistic given their existing responsibilities. The issue of democratic deficit has arisen from the underdevelopment of the institutions and processes of parliamentary democracy at the EU level.\textsuperscript{255} It is referenced against the parliamentary model of government, whereby the principle of the separation of powers is upheld and the executive is directly responsible to an elected parliament. The EU’s democratic deficit continues, as despite the EP being the only elected institution which represents the EU citizen, ‘there is a disjuncture between this constitutional position and its real position with EU citizens’.\textsuperscript{256} Most of its functions are remote, technical and distant from the EU citizen. Although it is a directly elected institution its representative function is undermined because of the low turnout of the EP’s elections. Moreover, the EP remains less focused on building its relations with the EU citizens and prefers to strengthen its relationship with the Council and Commission. The issue of democratic

\textsuperscript{253} Page 64. Cygan, A. (2013).
\textsuperscript{254} Ibid Page 65.
deficit could be addressed by involving the Committee of Regions (CoR) in the OMC processes, alongside the national parliament or EP to monitor/evaluate the OMCs. This would also act as a monitoring mechanism to ensure that the Commission does not excessively control the OMC processes. The CoR’s White Paper on Multi-Level Governance\textsuperscript{257} reinforced that European democracy would benefit from more inclusive and flexible inter-institutional co-operation, accompanied by sustainable political cooperation between the various levels of governance.

The collaboration of the CoR, EP and national parliaments to monitor the OMC is further supported by Cygan as he argues that ‘inter-parliamentary is increasingly becoming a vital component of the process of seeking democratic legitimacy and of the process of seeking democratic legitimacy and of the process of drafting European legislation’.\textsuperscript{258} Multi-level governance and its institutional arrangements allow better engagement of local and regional authorities in the process. The creation of the CoR itself is recognition that the EU must acknowledge regional interests, and multi-level governance presupposes that all levels of government are stakeholders and should contribute in the decision-making processes. The suggested use of the CoR combined with the EP and National Parliaments would allow the OMC (as a new mode of governance) to participate in a multi-level context and help to shape and assist the responsibilities of regional and local authorities to design and implement EU policies. This ethos is at the base of the Europe 2020 programme, which places its significance on achieving EU policy objectives through regional governance via improved procedures of policy co-ordination. A detailed discussion on the Europe 2020 programme with my suggestions for the Social OMC will follow in Chapter Four of this thesis.

Political reasons may contribute to the ineffectiveness of the OMC. The White Paper on Governance stated that “policies must be timely; delivering what is needed on the basis of clear policy objectives”.\textsuperscript{259} The Commission claimed in its Plan D Communication that that “people need to feel that Europe provides an added value”.\textsuperscript{260} From these

\textsuperscript{259}COM(2001)428.
claims, the Commission’s role in the various OMCs need to be questioned, especially if the OMCs have no enforcement mechanisms in place to achieve and monitor progress. The failure to implement the Lisbon Strategy could be seen as a topical example. The objectives of the agenda may have not been implemented but the benefits of almost a decade of the application of a sanction-less OMC are barely visible (since its introduction with the Treaty of Amsterdam). It seems idealistic to set specific time frames and then to keep them with the OMC as the key method in order to implement of the relevant policies. Therefore, keeping this in context the 2010 target included in the initial formulation of the Lisbon Strategy as a credible timeframe for the achievement of its objectives has been dismissed after the mid-term evaluation and the project has become an “open” one.

The 2005 spring European Council realised the mid-term failure of the Lisbon Strategy and made the process an ‘open’ one. The French and the Dutch negative referenda resulted in the European Council to decide on the option to make the strategy an open one or to drop the open method of coordination as the means of its achievement. It opted for the former.\textsuperscript{261} The negative votes in the referenda could have been due to the ‘fear of the harmful effect on jobs, the present economic labour market situation, [and] the impression that the Constitution leant too much towards the liberal or not enough towards the social’\textsuperscript{262}, all which would have been achieved if the Lisbon Agenda were pursued successfully.

Scholars, such as Wincott, suggest that the OMC alters the institutional balance established by Article 7 of the EC (Article 13 TEU); there are also arguments that it produces a shift to inter-governmentalism,\textsuperscript{263} as the EP and the CJEU are also not included in the procedure. The Council’s role is also reduced because the special committees that contain ad hoc Member States officials decide whether or not the Council can participate. The findings are sent to the COREPERs and the Ministers. The Council will not intervene in areas where there already have been agreements.\textsuperscript{264}

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the Council in the overall institutional setting of the EU. It is envisaged that that OMC has added a second head of competence in favour of the European Council, followed by the powers instituted by Article 4 EU Treaty (Article 15 TEU). Whereby, the European Council is to provide the necessary impetus to the Union, the OMC attributes to the same body a second ground of powers: define general objectives and guidelines.265 The EU and its institutions address the former the Member States address the latter. Therefore the European Council has a broader agenda and the meetings prepared by the way the COREPER would prepare the meetings. However contrary to the Council the decisions are reached via unanimity thereby endangering the role of the Parliament and Commission.266

In my opinion the Commission’s strong involvement with the OMC is unnecessary, as other means already exist which provide the Member States the opportunity to exchange information both inside and outside the EU. For instance, the COREPER is a platform where national legal rules, administrative and experiences are shared. The Exchange of information plays an important role in the functioning of the COREPER. The committees that do the preparatory work for the COREPER are composed of the Member States officials, supported up by national experts who are experts in their fields. In addition, sector specific national regulatory agencies (NRAs) are also required to report to the Commission. Some of these NRAs are set to operate in EU-wide networks with the coordination and under the control of the Commission.

There are legal mechanisms in place enforcing the Member States to provide information about the measures that they have in place, for example the Directive 98/34267 on the notification of all technical measures introduced by Member States in the field the free movement of goods and information society services. There are some directives that have the broad characteristics similar to the OMC. For example, the directive on environment impact assessment268 provides a procedural framework for decision-making; and for review and participation. However, unlike the OMC that includes citizens’ involvement, the individuals can take the matters to their national

265 Ibid.
266 Ibid.
courts to protect their individual rights. Based on the criticisms mentioned above it is recognised that the way the OMCs are instituted are commendable however there are suggestions which would improve the current way the OMCs operate. 269

Firstly, the problems with the current set up of the OMCs are that the their “openness” does not allow for the achievement for specific objectives within certain time frames, therefore may be it would be better if OMC were not used where there are strict time limits to adhere to. Armstrong 270 suggests that the OMC should be used in areas where unilateral policies of one Member State would produce detrimental results for the other Member States. The objective of the OMC would be:

‘To arrive at more or less similar results for States [as with the Community Method] but without a transfer of legislative competence to the EU to achieve that result (either because legislative intervention would be inappropriate or because Member States are reluctant to cede competence in this area). The problem with this sort of coordination is that it is continually begging the questions: why co-ordinate rather than legislate; why stimulate decentralised policy making rather that centralise policy making: why meddle in the margins rather than concede competence?’ 271

Secondly, the OMCs should be self evaluating and transparent. The EES is a valid illustration on how to rationalise the use of the OMC. Since the 2005 streamlining, the employment guidelines are integrated in the BEPGs; are designed to cover a three-year period and are subject to a concise timeframe and structure covering phases from conception to evaluation. This structure could be replicated for less mature OMCs. Also in order to make each OMC less restricted and

269 Directive 2000/60/EC [2000] OJ L237/1, see Page 338 Hatzopoulos. The main objective of the OMC should be identified in the initial stages. Therefore a first type of OMC should be used as a means for bringing about the implementation of EU hard law by the Member States. A type of OMC is already taking place in the form of the Water Framework Directive as a complement to the open ended terms and the apparent autonomy left to the Member States by the directive. These are constrained by the “Common Implementation strategy” which resembles the OMC. A second category of OMC could be implemented where there is a strong leadership or consensus as to the general objectives to be achieved.


be a better representative of the stakeholders it would be beneficial to increase the participation of the EP.

Dehousse\(^{272}\) points out that to argue that the OMC is not capable of influencing the choices of national governments would be taking it too far. The current soft version of the coordination processes could be a source of external restraints for the national authorities.\(^{273}\) The restraints are mainly procedural. The formation of ad hoc bodies at the European level allows governments to participate in joint efforts to include collating data creating schedules for national action. The OMC may force the Member States to take in consideration the new approaches and instruments. Open coordination can therefore result in political restraints. Some actors may use the European constraints as a lever to promote their domestic reform agenda. The OMC’s main focus on the management by the objectives may confine the Member States specific logic, which would be hard to escape. While, quantative indicators are good yardsticks enabling a large audience to monitor the development of policies. The time management aspect can also act as a constraint for the Member States. The time set for most objectives is ten years. This provides commitment, as no matter who win the election winners are they will work on the best practices. It would be difficult for them to gain positive public opinion to support why they consider themselves not bound by the objectives set in sensitive areas such as employment or fight against social exclusion. All three modes of governance outlined in the chapter so far have one thing in common they are governed by networks.

For all the three governance structures three corresponding theories have been devised. Majone’s theory of the regulatory state places the focus on regulatory agencies. Joerges and Neyer’s theory of deliberative supranationalism analyses the comitology procedure, and Sabel developed the theory of DDP, which relate to the OMC. These theories intend to analyse how the three forms of governance have come in to existence and evaluate the way they function. The proponents of the three theories are de facto acting as ambassadors for the governance structures on which they focus. Hence the three theories can be understood as policy proposals, which have been developed in order to underpin and promote specific forms of governance. These theories can be

\(^{273}\) Ibid.
acknowledged as reflecting the self-understanding visible in the three forms of governance structures. Finally, it will be argued that the three theories are reliant on different assumptions of rationality and three concepts of power: steering, consensus and code of conduct. The elements of the three theories are inclined to talk at cross-purposes. They fail to endorse the fact that the three forms of governance should be perceived as complementary rather than mutually exclusive structures.

2.5 The Regulatory State

This theory as presented by Majone encourages the delegation of discretionary power to non-majoritarian institutions such as agencies. He advocates the delegation of authority as an institutional response to the need to balance short-term political goals and long-term solutions. Majone argues that even if the regulation is seen to be adequate resorting to political intervention in discretionary policy areas leads to adopting policies that are already out of date by the time they come in to effect. This may result in more harm than good, as despite the short-term gains, the process may suffer from structural deficiencies, as it may not possess the instruments required to adjust to the changes. The limited effectiveness due to the time lags may illustrate the limited cognitive resources of the politicians and the institutions. Majone instead argues that the reason for delegation of powers by the politicians may be due them protecting policy areas from their own short-sightedness.

The non-majoritarian structures avoid short sightedness because they built upon three proponents. The first is having a strong sense of purpose as one institution is designated the responsibility of regulating a policy area. Secondly, the institution possesses values such as professional discretion, independence of judgment and fairness. Thirdly, the institution provides a broader institutional perspective that implies adopting polices that may be maintained for overtime. A combination of these elements provides the optimum base for policy interventions.

Applying the theory of the regulatory state to the EU Majone argues that regulatory procedures need to take into account of structural changes to the economy through internationalisation. Functionally, this creates the need for the transfer of competences from the national setting to the EU. Majone argues that the delegation of powers to the EU in many areas exceed what is required in order to establish an internal market. This is the result of regulatory competition which provides the Member States with incentives to agree to common rules through delegation to a neutral party.  

Majone’s theory of the regulatory state illustrates that the delegation of power resulting from power residing with the sovereign. His understanding of politics is derived from the pluralist perception of actors competing for power. Power may be utilised to intensify economic interests, and that markets should independently regulate them with minimum state intervention.  

Majone’s concept of bureaucracy exhibits the Weberian norms of modern bureaucracy such as professional discretion, policy consistency, fairness and independence of judgement. However, the Weber approach does not take into account the bureaucracies invoking their self interests and partial break down of hierarchy. Overall, the transformation of the integration processes and the turn to governance highlight that Majone’s Weberian proposal is out dated. This is obvious as only a limited number of agencies possess discretionary powers and none have complete independence. The other major issue with Majone’s proposal is that it assumes the EU’s evolution to a state. There would be the need of a vast delegation of competences from Member State to the EU and that the regulatory agencies would need to have exclusive competence in its field. His proposal an example of the classical liberalist concept of power would require further centralization of powers at the EU level; this would result in vertical governance as opposed to horizontal governance as conducted by the governance structures.

277 Ibid.
2.6 Deliberative Supranationalism

Joerges and Neyer argue in their theory of supranationalism that the comitology structure provides a framework for deliberation at the European level.\(^{281}\) They dismiss the Habermas ideal that national constitutional structures should be replicated at the EU level. They perceive the EU as a hybrid structure it is more than an international organisation and less than a federation. They claim that the normative ambition of ensuring legitimacy via deliberation is already being realised through Comitology.

Comitology is viewed as an area of deliberation as it provides a framework for ensuring a procedural infrastructure allows the achievement of a consensus through deliberation. However, this ideal is not totally achieved through comitology due to its political-administrative practices. Deliberative supranationalism is therefore advanced as a partly normative and partly descriptive concept to close the gap between the normative ideas and political realities.\(^{282}\) Deliberative supranationalism can be perceived as a hybrid concept developed for hybrid structure as it acts as a regulatory idea and evaluates how administrative processes develop in the European sphere. Joerges and Neyer point out why the transforming EU integration processes and constitutionalisation have not led to a regulatory state because they argue that the Commission and the Member State possess the discretionary competences within the comitology procedure and do not fully encourage the use of regulatory agencies as was proposed in the White Paper of Governance, because the idea of a regulatory state does not take in to account the normative and political aspects of regulation.\(^{283}\) There has been no evidence of any constitutional state delegation risk regulation to non-majoritarian institutions. Also as stipulated in the risk regulation example scientific knowledge acts as a filter for strategic objectives. Joerges and Neyer point out that the elements of the principal-agent theories fail to clearly recognise the role of the universally accepted scientific knowledge and scientific argumentation in everyday decision-making in risk regulation.


Deliberative supranationalism is supported by the Habermas ideas of power being a communicative force driven by consensus and strategic interaction, also to promote rational policy decisions through consensus and deliberation and that a one sided approach is not acceptable from a normative basis. However deliberative supranationalism introduces a large critique of Habermas’s deliberative theory. The issue is that Habermas is related to Arendt’s concepts which acknowledge power to be reserved with the political sphere. Habermas perceives bureaucratic structures as inherently problematic rather than independent spaces for deliberation. This leads to the separation between system and lifeworld in his theory of communicative action. Lifeworld is seen as ‘culturally and linguistically organised patterns of interpretation within which subjects find themselves’. This common ground consists of certain beliefs which allow for two or more subjects to formulate a common understanding of the world on the basis an existing shared interpretation. Allocating the concept of lifeworld to the non-bureaucratic and non economic spheres of society, Habermas utilises a simple understanding of the function and self-understanding of bureaucrats and a limited view of social practice occurring between the bureaucratic structures.

Luhman focuses on the concept of reiteration in the efforts to develop trust as a concept as a substitution to the Habermasian concept of the lifeworld. Every repeated social operation is a condensing operation which increases the pre-knowledge available for future operations. The forceful role of procedures in bureaucratic organisations, the result of the Luhmann approach is that he can maintain that the lifeworld becomes a strong feature of the social operations of such operations. Therefore, Luhmann can claim that potential basis for evolution of the social dimension of rationality is in fact relatively stronger with the realm of bureaucracy than elsewhere. This allows Luhmann to affirm that not only the pre-knowledge which is claimed by Habermas but social norms also play a vital role within bureaucratic structures.

285 Ibid.
286 Habermas.(2001).
287 Ibid.
289 Ibid.
From Luhmann’s viewpoint Joerges and Neyer’s efforts to expand the normative reach of Habermas’s theory to include bureaucratic structures may be seen as reinforcement.\textsuperscript{290} Habermas, however dismisses supranationalism due to the lack of input-legitimacy within regulatory structures such as comitology, instead he insists that bureaucratic structures need to be kept under the control of the public sphere if the normative ideal of achieving legitimacy is to be achieved through deliberation.\textsuperscript{291} Joerges and Neyer have seemed to utilise empirical evidence to illustrate that comitology decisions issue from consensus obtained through deliberation rather than bargaining.\textsuperscript{292} However, the limited extent of their empirical investigations it remains a challenge to extrapolate from them to the broader range of committees in the EU system. Therefore, the extent to which the theory of deliberative supranationalism can be generalised remains questionable. The theory and the empirical evidence need to be extended in scope if deliberative supranationalism is to develop in a general theory of comitology.

2.7 Directly-Deliberative Polyarchy (DDP)

DDP will be discussed in greater length in Chapter three. Here it is important to emphasise that the theory of DDP emphasises direct participation, deliberation and concrete problem solving. Sabel and Zeitlin argue that the OMC expresses the essence of DDP. It is directly deliberative because allows actors with direct field experience to bring about different reactions and open new possibilities. It is polyarchic because it is a system which allows local units can learn discipline and set goals for each other.\textsuperscript{293} Studies on the OMC as an operational mode highlight that the committees facilitating the OMC provide room for deliberation and exchange of ideas and present a move from mere ‘cheap talk’ to achieving valid decisions with vital policy applications.\textsuperscript{294}

\textsuperscript{292} Joeges and Neyer (1997).
It has been illustrated that the notion that actors participate freely within the OMC is a myth.\textsuperscript{295} The OMC does not really work from the knowledge provided by the actors on the ground rather it is based on models. These ideal models are devised in close circuits with participation from civil servants.\textsuperscript{296} Therefore overall the ideals of the DDP which are deliberation, participation, pluralism and the mode of operation of the OMC undermine the OMC’s definition as a ployarchic process. The DDP was devised in the US context and transferring it to the EU limits its value. For example DDP aims to complement the classical institutions of power yet at the EU level institutions characterising democratic nation are still being developed, especially institutions that mediate between governors and governed. It is therefore hard to define the EU as a democracy since there is no locus of power hence impossible to see who governs through general elections. The DDP employed models such as the OMC are likely to produce unintended results in comparison to the US.

The OMC’s impact is not easy to assess as it is not devised to produce real decisions, rather its function is to transform discursive structures and utilise a common language such as indicators, targets; a common knowledge bank and evaluation of results. The majority of areas that it applies to have recently been uploaded to the European level, the OMC can be perceived as an instrument of entrepreneurial discourse construction. It creates European universes within policy areas that had previously been dominated by nationally embedded discourses. Hence it can be used to create new fields of action. Its emphasis being on soft indirect and invisible power largely deployed by the shadow of hierarchy, the OMC highlights the continued relevance of Luhmann’s distinction between power, with its foundations in negative sanctions and influence.

The three theories of governance associated with the regulatory state, comitology and the OMC emerge from three different schools of thought and different assumptions about rationality and power. The substantive part of the three theories prefers to focus on the development of policy proposals rather clarifying their theoretical basis they are inclined to communicate at cross purposes. In the larger context of integration they tend to focus on various policy areas and regulatory structures with the result that their

\textsuperscript{296} De la Porte.(2002). Is the Open Method of Coordination appropriate for organising activities at the European level in sensitive policy areas? European Law Journal 8(1) 38.
theories remain partial, none are complex to allow the whole range of regulatory measures at the European level.

The development of such a theory is difficult due to the extreme dynamics of the evolutionary regulatory measures at European level. A clearer picture can be developed though contextualising the different modes of governance within the larger realm of the European integration processes and by strengthening the focus on the societal functions which different forms of governance structure reproduce within this setting. The base for such a theory would have to be a multi-dimensional concept of rationality which is capable of incorporating the functional, social and time dimensions of social structures, but also maintains that they are equally important. Although, the weight of each dimension will vary within different contexts and in relation to the reproduction of different societal functions. The diverse characteristics of power, as acknowledged by Foucault should be perceived at the same time as the higher density of power within formalised institutionalised forms should be taken in to account. Moving away from a wide concept of power including all forms of communication, it is important to devise a concept of power that illustrates the steady differences in the density of power. A concept which acknowledges the differences between the OMC and the regulatory agencies highlighting the differences in the societal functions produced also implies that social relations are characterised by different degrees of asymmetry and differences in the relative weight between different forms of power. This concept would be able to provide the foundation for understanding that the three forms of governance are complex ideals, the societal functions of the three forms of governance draw in three modes of regulating social interaction; they perceive themselves as geared towards gaining convergence, harmonisation and steering. The three forms are jointly linked with the aim to achieving further integration and can be identified as pre-integrative, integrative and post-integrative forms of governance.

The OMC is utilised to upload areas which were not in the European sphere and seen as policy areas falling outside the community method. Due to the divergences in the organisation in the relative policy areas across the Member States, the OMC can be seen as providing attempts to achieve convergence in policy areas where political resistance and technical difficulties facing harmonisation are high. From this aspect, the OMC may
be able to provide a structural basis for increased integration through competence transfers at a later date.

Comitology aids integration by harmonising, revising standards by transferring competences. This is contrast to the OMC’s role as a soft mode of governance which does not transfer competences. Comitology, therefore has been utilised in the intense phases of integration when the technical specification of new harmonising initiatives needed to be fleshed out. Although the policy proposal of a concept of a regulatory state remains unachieved, if it were to be introduced by constructing regulatory agencies with full discretionary powers, the EU would have state-like powers in those policy areas which would lead to the completion of integration processes. This would refer to moving towards the post-integrative phase where the main policy concern would no longer be the question of enhanced integration rather the day to day task of steering top to down steering in the relevant policy area. As EU competition policy highlights that these forms of steering are unlikely to prevail as a dominant mode of regulation in a hybrid structure such as the EU. On the contrary, as Majone points out that limiting centralisation continues to be a long-term outcome within competition policies and with the Common Fisheries Policy.  

2.8 Conclusion

The discussion in this chapter focused on the EU’s turn to governance, and the emergence of the new modes of governance. The use of the new modes was encouraged by the Commission through its White Paper on Governance. The new modes of governance were supported by the theories of power which were highlighted within the chapter. The aim of the next chapter is to evaluate the three theoretical approaches, namely proceduralisation, DDP and reflexive law. These methods acknowledge that the OMC as a new mode of governance can be viewed as internal to the law in the way that it adapts traditional understandings of legality in an EU which is divided in a normative basis and functionally more complex. These three approaches will be jointly evaluated to conceptualise the OMC SPSI.

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Chapter Three

Relations Between Governance and Law: An Insight to the Theoretical Models Associated with New Governance

3.1 Introduction

The previous chapters discussed the classical integration theories, the turn to governance and the emergence of the new modes of governance. In this chapter I wish to extend this discussion to proceduralism, DDP and reflexive law. All three important schools of thought and view governance to be inside the legal terrain. By the latter I mean that it works to adapt or transform legal structures within the fractured political reality. I will firstly examine the outside position which maintains that law and governance are seen to external to each other. I will then extend the discussion to argue that law and governance are not seen as separate components but have evolved from common pressures within the EU order. The outside approach bears the risk that the interrelations between hard and soft legal methods are downplayed.

The discussion will then highlight challenges and positive features of the inside or procedural understanding of the law and governance relationship. The main argument I will make is that the inside position views new governance methods such as the OMC as an internal response to the EU’s changing social and political processes and not an extra-legal development. In such circumstances, legal and political concepts such as rule of law and accountability are reformulated. But such an approach may also be criticised on the ground that the inside approach may allow the dominance of executive institutions and undermine democratic institutions.

The ‘inside theories’ that treat governance as an intra-legal concept will be discussed under three headings namely reflexive law, proceduralisation, and experimentalism. The three approaches highlighting the various types of functional and territorial complexities within which the OMC Social Protection Social Inclusion (SPSI) has to operate in will be discussed. It is important to examine how beneficial the procedural framework is in the areas where the OMC is utilised. Also to assess whether or not the assumptions of the OMC as an experimental or procedural regime have any strength to them? Secondly,
there is a need to investigate whether the theoretical approaches have normative percussions. Is the procedural rationale operating sufficiently to revitalise traditional norms such as accountability, democracy and the rule of law while providing descriptive codes, or does it face tensions? The chapter will analyse the OMC in the light of these queries and will evaluate the OMC SPSI under a particular analytical arrangement. This arrangement contains five features, namely, OMCSPSI’s display of cognitive features, the OMCSPSI’s display of adaptive features, the OMCSPSI’s display of participative features; OMCSPSI’s display of reflexive features, OMC SPSI’s display of procedural features. The central question is whether or not these features are prominent in the OMC SPSI. This arrangement will be tested to determine the weaknesses of the inside approach; and my argument in this context will be that the OMC SPSI exists of all five features, but has opposing procedural values and tends to promote the hierarchies that it was intended to eliminate. The final part of the chapter recommends adjustments to the inside approach, and a possible reform agenda of the OMC will be articulated in Chapter Four.

3.2 The ‘Outside Approach’

The White Paper on Governance which was the Union’s official response to the turn to governance as discussed in Chapter two also promoted the outside approach. 298 It acknowledged that the OMC would allow the coordination of social and employment policies where the Treaties would not allow it. 299 The OMC as a coordination process was only allowed to be applied in areas where there were no constitutional constraints set by the Treaties. 300 The positive elements of governance can only be appreciated through its separate functional and procedural roles from ordinary law making.

The Working Group examining the OMC for the Constitutional Convention highlighted the same view that the flexibility of the OMC may be adversely affected if it is added in a constitution. 301 Following this argument there is potential danger to the OMC and its legitimacy if governance is viewed through law. In this instance outside theories can

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300 Ibid Page 22 White Paper states ‘The use of the OMC must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions. It should not be used when legislative action under the Community Method is possible’.
provide better normative argumentation about the ‘gap’ between governance and law can achieve.

This normative position can be viewed in two ways. Governance and law are separate and this separation could be seen to complement existing legal structures. In such circumstances, the OMC would be working to enhance the legitimacy and effectiveness of the EU. On the other hand, the separation between law and governance could endanger the existing legal structures as it would provide alternative routes for policy formation from the traditional methods. Whilst in this instance the OMC would be moving from legality and the rule of law. The question is there a ‘gap’ as Scott and Trubek refer to it in law and governance and if so what is the purpose of such ‘gap’?\textsuperscript{302}

In the next section, these differences will be examined through a functional perspective by examining the contributions from methods such as the OMC which the traditional methods fail to provide. Has the OMC got its own steering power? Alternatively, does it utilise legality, democratic legitimacy and other values to aid its ability to steer? Secondly, from a procedural perspective, what are the positive or negative contributions to the constitutional structure of the EU emanating from this law and governance relationship? New governance may provide a constitutional compromise or it could have a negative impact on the EU’s social and democratic deficit.

3.2.1 The Outside Theories: Law and Governance; Mutual Complementarity versus Mutual Exclusivity.

The notion of the gap between law and governance is based on firstly the idea that governance is able to perform those tasks which traditional methods would fail to do so. Secondly, this very difference may be very mutually beneficial.\textsuperscript{303} This argument originates from noting that new governance methods such as the OMC are free from hierarchical control therefore can perform tasks (which may include delivering technical advice) which would not be possible if traditional legal mechanisms were utilised. However this may be one of the reasons why the turn to governance may not be appreciated, as the use of the OMC in increasing fields of complementary competences


means that it undermines the value of Union law. The procedural guarantees provided by EU law cannot be undermined irrespective of whether the instrumental targets are achieved. Similarly, the Member State or institution’s use of flexibility cannot undermine the right to take them to the CJEU on their relevant failures to fulfil policy requirements.

The differences between law and governance despite being functionally advantageous pose institutional threats to the Commission, thereby affecting the Union’s constitutional balance. The White Paper on Governance acknowledged that governance may be able to further the steering power of the EU. Yet in the same document the Commission perceived governance as a threat to its institutional role and having the potential to ‘upsetting the institutional balance’. Hence if new modes of governance are to be used they may only be utilised with the aim of ‘strengthening’ and revitalising the community method.

As suggested before in Chapter Two of this thesis the Commission’s competence could be curbed if the CoR would monitor the OMC (new form of governance). The CoR would allow regional actors and stakeholders to participate and monitor the OMC rather than decision-making to be left to the merely executives within the Commission.

Integration theories ranging from supranationalism and neo-functionalism to intergovernmentalism as discussed in Chapter One are used to explore whether the difference between law and governance has had an impact on the EU’s constitutional structure and if the OMC has had an influence on the EU’s constitutional balance. However, it can be argued that governance methods can by their characteristics escape such dichotomy. In the example of comitology a balance has to be struck between powerful actors exercising their authority and the Member States preferences. The OMC is not just a form of intergovernmental bargaining but it does not also allow Europeanisation in the areas that it operates in. The OMC seeks to provide a balance between supranational and national concerns by perceiving decision-making to entail

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306 Page 21-22 WP.
307 Page 8 WP.
political negotiation between different levels of authority namely deliberative supra-nationalism.\textsuperscript{309} New governance does therefore not disturb the constitutional structure as no one actor is seen to be formulating the decisions.\textsuperscript{310} However, these arguments may be opposed as there would be no need for the EU to develop the OMC in areas which were not within the EU competences if it did not see an opportunity for steering. The problem with the OMC allowing itself to operate in areas previously exclusive to Member States is that it relays the risk that the EU is not capable to set its own range of powers.\textsuperscript{311}

Despite not having the hard sanctions of hard law it does not mean that the constitutional structure is untouched, but it means diverting from the position of ‘integration by stealth’ as termed by Majone.\textsuperscript{312} For those favouring the EU, it represents a move away from intergovernmental bargaining, whilst those against Europe it means that supranational institutions gain grounds to formulate administrative networks and set their goals and targets in areas of Member State competence. Therefore, allowing the possibility of transfer of competences in the future.\textsuperscript{313} The supranational/intergovernmental tension is given new life and a new battle ground is pushed open.

In this sense, the supporters of the complementarity position face the dilemma that they have to establish that the OMC is successful to bring about shifts in domestic political cultures, yet also that it does so without damaging the existing institutional structures. Power is required for the OMC’s credibility, but the danger its use leads to the position where the OMC may be questioned entailing the illegitimate use of that power.\textsuperscript{314}

\textsuperscript{312} Majone, G. (2005). ‘The future of the Union; Montesquieu versus Madison’ in Majone. Dilemmas of European integration. OUP.
This means that we are left with two positions. If law and governance are seen separate on conceptual basis then we either accept that in the first case law and governance exist alongside each other (complementarity) or they compete with each other.\textsuperscript{315} This is the problem that the outside theories bring with them.

In the next section I will argue, that if the OMC is seen on its own it may seem that it is entirely separate from the traditional methods of EU law making, but new governance methods differ from this perspective and present a ‘nuanced area specific reality’.\textsuperscript{316} Governance and law may be connected to create hybrid institutions. Hence while acknowledging the difference between governance and constitutionalism has allowed new governance to prosper, it has concealed the legal and structural preconditions required to enhance the governance architecture for the EU polity.

3.2.2 The Tensions of the ‘Outside Approaches’: The case of hybridity

Outside theories are reliant on a logical gap between law and use of new governance. Law is hierarchical with inflexibilities in its model, whilst new governance is innovative. The risk is that these differences are over-stylised.\textsuperscript{317} If governance is recognised as ‘whatever is outside the classical methods’; the dangers are firstly that processes are merged together which are clearly different, and secondly that old established practices are hailed as new. Another limitation is that the connections between hard and soft law are ignored. Although, the distinction between governance and constitutionalism have enabled us to acknowledge the unique qualities of governance, they may have exaggerated and therefore undermining the interactions between the CCM and new governance.

The hybrid argumentation takes its origins from this approach.\textsuperscript{318} It is suggested that the old and new methods are combined. Trubek et al illustrate hybridity occurring in the areas of employment and macro-economic coordination. In the case of employment

\textsuperscript{315} The right to be the modus operandi of the integration project.
\textsuperscript{316} P83, Dawson. (2011). New governance and the transformation of European of European Law
there is a hybrid combination of ‘hard’ anti-discrimination and health and safety directives with the ‘soft’ monitoring and reviewing procedures of the EES. In this instance, there is a functional distinction between law and governance. The directives are utilised to provide general principles and the objectives can be achieved in soft law coordination. Soft law provides monitoring and the benchmarking structure for anti-discrimination resulting in a greater commitment from the Member States. In the second area of macro-economic coordination, there is a hybrid combination of the soft BEPGs which operate in correlation with the hard rules that were set to provide sanctions and definitions for the excessive deficits. These rules have been further strengthened by the legislative package brought out in by the Commission in 2010. Here, the functional division is set the other way around. Governance does not serve law, allowing interactions between national strategies. Rather law is observed as a ‘latent threat’ to ensure that failures to act may lead to judicial intervention via heavy financial penalties. The procedures are stylised like the OMC operating under the economic policy guidelines to provide budgetary stability ensuring that hard law is only applied in the case of a default position, described by Scharpf as governance operating in the shadow of legal hierarchy.

The relationship between the two in my view can be perceived improvised hybridity or functional hybridity. As the EU has to be able to coordinate diversity to deal with the factors that contribute to limiting budgetary problems while refraining from mutually destabilising policies, along with applying a self-interested approach. Trubek et al state:

‘Given these varied and possibly conflicting goals, it is no surprise that the Union has sought to draw on both hard and soft methods and processes and to marry them in a single system’.

320 The functional division is between the multilateral procedure (under Article 121 TFEU) and the excessive deficit procedure under Article 126 TFEU. The most recent proposal strengthened the sanctions to be applied under the procedure. COM (2010) 525 final. Proposal for a Regulation ‘On the Effective Enforcement of Budgetary Surveillance in the Euro Area.
This marriage implies that the hybrid combination suggests that law and governance are not separate, but mutually exist in one system. Maher points out that the soft measures allow comparisons between the Member States national practices, whilst the hard law measures ensure commitment from the Member States. Member States are more confident to participate in mutual learning programmes as they are aware that they may be able to steer the processes to achieve European policies that are compatible with their national commitments. Hence, the OMC despite being considered as soft law is ‘operating within a legal framework’, where one process achieves credibility by being linked and grounded within the other. On an empirical basis the law and governance stance seems to point to an interconnected relationship.

The stance is the same in the area of social inclusion, even though the OMC as been most developed in this area. This has not eliminated the use of the CCM. Rather, the two have developed consecutively. The thesis will in Chapter four will further suggest options for hybridity in this area by combining monetary programmes such as the European Social Fund and the Community action Programme on Social Solidarity (Progress) with the OMC.

It has been argued by Kilpatrick that to acknowledge the OMC as an alternative ‘to hard law’ may therefore ‘overlook the extent to which integration of governance tools constitutes already, in a significant number of areas, actual practice’. De Burca and Scott have pointed out three models for this integration. Hard law is utilised with OMC type processes, as a ‘baseline’ outlining the rights and obligation, secondly, hard law functions as a ‘default’ mechanism if the process fails or thirdly as a developmental device. Thirdly, the governance is the major substantive part of the legal regime. It has to be noted that governance and law cannot be seen as either/or; even though governance is seen to be opposite to hard law and constitutionalism, it is only able to maintain its distinctive character that difference because of its interactions with the legal frameworks.

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326 Page 131.
3.2.3 The Attachments of Governance and Law

These hybrid accounts raise the question whether or not governance and law are as distinct as they seem.\textsuperscript{328} The OMC seems to share similarities with the ‘hard’ constitutional laws just as hard law may be a lot softer than it is perceived to be. In employment directives, emphasised the heterarchy and set targets. When the EES came to force with its multi-dimensional basis containing flexible not very detailed provisions, this was already standard practice in employment and social inclusion. Kilpatrick argues that the EU has copied the way social and labour functions at the national level. A procedural solution to social problems has been a long part of national practice, where the dangers of action at the national level has given way to the idea that social standards should be a part of ongoing negotiations, dependent on the economic climate, bargaining power and the ‘constitutionalised’ social partners.\textsuperscript{329}

On a similar note the OMC is usually seen to be bureaucratic because it does not does entail utilising strong sanctions.\textsuperscript{330} It is a weaker way to achieve common standards through epistemic levels rather than legal levels. However, Dawson views social inclusion as a model which utilises regulation to one which sets procedures by persuasion, diffusion and networking which soft law also carries with it.\textsuperscript{331}

The issue of compliance is also considered to add an extra dimension within this argument. The EU faces the problems in narrowing the gap between its political aspirations and the distinct Member States legal systems. The EU is reliant on the Member States for implementation of its rules. Therefore EU law will be left with gaps in relation to the way rules are enforced.\textsuperscript{332}

\textsuperscript{328} Page 335-361. De Burca, G and Scott, J. Law and New Governance in the EU and US. Trubek and Trubek argue whether hard law was softer than it was perceived, like soft law can at time take a hierarchical in character.
\textsuperscript{330} Scharpf.(2002).
\textsuperscript{332} Weiler, J. Federalism and Constitutionalism: Europe’s Sonderweg.
Joerges and Zurn point out that this does not mean that post-national law-making will not be possible.\textsuperscript{333} States are willing to implement laws without a coercive hierarchy. However, the strategy needs to be different. Commands is not then required, yet national actors need to be convinced of the benefits of the transnational programme and its applicability to the existing norms and structures in the nation state. There is a need to build partnerships between private parties, governmental and non-governmental organisations all leading to effective compliance.

Similarly, Snyder has highlighted some of the EU’s limitations in gaining compliance and linked it with existence of soft law. Soft law mechanisms were used to ensure that negotiations took place between Member States and the EU institutions and not to ensure that states would be bound to the measures.\textsuperscript{334} Therefore softer forms of governance seem to compromise, and coordination ‘sits on a continuum with harder ones’.\textsuperscript{335} Hierarchical measures are reliant on their effectiveness. The outside theories are dependent on the distinction between law and governance. The dependence is rationality for one whilst the other is the processes. These changes point out that the theories exhibit the wrong picture of post-national law-making.

There are no concerns with the notion that governance presents normative problems for the legal system. The evidence of the connections between law and governance do not wipe out the use of constitutional or due process guarantees that the opponents of the OMC and governance have presented. Rather the collective integration of the OMC and other legal processes may highlight how far the EU has come away from the ideal of the CCM.\textsuperscript{336}

These instances highlight how it seems that now the choice is not about the OMC or the CCM, but rather there is a gap between stable rules and the negotiated provisions achieved by new governance. It is important that both are seen as part of a process of change and both require interactions between the various modes of law. At this point the

\textsuperscript{335} Page 91.Dawson.(2011)
‘insider’ version comes to light. This entails viewing the OMC and other new modes of governance as part of the processes and not external to law, therefore are constantly evolving and transforming. Therefore, the gap between governance and law is not real but this based on the visionary account of contemporary law and administration- that theories which suppose the internality of governance to law have utilised.337 The three schools of theorising will be discussed later in this chapter as the aim will be examine the theoretical frameworks within which governance can be seen to be as an example of legal proceduralisation. Thereafter, the contradictions and potentials that might emerge from the inside theories will be discussed. However, before doing so I need to discuss the conceptual and theoretical background from which inside accounts have emerged. How can a critique which sees governance on the ‘inside’ of legal obligations shed some light on the EU, and its legal and political structure? Do insights theories provide answers to the limits of the outside view?

3.3 The Inside Position

Constitutionalisation is aimed at juridifying political relationships. Lawyers seem to see law in governance as a device of constraint. Processes like comitology and the OMC face the legal challenge of being constitutionalised (put through political negotiations to legal reason and order whilst maintain their functional advantages).338 From the normative perspective law will contribute to governance through the penetration of procedural values into the arbitrary political arena.

For theorists, such as Dawson, the addition should be quite the opposite, and that the changes within the governance structure can be seen to contribute to the understanding of law. The OMC and new governance methods as pointed out in the White Paper on Governance illustrate that European law has evolved from a hierarchical structure to one where legal steering occurs without clear indications on where the authority is placed. Therefore, emphasis has to be place on the way governance is transforming the way EU law is operated and understood. It is this move that Sabel and Simon insist produce different findings than the current governance debate.339

339 Page 396. Sabel and Simon. (2006) critique states: ‘new governance may or may not be an answer to the dilemmas of this situation, but distinctions between working traditions and fanciful innovations are not. Indeed the suggestion at the core of much new governance discussion that societies can and should
governance including adaptability and policy linkage should not just be seen as external to law, but as outcomes of pressures faced by the legal sphere.

Inside theories insist that old models have been replaced by new ones. The OMC does not confine with the hierarchical model of accountability (such as parliamentary involvement), but it may use horizontal equivalents. Sabel and Simon agree for the OMC to ‘look forward and sideways to the efforts and views of peer institutions’. Therefore accountability is based on a dynamic/deliberative basis. It is described by Sabel and Simon as:

‘Accountability is strengthened not when the actions of the agent are constrained but when the agent is required to explain and justify his actions to those who have the necessary knowledge to understand and evaluate those actions’.  

3.3.1 Dynamic Accountability and its Tensions

The model of dynamic accountability has its limitations. The first as pointed by Harlow can be the definition of accountability itself. In the administrative sense accountability would refer to being accountable to agreed targets or objectives. In the political sense accountability would mean utilising administrative law as a device to connect administrative action to political institutions and the needs of the people. Political accountability refers to the actors who are answerable to each other, but also for the executive to be able to be answerable too.

Looking at whether the dynamic model adds anything to accountability in the political sense, it can be argued that being accountable to peer institutions will ensure that despite there not being mandates, administrative bodies will still provide answers to their use of power. If we are concerned with ‘who’ we are accountable to, then in the case of the OMC there are procedural rules to guarantee that national parliaments are

innovate at the margins without profoundly perturbing the arrangements that enable the innovations ignores the enduring insight of nineteenth century social that great innovations only arise in conditions that undermine their antecedents’.


341 Ibid page 401.

responsible to their administrations to ensure that European indicators are operated. The fear is that dynamic accountability may not be able to provide the link between the executive and the people. If it does not provide the link then as Harlow points out that horizontal networks will:

‘Degenerate into a complacent ‘old boys’ network’, their accountability function blunted by mutual interest. Mutual accountability networks tend to be more concerned with policy input and long-term relationships than retrospective evaluation; even external actors may then be ‘captured’ and sucked into the network rendering the possibility of thin accountability remote, and thick accountability even more so’. 343

For soft law this seems very possible as peer reviewing may just entail allowing networks to promote mutual interests. One of the criticisms of the OMC was that as it excluded parliaments both national and European it created an ‘insiders club’ of executives, it seems that dynamic accountability will further support this. Therefore, even though the OMC has brought about new models, these models face their own set of challenges.

The way in that peer reviews are conducted determines their potential as accountability structures. Sabel and Zeitlin emphasised that their model may not lead to the most favourable politically and democratically legitimate decisions. 344 Peer reviews need to be combined with other values. The OMC committees deal with transparency, on the one hand, and deliberation on the other, highlight the problems that exist when these values are in conflict with each other. The OMC has arranged a network of committees that evaluate national plans and evaluate indicators. These committees are forums where deliberative structures are found. 345 The committees bring scientific and technical information, their deliberative and polyarchial potential is high. However, the risk is that the committees might choose to protect its deliberative characteristics and therefore

344 Democracy needs citizens to be involved in the development of law as well as be subject to it. Peer review and directly deliberative polyarchy are doubtful because their rules are not verified by representative democracy via legislative enactment and control, secondly they allow the technocratic elites to make the decisions. Page 47 Sabel, C and Zeitlin, J. (2008). Learning from difference: The New Architecture of experimentalist governance in the EU. European Governance Papers 2.
decide not to promote transparency as national actors would be more willing to disclose information if they are certain that the transcripts will not be available.\footnote{Smismans, S. (2008). New modes of governance and the participatory myth. 31 West European Politics 5.}

Hence, in short it may not be possible to provide an epistemic community which offers information for political reform, and is also against the models of transparency and accessibility advocated by Sabel. The transition between dynamic accountability from a model of elitist citizenship to a directly democratic one will need a mix of transparency and deliberation, these values to at a potential conflict with each other.

An attempt so far, has been to provide a skeleton of the inside theory on the relationship between law and governance. It has not however become clear as to what it means to see governance inside the legal categories. If the OMC is at all law then, due to its soft characteristics, it is unlike any of other law of the Member States or the EU. Hence, it is understandable to view new governance as posing threats to law mediated rule and using the negative definition of the law being separate to the OMC or as existing as a more direct political form of rule.

The reality facing European social law is that alongside new governance, hard law (directives) are present with other soft law methods and all have devised a loose legal base. This means that associating ‘hard’ with legality and hierarchy should not be viewed as always the case. The question to be raised is what this analysis points to, as the old negative definition of law and governance may be incorrect. How can the OMC and like methods be conceptualised without reliance on external concepts or without basing legality on a formalistic conception of the legal order? The next part of the chapter will aim to answer these questions by observing three theoretical approaches, namely proceduralisation, DDP and reflexive law. These methods acknowledge that the method can be viewed as internal to the law in the way that it adapts traditional understandings of legality in an EU which is divided in a normative basis and functionally more complex.

3.4 Governance As Proceduralisation

3.4.1 Paradigms of law
In ‘Between Facts and Norms’ Habermas argues that proceduralism is not just a form of law but a paradigm shift, and that actors from politics and the judiciary work with a ‘implicit image of society’. 347 Twentieth-century law has been dominated by two images material and formal. Habermas maintains that the normative foundations of both paradigms are the same as they visualise individuals to go about their activities with minimum interferences. The difference between them lies in the way this should take place. The former model maintains that if an individual is merely protected this will lead to social just results. This assumption is undermined under the material paradigm, which assumes that agreements in the marketplace contain biases, resulting in the weak being oppressed by the stronger parties. Therefore the law has materialised to provide individual rights its goal is to put individuals in an economic context to ensure equitable private bargaining. 348 This materialisation is evident in the fact that the EU has succeeded in devising social protection systems that the OMC was geared to coordinate. It has also repeatedly, and failed from the Union’s first Social Action Programme in 1974 to provide a social dimension to the EU.

Materialisation has as Habermas states, allowed ‘the decoupling of system and life world’. 349 This means that originally the idea of political action was to provide justifications and allow negotiations for political decisions to be taken inter-subjectively, the increase in the state’s role has put greater pressure on the state’s ability to act and relay these terms. Inter-subjective bargaining has been taken over by abstract principles (i.e efficiency, money and power) designed to relieve some of the burden.

The normative result of this is an increase in the technocratic form of rule. In the modern welfare state the individual is given social rights and tangled in relations of dependency. Habermas looks at this normative puzzle and claims that to ensure equal treatment welfarist law must subtract the claim to welfare provision from its elementary social context. Individuals appear to be treated like ‘clients’ rather than the creators of the law. Individuals become the addressees of programmes that are conducted ‘in their best interests’. 350 Just social conditions are achieved at the cost of a detached rule of law.

349 Ibid page 216.
Each paradigm has failed because it has lost touch with public autonomy, which is crucial in achieving private autonomy. They fail to recognise that the form of law and its goals cannot be ‘given’ but must be achieved from upholding the practices and preferences of the citizen.\(^{351}\)

This provides some solutions to the problems with the welfarist model as it stands. The welfare model brings decision-making power to the centre in order to bring together resources to deal with economic distortion. However this centralising process does not allow for citizen input. The law needs to allow the citizen to participate in every day decisions.

Habermas supports the ‘procedural turn’ as a leap from the substantive to the procedural as this chapter will support. Law needs to support enhancing social goals but they need to be steered by those who are affected by these legal procedures. This means two things; firstly, to expand the distinction between law and governance-the distinction between making rules and their application to facts. Ideas on the rule of law have been based on the fact that rules should be formulated separately from the context in which they are utilised. The procedural paradigm questions whether the law can be developed in an abstract fashion or whether there is a requirement for reflexive relations between law and the social environment.\(^{352}\) Secondly, it reinforces a shift in law making from the material one to a procedural one where the focus is on allowing the individuals effected to participate.

### 3.4.2 Idea of Proceduralisation

Habermas has been a direct influence on utilising the theories of law and democracy attempting to apply the procedural theory to the problems of EU integration. Leonble has noted that the question of governance highlights the failure of the dominant formal and material programmes of modern law.\(^{353}\) The twentieth century was concerned with the problems of formal legality where the individual positivistic basis of the legal order

\(^{351}\) Page 408 Habermas. (1996).
was questioned. The current debates over institutional changes are drawn to the failures of the material model.\textsuperscript{354}

The Procedural accounts follow both the material and formal accounts. They perceive the formal and material as legal paradigms linked with heavy modernity.\textsuperscript{355} This modernity applies to a method that reveals positive laws. In the ‘formal’ sense a general law of behaviour which can ‘self-deduct’ on to factual circumstances.\textsuperscript{356} Or in terms of the material one, ‘a teleological norm’ structured to gain pre-stated goals. In both circumstances, legal reasoning and interpretation are to be set on an objective social condition which is firstly presented through legal texts and then judicial reasoning.

By doing so, these two forms have a common feature. It is one thing to impose a rule but another to apply it to the facts.\textsuperscript{357} This creation and application feature sets the boundaries between legal and political actors. By this feature the officials do not have to decide as to what is law, rather they are imposed by rules. These rules set the standards for the actors to be judged. This means that legal arguments are not just about providing a balance between the interests of individuals; rather social interests are subjected to the ‘governance of rules’.\textsuperscript{358}

This feature may be acceptable in terms of legality but it has been viewed as problematic by Scheuerman since it entails the problem of time-space compression.\textsuperscript{359} In the modern economic climate where the state regulatory tasks are in a state of adaptation, the legislator will not have all the information to create rules a priori.\textsuperscript{360} In such circumstances the distinction between law creation and application cannot be fully sustained. The central actor can only develop general rules that would be overridden by the changes occurring in the regulatory field itself. The temporal and functional

\textsuperscript{354} Page 226-227. Weitholter looks at proceduralisation as a shift on how law is being structured. Legal programmes have been structured towards proceduralisation not aimed towards social guarantees or provisions, but rather the conditions of these guarantees. The question is what has to be achieved and not what is allowed. ‘what are the conditions by which social aims find their reflection in general law’


\textsuperscript{357} Page 40-41. Neoble and de Munck (2001).


\textsuperscript{360} Ibid Page 91-94.
complexity of the modern society brings together stages that were separate. The question of what the law means in now dependent on social information which constantly changes.

As identified by Scheuerman, this creates further obstacles at the EU level. There is a problem with the notion of EU as being the law creator. The EU is required not only to act quickly but also acknowledge the national, social and political systems of the Member States. This is not easy in areas where the OMC operates as not all actors will share the common view of EU action that field.\textsuperscript{361}

The challenge is also applicable to the idea of national legal orders as addressees of the law. The nation state is not merely a lower level unit which power is delegated to but it has its own sovereign powers. Therefore the creation and application distinction is seen to be problematic with the EU being diverse and it as an order whereby sovereignty is fundamentally divided.\textsuperscript{362}

Hence, proceduralisation requires acknowledgement that there is a state of transformation occurring between creating the law and its application. For the rules to be applied correctly the courts are required to assess the needs of the ones most affected by the legal acts. Practically, this proceduralisation strategy not only applies to courts it is aimed at decentralising power on a general basis. This dates back to idea that the law should seek the ‘external constitutionalisation’ of different spheres of action.\textsuperscript{363} This view suggests that the legal institutions do not just apply the law but seek to mediate between the actors involved. The actors need to deduce the meaning of the law in a distinct ‘life-world context’.\textsuperscript{364} Law itself is an institution which allows social bargaining and deliberation and the results of such cannot be presupposed. Here it is clear that law is not something external to the processes of deliberation, but it is through law that the conditions for fair and equal access to the political process can be obtained.

3.4.3 Proceduralisation in the EU


\textsuperscript{363} Taken from self-governing bodies and arbitration boards, these forums are required to look after their own affairs and resolve their conflicts. This allows the individual’s autonomy may be replaced by a social autonomy, Habermas. (1996). Page 412.

\textsuperscript{364} Page 114 Dawson. (2011).
In assessing whether or not proceduralisation is the best approach to describe the current stage of the legal integration within the EU depends on firstly looking at the OMC through the steps that Habermas and Wietholter suggested. It seems that in one way the OMC is inappropriate for their approach, as it requires proceduralisation to be extended from national to supranational forms of law-making. Secondly, it requires comparisons of law’s proceduralisation to a method that has been to invoke an ‘expulsion of law’.  

Habermas’s conception involves placing the deliberative procedures under a clear constitutional framework, while the OMC departs from the idea of a constitutional framework.

If the procedural theories are applied to new governance there is need to recognise that in the EU formal and material paradigms do not have much explanatory potential. The case law between the CJEU and the constitutional courts highlights that there are contests between them for authority. The material paradigm also illustrates low credentials. The EU has not really mimicked the welfare state. The imbalances occurring from the progressing internal market and the Court’s inability to provide support to the national welfare provision mean that the EU may not be able to secure the individual private autonomy through the protection of social entitlements.

It is only in this social context that an attempt to look at the OMC as a procedural regime can be made. The method does not accept materialisation as the goals are not specified and neither is the ‘approximation’ of social standards seen as the ultimate aim. The method also distances itself from the formal view as law is never created in a complete way, rather targets and objectives are set to apply to the facts and circumstances. The method does not provide a law-making mechanism which would reassure clarity and stability.


There are big changes to the application and creation principles that were devised by Leonable. In the case of the EU it is not possible to define the law from the material conditions in which it is to be applied. Due to the national and structural diversity, the idea of law needs to be defined in a supranational context and then delivered through national legal systems as the question what the law is can be dealt with at the national level.\textsuperscript{370} A shift to the procedural regime means that legislative power is subject to devolution.

The application of proceduralisation to the OMC has its set of troubles. The Habermasian procedural approach that the OMC follows involves an acknowledgement that ‘the conditions under which a deliberative process may succeed ……must be affirmatively created rather than taken for granted’.\textsuperscript{371} The law cannot be seen to obstruct mutual learning and effective strategies. It is a necessary to provide a procedural mechanism for law-making which provides the basis whereby legitimate decentralised governance must fit. It is difficult to see how this context could be supplied omitting the traditional modes of law-making that the OMC is meant to replace. National authorities achieve conditions of political deliberation through public law instruments. These are not present in the context of European social law. If we use hard law then there are contradictions. This is because the procedural approach supports the open texture of rules and their context dependence; this condition must also apply to these procedural standards (the rules that would produce equitable conditions for political deliberation).

Habermas’s deliberative ideal seems to deal with moral pluralism by making agreements at a vague procedural level. But what if the conflict is at this level, does the provision of procedural solutions achieve enough to resolve the contestation? The problem remains with the change from the substantive to the procedural. The substantive impact of the policy depends on its ability to include all voices. ‘The question of what is an adequate or proper process’ is the one that itself is ‘legitimised through procedure’.\textsuperscript{372} This brings about questions that are substantive in nature (such as

\textsuperscript{371} Ibid page 3.
questioning how this procedure is properly democratic in the absence of procedures such as collective bargaining, worker security, proportional representation and cumulative voting). Therefore, referring to procedural values raises questions for substantive contestations.

In the case of the OMC the issue of hierarchy may be applied as the questions to be raised are that who is making the decisions on setting targets and objectives? Are they not subject to political contestation as the procedural approach claims? Do they represent competing views about the boundaries of the European Social Model?

The conclusions are that proceduralisation may provide a good analytical framework for illustrating changes in EU law, but it also has its problems. The complete procedural approach to new governance leaves certain things unaccounted for. What is the relationship between legality and the use of new governance procedures to deal with the EU’s legitimacy concerns? Can proceduralism be utilised with other models such as the reflexive model that look to using experimental and deliberative forms of social reform rather than merely observing the procedure and substance. The next approach of directly- deliberative polyarchy (DDP) may be useful in evaluating the law governance dichotomy.

3.5 Governance and Experimentalism: DDP

Under the DDP model the law needs to be proactive to facilitate the process making deliberative and experimentalist policy solutions. Actors are required to develop and devise legal programmes and with it experimentalists point out three roles for modern law.

Firstly, the Courts participate to revaluate existing knowledge. The CJEU can be used as an example as it facilitates the hybridty of the new legal problems with the existing jurisprudence. The law departs from old certainties and allows cognitive revaluation, while simultaneously allowing participants to develop new knowledge.373 Secondly, the Court needs to encourage parties to achieve a negotiated and commonly agreed

outcome. Here, DDP highlights its polyarchial approach which is to delegate the job of framing legal norms to lower-level actors who themselves need to negotiate and deliberate towards achieving successful outcomes. Finally, legal institutions need to constantly be involved in the monitoring and reviewing process. Legal decisions should not be conceived as one off incidents, rather the aim is like proceduralisation to ensure mechanisms which allow revisions, negotiations and consensus building.

Law as a revision structure under DDP faces two trade-offs. Firstly, it encourages diversity as it provides low level actors decision-making powers in order to ensure the EU can obtain a stronger social dimension. This approach diffuses DDP’s view of experimentalism and EU integration. Experimentalists such as Young argue that the functional, normative and territorial distinctions in society should not lead to a decline in public law-making. Conversely, it should permit citizens to formulate their own meanings of the law. The diversity of the European polity encourages the law makers to reflect on the impact of the legislation on the individuals concerned.

The second trade-off is that the delegation of powers provided to low level actors comes at a cost as they are expected to provide feedback to the centre in relation to the objectives and procedures of the policy community as a whole. Here if diversity is viewed to provide mutual learning then it remains an advantageous position as long as there are clear opportunities for the central and other actors. At the same time, the idea of giving autonomy to lower level units for information seem at odds with the EU as it does not have the capacity to grant autonomy. It can intervene intentionally in very limited circumstances, but the Member States are in a sovereign position and can determine the role played by the EU in relation to mediation.

In DDP, this position is marginally altered. The low level actors are provided with authority in order to enhance the cognitive capacity of the central institutions in order to improve policy making. This strategy is open to reformulation, and it presents recentralisation opportunities even though on a deliberative and dynamic basis. Central

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intervention is now involved in areas which do not fall within its remit.\footnote{This illustrates that the OMC and DDP could lead to procedural or functional centralisation. See Smisman, S. (2008). New modes of governance and the participatory myth. 31 West European Politics. Page 278. Sabel and Zeitlin.(2008).} Hence, it seems that DDP is also suffering from the hierarchy problem as the procedural approach.

### 3.5.1 The Experimentalist Architecture of Governance in the EU

Supporters of the DDP Sabel and Zeitlin theory argue the EU is a paradigm case for the DDP approach.\footnote{Page 273. Gertsenberg and Sabel. (2002). ‘Directly-Deliberative Polyarchy: An institutional ideal for Europe? In Joerges, C and Dehousse, R (eds). Good governance in Europe’s integrated market. OUP.} This is because it does not have the features that would uphold the traditional view of accountability. The absence of sovereignty along with the gaps present between EU law and its application in national legal systems makes clear distinctions of authority between those who devise the law and those held responsible for its difficult application. There is a need for transnational devices such as the OMC that allow pooling of information. However because it is not easy to legitimise such mechanisms the experimentalist approach is taken as a preferred one. This is because it does not just rely on supranational executives who do not have sufficient steering capacities. Neither, does it leave decision-making to states, there is an architecture that runs beside the constitutional relationship between the Member States and the EU. Sabel and Gerstenberg’s original definition of DDP highlight this trade off as they state:

‘In this decision-making design, framework goals (such as full employment, social inclusion, ‘good water status’, a unified energy grid) and measures for gauging their achievement are established by joint action of the Member States and EU institutions. Lower-level units (such as national ministries or regulatory authorities, and the actors with whom they collaborate) are given the freedom to advance these ends as they see fit’\footnote{Page 278. Sabel and Zeitlin.(2008).}

This would be regarded as the first part of the trade-off it is the functional granting of autonomy. In the OMC it would be equated to the system of national reporting, where the EU agrees its overall objectives but lets the nation states to implement their own
solutions in delivering them.\textsuperscript{380} The second trade off is present in other aspects of the OMC:

‘But in return for this autonomy, they must report regularly on their performance especially as measured by the agreed indicators and participate in a peer review in which their results are compared with those pursuing other means to the same general ends. Finally the framework goals, metrics and procedures themselves are periodically revised by the actors who initially established them, augmented by such new participants whose views come to be seen as indispensible to full and fair deliberation’.\textsuperscript{381}

The second element is of the new order is for Member States to report on their performances and then receive evaluation through benchmarking. The feeding in to common benchmarks and the delegation of authority are exhibiting reflexive elements present in the procedure and portray an abstract similarity between the DDP’s elementary design and the OMC’s official specialised procedure as prescribed by the Lisbon Strategy.

The DDP has tried to relate the OMC to the ‘directly-deliberative’ and ‘polyarchical’ elements. It is polyarchial as there is no anticipation that the shared objectives should lead to uniformity or a procedural framework.\textsuperscript{382} There is no need for peer review or a mutual learning mechanism if they present only what is already known. It is considered as directly-deliberative because peer review not only allows integration of different elements but also provides opportunities for actors to view their problems cognitively. The interests of states in policies are not fixed but rather are subject to changes in order to provide justifications to others.\textsuperscript{383} The OMC takes on itself to make actors ‘question their initial representation of the issues which they confront, and even more precisely to

\textsuperscript{380} Page 304. Sabel and Zeitlin.(2008).
\textsuperscript{381} Page 130 Dawson. (2011). Taken from Gertsenberg and Sabel (2002).
\textsuperscript{383} Page 4. Deakin and de Schutter.(2005). This is the same for DDP and the procedural approach which argue that the OMC’s success is due to the procedures which operate as incentives for actors to think about the extent to which their understanding of the problem which has to be resolved and their own position may be context dependent.
reconstruct the definition of the issues with the other actors concerned. The law needs to encourage the reformulation of collective knowledge alongside legislative action.

The question is where under the OMC does this capacity lie? There are contradictions as how can law carry particular understanding of problems and disentrench them at the same time? Much has been achieved taking the OMC example there has been a focus on active welfare policies, this would support Sabel and Zeitlin’s assertion that the OMC is capable for cognitive re-evaluation. The method has therefore guided national policies by providing new policy vocabulary. The issue is that the more the vocabulary is productive the fewer the opportunities will be for re-evaluating existing knowledge. The method may act to entrench particular policy paradigms rather than destabilising them. If the DDP’s capacity to frame national policy is utilised the polyarchy upon which is would be based may be threatened.

To overcome this scepticism means relying on the method’s ability to advocate to the States that it is coordinating in areas which are viewed as sharing the common problems. It depends on the peer review mechanisms that provide evaluations that were revised by utilising the experience of the states. Hence, the success of DDP relies on political commitment and the determination of the actors to seriously conduct the policy coordination processes.

There are namely three dangers with the use of experimentalist approach. The first is the issue of power. The experimentalist approach relies on the ability to rely on cognitive resources and allow deliberation among the stakeholders. The power delegated to the stakeholders is a means of enhancing law’s responsiveness. The problem lies with trying to establish who the stakeholders are. Simon argues ‘legal pragmatism has little to say about who has standing to participate in stakeholder negotiations and how the

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384 Ibid.
views of different participants are to be weighed in decision-making'. The answer to this question is both vital and necessary. Simon proposes a presumption for inclusion rather than exclusion, whilst the Habermasian approach agrees with the idea that all those that are affected by the decisions should have say in its formulation. It is not possible for the limitless participation in European or national democracies. However, the greater the participation of various actors the greater the pressure will be on the ideals of direct deliberation and exchange between individuals on which deliberative theory relies on. It means that is harder to deliberately work through policy reforms.

Secondly, the issue is that the role of the central institutions like the courts and the legislature face problems under the experimentalist approach as the courts seem to be peer reviewing rather than having a constitutional role. In experimentalism the courts provide conditions for the parties to negotiate like the procedural approach. The problem is that institutions, such as the courts, need to rely on some forms of legal hierarchy in order to provide the conditions necessary for free negotiation to take place, Sabel and Zeitlin describe it as a penalty default. In basic terms if hierarchy is applied can it be regarded as an experimentalist approach?

The final approach, as stated by Scheuerman concerns the rationality gap between law and its application but what would be seen as a functional gap under the proceduralist approach. As Scheuerman points out, ‘legislators and administrators may find themselves debating complex issues and potential objects of regulation whose contours suddenly alter before their eyes’. Law could accept the gap and allow itself to be downgraded from being able to regulate social life and just allow courts to only provide guarantees of individual rights, or it could ‘synchronise state economic regulation in accordance with the temporal imperatives of high-speed capitalism’. Law can either not matchup with society or it does but by compromising its normative position (it is present in an institution which is

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388 Sabel and Zeitlin,(2008).
390 Ibid page 105.
independent of the activities that it is set up to regulate.\textsuperscript{392} Scheuerman highlights that it is the temporal inefficiencies and the rigidity of the law which allow the review of decisions that are adversely affecting individual rights. The act of capital synchronisation could be viewed as shifting away from the tradition of legitimising law through political deliberation. DDP is also advocating the preference of economy for the continuous adaptation of rules and their benchmarking along with their performance.\textsuperscript{393} Scheuerman argues that law should not evolve in a similar fashion. In modern times there is the need for the law to be more stable in such a way that it is not affected by social conditions, rather it has its own entrenched character.\textsuperscript{394}

3.6 Reflexive Reading in the EU

The roots of reflexive law may lie at the domestic level, as supported by Teubner.\textsuperscript{395} Does that mean that reflexive law has no place in the new governance debate? Looking at the OMC, it is seen as a ‘constitutional compromise’ between various levels of authorities.\textsuperscript{396} Reflexive law’s claims that the main fragments in society are functional rather territorial adds nothing to the debate on the intergovernmental and federalist debate on the EU.

Reflexive law may be implemented if the OMC can be seen through a functional lens. On a territorial level, it is assumed that the EU norms are utilised through national laws. At the functional (horizontal) level it is presumed that the EU legal system can communicate with other territorial areas. This act of legal communication has the potential to be viewed at the functional and territorial level as a construal of normative authority and as a ‘language that is simply adapted into the logic of the system’.\textsuperscript{397} The problem is that at the territorial level national legal systems will only apply EU norms so far as they perceive audible within their own national settings. There are also problems at the functional level as the role of EU social law is to provide solutions to the differences amongst the states and the various organisations and rules that

\textsuperscript{392}Page 105. Scheuerman.(2004).
\textsuperscript{393}Ibid at Page106.
\textsuperscript{394}Ibid at page 124.
\textsuperscript{397}Page 147. Dawson (2011).
characterise processes of collective bargaining, industrial tribunals etc which have a clear distinct language beyond the capability of any ‘central’ actor. European law needs to organise itself in such a way that it can organise areas that have their own clear procedures. Reflexive law seeks to provide solutions to these problems by producing internal and external reflexive structures within social systems. If systems or states are meant be self-referential they need to be aware of their interdependence. For example, looking at the system of economy it is not intended to react to external factors but the law may assist the economic system to utilise its links and impact on in other areas of society. The system is ‘normatively closed’ and ‘cognitively open’. 398

The Lisbon Strategy offers a reflexive approach as it was constructed on the basis that achievement in one area will have an impact in the other areas. For example, the integrated guidelines for jobs and growth have linked the employment reforms to the Stability and Growth Pact. These linkages have further been strengthened within the Europe 2020 reforms which are further discussed in Chapter four. On an external level the OMC provides assistance to governments and different policy areas to reflect upon the demands of each other. This is visible through the OMC SPSI which requires ‘effective and mutual interaction between the Lisbon objectives for greater economic growth, with more and better jobs and greater social cohesion’. 399 Member States are expected to not only base their social reforms against other Member States but also reflect on the interactions between social policy and other fields of policy-making. Reflexive law’s internal dimension can be observed through the Lisbon Strategy. The strategy allows new governance to be utilised in order to build partnerships between various levels of governance and allow participation of non-governmental actors. 400 The OMC is encapsulated within the social discourse working to maintain a balance between the social and economic policies.

The problems with the reflexive approach, as pointed out by Michael King, is that it wants to advocate the theory autopoietic systems ‘while at the same time observing

399 Common Objectives in Social Inclusion and Social Protection (European Council, 2006) at Point B
400 ‘Mobilisation and collective effort are the key elements of the partnership. The challenges and affect our model of development. We have to rise to them together-after all, every one’s individual input is essential to ensure collective success. The scale of the challenges is such and our economies so interdependent, that no Member State is capable of facing the task alone. ‘Working Together for Jobs and Growth: A new Start for the Lisbon Strategy. COM (2005) 24 final at 14.
ways in which law might improve its performance through better relations with other systems’.\textsuperscript{401} It aims for a discourse of the various functional systems but the problem is if the common discourse is missing then it means that we self-reflect and integration cannot be possible. Luhmann highlights this issue as he states:

‘Reflexive law can only be self-reflexive law. Only in the manner in which it reproduces itself can it take account of the account of the fact (and perhaps take more account of the fact) that society (and hence also law itself) reproduces itself autopoietically.’ \textsuperscript{402}

The OMC’s discourse on mutual learning does have similarities with reflexive law in that self-referential systems need to be sensitive to the demands and externalities of others. Mutual learning emphasises the need to publicise externalities and learn from best practice. It is devised to allow Member States to alter their social programmes in accordance with the demands of other policy fields. However, what could be seen as enhancing the reflexive capacity may be viewed as self-reflection (i.e selectively opting for policies that are in harmony with the host state plans). Best practice examples may be interpreted in accordance with existing national programmes to the extent that there are no reflexive elements; however new terms, such as active inclusion and budgetary stability are introduced as external information is placed on existing practices.

The three approaches which have been outlined separately despite their differences illustrating common challenges that need to be addressed while offering solutions. The concerns with modern law are that it tends to view individuals as clients. The law requires the individuals to respond to the law; it is far away from the normative reasons and discussions of the individuals that it applies to. The real alternatives need to provide conditions to facilitate the law to be open to contextual information and allow legal procedures to provide possibilities for legal authorship. The law should assist the cognitive resources and normative reasons to whom the European norms are applied to. This requires striking a balance between the law’s procedural and substantive roles. On a substantive level the aim of achieving societal guidance through law is delegated to local decision-making bodies to take responsibility of legal outcomes, this delegation of

authority ensures that there is an increase in expertise and knowledge for future rule-making. Procedurally, the law utilises its steering capacity to invoke internal deliberation and externally it will result in realising the impact of its actions on other areas. These common solutions can be mapped via five elements of the procedural/inside approach to the law-governance debate one which view new governance to provide opportunities for legal transformation.403 The chapter will now develop five features of the procedural turn on the law-governance debate, which will be utilised to analyse the OMC process on Social Inclusion and Protection (OMC SPSI). These are namely law as cognitive, adaptive, participative, reflexive and procedural. Firstly the five features will be examined to determine how far they are seen to exist in the OMC SPSI, what lessons can be obtained for the development of the method? How can this assessment result in the re-evaluation of the law and new-governance debate?

3.7 Analysis of the Features of the Procedural Turn on the Law-Governance Debate through the OMC SPSI

3.7.1 The OMC SPSI’s Display of Cognitive Features

The first feature of the procedural or inside debate is law as cognitive. It relates to law as being a method of communication, given and objective normative rules are followed alongside future progression. This progression involves destabilising the original problems and basing new ones by obtaining information from regional levels. There is a need to utilise all the information available from the regulatory environment due to the cognitive limitations that are present in post-national law-making. The devolution of law-making to the local level does not exhibit the weakness in law. Rather, it is observed as a means of law-making that respects the public autonomy of the Member States and its citizens.

The law is cognitively open in that monitoring its success in terms of the regulation of society is dependent on it its abilities to draw new information from its environment. In terms of new governance it needs to realise the diverse potential of the national contexts that it is placed in, and that the diversity with the national contexts may lead to new avenues for policy learning and adaptation. Looking at the OMC SPSI it seems to

highlight that the orientation of policy-making has been altered even though the diagnostic capacity of the method has its limits. Berhnard illustrates this idea using Habermas paradigms. Policy learning is a voluntary exercise within the OMC, as Member States are not faced with any sanctions following their failure to implement the European objectives. Yet the collection of information is not voluntary, as Member States are required to reflect on their national practices in light of the EU objectives which are reiterated through peer reviews and the committees. Actors then may utilise these objectives as a template for action.

The method also seems to marry social inclusion policies with the labour market policies. ‘Making work pay’ is one of the strands within the Nice objectives highlight the linkages between poverty and involvement in the labour market as a common set of information created by the OMC SPSI. Although there are no agreements on the substantive policies required to alleviate exclusion, it is agreed that low income is a factor contributing to exclusion, and also as discussed in Chapter four that there are linkages amongst the activation idea and that providing job opportunities may work to eliminate social exclusion. Hence, to a certain degree the EU discourse has managed to cognitively achieve success by marrying certain categories even if the policies linked to them vary. On a cognitive level the method has been fruitful in piercing a social policy discourse which was previously dealt with at the national level.

The OMC has the cognitive ability to ‘Europeanise’ certain policy areas by placing them on the national agenda and providing them with priority. This agenda setting exercise encourages states to reflect on reoccurring problems. Certain aspects of the OMC may enhance this reflective function. Firstly, the guidelines from the Commission to the Member States on preparing their NAPs require them to ‘give a synthetic overview of the economic, social and demographic context that needs to be taken into account when setting priorities and developing policies’. Secondly the Member States are expected to utilise a comparative lens to draw comparisons between their own social exclusion issues against other states. Both aspects refer to the OMC’s capabilities in

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405 Ibid Page 45.
The experimental approach also suggests that the law should be able to meet the demands of different policy fields. The Joint Reports in Social Inclusion have the potential to carry out this function as they contain data (including statistical data) on the social protection reforms in each Member State as well as providing the overall picture of the EU. However the Joint Reports are merely descriptive documents in which the Council and Commission point out the Member States failures to provide strategic analysis. Having said this, detailed descriptions contained in the Joint Reports allow for the Council and Commission to develop a consensus which is used to formulate common objectives and indicators. The example of this is the case of the adoption of the active inclusion policies which are discussed in Chapter Four. The need for active inclusion policies were discussed in the 2005 and 2006 Joint Reports as recommended by Member States in their NAPS. This resulted in the Communication and Recommendation on ‘taking forward the active inclusion of people furthest from the labour market.

3.7.2 The OMC SPSI’s Display of Adaptive Features

The cognitive characteristic of the law allows it to be adaptive. In order to remain adaptive, it cannot remain rigid because diversity allows the law-making process to utilise practices that would have not been otherwise available. Law also needs to cultivate a dialectical relationship between local norms and common goals, as local norms inevitably are fed in the wider policy discussions about the design of rules and

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408 I am referring to the Joint Reports 2007 and Joint Reports 2008.
their implementation. The OMC was designed to maintain its equilibrium between respecting the diverse national social conditions and the need for action at the Community level. The use of the OMC does not mean that the steering power is completely taken away from the centre yet it is presumed that European policies require operation on a national level; this is in accordance with the intergovernmental reading of the OMC as it gains national support due these contributing factors. The OMC SPSI is flexible enough to accommodate the changing nature of poverty, the OMC here works as an iterative process and national authorities adjust accordingly this cognitive openness allows the process to be viewed as a flexible legal mechanism.

The disadvantage of such flexibility in the law making process may mean that it costs in terms of allowing public participation or indeed making it more selective. There is a need to strike a balance between flexibility and participation for inside/procedural theories. There is a requirement for rules to remain flexible in order to adjust to the environmental conditions, whilst the law needs to obtain information from a variety of sources and actors in order to properly reflect the current social conditions. Lenoble and De Munck propose that this conflict may be resolved if a ‘dialectical’ relationship is sought between the application of EU objectives on national levels.\(^{411}\) The law is required to adapt to the changing priorities and to mirror what works at the national level. In the OMC SPSI the Social Protection Committee (SPC) fulfils this function by devising the Joint Reports which are adopted by the Council and Commission, that contain critical reviews on the NAPS. However, the individuals who participate in the reviewing processes under the umbrella of the SPC may not be the same as those who are responsible for the implementation processes and make the decisions about national reporting. Therefore those that are responsible for decision making in the EU are in effect not present in the discussions that take place nationally. Hence in reality the OMC would not be best model for dialectical rule-making.

3.7.3 OMC SPSI’s Display of Participatory Features

Law must also encourage deliberation alongside removing barriers among the selected actors. The OMC SPSI has proven to allow greater participation of actors than the

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corporatist EES. Participation in the OMC revolves around two models. The first contains actors from the national and federal levels along with invited participants. The structure contains a working group organised by the national social ministries and NGOs. The second model delegates decision-making downwards to various institutions. This model has encouraged national governments to develop new structures for NGO participation. Thus, NGOs prefer this role as this method gives non-state actors ‘a certain legitimacy to lobby’. National governments are pressurised to stipulate within their NAPS the steps they have taken to ensure participation of non-state actors. This as Dawson describes has ‘created a whole new dynamic, bringing different people and groups together both horizontally and vertically’. The second advantage of this second model is that it has provided funding to NGOs. An example of this is Progress (A community action programme) which is funded in order to support ‘developing the capacity of key European level networks to support and further develop Community policy goals and strategies on social protection and social inclusion’.

It is true that participation is determined by the gate keepers of the process and the gate keepers are national governments. They ultimately decide who should be represented in the national strategy reports. The Commission can also act the gate keeper as participation may be determined by the funding obtained through Progress scheme. The lack of funding makes it more of a challenge to achieve concentrated levels of involvement. As the executives are the gatekeepers of the OMC, parliaments are excluded from the processes. Experimentalists, such as Sabel and Simon urge that the next best option would be for law to achieve its legitimacy from peer reviews and scrutiny by those with expertise.

3.7.4 OMC SPSI’s Display of Reflexive Features

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Inside theories do not accept the traditionalist view of legal integration. Procedural law does not aim to integrate citizens around common values. Instead the law is integrative as in a reflexive way it respects the autonomy of local bodies but requires them regard others and grow in functional and territorial domains. The concept of reflexivity aims to integrate competing objectives; the law needs to bring diverse positions together in a common discourse. This discourse contains opposing normative messages and ‘seeks to explore different ways for securing their fruitful interaction’.\footnote{Ibid Page 6. De Burca and Scott. (2006).} Law as integrative is in operation to allow actors to reflect the impact of their actions on others. In the context of the OMC SPSI it needs to attend to the diverse social protection systems resulting from diverse historical and cultural contexts. This integration occurs through creating institutions such as peer reviews. The EU is territorially and functionally separated.\footnote{Smismans, S.(2005). ‘Reflexive Law in Support of Directly-Deliberative Polyarchy: Reflexive Deliberative Polyarchy as a Normative Frame for the OMC’ in Deakin, S and de Schutter, O. (eds). Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe? Brussels: Bruylant.} The functional discourses have their own sets of priorities in the example of social inclusion it involves reducing the rate of poverty. The functional autonomy of the OMC SPSI is retained within the streamlined OMC. It is structured in a way to feed in employment and fiscal policies and feed out to other policy areas.

In the dynamic accountability model devised by Sabel and Simon peer reviews are viewed as a functional substitute for the parliamentary scrutiny and allow the pooling of information and knowledge. Peer reviews may be seen to have similarities to comitology in the way they allow the pooling of expertise. This is evident in the creation of the networks of independent networks which evaluate policies. Secondly they encourage a rigid reflection on common problems.\footnote{Joerges, C and Neyer, J. (1997). From Inter-governmental bargaining to deliberative political processes: The constitutionalization of Comitology. 3 European Law Journal 3.} Peer reviews have two integrative elements. Internally they are devised to encourage and realise the expectations of others, externally they are required to provide justifications for their inabilities to meet European objectives.\footnote{Page 133. Jacobsson, K.”Trying to reform the “best pupil in the class”? The OMC in Sweden and Denmark in Zeitlin and Pochet .The OMC in action: The European and Social Inclusion Strategies.} In contrast to these interpretations, peer reviews are seen as developing mutual learning rather than providing evaluations of the NAPs of other Member States. The operational guide to peer review and assessment also support this understanding as peer reviews were established to aid transnational
learning and not to act as an accountability device.\textsuperscript{421} However, the integration of national policies through the peer review process may allow the exchange of ideas but it also undermines the need for real accountability. Peer reviews are not meant to review rather they are reports. Peer reviews also face the problem of transparency as participants may only decide to be honest and open if they are ensured that the committee meetings are private. Eurocities claim that for peer review to be more transparent information on the participants that are invited should be available.\textsuperscript{422}

Functional integration is the other type of variety of integration associated with the OMC. Functional integration maybe seen in the 2005 Commission’s streamlining Communication document.\textsuperscript{423} The streamlining procedure supports the multi-dimensional approach of the OMC SPSI as it was acknowledged that social inclusion and social protection policies are mutually dependent on other policies areas. Therefore they need to feed in and out in employment and fiscal policies. The question is whether the OMC SPSI’s integration with other Lisbon Strategy processes should be perceived as the subordination of the social or whether this has led to the OMC losing its functional and procedural autonomy? Is the OMC a reflexive medium or does it allow social policy to be functionally colonised by economic discourses?

The requirement of functional integration has resulted from the EU’s definition of social inclusion. The 1993 Green Paper on Social Policy defined social inclusion as:

‘Does not only mean insufficient income. It even goes beyond participation in working life; it is manifest in such fields as housing, education, healthcare and access to services. It affects not only individuals who have serious set-backs but social groups, particularly in urban and rural areas, who are subject to discrimination, segregation or the weakening of the traditional forms of social relations. More generally, by highlighting

\textsuperscript{422} Ibid Page 11. Operational Guide.
the flaws in the social fabric, it suggests something more than social inequality, and
concomitantly, carries with it the risk of a dual or fragmented society'.

This idea is also supported by the NGOs, for example AGE argue that the policy
instruments that promote social inclusion of the elderly are dependent on factors such as
pensions, age of retirement and the taxes given in each Member State. There is a need
to acquire knowledge on the budget and resources available to determine the adequacy
of pensions; such information may be available from the Integrated Guidelines for
jobs. The data is required to be functionally integrated in order to achieve the EU
objectives. This is an example of reflexive integration within the different strands of the
OMC. The autonomy of each process has to be maintained in order to achieve the
separate policy objectives. Moreover, objectives are considered together to ensure that
every process can attain its own set of objectives. Just as the OMC has expanded the
definition of social inclusion it has encouraged the interaction of economic and social
actors, thereby providing social and economic actors with a legitimate political voice.

The feeding in and feeding out mechanisms contained in the streamlining
communication aimed to ensure that actors have equal opportunities. Member States
were required to consider the impact of the employment and social protection and fiscal
reforms. This obligation was placed through the objectives and guidelines of the OMC
SPSI. However the evidence suggests that the streamlining was a failure as there was
not an enough evidence of the feeding in and out of the coordination processes and
secondly there was a lack of balanced synergies between them. The evidence to support
this conclusion is deduced from examining the integrated Guidelines 2008-2010. While,
the third objective mentions the ‘determined action to strengthen and reinforce social
inclusion’; and the requirement that ‘strengthened interaction is needed with the OMC
in Social Protection and Social Inclusion’, the Guidelines barely mention them. Out of
the 24 Guidelines only two make references to social inclusion. This is done through
Guideline 17 which asks to for the incorporation of the third social cohesion objective
of the EES, and Guideline 19 which requires ‘Member States to ‘ensure inclusive labour

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425 Page 16. The Older People’s Platform (AGE).
426 Commission Communication to the Spring European Council on ‘Integrated Guidelines for Jobs and
427 Ibid page 27.
markets, enhance work attractiveness and make work pay for job seekers, including disadvantaged people and the inactive’. In contrast the first six guidelines aim to provide support to fiscal policies. For example Guideline 5 seeks to ‘contribute to a dynamic and well functioning EMU’. These preferences have meant that Member States have ignored social inclusion targets while providing reports on employment and fiscal policies.\(^{428}\) Similarly, the 2006 Network of independent Experts Report on feeding in and feeding out emphasised that the NAPs and Integrated Guidelines failed to pay attention to the OMC SPSI by either incorporating social inclusion within other categories or not by not observing it at all.\(^{429}\) The feeling amongst NGOs such as the EAPN is that there is very limited integration and if it does occur then it does not act to improve reflexivity rather it is promoting the functional domination of one discourse over others. The EAPN’s report observing feeding in from the implementation reports in the OMC SPSI states:

‘Most EAPN national networks point out that the implementation reports remain overwhelming economic and with little evidence to show how this economic vision of Lisbon can deliver social justice, decent jobs and a better life for people currently experiencing poverty and social exclusion………From the national responses it is clear that there is little evidence of a clear link with the policy priorities and measures of a streamlined OMC SPSI. For most groups, this was above all evidence of subservience to Lisbon and the imposition of ‘growth and jobs’ priorities.\(^{430}\)

Consequently streamlining has resulted in ‘narrowing the political debate’ to a mere debate on growth and jobs.\(^{431}\) This is seen in the employment context as when the Integrated Guidelines are examined social inclusion policies are assessed to determine whether or not they contribute to increasing the employment rates and balanced budgets. However, there are not enough assessments done the other way around. After the streamlining process the OMC seems to have been sidelined in comparison to the

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\(^{431}\) Page 3 ibid.
other functional fields of action. In its place I suggest a need for a new type of relationship based on the reflexive ideal, where social inclusion does not depend on an inherent hierarchy rather ideas and information is taken from all levels of society (including NGOs and non state actors) and utilised in policy-making. These remedies may be applicable nationally and at the EU level. At the EU level there is a requirement to expand the agendas of communities to increase integration. The SPC comments:

‘Joint SPC-EMCO-EPC meetings aimed at discussing issues concerning the dynamic interplay of the three policy areas and to improve mutual understanding – as well as to cooperate in the preparation of common opinions–ensuring equal footing to all Committees in relation to the evaluation of both the NRPs and NSRs’. 432

If the committees interact only with their own specific actors then they are faced with the dilemma of being insulated from external sources of information, even though they may be able to achieve a deliberative set of policy ideas. If the committees are integrated then it would allow EU decision-making to consider the social and economic impacts on an equal footing. It is acknowledged that while each committee will be specialised in its area of expertise, it will consider the multi-dimensional approach utilised in the social inclusion decision making forums and reflect on other objectives when deciding its agenda.

Nationally, the EAPN claim that the Lisbon Strategy has failed to give ‘evidence of the impact of growth (or indeed lack of growth) on the delivery of better jobs or quality of life’. 433 The Integrated Guidelines are not reliant on approved and tested information on the relations between fiscal, employment and social inclusion policies. There is a need to utilise social impact assessments which could monitor the effect of the reforms on the priorities that are set in other fields, the use of social impact assessments will be further explored in chapter four. The 2008 Joint Reports also mentioned the use of the social impact assessments in order for Member States to provide information on the external


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effects, for example the impact of pension reform on the EES objectives. Integration is supported but not in the complete sense it is seen not remove differences, rather as in the case of the OMC SPSI as it is viewed as a separate field and not do be internalised within employment, education, or fiscal reform. Rather the aim of integration is to flourish the autonomy of each field of action. The OMC on a territorial and functional level aims to seek integration yet it is faced by threats of centralised decision making, there is a requirement for social impact assessments which may root out the problems that lie behind terms such as ‘feeding in’ and ‘feeding out’. The use of social impact assessments will be further explored in Chapter four of this thesis.

3.7.5 OMC SPSI’s Display of Procedural Features

The notion of law as procedure contains proponents of all the four procedural regimes mentioned so far. Law is perceived as a form of structure rather than a substantive framework. Law should not need to predict the substantive outcomes; rather it should allow the actors to achieve policy reforms in accordance with the social and normative environment they are in. This should be achieved in a reflexive manner. It presents the most normative aspect of the procedural paradigm as it argues that new governance should not just act as a steering device or an effective problem solving procedure rather it should open European law. The procedural account of the law-governance debate advocates that new governance is providing individuals with greater access to the legal order. As there not a common agreed definition for the European Social Model, law needs to take leadership to provide procedural instruments for negotiation and the environment to learn from various policy positions. This can only be conducted if there is certainty guaranteed in the outcomes.

The OMC procedures seem to exist in a loose procedural framework allowing the use of indicators and objectives. Alongside the Community Action Programme and the various Council decisions setting the tasks of the OMC committees the operational guide provides instructions to peer review processes. The guide can be viewed as a code of conduct, as it assists in the formation of rules to allow impartial peer reviews,

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and contains details for the participants on their reporting requirements. This seems to correlate with the Habermasian belief that for the creation of an unstrained and productive discourse there are requirements to develop loose boundaries to constrain the political discourse in order to allow greater participation and equal footing among the actors. This example can be highlighted in the operational guide that only allows 30 participants in a peer review to allow diverse discussions and exchange of ideas. This is also to guarantee that the reviewing procedure is a deliberative effort rather than a forum to disseminate the set policy ideas.\textsuperscript{436}

Member States such as Hungary and Austria urge that the OMC requires the setting of parameters, even though its strategic priorities are susceptible to change. Boundaries are needed for its secondary features such as the Member State duties on reporting to assist them to adequately prepare the reports.\textsuperscript{437} The NGOs also support some sort of codification. For example Solidar, EAPN and AGE all demand timelines to be provided which to set consultation details.\textsuperscript{438} In this instance the use of the law and procedural rules within the OMC SPSI mean that there would be a constant review of the policy exchange mechanisms. The rules will also work to secure the OMC with equal footing, as the EAPN point out the vulnerabilities of the OMC as:

‘As a general point this present time of uncertainty has shown how vulnerable the social aspects are within the EU. There is a need to institutionalise the OMC on Inclusion and to give more certainty to its continuance. As there appears not to be a treaty base for such an approach maybe it can be achieved by a joint Council and Parliament decision. Such a decision would signify a real commitment to achieving social progress at EU level and provide the stability needed to ensure confidence in the OMC processes on Social Protection and Social Inclusion.’\textsuperscript{439}

Hence a move towards outlining the important features of the OMC, despite not having the support of Treaty may assist in achieving a more certain institutional obligation. However, if the OMC is just perceived as a procedure then it faces criticisms because the OMC SPSI bears a substantive element, as it actively required to assist reforms. If

\begin{flushleft}
\textsuperscript{436} Ibid at Page 11.
\textsuperscript{437} Page 225. Dawson.(2011).
\textsuperscript{438} Page 4.Solidar, Page 11 AGE, Page 12 EAPN.
\textsuperscript{439} Page 7. EAPN.
\end{flushleft}
there is just focus placed upon procedure then the fear is that it will firstly neglect the substantive changes that are needed and secondly that it may lead to politicisation. On reflecting on the first point ETUC suggest the need for a detailed response as it argues:

‘Bolstering the OMC process does not mean embarking on a procedural approach …… ETUC supports an OMC that cannot be reduced to a mere framework for close cooperation on social protection based on exchanging experience, learning from each other and benchmarking performance in an attempt to identify best practices, even though there are always lessons to be learned from exchanges between Member States. After all, in ETUC’s view such an approach would be too weak and ineffective bearing in mind the challenges to be faced, both as regards the fight against social exclusion and in terms of the future and quality of pension and long-term healthcare systems’.  

This line of argument echoes the views expressed by Heretier and Scharpf that the soft nature of the OMC cannot begin to tackle the EU’s social dilemmas. Hence coordination can only be utilised if it results in the adoption of hard law. The fear as pointed out by EAPN is that the national strategy reports seem to discuss the policy matters that have already put in place, procedural requirements appear as ticked boxes on paper rather than having a real impact. It seems that it is about time that a procedural framework should be established accompanied by the willingness of the actors to utilise the framework to its fullest in order for the EU to attain its goals for eliminating poverty as declared by the Europe 2020 objectives which are further discussed in Chapter Four.

In relation to the second argument which relates to the procedure being politicised, it should be noted that it stems from the fact that the diversity which is present at the substantive level can be standardised through commonly set procedural rules. The Commission provides the basic guidance to the Member States with regards to the content of the NAPs that the Member States need to submit for the OMC SPSI.

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440 3.1-3.3 ETUC Page 226 Dawson 2011
442 Page 27 EAPN.
However it is the objectives and indicators that raise contentions. Different actors will interpret the indicators in accordance to their own will. This is the case for UNICE who stipulate that the objectives of the OMC should be economically inclined, while ETUC argue that the objectives and indicators are not dependent on competiveness and growth targets.443

It seems that the type of indicator used is influenced by political inferences, it is not a choice influenced by technical experts. Hence it was argued in the 2001 SPC indicators Report that the indicators need to work to highlight general social issues.444 This argument in my opinion correlates with Joerges and Neyer’s argument that despite comitology representing a technical decision-making model does not mean that it should not be susceptible to normative questioning. Rather decisions need to maintain a balance between utilising experts and up keeping normative and political values.445

The point can be emphasised by observing the highly contestable OMC SPSI primary indicator namely ‘at risk of poverty’, this considers individuals at risk of poverty if their income is below 60 percent of the median income.446 This indicator seems be more harsh towards Member States with faster growing economies, highlighting that the indicators merit substantive political decisions and can determine the choice of action and evaluation. There is also contention in relation to the scope of the indicators. NGOs such as FEANTSA argue that the indicators should convey the relevant social voice for example, devise a measurement for the elderly over the age of 80.447 Finally, the politicisation of procedure indicates that the OMC is heavily influenced by political decisions. The process at first appears as a negotiation and learning process is allowing executive negotiation to dominate under the heading of participatory governance.

3.8 Conclusion

The features of proceduralism discussed in the preceding sections present a new governance theory of law that combines the various theoretical approaches all existing

443 UNICE at 2.1 and Page 3 ETUC.
447 Page 3 FEANTSA.
with their individual methods. The inside theories have attributes which allow one to deduce the possible similarities with new governance. However, they present problems owing to the contentious views about the turn to governance, reflexive law and proceduralism. New governance methods, in all its approaches seem to neglect legal steering on a substantive level. It is felt that steering should not be carried from the centre as it has an adverse on the diverse political norms. Rather it places the need for legal actions to be more reflexive and conducted on a more decentralised level. In the case of the OMC there is a preference for the goals to be converged, and law is to operate in the background and support substantive disagreements.

This alleged devolution of hierarchy raises questions as to the extent that those factors which made law-making hard apply to the procedural level. These factors are based on various differences at the functional, territorial and normative levels. The issue is that if it is cumbersome to agree on substantive EU social policies, then agreement on procedures will not be so easy. The dangers are that either the procedural norms will have insufficient normative effect and will reflect in to the self referential discourse of each Member State or that they allow the dominance of one substantive view over the other. Each option has its own dilemmas, firstly if the normative power is delegated this may allow the dominance of some powerful actors. In the instance of the OMC hierarchical steering is not gained through substantive public law principles rather it is obtained through procedural rules that provide guidance to the participants. The rules have been agreed by the centre, but the centre has the opportunity to utilise the local and experimental discourses. The other possibility is that legal steering has in reality not put in place new hierarchies; rather it may support the old ones. The Member States take whatever suits their local needs and do not effectively utilise the guidance from the benchmarks, indicators and guidelines. Proceduralism is concealing the old inertia and that Europe is effectively dealing with the same old social defects.

These conclusions lead to the cynical observations of whether the OMC as designed in Lisbon and the five features stated above give rise to governance existing as an intra-legal conception, or whether it allows for enactment of hierarchies and the dominance of political power. This is precisely raised by Kennedy as he states:
'The new governance literature also seems, at last to my ears, in full retreat from what might be called the linguistic or self-reflective turn in legal scholarship. The tradition that would see these alternatives, hard and soft, as claims, postures, justifications, rhetorical performances rather than as useful policy alternatives to be selected and deployed as needed……Lost is the historical and cultural randomness of the regulatory system, and its porousness to instrumentalization from without. What are the stakes, not constitutionally, but actually- for this round, this conflict, this rule, this standard? Who for example, benefits from policy failure from governmental gridlock- from governance deficit, democracy deficits, from old governance, or for that matter, from ‘new governance’?\footnote{Page7. Kennedy, David.(2005). ‘Remarks on New Governance’. Paper presented to the Workshop on New Governance, Harvard Law School. February.}

Kennedy acknowledges that the move towards legal and regulatory strategies points to a preference towards a particular mode of governance but it also highlights a means of legitimising power. This political strategy is not hidden i.e the targets and goals of the OMC are apparent. The turn to governance will be a positive contribution under this reasoning as it allows social policy to be contested in the open.

This chapter has highlighted both the strengths and weaknesses of the theoretical models associated new governance. In this context I utilised the common features to in order to furnish a theoretical understanding of the OMC SPSI. The role of the next chapter will be to proceed further and illustrate that the OMC SPSI is not just a faint legal mechanism; rather, it has gained prominence in EU social policy-making. In this discussion, I will highlight the deficiencies of the OMC and provide suggestions for its reform in order to meet the demands of Europe 2020 and survive in the current financial crisis. These will include the opening up the institutional framework and allowing individuals and Parliament the right to scrutinise the indicators, targets and goals all that formalise the normative mechanisms of the OMC as it currently stands.
Chapter Four

Social Inclusion and the OMC: Considerations on its Past, Present and Future.

4.1 Introduction

In the previous chapters I have focused on the strengths and weaknesses of the theoretical models associated with new governance. In this context, I utilised the common features of the theoretical models to in order to furnish a theoretical understanding of the OMC SPSI. As mentioned in the previous chapter the discussion will now proceed further and illustrate that the OMC SPSI is not just a faint legal mechanism, rather it has gained prominence in EU social policy-making. The discussion will also highlight the deficiencies of the OMC. I will provide suggestions for its reform in order to meet the demands of Europe 2020 and survive in the current financial crisis. These reforms will include the opening up of the institutional framework and allowing individuals and Parliament the right to scrutinise the indicators, targets, goals and all that formalise the normative mechanisms of the OMC as it currently stands.

This chapter will provide an empirical analysis of the OMC SPSI; this is done in order to provide an evaluation of the Social OMC before 2008. A brief historical account of the Lisbon I and II will be provided. Thereafter a critical account will be presented of the results of the Social OMC. Flexicurity and activation will be examined as they were by-products of the Social OMC. The idea of activation is associated with the idea of social policy as a productive factor that emphasises on the harmonious mutual interaction of economic, employment and social policies. It refers to social protection and employment policies intended to encourage labour market participation while providing security for those outside the labour market. Similarly, flexicurity demands a balance between flexibility and security in order to increase the adaptability of workers

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and enterprises in an ever changing economy. Finally, proposals will be provided for reforming the Social OMC for it to be more credible and claim success in Europe 2020.

4.2 The Social OMC Before 2008

EU cooperation and coordination in social policy has been covered in three strands: The first being the OMC on poverty and social exclusion (OMC SPSI) which was launched under the 2000 Lisbon Strategy; the second being the OMC on pensions which was launched in 2001. Finally, the OMC on healthcare was introduced in 2004. Since 2006, the three OMCs have been streamlined into one integrated named as the ‘Social OMC’. The Social OMC contains 12 commonly agreed EU objectives. There are three objectives for each strand, followed by three overarching objectives which entail horizontal issues that overlap in each strand.450 The Social Protection Committee (SPC) administers the Social OMC. The SPC contains representatives from the Employment and Social Affairs ministries of each Member State, Commission representatives as well as members from the ‘Employment Social Policy, Health and Consumer Affairs’.

As mentioned in Chapter Three “Social Europe” currently consists of policies and supranational regulations that emerge via the activities of the markets and the courts. The EU has limited authority for reforms on policies which look to coordinate areas such as gender equality, health and safety, and worker information and consultations. These supranational regulations and policies can only be reformed at national levels by the Member States under their national employment and welfare regimes.451

The national labour markets and social security schemes need to be constantly updated in order to meet the demands created by the internal market and common currency. If this coordination occurs not only nationally, but also at the supranational level, this would enable the Member States to cope better with the European and global economies. For these processes to occur institutional forms are needed that would be sensitive to the diverse European welfare regimes, national responsibilities and the European multi-level system. It is argued by Heidenreich and Bischoff that in the area

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450 12 EU objectives for the streamlined Social OMC were adopted by the EU in March 2006. 
of European employment and social policy substantial EU coordination processes, accompanied with the interaction and bargaining procedures between the Council and Commission have led to the OMC providing a high quantity of supranational regulatory structures.\footnote{Page 507. Heidenreich, M and Bischoff, G. (2008) The OMC: A way to Europeanization of Social and Employment Policies? JCMS 46(3).} The Member States utilise the common objectives and initiatives set within the reports. These common objectives are initially set from the results of the coordination procedures.

As mentioned in Chapter Two variations exist within the coordination processes in areas where the OMC is applied. These differences are dependent on whether or not there are requirements set by the Treaty. Citi and Rhodes in their analysis of the OMC identified mechanisms for achieving convergence.\footnote{Citi, M and Rhodes, M (2007). ‘New modes of Governance in the EU: Common objectives versus National preferences’. European Governance Papers (EUROGOV), N-07-01\url{http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-01.pdf} Accessed 21 May 2013.} These are: simple benchmarking and recommendations; voluntary binding policy objectives and benchmarking and peer pressure; voluntary binding policy objectives and benchmarking and peer pressure and structured coordination; legally binding policy objectives (with sanctions) and benchmarking and peer pressure and structured coordination; legally binding policy objectives (with sanctions) and benchmarking and peer pressure and structured coordination. All but the last are described as forms of OMC. The effect of use of their model is that at one end of the scale hard law convergence capacity is highest with a gradual weakening of that capacity as OMC and OMC like governance architectures deployed a shift towards softer law. The Maastricht and Amsterdam treaties respectively provide a Treaty base for the EES and economic policies.\footnote{Maastricht Treaty introduced the EMU provisions Articles 98-124 EC. The Amsterdam Treaty added an Employment title, these provisions dealt with the EES (Article 124-30EC). The EES was created under Article 125 EC.} There are established guidelines for economic and employment guidelines, alongside the need to meet the set indicators and recommendations. Whilst in areas such as social inclusion there are only Commission guidelines to adhere to despite the requirement of producing National Action Plans (NAPs). The concern here seems to be that the different instruments of EU governance will have different aims in terms of convergence. For example, a directive provides the Member States with the discretion to achieve the results, unlike a regulation which looks for convergence of actions and results. As seen in Chapter three of this thesis the OMC processes are usually oriented towards the ideational category of
debate. At this level we may observe a certain degree of cognitive and normative convergence around certain frames, discourses and paradigms that come into existence due to the OMC. However this does prevent decisions, results and actions within the bounded rationality created by cognitive or normative convergence. In this way, even certain constraints on autonomy at the level of changing logics of appropriate action do not need to be incompatible with degrees of policy diversity.

In 2005 the Barroso Commission sought to relaunch the Lisbon Strategy. This was based on a). The need to increase in the focus to prioritize growth and jobs; b) need to involve stakeholders in the reforms processes and c) the ability to efficiently streamline to achieve coherent objectives. Despite the Treaty requirements to produce annual guidelines for employment under Article 128 EC (new Article 148 TFEU) and economic policy under Article 99 EC (new Article 121 TFEU) it called for the adoption of the ‘Integrated Guidelines’ for macro-economic, microeconomic and employment policies. This was done in order to foster growth and employment.455 The 2005 Spring European Council took a prominent step in terms of planning and reporting procedures. The European Employment Guidelines and the BEPGs were integrated in to the common guidelines. This document called the “Integrated Guidelines” linked the EES with economic policy coordination. The guidelines were part of 24 macro-economic, microeconomic and employment guidelines of the Lisbon Strategy for a period of three years. The new three year cycle the first being in 2005-08 began with a document of the Commission. From there onwards the Council decided on the Integrated Guidelines followed by the National Reform Programmes (NRPs) devised by the Lisbon Coordinator. The Member States were demanded to take more ownership of their NRPs through the domestically nominated Lisbon Coordinator456, as well as enhancing the role of the national parliaments, social partners and civil society members in the process of implementing the NRPS.457 The NRPs were followed by the Joint Employment Reports annual implementation reports submitted in the autumn of the following two years (2006, 2007), with a new cycle beginning in 2008 for the period 2008-10. The guidelines were also kept for the cycle 2008-2010.458 The country-specific

recommendations were kept with little amendments. The European Commission continued with its participation and delivered its annual reports referred to as ‘Progress Reports’, with a ‘Strategic Report’ prefacing the new cycle.

In 2006, with the aim of reducing the heavy reporting generated by the bureaucratic uncoordinated procedures, the Commission produced the Single Social OMC (OMC/SPSI) which brought together the previous three OMCs on social inclusion, pensions and healthcare. The Commission also brought out the annual ‘National Reports on Strategies on Social Protection and Social Inclusion’ (NRSSPIs). The aims of these changes were to ensure that the Lisbon and Social OMCs were linked via feeding-in and feeding out processes. The Commission stated specifically that the Social OMC ‘should parallel and interact closely with revised Lisbon on growth and employment objectives, while Lisbon programmes ‘feed out’ to advance social cohesion goals’. These changes brought about positive results as the OPTEM study on the EES credited the single National Reform Process to promote the awareness for lifelong learning and older workers.

The significance of these architectural reforms is that there was a shift in the accompanying rationale for coordination. The Commission’s emphasis on a bilateral relationship with the Member States under the new architecture represented at least initially a retreat from a ‘multilateral ‘ experimentalist and horizontal approach to policy learning as discussed in Chapter Three of this thesis. Simultaneously, the Commission moved away from the Kok Report’s demands for greater naming and shaming and gave greater freedom to states to develop reform strategies in accordance with the integrated guidelines. The change in the governance architecture demonstrated a vertical dimension of the relationship between the EU and Member States, at the same time it placed more emphasis on rendering the Member States accountable for their decisions than on iterative recalibration of normative steering. The States were provided with the opportunity of enhanced accountability both in terms of increasing EU level evaluation

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of the implementation of guidelines and in terms of governments’ engagement with national parliaments and other stakeholders.\textsuperscript{461}

In this sense while treaty-based coordination especially the EES as discussed in Chapter Three had been the model for many of the features of the initial OMC to combat social exclusion. That model had altered from one that initially emphasised iterative recalibration and densification of its objectives and recommendations, to one that sought to simplify its normative features and make the Member States accountable for their policy choices. For Armstrong, the ideal for the Social OMC was to be more like the initial trajectory of the EES, yet the experience of the EES made clear that the institutional change within OMC processes was not uni-directional.\textsuperscript{462} It seems to me that despite the Commission’s attempt to promote the social pillar via the OMC SPSI, the economic objectives of the EU gained importance over the EES. The best example of this can be found in the case of the 2005 Integrated Guidelines, which contained the guidelines for the EES and the economic policy coordination. This dampened the impact of the OMC SPSI as the economic policy coordination looked to promote the internal market, competitiveness, ‘sustainable’ growth and assist a ‘dynamic and well functioning European Monetary Union’.\textsuperscript{463} Equally, at the Treaty level the EES was expected to be ‘consistent with the broad guidelines of the economic policies of the Member States and the Community’.\textsuperscript{464} In addition, also expected to adhere to the ‘principle of an open market economy with free competition…stable prices, sound public finances and monetary conditions and a sustainable balance of payments’.\textsuperscript{465}

4.3 Employment and Social Exclusion

‘Activation’ is the policy paradigm that the EES and the OMC SPSI utilise in order to combat unemployment and social exclusion.\textsuperscript{466} The idea of activation is that social policy remains a productive factor which places its emphasis upon a harmonious mutual

\begin{itemize}
  \item Article 126, Treaty of the European Communities). New Article 146 TFEU.
  \item Article 4, Treaty of the European Communities). New Article 119 TFEU.
\end{itemize}
interaction of economic, employment and social policies. It refers to an articulation particularly of social protection and employment policies intended to encourage labour market participation, while ensuring the security of those outside the labour market. This interpretation of Lisbon’s social dimension pushes EU intervention beyond the sphere of social regulation identified by Majone. This is associated with isolating national redistributive policies from EU economic regulation towards an attempt to connect and reconcile the economic and social policies through EU action. It is this connection between the economic, employment and social policies that has been presented as being the mutually reinforcing elements of the Lisbon Policy triangle. The aim is to promote the concept of ‘make work pay’ namely that any form of employment is the best method to decrease poverty and social inclusion. The EES highlights the need to create work incentives for the people most vulnerable such as the young and those outside the labour market, whilst the OMC SPSI promotes the need to deal with discrimination and create equal opportunities and ‘access for all to the resources, rights and services needed for the participation in society’.

Employment, quality of work and social inclusion are interconnected as good quality of jobs alongside a boom in employment would surely be beneficial to those that are unemployed on a long term basis. The specific targets of 70% overall employment, female employment of 60%, and an employment target for older workers of 50% were set accordingly.

It was the success in increasing the employment rate that underpinned the optimism expressed by the Commission’s 2006 annual assessment, and by the European leaders in the Spring European Council of 2007, that the renewed Lisbon Strategy for Growth and Jobs started to bring results. The structural indicators released over a year later in

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June 2007, which included the figures for the period 2005-06. In the first phase of the Lisbon Strategy between 2000-05 overall employment rates among the EU15 had grown by less than 2% points from 63.4% in 2000\(^{475}\) to 65.3\(^{476}\) in 2005 (an average annual change of less than 0.4 points). The EU 27 showed a growth from 62.2% in 2000\(^{477}\) to 63.4% in 2005\(^{478}\) (an annual change of 0.24 points). The increase between 2005 and 2006 (which reflects the impact of the new strategy) is higher bringing the employment rate to 66% for the EU 15 and to 64.4% for the EU 27 (an increase of 0.7 and 1 points), and 67.3% in 2008.\(^{479}\) The overall employment rate in 2010 was 68.6% for EU 27 and 68.4% for EU17.\(^{480}\) However the figures failed to mark the intermediate employment target rate of 70% to be reached in 2010.\(^{481}\)

The Lisbon Strategy also set targets for improving female employment rates. The average employment rate in the EU 15 rose from 54.1% in 2000\(^{482}\) to 57.7% in 2005,\(^{483}\) thereby reaching the intermediate target of 57%.\(^{484}\) The figure for the EU 27 rose from 53.7%\(^ {485}\) in 2000 to 56.2% in 2005. The increase was higher in 2006, bringing the rates up to 58.6%\(^ {486}\) for EU15 and 57.2%\(^ {487}\) for EU27 coming to the Lisbon target for 60% for 2010.\(^ {488}\) In 2010 female employment rates were above the target set at 62.1% for EU27 and 61.7% for EU 17.\(^ {489}\)

The third target related to increasing the employment rates of older workers defined as those between 55 and 64 years old. There was greater success in the employment rate for older workers than for women prior to 2005 rising from 37.8% in 2000 to 44.1%\(^ {490}\)

\(^{475}\) Eurostat Structural Indicators 2007.  
\(^{476}\) Eurostat Structural Indicators 2007.  
\(^{477}\) Eurostat Structural Indicators 2007.  
\(^{478}\) Eurostat Structural Indicators 2007.  
\(^{479}\) Eurostat Structural Indicators 2007.  
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\(^{486}\) Eurostat Structural Indicators 2007.  
\(^{487}\) Eurostat Structural Indicators 2007.  
\(^{488}\) Eurostat Structural Indicators 2007.  
\(^{489}\) Page 485 Dieckhoff.  
in 2005 for the EU15, and from 36.9%\textsuperscript{491} in 2000 to 42.3% in 2005 for the EU27 and further increasing in 2006 45.3% for the EU15 and 43.5% for the EU27. It further increased in 2010 as it was 46.3% for EU27 and 45.8% for EU17.\textsuperscript{492}

An examination of the more general developments regarding poverty (here measured by the 60\% median income threshold) and social equality illustrated a decline in the last decade. The poverty rate has increased from 15\% in 2000 when the OMC SPSI was introduced (or 16\% in 1996) to 17\% in 2007 in the EU-15. The increase has been strong within the Scandinavian countries, Luxembourg and Germany.\textsuperscript{493} Despite the spread of activation policies the proportion of the working poor, stood at 8\% \textsuperscript{494} in both 1997 and 2007 within EU-15.\textsuperscript{495}

(a) The quality of work

In February 2002, improving quality of work was included in the employment guidelines as a general objective. The Guidelines referred to the following ten main dimensions of the quality of work that should be considered during policy initiatives: intrinsic job quality; skills, lifelong learning and career development; gender equality; health and safety at work; flexibility and security; inclusion and access to the labour market; work organisation and work-life balance; social dialogue and worker involvement; diversity and non-discrimination; and overall work performance.\textsuperscript{496}

Indicators would be utilised to measure the progress of the Member States for the above objectives. However from the onset there were problems as social dialogue was not featured in any of the indicators. The indicator on mobility between pay levels would measure ‘intrinsic job quality’ even though pay is an ‘extrinsic job feature’. The cultural issues may impact the work balance indicator which measured employment rates between those who had no children and those with children aged 0-6 years. The indicator on low pay was also not present which could have provided information.

\textsuperscript{491} Eurostat Structural Indicators 2007.
\textsuperscript{493} Eurostat Structural Indicators 2007.
\textsuperscript{494} Eurostat Structural Indicators 2007.
\textsuperscript{495} Page 10. Buchs.(2009).
relating to finance, although later an indicator measuring working poor which was devised by the SPC was adopted.

The Lisbon 2005 Strategy ensured that ‘Quality at work and productivity’ were featured as part of the core objectives within the integrated economic and employment guidelines. There were however no mention of the components of work quality, although attention was paid to monitor in the form an indicator reduce the share of working poor. 497

In relation to work-family reconciliation the target set was that by 2010 there would be a provision of child care to at least 90% of children between three years of age and the mandatory school age and at least 33% for children under the age of three. There were also three average targets with respect to skill improvements; a) a rate of no more than 10% early school leavers; b) an upper secondary school completion rate of 85% of 22 year olds by 2010; and c) 12.5% rate of participation in lifelong learning for the adult learning population aged 25-64. 498

The implementation reports of summer 2006 echoed that the early National Reform Plans and did not show any efforts on the part of the Member States in addressing work quality. Consequently, the Commission failed to address the issue of work quality and in its report merely stated that: ‘Progress in the quest to increase quality at work again remains mixed and the implementation of policies to further this aim is limited’. 499

While the gender gap has improved the quality of employment, the measures adopted did not show improvements. The main work in the national reports was done around increased childcare provisions, and there was little focus on the pay differential indicator of gender quality. There were failures to make any significant improvement in developing an adequate balance between labour flexibility and security. Despite the Member States formally committing themselves in the 2006 Spring Council to a more

498 Ibid page 7.
In its approach to strengthen the European welfare states the EES and OMC SPSI objectives demonstrated that, whilst both eventually aimed at strengthening the EU’s competitiveness and growth there was also a strong emphasis on social inclusion, the fight against poverty and equal opportunities. An additional difficulty in characterising the OMC’s policy content is based on the fact that ‘activation’ policies can be differently interpreted.\footnote{COM(2005)33 final. Communication from the Commission on the Social Agenda.} Daly regards activation to be the underlying philosophy of Lisbon.\footnote{COM(2006)44 final. Concerning a consultation on action at EU level to promote the active inclusion of the people furthest from the labour market.} Activation as a concept is connected with the very idea of social policy being a productive factor which highlights mutual interaction of economic, employment and social policies. Activation can be seen to modernise welfare states helping them survive challenges and create ‘a better access to labour markets as well as training opportunities for previously long-term unemployed people’.\footnote{Page 46l.Daly.M. (2006) .EU Policy after Lisbon JCMS 44(3) .} Secondly, activation can also be a means of restriction of social citizenship rights. This is because activation is often linked to the evolution of guaranteed social rights into “social contracts” according to which the social rights need to be earned. Activation policies seem to be placed with finding the reasons for why the individuals are unemployed. These reasons may include issues other than purely economics such as the lack of motivation and required skills.\footnote{Page 7. Buchs. (2009).} Therefore, the policy ideas focus on transforming individual attitudes, behaviour and skills rather than promoting the demand for labour or the generic redistribution of wealth.

### 4.4 Social Inclusion Policies

The bulk of the policies that combat Social Inclusion are within the NAPs on Social Inclusion. Social protection was added to social inclusion from 2006 within the National Reports on Strategies on Social Protection and Social Inclusion(NRSSPSI) following

the pursuit of the Lisbon Agenda by stressing to work to ‘significantly reducing the number of people at risk of poverty and social inclusion by 2010’. However, the data for the period 2001-05 are imperfect, and therefore, cannot provide evidence of progress. The common indicator set was the ‘at-risk-of-poverty rate’ i.e. ‘the share of persons with an equivalised disposable income below 60% of the national equivalent median income, which measured relative (financial) poverty’. The recession and the economic meltdown of global financial markets of 2008 could change the focus of the indicator and require it to look at the impacts of the economic recession on the risk of poverty.

The aim of the Lisbon relaunch in 2005 was that the streamlining process which brought together health, pensions and social inclusion was meant to allow the Member States to focus better on the objectives. This would then result in more focused plans as the Lisbon Phase one results for the EU 15 for reduction of poverty were rather negative. This was due to the Member States not quite meeting the original objectives of the strategy.

The 2006 social inclusion objectives presented a simplification of the original Nice objectives. They were the following:

1. Access for all to the resources, rights and services needed for participation in society, preventing and addressing exclusion, fighting all forms of discrimination leading to exclusion;

2. The active inclusion of all both, by promoting participation in the labour market and by fighting poverty and social exclusion;

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505 Presidency Conclusions Barcelona European Council 15 and 16 March 2002 SN 100/1/02 REV 1
507 Ibid Page 490.
509 The Nice Objectives adopted in 2000 by the Employment and Social Affairs Council were to: facilitate participation in employment, and access by all to resources, rights, goods and services; prevent the risk of exclusion; help the most vulnerable; mobilize all relevant bodies. Member States were requested to submit NAPs on Inclusion by June 2001 incorporating these objectives into national strategies and programmes. These NAPs would cover 2001-2003 and be reviewed by the Council and Commission
3. That social inclusion policies are well coordinated and involve all levels of
government and relevant actors, including people facing poverty, that they are effective
and mainstreamed into all relevant public bodies, including economic, budgetary,
education and training policies and structural programmes.513

In the pursuit of these objectives the Member States were required to produce annual
reports on their progress. The guidelines for the preparation of the National Reports on
Strategies for Social Protection and Social Inclusion 2006-08 provided an outline of the
requirements of the reports and highlighted the connection that needed to be built
between the need to following social inclusion policies and still keeping up with the
strategy for growth and jobs.

The Luxembourg Presidency Conference of 2006 led to the revised indicators. The
Member States were expected to utilise the indicators to measure progress within their
national reports. They contained overarching objectives, and one for each of the three
strands which were social inclusion, health and long-term care, and pensions. They were
based on the Laeken indicators, containing 11 primary, and three secondary indicators,
and a new category of 11 context indicators. The breakdowns by age groups and gender
were more systematically applied. Some of the indicators which were initially in the
primary group were moved to the secondary level and a number of primary and
secondary indicators became ‘context indicators’. Other indicators were refined such as
the jobless households’ indicators. Finally, some indicators were omitted including
persistent poverty calculated with a 50% threshold, long-term unemployment share, and
very long term unemployment rate.514

From a theoretical lens it can be argued that the choice of indicators selected present
hidden political contestation and conflict. For much of the governance literature
indicators are crucial in allowing processes of soft coordination to function
effectively.515 They allow European governments to exchange and adapt best practices
on the basis of an abstract comparative evaluation of what is effective in combating

418 final.
515 Mabbert, D. (2007). Learning by Numbers? The Use of Indicators in the Coordination of Social
social exclusion. They rely on deliberative bodies like the SPC to provide the substantive contents without the need for intergovernmental bargaining. This allows for diverse welfare regimes to utilise a common framework where the European social policies can be evaluated. The problem is however that the choice of an indicator is a political one as much as it is a technical one. Different NGOs may engage in lobbying to ensure that their interests are best covered. The choice of the indicators tends to reflect the type of social model the EU intends to adapt. The use of words such as ‘soft law’ and ‘indicators’, conceal the tensions between substantive viewpoints that can only be addressed legitimately in the open.

I argue that the revised indicators were devised in order to not let the list of indicators grow during the streamlining process yet capture the multi-dimensional phenomenon of social exclusion and act as an aid to mutual learning. The new objectives were mirrored with the overarching indicators as well as the specific indicators to underpin the social inclusion process. The idea to have the overarching indicators pointed to the desire of building an analytical bridge between the Lisbon and Sustainable Development Strategies and the streamlined social OMC processes. In this way these overarching indicators would support the mutual interaction of the processes. However, the reduction in the indicator numbers may present a move from the multi-dimensional representation of social exclusion with limited room for mutual learning. Moreover, indicators on immigration and child well-being may result in certain groups to be excluded. Moreover, the changes in indicators bring about quantiative and qualitative changes within domestic policies. The fear is that these changes may produce drifts between the cycles rather than systematic building on earlier iterations and project an image of EU policy coordination as being in perpetual transition.

The Joint Reports highlighted the work still to be done within Europe to secure social inclusion in Europe and also gave the EU feedback directly from the Member States on their current status in relation to achieving the targets set by the renewed Lisbon Strategy.
The following Table outlines my assessment of the Joint Reports 2002-06:\textsuperscript{516}

<table>
<thead>
<tr>
<th>YEAR</th>
<th>OVERALL ASSESSMENT</th>
<th>ISSUES IDENTIFIED</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>POSITIVE</td>
<td>Developing an inclusive labour market;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Guaranteeing an adequate income;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tackling educational disadvantage;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Protection of children rights required;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Regenerating areas of multiple deprivation.</td>
</tr>
<tr>
<td></td>
<td>OVERALL ASSESSMENT</td>
<td>ISSUES IDENTIFIED</td>
</tr>
<tr>
<td>2004</td>
<td>POSITIVE</td>
<td>Promotion of active labour market policies.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ensuring adequacy and accessibility of social protection schemes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Increase access to housing, health lifelong learning.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Reduce poverty and social exclusion amongst immigrants, and children</td>
</tr>
<tr>
<td>2006</td>
<td>Evidence of implementation gap</td>
<td>Overcoming discrimination and increasing the integration of people with disabilities, ethnic minorities and immigrants</td>
</tr>
<tr>
<td></td>
<td>Needs more attention:</td>
<td>Tackling education, child poverty and social protection.</td>
</tr>
<tr>
<td></td>
<td>Gender Mainstreaming;</td>
<td>Increasing labour market participation.</td>
</tr>
<tr>
<td></td>
<td>Governance;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Indicators;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Links between social policy and Structural Funds.</td>
<td></td>
</tr>
</tbody>
</table>

The table demonstrates that during the period 2002-2006 there were improvements in relation to the setting of indicators, the participation of stakeholders, and the use of quantitative targets. However there was still a need for the Member States to take action in order to improve labour market participation, and eradicate child poverty which was one the main areas of focus in order to completely eradicate poverty.

As the Joint Reports were compared structurally for this thesis it was noticed that the first cycle of reports were lengthy documents containing a political executive summary, a more analytical section on the EU followed by shorter analyses of the Member States NAPs. The chapter exploring the EU in generic terms stipulated the redistributive paradigm. The emphasis was placed on low income and the impact of social transfers. The parts of the reports highlighting the political assessments of the priorities and challenges faced by the Member States exhibited different paradigms providing the indication that different signals might come about the OMC architecture and might change overtime.

The comparison of the reports shows the changes in policy problems and priorities. The 2002 core challenges are in harmony with the multi-dimensional approach taken by the Nice objectives, where social exclusion was framed within policy fields and interventions that are consistent with the citizenship paradigm. The 2004 report portrayed a shift from labour markets to active labour markets from subjective income adequacy and a right to human dignity to the adequacy of social protection systems. There was a stronger emphasis on labour market participation; targeting vulnerable groups such as children, ethnic minorities, immigrants and reform of social protection this is consistent with the activation paradigm.

The aim of the Joint Reports was to act as a mechanism for reviewing national policies and strategies reported in the NAPs. The Member States were benchmarked against their own initial position with successive NAPs intended to strategically advance the Member States policies and programmes. The role of the Joint Reports was to review how the Member States used their NAPs and the OMC methodology strategically to plan their social inclusion policies rather than assess the overall effectiveness of the systems. This approach had its implications. Firstly, it is implied that the function of multi-surveillance was to review the domestic adaptation to the OMC as a process with an emphasis on the process by which Member States constructed their NAPs by utilising the common objectives and indicators, rather than looking at substantive policy effectiveness. The Member States were criticised for not providing strategic plans, clearly benchmarking their developments, and also not mobilising all relevant actors.
when preparing the NAPs. The second implication is that the OMC methodology is constantly encouraging the continuous improvement of even high performing states resulting in a situation where poor performing states are being praised for their efforts to do better and high performing states are criticised for their lack of ambition to do even better.

Looking back to the discussion in Chapter Three relating to the governing and accountability dimensions of the NAPs, it is apparent that in the first cycles of the process there was not a strong accountability pressure on the states. In a process in which those giving the account the Member States are also part of the forum to which the account is given and in the absence of a more independent role for the European Commission, the result was largely an information exchanging exercise. The 2004 Joint Reports emphasised the ‘high levels of investments in policies to promote social inclusion’ and on ‘high levels of social investment’ as a means of achieving the Lisbon goal of ‘the most socially progressive countries within the Union are most economically advanced’. This was not in the Commission’s original draft, and with the SPC bargaining out the Joint Report. This could be seen as undermining the EU institutions to relay clear judgements to the Member States.

4.4.1 Targets to Mark Progression in Social Inclusion

Targets, such as common indicators, are important in the OMC framework as they allow comparisons between Member States and assist to measure progress. The Social Inclusion Strategy was not as strategic to set targets to be gained by 2010 like the EES. Rather it namely provided a vague objective of ‘significantly reducing the number of people at risk of poverty and social exclusion by 2010’. To not set targets was quite risky as there were previous concerns from Lisbon I that if Member States did not set targets then it would be very difficult to mark progress. This theme was raised during the revised strategy (Lisbon II) and efforts were made to use direct outcome targets.

In relation to marking the progress of the Member States from their NAPs, it could be said that the EU’s central ideas on social inclusion were present but not anywhere near to perfection. The reports submitted from France, UK and France were positive. On the other hand the Belgian, Irish, and Spanish reports showed improvements. Yet the Lisbon issues were not covered by Denmark, Sweden, Austria, Greece and Luxembourg.\footnote{Table 1. COM(2004) . Joint Report on Social Inclusion 2004(including statistical annex)(Luxembourg, Office for Official Publications of the European Communities).}

Even were indicators were present the Member States failed to utilise direct outcome targets in their initials NAPs. In 2003 after the production of the second NAPs countries were still failing to provide clear and quantified targets, despite Member States being instructed in doing so by the Spring Council.\footnote{Table 1. COM(2004) . Joint Report on Social Inclusion 2004(including statistical annex)(Luxembourg, Office for Official Publications of the European Communities).} This was the case for Belgium, Denmark, Germany Italy, Luxembourg, Sweden and Finland who did not provide any quantified targets.\footnote{Table 1. COM(2004) . Joint Report on Social Inclusion 2004(including statistical annex)(Luxembourg, Office for Official Publications of the European Communities).}

Portugal, Spain, Greece, and Ireland stood out for using direct outcome targets for reducing ‘at risk-of-poverty rate’. These countries set quantifiable outcome targets for reducing risk-of poverty’ based indicator of 60% per cent of equivalised median income.\footnote{Table 1. COM(2004) . Joint Report on Social Inclusion 2004(including statistical annex)(Luxembourg, Office for Official Publications of the European Communities).} The UK gave the target of reducing the number of children in low income households by 25%. France, the Netherlands and Austria also used direct outcome indicators.\footnote{Table 1. COM(2004) . Joint Report on Social Inclusion 2004(including statistical annex)(Luxembourg, Office for Official Publications of the European Communities).}

The Member States were provided with guidelines before formulising their 2006-2008 NAPs to adequately assist them to utilise the commonly agreed indicators, in order to set quantifiable targets to reduce poverty and social inclusion by 2010. Belgium provided quantifiable outcome targets linked to the revised indicators: reducing the number of children in households where no one is in paid employment from 12.9% in
2005 to 7% in 2010, reducing the number of children at risk to 12% by 2010, and reducing early school leaving to 10% by 2010. Denmark’s direct outcome targets related to the common indicators of at least 85% of youths must complete a youth education in 2010. Sweden had the direct outcome target to reduce unemployment to 4%. The German NAP targets for inclusion areas were not defined. The NAP did include the output target that no young person under the age of 25 should remain unemployed for longer than 3 months. Neither did it provide information on the target of permanently reducing the numbers of young people without qualifications by 2010. Finland on the other hand, still failed to provide targets and measures relating to social exclusion and poverty. In addition countries were now basing their direct outcome targets on the EU indicators.

The following table indicates the progress regarding NAPs of EU 15 overtime on the basis of the Joint Reports 2002 and 2006:

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Best Countries</td>
<td>Denmark, France, Netherlands (‘Utilising a holistic approach’)</td>
<td>Belgium.</td>
</tr>
<tr>
<td>Next Best</td>
<td>Finland, Portugal, Sweden, UK (‘Utilising a reasonably coherent approach’)</td>
<td>France, Finland, Ireland, Spain, UK.</td>
</tr>
<tr>
<td>Third Best</td>
<td>Belgium, Germany, Ireland, Italy and Spain.</td>
<td>Austria, Denmark, Germany, Netherlands and Portugal.</td>
</tr>
<tr>
<td>Poorest performers</td>
<td>Austria, Greece, Luxembourg.</td>
<td>Sweden, Greece, Italy, Luxembourg.</td>
</tr>
</tbody>
</table>

There are two points to note about the grouping of the states. Firstly the new reporting structure, its time frame and presentation allowed for a more thematic analysis of child poverty. The Joint reports presented an evaluation of the effectiveness of domestic policies in terms of their impact on child poverty outcomes. This meant that there was a shift from the fact that the process claimed not to be making direct assessments of policy performance. This claim could have never stood ground as the indicators could be utilised to determine policy performance. Secondly, the focus of the Member States

on employment measures reinforces the activation paradigm that employment is the best route out of poverty and exclusion. However, work can only guarantee reduction in child poverty if it is well paid and reconciled with affordable child-care.

The Task Force on Child Well-Being and Child Poverty which was set up during the Luxembourg Presidency under the SPC has worked well to bring about improvements to the living conditions of children. This would be seen as another positive change come about due to the EU social inclusion policy as Member States within their NAP look at the objective to prevent child poverty and allow social inclusion. The NSRs and NAPs 2006-2008 were more strategic than the previous years, also focused on child poverty. The European Spring Council 2006 asked Member States ‘to take necessary steps to rapidly and significantly reduce child poverty, giving all children equal opportunities regardless of their social background’.527

Noticeably, the term social exclusion has been replaced by social inclusion because the Joint Report on Social Protection and Social Inclusion 2007 favoured the use of active inclusion. The term ‘active social inclusion’ is now defined to mean participation in the labour market.528 Activation policies encourage the individual to advance the skill sets and improve the employment prospects for the most vulnerable. The policies related to activation in the NAPs need to look towards assisting groups such as older workers, new entrants, youth, women, disabled, migrants and long-term unemployed.529 However, only Austria, Denmark, Finland, Germany, Greece, Luxembourg, Malta, Sweden and Spain report on meeting the target of ‘offering young people a new start within 6 months’. The fear is that lack of active support for groups like the long term unemployed will further push individuals in to social exclusion. Moreover, the trade unions and civic society organisations have pointed at the limited scope of activation measures.530 The emphasis on eliminating disincentives to work and increased conditionality of benefits does not take in to account that not all people can work and

530 ETUC 2006. ‘ETUC Reply’. Reply to the Communication concerning a consultation on action at EU level to promote the active inclusion of the people EAPN 2006.
there are not appropriate jobs for all individuals. They highlight the need to device alternative options to achieve social inclusion for individuals that are unable to work.

A further cycle of reports of NSR and NAPs for 2008-2010 were produced in a different economic climate to the preceding reports. The social impact of the recession emerged as the key themes for the 2009/2010 Joint Reports. The thematic analysis of the Joint Reports relied on both the SPC and the Commission’s Joint Reports on the social impact of the recession. Taken together with the deeper analytical work done on child poverty it is evident that the NSRs and NAPs are just one type of monitoring and evaluation undertaken at the EU level. The SPC’s openness to engage with experts allows for the SPC to produce better thematic findings which are then fed in the Joint Reports.

It seems that whilst Lisbon I promoted welfare organisation, the Lisbon II model changed its focus to allow social cohesion and work against discrimination. It removed social inclusion as the main concept for focus. There appear to be two approaches to social exclusion within the OMC. The first tends to correlate with the OMC as being a multi-dimensional approach which calls for changes in the policy in an integrated fashion. The second is much more focused which looks to activation as the main priority. Social exclusion is a flexible concept with multiple references and meanings therefore can fit with both understandings. However the danger is that the social policy models, in particular the reforming ones, can only bear a limited amount of instability. Hence, veering between quite different concepts and meanings, in my view, makes the OMC policy programme not very stable.

To achieve better results in social inclusion I argue in this chapter that there is a need to reform closer to the OMC model. As the OMC model allows for common objectives to be achieved through a variety of governance architectures such as peer reviews, exchange of best practice and knowledge. The OMC allows issues to come to the European form which then allows countries to look at common problems and devise

common solutions on the basis of knowledge and best practice. There are evident issues with the OMC Social inclusion including the lack of sanctioning and not enough of the targets that put pressure on Member States to abide to. The procedural flaws include lack of definitions for good practice, and that the indicators are more concerned with eradicating poverty than tackling social exclusion.

It seems obvious that the process has flaws this allows Member States reasons to not take social inclusion so seriously. The Member States fail to see the OMC as more than a means of exchanging practice. Scharpf also points out that, the Lisbon Social inclusion process lacks output or performance legitimacy. Social inclusion itself has a biased nature in that settles in well with the liberal model which can be difficult for Member States as it relies on cognitive mechanisms to bring about convergence within the community. Meanwhile, its positive contributions include its processes for collecting knowledge and data about problems and potential solutions, during the governance arrangements being conducted and improved after each cycle.

A notable shift in the Lisbon’s competitiveness discourse was the increasing prominence given to labour market flexibility. The 2000 Strategy stressed the need for workers to be sufficiently mobile and adaptable in order to be able to ‘anticipate, trigger, and absorb’ changing economic circumstances. In response it recommends that unsustainable social protection systems should be reformed through the development of active employment policies to incentivise work over welfare. This theme was followed through the introduction of flexicurity in the relaunched strategy discussed in the next section.

**4.5 Flexicurity**

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536 See Chapter two.
Even though the later European Councils surveyed the progress of the Lisbon Strategy, the 2004 Kok Report ‘Facing the Challenge’ highlighted under performance in many areas, including the labour market.\(^{538}\) The report recommended a balance between flexibility and security in order to increase the adaptability of workers and enterprises in an ever changing economy. Following its negative mid-term evaluation, the Lisbon Strategy was revamped to focus on delivering stronger, long lasting growth, and more and better jobs.

The tone of the Commission’s criticisms of developments in this sphere reflected the fact that, in the course of 2006, ‘flexicurity’ was increasingly becoming the central plank for its programme for improving work quality in work. The Commission stepped up to the debate on labour market reforms through its bold 2006 Green Paper ‘Modernising labour law to meet the challenges of the 21\(^{st}\) century’, which posed a ‘flexible and inclusive labour market’ as a key challenge and advocated a flexicurity approach. This was followed by the 2007 publication of the Commission of ‘Towards Common Principles of Flexicurity: More and better jobs through flexibility and security’. This document capitalised on the informal endorsement of flexicurity at the political level of the European Council in 2006, and provided both a general conceptual framework and pathways to determine and develop flexicurity agendas at Member State level.

The Commission relied on the neo-classical labour theory developed by economists in the 1980’s. The theory emphasises the fact that in the labour market there was a distinct division between employees with high levels of job security and workers who had less chances to gain access to good jobs. This evidently created entry barriers for workers who disadvantaged by low skills, ethnicity, or gender.\(^{539}\)

‘Flexicurity’ is a model which had been devised by the Dutch and the Danes in the 1990s. It was proposed as the way of undercutting such segmentation and creating a


more inclusive labour market.\textsuperscript{540} It seemed to place issues already at the EU level that seemed important to the employer and employee. Furthermore, it offered an overreaching concept that linked the reform programmes in the employment and social fields.\textsuperscript{541}

The Commission in its 2006 ‘Green Paper on Modernising Labour Law’ launched flexicurity.\textsuperscript{542} The Paper not only highlighted the benefits that flexicurity would bring while Member States continued to progress towards the Lisbon objectives. It recognised the need to adapt labour law to assist employees during phases such as transitions and job mobility. It also considered the problems faced by employees that could occur in various contracts ranging from the part time, temporary work, agency jobs, being employed by subcontracts, self employed and frontier workers.

The aim of flexicurity is the partial dismantling of static labour law protection that acts as a counterweight to flexibility and its replacement with dynamic protection that embraces flexibility but offers a new kind of security in return. This is particularly difficult towards the vested interests in static labour market protection, namely the labour markets ‘insiders’ with relatively stable positions and their unions. These vested interests know what they stand to lose, but often remain unconvinced of the benefits. The flexibility part of flexicurity is certain, whereas the security part is uncertain.

To become more effective in its quest for dynamic employment security, flexicurity requires labour law to focus more on particular individuals and their labour market positions. There is an obstacle, as traditional labour law is often standardised and collective in its approach, with unions being the agents for a supposedly uniform labour force that speaks in unison. Flexicurity interferes with the traditional role for unions, further complicating its reception at the national level of the Member States on the part of the powerful unions. However, flexicurity is not anti-union. It relies on union involvement to safeguard and promote the employability of workers throughout their careers both inside and outside companies.

\textsuperscript{540}COM (2006), Employment in Europe 2006.(Luxembourg, Office for Official Publication of the European Communities).
Flexicurity contains four essential components:  

- Flexible and reliable contractual agreements (from the perspective of the employer and employee, of ‘insiders’ and ‘outsiders’) through modern labour laws, collective agreements and work organizations;  
- Comprehensive lifelong learning strategies to ensure the continual adaptability and employability of workers, particularly the most vulnerable;  
- Effective active labour market policies that help people cope with rapid change, reduce unemployment spells and ease transitions to new jobs;  
- Modern social security systems that provide adequate income support encourage employment and facilitate labour market mobility. This includes broad coverage of social protection provisions (unemployment benefits, pensions and healthcare) that help people combine work with private and family responsibilities such as child care.

The Commission had made earlier attempts at promoting flexicurity. It was marked with success in the case of the Directives on part-time and temporary workers (Directives 97/81/EC and 1997/70/EC) which were adopted by the social partners namely UNIC, CEEP and ETUC. However they failed to reach an agreement for adopting legislation on agency work.

In responding to the Green Paper on Flexicurity ETUC argued that lowering employment protection may lead to issues of trust, loyalty and personal investment with regards to the employee, while the employer may be happier to invest on the training and skills of their employees. Also, current employees with standard contracts should be

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provided with less protection in order to achieve a balance and lessen the gap between those inside to those outside the labour market.\footnote{ETUC (2007). ETUC position on the European Commission’s Green Paper. Modernizing and strengthening Labour Law to meet the challenges of the 21st Century, COM (2006)708 final, Brussels, European Trade Union Confederation.}

The Commission proposed eight suggestions in its 2007 Communication.\footnote{COM (2007). 359. Towards Common principles of flexicurity: more and better jobs through flexibility and security.} The purpose of the suggestions were to allow the Member States, EU institutions and social partners to agree flexicurity measures that would be officially adopted by the EU Council towards the end of 2007. The suggestions aimed at the Member States were built on common principles which if implemented may lead to better productivity in the work place. These common principles would be utilised to develop the principle of flexicurity which in return would be able to enhance ‘lifelong learning strategies’, ‘effective labour market strategies’, security provisions that would increase employment and social cohesion’.\footnote{Page 6. COM (2007) 359.} The common principles would also ensure that flexicurity would work towards being adaptable to the market; assist to produce ‘financially sustainable policy packages’; promote gender equality\footnote{Page 7. COM (2007) 359.}; reduce the divide between those currently in employment and those who are unemployed\footnote{Page 9. COM (2007) 359.}; maintain a balance between rights and responsibilities\footnote{Page 9. COM (2007) 359}; promote trust and dialogue between parties in order for them to together develop policies.\footnote{Page 10. COM (2007) 359}

In recognition of the fact that there are cultural, socio economic and institutional differences among the Member States, the Commission did not set a single flexicurity model. Rather it has provided the Member States ‘pathways to flexicurity’.\footnote{Page 11. COM (2007) 359} The first pathway is designed to assist the Member States ‘pathways to flexicurity’.\footnote{Page 12. COM (2007) 359} The first pathway is designed to assist the Member States with extreme conditions i.e. where there is a high level of protection for those within the labour market and little to those not employed. It aims to cut down contractual segmentation.\footnote{Page 13 COM (2007) 359} The second pathway is designed for the Member States who offer a high protection via social security but have
low job flows. The Commission proposes for the Member State to introduce better lifelong learning opportunities and help in cases where companies relocate due to decrease labour. If those conditions are met then the Member States may able to relax their dismissal procedures. This would enable employers to save time and costs.\textsuperscript{561}

The aim of the third pathway was to encourage the Member States to generate activation policies that provide opportunities for individuals to participate in lifelong learning arrangements and develop skills. This pathway was intended for the Member States which despite having high employment rates had groups which were at risk of exclusion.\textsuperscript{562} The fourth pathway asked the Member States to report their progress via the National Reform Programme Reports. It was aimed at countries with groups on long term benefits due to elements of economic restructuring. Here the Member States are required to be proactive and take steps where there threats of redundancies, provide better assistance through social security.\textsuperscript{563}

The Commission through the Flexicurity Communication showed some good intentions to assist the Member States to work towards improving work quality. This was done by encouraging the Member States to participate actively through partnerships and social dialogue to create policies in which there is little disturbance in the flow of the internal market but also the unemployed can be better looked. However it failed to provide ways to go about to set up the mechanisms of change to fully avail those policies; hence it highlighted that flexicurity may have its limitations.

‘A well functioning labour market and high employment rate create employment security’.\textsuperscript{564} The problem with the flexicurity concept is that it fails to understand that individuals may prefer to be employed at lower wages than those already in the labour market, rather than staying without a job. The flexicurity concept regards ‘high quality and productive work places’ as ‘essential’.\textsuperscript{565} It is not so easy to determine how far the flexicurity approach will flex to allow the acceptance of low wages. The ultimate fear is

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\textsuperscript{561} Page 14 COM (2007) 359  \\
\textsuperscript{562} Page 16 COM (2007) 359  \\
\textsuperscript{563} Page 17 COM (2007) 359  \\
\textsuperscript{564} Ibid page 6.  \\
\end{flushright}
that if protection is provided to jobs than the workers than this would doom the Strategy.  

There is a requirement to provide a balance between the need to adopt policies that work to reduce unemployment against softer policies such as increasing unemployment benefits. The trade unions may view the extensive problem solving policies which are implemented for economic reasons as going against the very aims of flexicurity. There need to be clear considerations placed on the fact that unemployed individuals may be influenced by financial restraints to accept new employment. However, this type of segmentation is temporary resulting in the new job entrant being provided with less protection than those already in the labour market.

These policies actually assist in formulating labour market reforms. Funk comments that ‘Such marginal liberalization policies may be a transnational device to gradually build a political coalition in favour of a more equitable labour market reforms’. These reforms could lead to a decrease in unemployment as those inside the labour market have less opportunities for utilising power for wage bargaining and also that smaller gaps in unemployment durations would mean that skills are always utilised efficiently rather than wasted.

Flexicurity policies may also cause gender job segregation. This usually has an impact on women as they are more likely to employment breaks resulting in a ‘segmented labour market’ whereby jobs are secure but are coupled with lower wages and less opportunities for career progression. In order to combat this there is a need for polices to be formulated that take ensure that factors such unpaid work should not have a negative impact on female career progression.

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568 Ibid page 375.
569 Ibid page 375.
570 Ibid page 376.
571 Ibid page 377.
Flexicurity seems to be distilled in the labour market of countries with a strong culture of social dialogue. The situation is much different in the Mediterranean countries where the relationship is not so smooth between the employer and employee. In addition it is not so easy to implement flexicurity provisions if the individuals inside the labour market are politically influential. Finally, the reforms could be heavily influenced by the participation of social partners, but the social partners need to utilise their influence and provide a contribution in order to achieve the targets set by the EES. If their participation is limited then the danger is that it could have a negative impact as the policies provided by the government may be harder to accept and follow. Therefore, in my opinion flexicurity my benefit from utilising the OMC and social dialogue together more robustly rather than total reliance on social dialogue, as the OMC may introduce more non state actors in the decision-making. This would be a better option in the current economic climate where austerity measures are being introduced by Member States and social protection available to workers is being reduced.


It has been argued that the OMC can transform EU law-making. This idea of transformation or transformation thesis perceives the OMC to evolve continuously. Moreover, during this process of evolution the traditional elements of legal accountability and participation are taken over by new features such as peer review as mentioned in Chapter Three.

The transformation thesis relies ‘on a deliberative conception of the EU polity; one in which the processes of new governance have the potential to significantly alter the perceptions of state and non-state actors’. This is similar to Scharpf’s idea of input legitimacy, to the effect that the decisions are seen to be legitimate ‘if and because they


reflect the will of the people and that they can be derived from the authentic preferences
of a political community’. 574

As mentioned in Chapter Three the experimentalists approach the OMC by suggesting
that it should be perceived to ‘an extra legal process’ . 575 It is a ‘second best solution’
and, in relation to the traditional EU legal instruments, it appears rather weak. 576 The
transformation literature recognises the EU as an experimentalist legal structure where
power is shared between legal actors.

This change in perception of the EU within social policy recognises the fact that there a
constant battle of the EU to take into account the rich diversity of the Member States
welfare regimes, coupled with changes in national preferences. The existence of this
diversity means that it becomes very hard to achieve fixed rules in social policy.
Therefore, common law making would not be able to resolve issues of regulatory
competition and devise any form of minimum social standards. 577 The issue of concern
with the OMC and this change of discourse is that the OMC in particular seems to
discard legal and political accountability as it does not take in to account the role of the
CJEU thereby, ignoring the EU as a polity. 578 However, in the defence of the OMC with
the other new forms of governance is the fact that it seems to revaluate accountability
and subsidiarity. The transformation thesis claims that new horizontal and dynamic
methods of accountability are replacing the traditional methods. An example of this is
the OMC reporting cycle which holds the actors participating responsible in relation to
maintain the changing standards that are being set within the process. This cycle allows
the reframing of goals and norms.

As mentioned in Chapter Three the peer-review process within the OMC SPSI allows
the national administrators to not only utilise the peer review committees as a
transparent forum to defend or provide justifications on their chosen policies. They also

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exchange opinions and allow themselves to be scrutinised. This peer-review structure works to develop accountable relations between the policy makers and the civil society. The Kok review of the Lisbon Strategy favoured the peer review approach as it highlighted that peer review was the most preferable way to overcome the gaps in the implementation procedures. The SPC is heavily involved within the peer-review cycle. The peer-review procedures involve the Commission officials and national representatives working together in closed meetings to provide the scrutiny of the NAPs. It is expected that the participation of ‘Progress’ (the forum sponsored by the Community Action Programme For Social Solidarity is officially responsible for the peer review process of the OMC SPSI) will add value to horizontal accountability as it designed to demonstrate best practice found in the Member States.

Generally it is feared by its opponents that peer review procedures are not as transparent as they may seem, rather they are viewed as closed door procedures. The participants are national administrators; therefore, the peer reviews may not do much to achieve a more dynamic form of accountability in EU governance. The Member States that are involved in the process complain about conflict between the limited access to the peer review documents and the Treaty obligations on transparency under Article 255 EC. It seems that the peer review processes are focused towards providing mutual learning rather than dynamic accountability, as dynamic accountability as discussed in Chapter three is dependent on the procedures being fully transparent.

The SPC which was founded in 2004 proclaimed its role as facilitating mutual learning. The Commission further supports this, as it states the following:

‘It is important to note that the Peer Review Programme is not based on competition, but should be regarded as an invitation to discover and exchange the wealth of experiences and good practices available at Member-State level and to explore their applicability in other contexts’.

On a practical basis in terms of democratic experimentalism as mentioned in Chapter Three peer-reviews do not present threats to destabilise policies as they do not seem to review. However the overall procedure may lead to improve accountability and critical evaluation. From the point of subsidiarity, it can be seen that participation is guaranteed at the national level by procedural gatekeepers. However, the national participants do not have the structural right of entry at the EU forum. If participation is only limited to the national level then the feedback in to the centre will be limited.

Transformation may be improved by firstly the Commission taking action and monitoring the procedure to ensure that the participation requirements are met. Secondly, there is the need for greater transparent interactions between the SPC and other peer reviewing bodies. The issue of concern is that it hard to monitor participation as the EU does not contain any procedural basis for the method. The limited EU competence for social inclusion and policy may leave fewer options to utilise soft law and horizontal coordination required by the OMC SPSP.

The above section explored the idea that the OMC can transform policy-making by utilising mechanisms such as peer review and the participation of stakeholders. What seems to be missing in the discussion so far is the debate on the whether the Social OMC (with its three strands on social inclusion, pensions and long-term healthcare) has delivered concrete results. This is of important concern in this thesis as it is this discussion that will provide the basis for the proposals made in the final part of this chapter on the future and the role of the Social OMC within the Europe2020 Strategy. The next section will aim to answer whether the Social OMC has succeeded to relay the results. As discussed in Chapter Two in terms of its institutional characteristics, the absence of a shadow of hierarchy (legislative and executive decisions) would suggest that this mode of governance would not be able to effectively deal effectively with the problems that it is meant to resolve. Yet the following section will argue that through weak policy instruments such as policy learning it does have real effects. It’s not the hardness or softness of the OMC but its ability to allow creative appropriation and action at both national and European levels.

4.7 Has the Social OMC Delivered Its promises?
4.7.1 The Social OMC: An assessment of its adequacy and its impact

4.7.1.1 The impact of the Social OMC

The Social OMC has had an impact on domestic and EU politics. This impact is evident in two ways. The first is the substantive impact of the OMC, which consists of the changes that it has brought about in the policy thinking and in the individual Member States’ policies. The second is the procedural changes i.e. the impact of domestic policy making, shifts in governance and policy making arrangements.

1) Substantive policy change

The EES and the OMCSPSI have resulted in three substantive policy changes. The first being a cognitive shift by bringing about changes in the way national policy is thought about. The second is a political shift which works to enforce changes in policy agenda at the national level. Finally, there are noticeable programmatic shifts which enforce specific changes in policies at the national level. The cognitive shift has been the most effective in bringing change at the EU level. The examples of this change would include debates in Belgium, The Netherlands, and France in order to combat unemployment, introduce flexicurity; eradicate child poverty; make work pay; active ageing; providing sustainable social protection. The Baltic countries and Poland revised their employment and social policies before entering the EU. They also participated in the EES and the Social OMC before their accession.

The political shift of policies arising at the national level due to the EES and social OMCs are evident in Belgium, France, Germany, the Netherlands, Spain, Sweden, Poland and the Baltic Member States. There have been changes throughout the national political agendas of these countries as they have paid attention in their policies

583 As discussed in Chapter two.
585 Ibid.
586 Ibid.
with the aim to remove social exclusion and child poverty; improve lifelong learning, gender mainstreaming. They have also made efforts to tackle old problems such as pensions, early exit from the labour market, gender segregation, integration of immigrants, and child care provisions. These attempts of change from the Member States highlighted that the OMC had a positive impact, encouraging the Member States to reframe their political agendas and focus their attentions on the fight against poverty and social inclusion.\[587\]

The EES highlighted the changes that the OMC brought to the national policies and programmes. This change is evident in the development of the UK, Irish, German and Dutch policies in activation and unemployment. This was followed by the French and German tax reform, active ageing and lifelong learning policies, alongside the Danish and Swedish efforts to reduce ethnic and gender mainstreaming.\[588\]

In comparison with the EES, the assessment of the changes implemented by the Social OMC on national policies is not so easy to identify. Among the positive changes were the policies introduced in Ireland in relation to integrating immigrants and emphasis on relative income poverty. By comparing experiences within the OMC SPSI and the EES, new policies were introduced to assist lone mothers in employment and combat anti-immigrant racism.\[589\] The introduction of the New Active Solidarity Income was also a notable change as it provides additional income to individuals on low income without losing their benefits.\[590\] The 2005 evaluation of the NAPs claimed changes in the UK in relation to policies dealing with lone parents and child care; improvements in social assistance in Slovakia, introducing the tax credit system in Slovenia and providing


public assistance centres in Luxembourg.\textsuperscript{591} There is a need for further research to
determine the exact significance of the OMC’s influence in these Member States and
their reforms.

The OMC has some impact on the national reforms related to pensions. It is
acknowledged that it is institutionally far weaker than the OMC SPSI and the EES. The
OMC has been credited by The European Association of Public Sector Pension
Institutions (EAPSI) and the European Older People’s Platform (AGE) to extend the
choice of policies nationally and at the EU level by creating awareness of the reforms in
place of different Member States.\textsuperscript{592} For example, Portugal officials attribute the
pension and security reform in 2006 to the OMC. Here, the OMC combined into a
distinctive hybrid the elements from the experience of other European countries.\textsuperscript{593}

2) Procedural shifting in Governance and Policy-Making

Zeitlin acknowledges that the EES and the social OMCs have contributed significantly
to procedural shifts in governance and policy-making arrangements.\textsuperscript{594} These shifts in
domestic governance are visible through horizontal and vertical integration, evidence
based policy making and stakeholder involvement. The creation of new bodies, that are
required for drafting the SPSI NAPs allow opportunities for horizontal integration of the
different policy fields. An example of this collaboration of various policy sectors and
administrative units is present in the form of the Transversal Policy Document (DPT) on
Social Inclusion which is annually produced.\textsuperscript{595} Whilst the French Inter-Ministerial
Committee to Combat Social Exclusion (CILE) has not been as effective in allowing
horizontal integration, developments similar to the DPT are found in Cyprus, Malta,
Hungary, the Czech Republic, Poland, Slovakia, Lithuania, Latvia and Estonia.\textsuperscript{596}
However, the NAPs are regarded as reports to the Union rather than official operational
planning documents. The OMC on Social Inclusion has managed to successfully be
mainstreamed into domestic policy-making in countries such as Ireland, Portugal,

\textsuperscript{592} Ibid page 10.
\textsuperscript{593} Ibid page 7.
\textsuperscript{594} Ibid page 8.
Belgium and France, through linkages to National Anti-Poverty Strategies and budgetary planning processes.\footnote{Norris.( 2007 ). Chapter3.}

As the OMC SPSI cycle requires monitoring. It is envisaged that the Member States will develop systems to collect data utilising Europeanised survey instruments, information systems and statistical indicators. Hence, by following the requirements of the OMC the Member States are improving in their national steering capacities and statistical capacities. To use France as an illustration, where national statistical capacities in the social field were better developed, the OMC/Inclusion and common indicators have allowed the harmonization of national indicators of poverty and social exclusion.\footnote{Page 9. Zeitlin (2009).}

The OMC SPSI has also resulted in enhanced vertical coordination. The Member States such as Sweden, Spain, Belgium, France, Germany, Austria and the UK have devised formal and informal structures to allow for closer coordination at a national, regional and local level.\footnote{Page 56. OPTEM (2007).} Belgium, for example, has created an Action and Indicators Task Force which resulting in more active coordination between national subnational authorities in the federal and unitary states. After participating in the OMC, some Member States have also begun to devise Local and Regional Action Plans for social inclusion. This illustrates the point that the OMC may be seen as a cognitive template which can be used to further develop the governance relationship between the national/federal governments and regional/local authorities with the view of working towards decentralization of the administrative and policy-making competences in these fields.\footnote{SEC (2006) 345.}

The OMC also allows the involvement of non-state actors to participate in social and employment legislation at the domestic level. The EES and social OMCs in particular OMC SPSI has provided the social partners and the civil society with consultative and participatory structures to implement, monitor, and evaluate policy formation.\footnote{Chapter three of the thesis.} This has been the strongest in social inclusion where mobilisation of all relevant bodies
figures prominently among the EU’s common objectives. For example, in Sweden the ‘Network Against Social Exclusion’ a committee on social and welfare issues was created in order to mobilise the social NGOs and voluntary associations to work together in preparation of the NAPs.  

The European Anti Poverty Network (EAPN), the European Federation of National Organisations Working with Homeless (FEANTSA) and associations for the disabled participate at the European level in the field of social inclusion. After social cohesion became one of the overarching objectives of the EES Member States such as Finland, Spain, Portugal, Ireland, Greece, Cyprus, Hungary and Latvia, had no reservations to the involvement of the social NGOs. However, there has been opposition to their involvement in Belgium, Denmark and the Netherlands, because they are seen as a threat to the social partners’ role in employment.

The OMC has allowed the development and involvement of diagonal networks within the coordination processes. At the EU level the European social NGOs involved in the OMCs include the EAPN, FEANTSA, AGE, SOLIDAR, the European Disability Forum, ATD-Fourth World and RETIS (the European Transnational Network for Social Inclusion, whose members include EUROCITIES and the Council of European Municipalities and Regions). They are consulted in relation to the OMC SPSI; their role includes providing critical independent reports from the information given to them by their national representatives. The networks are provided funding by the EU under Progress (The new Programme for Employment and Social Solidarity). Nationally, level the civil society organisations with public bodies work together through the EU funded Transnational Exchange Projects to produce territorial action plans for employment and social inclusion.

Mechanisms of Influence

There are five mechanisms through which the OMC exerts its substantive and procedural influences on national and employment reforms. They are vertical and

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horizontal pressure applied externally, funding support by the structural funds, socialization and discursive diffusion, mutual learning and creative appropriation by domestic actors.\textsuperscript{605}

a) Vertical and horizontal pressure applied from external sources

The Commission applies vertical pressure on national governments. The EU committees, the Council and other Member States apply vertical pressure on Member States through naming and shaming and other types of soft sanctions. The aim is to apply peer review to induce governments at the national level to apply their committed policies. However, the effectiveness of external pressures applied via the OMC will be dependent on causal mechanisms which include socialization, mutual learning and creative appropriation by domestic actors.\textsuperscript{606}

b) Funding support by the structural funds

The connection between the OMC and the structural funds had a bearing on the policies related to activation and inclusion. This linkage has influenced the way EU finance has changed the way in which course from spending on social labour market projects rather than infrastructural projects. Domestic actors may not have the knowledge of this OMC connection. This mechanism relies on the tightness of the link between the OMC processes and European funding. The NGOs seem to fear that the obligation for Member States to earmark 60-75\% of Structural and Cohesion fund expenditure for the revised Lisbon Growth and Jobs priorities may have a negative impact on social inclusion policies.\textsuperscript{607}

c) Socialization and discursive Diffusion

By utilising EU concepts, and reviewing the Member States plans for realising common objectives, it can be said that the OMC is able to produce a cognitive discursive frame of reference. Further it is possible that the OMC structures could ‘lead to the

\textsuperscript{605} Page 12, Zeitlin (2009).
\textsuperscript{606} Pp75-76, OPEM. (2007).
internationalization by national actors of common discursive conventions and behavioural norms through a process of mutual socialization and communicative interaction’. 608

d) Mutual learning from the OMC processes

Mutual learning is one of the main attributions of the OMC. This is widely accepted by official reports, academic surveys, and detailed external sources such as OPTEM which praised the OMC’s contribution to the mutual learning processes in the EES. 609

From the point of cross-national learning the OMC may be able to have heuristic, capacity-building and reflexive/maieutic effects. 610 The EES and the Social OMC’s from a heuristic viewpoint have worked to identify common problems and develop common solutions; also brought about awareness of useful policies that are being utilised in other Member States. In relation to capacity building, the OMCSPSI’s successes include the development of common EU indicators, use of EU-SILC the statistical database as well as progression with regional indicators.

On a reflexive note the OMC SPSI has enforced obligations on the Member States to reinvent approaches and compare their national progress against the EU objectives and to the attained targets of the other Member States. Thereby, they need to effectively revaluate their own policies to establish whether or not they have successfully achieved those goals. Thus, the peer review procedures that review the NAPs now aim to place focus on themes such as active inclusion and flexicurity in order achieve better results.

e) Creative use of Domestic actors

The OMC has influenced national social and employment policies by utilising domestic actors. 611 It does so by allowing national actors to use European concepts, set


objectives, guidelines, targets, indicators, performance comparisons, and recommendations. The OMC illustrates here that there is ‘no impact of Europe without usage by domestic actors’.  

Therefore the Member States may take advantage of the OMC processes to bring about national reforms. The Member States may use the opportunity to place issues on the EU agenda which are seen to be sensitive at the local level. The same might be the case for specialised agencies, social partners, civil society organisations, local authorities, Employment and Social Affairs Ministries who may also exploit the leverage effect of the OMC to put pressure on governments to advance their own agenda.  

As discussed in Chapter Three, the OMC presents a structural opportunity for the weaker actors to utilise the democratizing destabilisation effect to hold governments accountable and demand more participation. However, the ultimate effects that it will create will depend on what the actors will make of them. Generally, it is the weaker institutions that show more interest in the new opportunities presented by the OMC for participation and domestic policy formulation.

4.7.1.2 Adequacy of the Social OMC

The adequacy of the Social OMC to provide results is the reference to its theoretical capacity to produce results. It is so far a rather mixed picture of the theoretical capacity of the OMC toolbox to produce results. It could be noted that the institutional awareness of the Social OMC remains elite-driven, and therefore, limited in its democratic potential. In most countries there is no media coverage of the Social OMC and no political discussions about the process that it has made.
If the adequacy of the policy coordination is examined, then at least in the healthcare strand the ambiguous words of the common objectives were useful. This allowed more competences, and there would have been greater efforts to block the common objectives (in health) had the objectives been clear. Yet Flear examines the normative orientation of the health objectives which demand to ensuring ‘access for all to adequate health and long-term care…………and that inequalities in access to care and in health outcomes are addressed’ but must also correlate with financial sustainability and optimisation. Therefore he concludes that this reading means that the objectives extend market rationality as they promote governance from a distance.

In examination of the adequacy of the NAPS and the National Strategic Reports on Social Protection and Social Inclusion (NSRSPIs), it is obvious that the NAPS produced in 2003-2005 were mere reports. They needed to be restructured and developed as action plans. An analysis by Sirovatka of the NAPs between 2004-2006 and 2006-2008 showed a low level of commitment, in the NAPS especially from the Czech Republic. However more positively the NAPs appeared soft but provided positive results: for example the Irish report at first lacked strategy, data and analysis of problems. This improved after the shaming procedure conducted out by the Commission.

The lack of coordination between the strands (pensions, healthcare and social inclusion) causes problems between feeding-in and feeding-out processes. Whilst Frazer and

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619 Ibid.
Marlier\textsuperscript{624} point out that the links between social inclusion policies and employment/economic policies were very limited. It is also argued that the functionality of the health OMC was reduced as a range of conflicting actors tried to influence policy-making space. This entailed competition for time and political attention. \textsuperscript{625}

The adequacy of the set of the common indicators as tools for measuring progress towards the common objectives is a key dimension of the OMC’s adequacy. Indicators for access and quality of care can seek to maximise performance, as they ensure that equity and solidarity are subordinated in a neoliberal frame. \textsuperscript{626} At the same time, overreliance on indicators in Joint Reports can be misleading, because indicators are general. It is acknowledged, that not every element on social inclusion will be covered within the OMC. Rather it should be interpreted a flexible tool. Limitations such as data handling and political risks have delayed the work on the healthcare indicators.

Summing the impact of the Social OMC, it can be agreed that the EES and the Social OMC have increased the efforts to tackle long-recognised national problems and stimulates self-reflection on national performance. The OMC has contributed to enhance soft law commitments and is also utilised to further commitment to the transposition of hard law. The Social OMCs have also acted as agenda setting, as they put new issues in the domestic forum, including topics such as activation and child poverty. The impact of the OMC on horizontally and vertically integrated policy-making is thus quite significant. However, there are evident problems taking the example of Belgium where the preparation of NAPs gave rise to new bodies for coordination. Looking back to the examples illustrated in the chapter, it can be said that the Social OMC did not prevent national and regional governments and social partners from adopting the selective bits and pieces of the paradigm.

The Social OMC has also had an impact on the institutional arrangements of the EU. The European Commission used the OMC to expand its influence in sensitive (social)
policy areas. The Committee on Legal Affairs of the European Parliament 627 highlights the indirect legal effects of soft law which would allow the executive effectively to legislate by means of soft-law instruments, undermining the Union’s legal order.

Overall it can be noted that there are factors which bridge the gap in understanding the OMC’s adequacy against its impact. Firstly, some studies have looked at the OMC’s potential effect and ignored its actual impact.628 Some of the theoretical studies have observed the extent to which the OMC has supported existing discourses of particular paths of national reform, which requires a more in depth diachronic analysis.

From a methodological perspective, it can be said that studies dealing with the adequacy of the Social OMC look at many changes in the OMC processes. These include achieving the indicators, enhancing mutual learning activities, streamlining etc. The problem with this is that not all the instruments are readily available for analysis and this will have a negative impact on the results.

Since the social OMC is being used by domestic actors, the national actors utilise the strategic use of the EU concepts, objectives, guidelines, targets, recommendations, etc. Domestic actors are not concerned with how hard or soft the instruments of the OMC toolbox are, as long as they have real effects. This by no means implies that the OMC architecture has no influence on the impact of the Social OMC. The fact is that the Social OMC is relatively closed up and becomes a barrier to creative appropriation.629

The discussion so far has examined the original Lisbon I (2000-2005). The OMC was seen as a qualified success and the positive influences of the OMC on national reforms were discussed. At the same time the OMC was also criticised by the Kok Report 630 and the European Commission 631 for failing to deliver Member State commitment for the implementation of agreed reforms needed to reach the Lisbon targets.

628 Ibid page 3.
629 Ibid page 134.
The relaunched Lisbon II Strategy (2005-2008) was designed to provide ‘a framework where economic, employment and social policy mutually reinforce each other, ensuring that parallel progress is made on employment creation, competitiveness and social cohesion and social cohesion in compliance with European values’. Lisbon II was problematic for a number of reasons. Firstly, that the integration of the EEGs with the BEPGs enhanced freedom for Member States to set their own priorities within the NRPs, which led to the unevenness in national employment policy reporting and a loss of EU level monitoring capacity. Secondly, it was hard to assess the social, economic and employment dimensions of Lisbon II due to the absence of any specific institutional mechanisms that would record feedback. Thirdly, the NRPs lacked visibility in most Member States whilst involvement of state/non-state actors was often confined to formal consultation and information exercises.

In response to the weakness of the mutually reinforcing dynamic between economic, employment and social policies within the revised governance architecture of Lisbon II, and against the backdrop of mounting unease about the social impact of the global financial crisis President Barroso acknowledged in his political guidelines for the next Commission the ‘need to revise the current Lisbon Strategy’ by bringing ‘different strategies and instruments together’; thereby ‘turning it into a strategy for an integrated vision of EU 2020’. He also called for ‘a new, much stronger focus on the social dimension in Europe, at all levels of government’. The questions that this thesis now needs to address are, firstly, how can the Social OMC be strengthened? What is the role of the Social OMC with Europe 2020? How can the Social OMC be integrated and strengthened within Europe 2020? The next section will dwell on proposing solutions to these questions and evaluate the impact of Europe 2020 in the areas of social inclusion and combating poverty. Finally suggestions will be made for improving the Europe 2020 guidelines in order to support the targets to combat poverty and increase social inclusion.

4.8 OMC- Social Inclusion and Social Protection Post-2008

The Lisbon Strategy utilised policy tools including regulation, social dialogue and structural funds. The OMC was characterised by the use of terms such as soft law, experimental governance, flexible normative policy standards, decentralised policy-making and self-regulation. The EU’s revised toolkit was intended to represent instruments to face up to EU’s challenges whilst upholding sovereignty and national diversity. The Lisbon Strategy operated under the multi-level governance approach, as policy-holders were encouraged to exchange information and apply peer pressure, to motivate governments for policy formation.

Despite its success, the criticisms of the Strategy increased following the financial, economic and budgetary crisis within the western economies. The Strategy was criticised for the weakness of the ‘better regulation’ approach to financial markets, since authors argued that the crisis was due to ineffective regulation and excessive financial liquidity. The Strategy was also questioned for its effects on the labour market. It is unclear whether or not economic deregulation and flexibility in labour markets is the most favourable method for economic growth and reducing the impact of the crisis. Pochet comments that the inequality and adequacy of the welfare benefits have been neglected in the implementation of the Strategy. However, they contributed to reducing the negative impact of the economic cycle, through the promotion of a more inclusive society.

It is generally known that the problems began with the liquidity shortage among financial institutions, as they faced harsher market conditions for rolling over short term debt. The interbank market more or less closed and risk premiums on the interbank loans increased. The banks were overwhelmed with a serious liquidity problem. The major banks defaulted in September 2008, taking down the key US and EU financial situations. The crisis resulted in credit cuts and the decline of economic activities.

The IMF projected an increase in the average debt-to-GDP ratio in the euro area of 30% and that it will increase by 90% of GDP by 2014. This average covers the average increases for some Member States. Some of the budgetary deterioration is permanent. After some years, growth rates often recover to the pre-crisis state, however, the loss in input is generally permanent, implying a loss of public revenues.\textsuperscript{639} Many EU countries, such as Greece represented financial stress, as since the 2000’s it has been running and hiding an expansionary budgetary policy.\textsuperscript{640} Other countries have suffered increased budgetary tensions. The fiscal stimulus amounted to 2% of GDP on the average in the EU for the period 2009-2010. Due to the rise in the fiscal deficit over the period estimated to about 5% of GDP, the resulting budgetary developments amount to 3% and some of the fiscal expansion is likely to be permanent.\textsuperscript{641}

These developments raised queries on the reform agenda, governance of economic and social matters based in the Lisbon Strategy. Before the crisis, it was believed that the Strategy contained sufficient budgetary surveillance to prevent instability.\textsuperscript{642} However, the limits of such neglect became obvious at the beginning of the crisis. Further criticisms focused on the economic and budgetary coordination in the Euro zone through the Stability and Growth Pact and the BEPGs. In the consideration of crisis prevention and management, both mechanisms have been at the centre of the political debate.\textsuperscript{643}

One of the problems with the Lisbon package was that it failed to ‘recalibrate’ the European Social Model; rather, it was an economic project that destabilised it. The delay in the reform process and the tensions over its implementation could be understood in terms of the ongoing tension between the Lisbon ideology and the socio-economic compromise of many EU members.\textsuperscript{644}

\textsuperscript{640} Marzinotto .(2010). ‘two crisis, two responses’. Bruegel Policy Brief, 2010/01.
\textsuperscript{641} European Commission (2009), Economic crisis in Europe causes, consequences and responses, European Economy series No7/2009.
It seems that economic integration seems to be clashing with national varieties of capitalism. Rather than promoting competition built on comparative advantages, the EU is propelling convergence. Integration attempts affect liberal market capitalism and organised capitalism differently and then deliver a clash of capitalisms. The convergence may result in two different results. Firstly, that convergence alters the way in which continental European economies operate. Secondly, the political resistance in the organised economies may lead to a crisis of political integration. In other words integration by stealth has come to a point where increasingly the EU strategies are seen to be conflicting national socio-economic institutions.\textsuperscript{645} Therefore this causes the Lisbon Strategy to be interpreted as a source of political opposition with the EU.

Creel et al point out that the EU’s poor performance highlights that it has not managed to develop economic policy institutions that are required to facilitate its potential growth. This means that it lacks ‘the real means of a proactive macro structural policy mix (…….) implementing structural reforms without coherent macro-economic governance’.\textsuperscript{646}

The Greek crisis has further added to the critical understanding of the Lisbon governance. This is in relation to the mechanisms utilised through the Stability and Growth Pact and its interactions with the economic and employment guidelines. The debate is surrounded around crisis prevention (the need for enforcing existing provision on auditing, stress-testing of budgetary policy and incentives for budget reforms) alongside the need for crisis management (interaction between EU and IMF, loans, financial assistance).\textsuperscript{647}

In relation to the social and employment policies scholars, including Zeitlin,\textsuperscript{648} have argued that the Strategy presented a revised political equilibrium. It outlined a progressive shift from the original compromise between social democracy, and

\textsuperscript{645} Majone.(2005). Dilemmas of European integration: The ambiguities and pitfalls of integration by stealth: Oxford: OUP.
\textsuperscript{647} Marzinotto et al(2010).
liberalism presenting a ‘Third way’ towards a more right centred approach. There was now a need for a revision of the social and employment strategies. Bearing this in mind, it can be argued that the Europe 2020 Strategy needed to maintain the flexicurity principle as it was applied during the economic downturn. However, now the emphasis should be on providing employment security before pushing for greater flexibility.

Economists have stressed that the Lisbon Strategy failed due to its lack of efficacy. Yet Zeitlin defined the cognitive impact of the Strategy and declared the OMC governance as ‘a qualified success’. In the area of social and employment policy the Strategy has raised the importance of national social policy issues in many Member States resulting in them to change their policy thinking and cognitive maps through the introduction in the national debate of EU concepts (social inclusion, gender mainstreaming, etc). It was acknowledged that the OMC processes have brought about changes in national policy thinking by the incorporation of EU concepts and categories (such as activation, prevention, lifelong learning, gender mainstreaming and social inclusion) into domestic law.

As discussed in Chapter Three, the Lisbon Strategy has established the OMC as a participatory mode of governance that highlighted the subsidiarity principle and served as an example of democratic experimentalism. However, the participation of the social partners and NGOs varied among different strands of the social OMCs. Evidently the social partners have not been involved actively in the coordination processes. Similarly Kroger pointed out that ‘access for civil society organisations to policy processes at EU level is poorly regulated and does not seem to be equally open to all in all instances(...) it does not fulfil the democratic norm of both liberal and deliberative

650 Ibid 97
democracy’. Therefore the OMC does little to bridge the gap between the citizens and the EU.

The positive effects of the economic and financial crisis are that it has increased the awareness on the importance of social policy as economic stabilisers. This, in turn, has reinforced the need to address the tensions between economic, employment and social objectives and to develop a balanced and sustainable approach in the future. The Lisbon Strategy especially since its relaunch in 2005 demonstrated that the trickle-down ideology, which assumes that economic growth through increased competition will benefit all has not worked and is not sustainable. Levels of poverty, inequality and social exclusion have remained high even before the recession. The challenges of an ageing population and the effects of increased mobility and diversity will undermine future economic progress if not dealt with strong social policies. Therefore it is clear that a stronger Social EU is required to support economic growth and underpin free movement and indispensable requirement to ensure the EU’s political legitimacy.

The Social OMC has played an important role to raise the importance of social policy at both EU and national levels, to develop new ideas, knowledge and expertise, improve data collection and mobilise a range of actors. However, there is the need to strengthen the Social OMC, as its current weakness of being seen as a soft process affects its ability to provide a better balance between economic, employment and social policies.655 There has been insufficient rigorous monitoring and evaluation and reporting of the Member States performances. Furthermore, the potential of the Social OMC to apply peer pressure on Member States to do more through benchmarking and more generally transitional comparisons has been made more difficult by the lack of timely statistical evidence. Furthermore, FEANTSA highlights that the Member States have weak governance arrangements for tackling poverty and social exclusion. Many of the countries are lacking mechanisms for mainstreaming social inclusion objectives in national and subnational policies or ineffective strategic planning systems for

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655 The OMC is seen as a soft process because of there being no sanctions against the Member States if they fail to make progress. The Social OMC has low visibility and there has been a lack of public promotion of the process.
implementing policies for mobilising actors.\textsuperscript{656} All these accounts provide the urgency to strengthen the Social OMC for its future use within EU governance.

4.9 The Future: Proposals for the Future of the Social OMC

The optimistic accounts of the Social OMC as presented by scholars such as Sabel and Zeitlin as discussed in Chapter Three cannot ignore the fact that the OMC has its deficiencies as it does not allow sufficient parliamentary representation and therefore presents limitations in the choice of policies for social reform available to the Member States at the national level. Hence, in this section of the thesis I will explore possible options of reform for the Social OMC.

Scholars, such as Smisman and de Burca, promote using the Charter to cure the deficits of the OMC.\textsuperscript{657} I suggest that constitutionalising the OMC via the EU Charter of Fundamental Rights could allow the law to provide legal and procedural conditions that may result in better policy coordination. The constitutional process needs to take into account that the basic view of the constitution providing basic rights does not provide all the solutions required by the OMC from law. The OMC has been perceived to promote integration through law, yet the OMC activities cannot escape political influences. The solutions for the OMC cannot just be led by the Court. Rather the OMC’s toolkit compromising of reports, indicators, and recommendations need to be reviewed by the parliament and external institutions such as the European Ombudsmen in order to ensure democratic accountability. To constitutionalise the OMC would require law and new governance to work together to redefine each other and allow the broadening of the OMC procedures.

The binding status of the Charter of Fundamental Rights may be able to provide solutions for the OMC. If it is felt that the OMC may ignore welfare commitments under the shield of economic coordination, the Charter could be utilised here to

\textsuperscript{656} FEANSTA. (2007). Untapped potential: Using the full potential of the OMC to address poverty in Europe, Brussels: FEANTSA.

counterweight the legitimacy claims of the enshrined social rights to encourage better relations between social and economic dimensions. Chapter IV of the Charter on Solidarity provides the entitlement for fair and just working conditions; social security and social assistance; maternal and paternal leave. Moreover, the Charter’s preamble deems social rights to be of equal importance as it recognises its founding values are dignity, freedom, equality, and solidarity. The Charter requires the Court along with other EU institutions to interpret EU norms in accordance with social values.

The use of the soft OMC with the hard Charter would be in accordance with the hybridity theories discussed in Chapter Three of this thesis. This would be evident as the OMC would provide grounds for further growth of fundamental rights. The OMC procedure could transfer the fundamental static rights to useful political instruments, while the Charter could act to monitor the far too flexible OMC. The problem here is however is that utilising the OMC for fundamental rights could subject them to abuse by political influence, whilst the use of the rights to monitor the OMC may obstruct the use of new governance as flexible instruments.

Another option for the reform of the OMC processes would involve in the CJEU having a greater role to promote values such as transparency, accountability, reasoned decision-making. This could be achieved by first allowing judicial review to ensure that the OMC SPSI allows a variety of stakeholders within the implementation procedures and not limit the OMC SPSI as an insider’s club of executive actors. The way to overcome this would be to change the requirement of the widest possible mobilisation of actors in to a concrete requirement. This could be one of the OMC constitutionalising requirements. The Court placing a justificatory burden on the Commission who is denying actor involvement would need to provide explanations for that exclusion. This would also afford actors the responsibility to take more seriously their involvement within the processes.

Secondly, the need for judicial review of new governance procedures would allow the Court to question the political actors on their information basis for their decisions. It has

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658 Article 31 of the Charter.  
659 Article 34 of the Charter.  
660 Article 33 of the Charter.
to be acknowledged that the OMC is technical and comprises of technical knowledge. This is obvious in the use if the indicators and metrics that measure poverty, unemployment and social cohesion. These indicators are an important element of the knowledge basis on which EU social policy decisions are made. However it is important to note is that excessive deference to scientific knowledge can be problematic as it may lead to coordinating social policy as a managerial exercise.

Thirdly, the Court could provide reasons for its decisions. If this rationale is applied to the OMC it can be argued that if the OMC SPSI was asked to provide reasons for specific recommendations or indicators this process would show decisions made on a self interest basis. The use of judicial review could encourage the need of justifications from a closed circle of decision makers and encourage effective dialogue. Finally, if the Court supervises the need for transparency and access to documents within the OMC it will assist the OMC to be more open and encourage accountability of the actors involved in the process.

The OMC procedures may also be improved through two non judicial approaches namely, the use of the European Ombudsmen (EO)(which would provide an administrative vertical remedy)and by utilising the Social Impact Assessment (an example of horizontal coordination) in order to encourage a balancing act between fiscal and social coordination. The EO may listen to the claims individual applicants who are excluded by the Court as they do not meet the standing criteria for consideration for judicial review. The EO operates with a different logic to the Court, whilst the EO like the Court also carries an adjudicatory role like the Charter of Fundamental Rights individuals complain to the EO to attain a realisable remedy. The remedies available to the EO are better tailored for new governance processes as its criticisms offered are aimed at improving dialogue. The EO reports to the EP which may use the EO’s recommendations for new political proposals.661 The EO’s aim is not just to provide the individual a remedy, but also lead to the EP engaging in new initiatives which are upholding the public interest.

The EO may provide useful solutions for the OMC due to its hybrid nature because its role ranging from adjudication and dispute resolution may allow it to investigate abuse of power and cases of exclusion of institutions. This would be conducted with the involvement of the EP. This would be a positive change as Parliament has been previously been ignored within the OMC. The EO may also raise complaints against national institutions in relation to their implementation of EU law. This would be useful as many of the maladministration of the OMC methods take place at national level.

The above suggested reforms are forms of vertical coordination. However, the problem with vertical coordination is that it misses out the fact that not only does the OMC distort the power between the Member States and the EU it also creates interdependence between social and economic policies. These boundaries have resulted in criticisms of the OMC procedures, as they have an impact on the autonomy of these fields. For example, as mentioned in chapter three of the thesis that Lisbon’s demand for the social inclusion process to feed in and feed out within other Lisbon processes is a multi-dimensional process but the social policies are at threat of being ignored by the need for the Strategy to be competitive and promote growth. There is a need to resolve conflicts between the political entities and the individual as well as the interaction of functional discourses. This may be done by societal constitutionalism which would incorporate all functional spheres including politics, science, religion, economics and polity. From the OMC perspective there is a need to ensure that constitutionalism ensures that the tensions between the social and economic aspects are looked after within the coordination processes. Currently, the OMC can manage these tasks via its requirements for the feeding-in and out and by horizontal coordination of the different federal departments in order to draw the NAPs. Further action could be taken to enhance this societal constitutionalism within the OMC by firstly sharing the minutes of the EPC, SPC, EMCO to allow the interchange of views and secondly, by using the

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662 In examining functional (concerning the separate, autonomous policy in which EU law is engaged) differentiation globally, Teubner argues, that modern society requires a form of societal constitutionalism, which can mediate conflicts between the individual and political entities as well as the interaction of functional discourses. Teubner, G. (2004). Societal Constitutionalism: Alternative to State-Centred Constitutional Theory in Joerges, C., Sand, J. and Teubner, G. (eds). Transnational Governance and Constitutionalism. : Hart. This was taken from Luhmann’s idea of the Constitution as an instance of structural coupling between functional sub-systems. This constitutional discourse has two aims. The first is that it is geared towards allowing discourses that are depending on each other to interact or couple on a structural basis on the other. It must ensure that this meeting respects the autonomy of each system. Luhman, N. (1992). Operational Closure and Structural Coupling: The Differentiation of the Legal System. 13 Cordozo Law Review.

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Social Impact Assessment (IA) within social inclusion. The 2009 Guidelines on Impact Assessment\(^{663}\) ensure that the IA takes into account impacts which may lead to inequality, or effect the implementation of social protection measures. These questions if raised and mainstreamed across the OMC would lead to strengthening the OMC’s reflexive capacity.

I argue that social mainstreaming has been injected through the hybrid combination of the softer IA and supported through the hard law Treaty Article 9 of the TFEU called the ‘Horizontal Social Clause’ which provides an increased status to social issues. It states that ‘In defining and implementing its policies and activities, the Union shall take in account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health’.

This is potentially a major breakthrough for social policies as the Article is formally showing a commitment from the EU to filter the soft law OMC SPSI objectives in areas where hard law prevailed. The advantages of the IA include the fact that it increases accountability. The current OMC presumes some contested assumptions such as, that social policies have the same weight as competitiveness policies. The IA allows these assumptions to be questioned by critics even if there is no change of the guidelines or indicators that are at the very least contested. The political advantage of the IA is that it allows cross-sectoral input of the direct and indirect impact of the proposed indicators and framing of joint reports that would be utilised within the OMC. It would provide minimum standards and a type of framework which would allow trade-offs between competing policy choices for the OMC which prefers technical indicators and sector specific procedures.\(^{664}\)


\(^{664}\) I acknowledge the limitations of the Social Impact Assessment’s ability to provide complete societal constitutionalisation of the OMC. As the results of the IA are heavily reliant on the response provided by the committees such as the SPC and the Commission, therefore its results may change depending on their will to participate in the feeding in and out processes. The positive elements of the IA in my view outweigh the negative aspects as social mainstreaming is encouraged under Article 9 and Community practices in areas such as gender policy. It offers a serious platform to analyse the impacts of attempts to coordinate economic and social policies through the use of indicators. This reflexive step is an important achievement in promoting societal constitutionalism of the OMC procedures.
The role that could be offered to the EP in relation to the operation of the OMC is contested. The experimental view of the OMC as discussed in Chapter Three does not really envisage a role for the EP in the OMC processes. Rather it is seen to obstruct the new governance processes, and to obtain accountability in new governance there is no need for sovereignty or a single popular legislator.665 However, I argue that whether or not specialist expertise is required in the OMC SPSI because it seems that the EP would be suited to discuss and provide a general overview on indicators. After all the EP members have some experience in providing advice in committees and then some members may be involved in the SPC. I suggest that the involvement of the EP in the OMC would increase its legitimacy as it would provide a platform for the scrutiny of the actions of the executives. I look to the comitology procedure mentioned in Chapter Two of this thesis for some guidance. The comitology procedure is a good example of allowing a balance between ensuring both experimentalist governance and democratic legitimacy. The Parliament is not involved in the functioning of every Committee but it may provide an input if there is danger of the institutions abusing power. The Parliament may interact with other institutions about if the implementing measures are coherent with the procedures and their justifications. Looking at the EP it may be involved in the OMC in two ways. The first would involve utilising the co-decision procedure to scrutinise the overarching objectives and annual guidelines of the OMC. Secondly the EP’s social affairs committee could review the NAPs, indicators, the minutes of the SPC, EPC and CAP meetings (which is responsible for the Progress funding). These measures would ensure accountability and transparency. The EP’s interest in the OMC would also make the national parliaments view the OMC as more than a mere executive process and their involvement in the OMC procedures would allow them access to the CAP funding which is specifically allocated for the OMC.

The advantage of allowing parliamentary involvement within the OMC procedures would mean that there is not a single legislator. Rather the legislator would consist of national and regional actors implementing the OMC goals. The disadvantage of parliamentary involvement in the OMC is that it is possible that there may be an abuse of power by network actors that may utilise the OMC to strengthen their own networks.

Following the suggestions to enable the OMC to foster greater deliberation (i.e. through the involvement of Parliament, EO and Charter); it is now imperative to discuss the ways in which Europe 2020 could assist and strengthen the Social OMC.

4.9.1 Recommendations for Europe 2020 to strengthen the Social OMC

The EU launched the Lisbon Strategy in 2000 and ended it in 2010. As mentioned before, it was criticised for its weak governance architecture and social dimension. The post 2010 Strategy needed to be able to provide an equal footing to both economic and social objectives. This included the better involvement of the stakeholders, and mainstreaming of social cohesion and inclusion objectives within EU policy making. These processes should be accompanied with better horizontal coordination between the social and other independent policies. The NGOs required greater political commitment to be embodied in specific commitments to quantified EU and national social/inclusion targets backed up with policy measures and financial support. President Barroso (European Commission President) acknowledged that the Lisbon Strategy had to be revised ‘bringing different strategies together’ and ‘turning it together into a strategy for an integrated vision of EU 2020’, while calling for ‘a new stronger focus on the social dimension in Europe, at all levels of government’. In this section I will provide recommendations that Europe 2020 should take in consideration in order to strengthen the Social OMC, rather than abandoning it.

1) Clear EU social objectives with EU and national social outcome objectives

The new Europe 2020 strategy must be built on mutually reinforcing economic, social, employment and environmental objectives. The prerequisite for eradicating poverty and social inclusion (and achieving the Europe 2020 goal of ‘inclusive and sustainable growth) is to address inequality. This requires producing universal policies aimed at promoting social protection systems to ensure citizens access to high quality services. There is also the need for a stronger thematic focus in particular due to the recent

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initiatives by the SPC and NGOs policy coordination should concentrate on specific issues such as child poverty, homelessness, active inclusion and health inequalities.\(^{667}\)

2) EU and national social outcomes targets

One of the five headline targets to be achieved by 2020 includes ‘reducing the number of Europeans living below the national poverty line by 25% and lifting 20% million people out of poverty’. One of the seven flagship incentives proposed by the Commission is the ‘European Platform Against Poverty and Social Exclusion’ (EPAP). The aim would be to ensure ‘social and territorial cohesion such that the benefits of growth and jobs are widely shared and people experiencing poverty and social exclusion are enabled to live in dignity and take an active part in society’.\(^ {668}\)

The role of the EPAP will involve strengthening EU cooperation in the field of social inclusion and social protection. The EPAP needs to become a distinct symbol of this renewed Social EU. It could play a role in allowing the other strands of EU policy-making to contribute to the EU’s social goals. The EPAP should have a dominant role in reporting of the implementation procedures with regards to the IA. The EPAP could also provide guidance to the Member States for them to strengthen their governance arrangements. Where governance issues are developed the Commission, the SPC would provide guidelines for the Member States to help them to strengthen their practices. These guidelines in return could become part of the EPAP acquis and be utilised within the monitoring and reporting process.

It would be beneficial if the EPAP would complement the Social OMC rather than the current indication of the Commission which suggests that the Social OMC has been engulfed within the EPAP.\(^ {669}\) It could function at a number of levels. It could be utilised to identify the linkages between social employment and economic policies (e.g. treating this like a policy design policy monitoring/evaluation).

\(^{667}\) FEANTSA 2007 and SPC2007 Proposals generated from the summary of Member States replies to the follow up questions on how to enhance mutual learning with the OMC Social Protection and Social Inclusion. Brussels. SPC.
The SPC, its Indicators Subgroup, the Commission, and the EU Heads of State and Government in June 2010 agreed on the target aimed at ‘promoting social inclusion, in particular through the reduction of poverty’. The target is based on a combination of three indicators: the number of people at risk of poverty (EU definition; total population), the number of people materially deprived (EU definition but stricter; total population), and the number of people aged 0-59 who live in ‘jobless’ households (defined, for the purpose of the EU target as households where all the members aged 18-59 have, on average, very limited work attachment). The target will consist of reducing by 20 million the number of people in the EU (120 million) who are at risk of poverty and/or materially deprived and/or living in jobless households.

Frazer et al point out that the target is less than expected. However the adoption of a target itself is portraying a political social commitment of the EU. This is a move to ensure that social/cohesion/inclusion are provided with the same enhanced status as the other political priorities in the Europe 2020 Agenda, all of which are linked to quantified targets.

Under the principle of subsidiarity the Member States can set their targets on the basis of what they consider the most appropriate indicator, depending on their national circumstances. This is an example of the multi-level approach route that could be taken through Europe 2020 as targets need to take account of the views of stakeholders; evidence based and ensure the causes of poverty and inclusion are monitored. The Member States may be asked to explain how the national targets allow the EU target to be achieved. Marlier et al comment that ‘analytical tools such as tax-benefit stimulation can help in projecting forward benchmark scenarios against which the level of ambition of targets can be assessed. Significant scientific work is required in this complex area, and researchers have a major contribution to make in deepening the information base for decision makers’.

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672 Ibid.
673 Ibid.
674 Ibid.
It can be argued\textsuperscript{677} that countries need to set their national targets in a transparent way with continuous dialogue with the SPC and Commission. If these targets are set in such a way, then it is likely that they will attract greater public and political commitment to them. This is especially important, as the time frame is up to 10 years (2020) and during this period governments may change. If the targets are set via a robust procedure, then there is a greater chance that incoming governments may be unable to follow them.

3) Rigorous benchmarking, monitoring and evaluation
The post-2010 arrangements need to make rigorous benchmarking, monitoring and evaluation key in the EU process. This requires the following:

The Member States and the Commission need to make to the social objectives more tangible, including a more intensive use of common indicators confirming EU coordination in the social sphere. The Member States could set goals to improve the performance of agreed indicators covering each relevant social protection and social inclusion policy domain.\textsuperscript{678} Benchmarking of the Member States performance against the common indicators should serve as a diagnostic tool for assisting national and local actors to identify weaknesses in the current policies.

Regular monitoring and reporting towards the EU/national targets of progress towards EU and national targets towards the performances on the set agreed indicators summarised in the annual report to the Spring European Council and EP. The monitoring should also be vigorous providing evaluation of the results as well as boosting the statistical capacity at the EU and national level. The use of IA should be encouraged; with arrangements that allow participation from the civil society and independent experts. This strengthened monitoring process would allow all the bodies, including the SPC and Commission, to make recommendations to the Member States for them to achieve their targets.

4) Application of Integrated Guidelines for growth and jobs with the Social OMC

\textsuperscript{677} P238. Fraser et al. (2010).
\textsuperscript{678} Marlier et al. (2007). The EU and social inclusion: Facing the challenges. Bristol: Policy Press.
In April 2010 the Commission produced its proposals for Integrated Guidelines to deliver on the Europe 2020 Strategy. These were later adopted by the Council in October 2010. They were adopted under Article 121 and Article 148. The aim was to provide guidance to Member States on defining their NRPs and implementing reforms, reflecting interdependence and in line with the Stability and Growth Pact. The ten Guidelines consist of six Economic and four Employment Guidelines. While the Guidelines are addressed to the Member States, the Europe 2020 Strategy needs to be implemented and monitored with the civil society including social partners and local authorities.

The Guidelines most relevant to the Social OMC are: a) Guideline No.10 on ‘Promoting social inclusion and combating poverty’ which sets the policies to reach the EU headline target on social inclusion. The Guideline is broad reflecting the main strands of the existing Social OMC and stressing the importance of access to sustainable services; and the key role of social protection systems (including healthcare and pensions); b) Guideline No. 7 ‘Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality’ which highlights that flexicurity should be underpinned by an effective active inclusion approach. It underlines the important role of employment services and adequate social security in supporting those at risk of unemployment. It emphasises the need to support those who are furthest away from the labour market’s; c) Whilst Guideline No.9 looks to ‘Improving the quality and performance of education and training systems at all levels and increasing participation in tertiary or equivalent education’ is very relevant in tackling child poverty and exclusion.

These Guidelines suggest that the aim of the Commission is to mainstream the Social OMC with the integrated economic and employment policy coordination framework. These Employment Guidelines have also attracted criticisms from organisations that are concerned with the EU’s focus on poverty and social exclusion. The European Anti-Poverty Network (EAPN) claims that ‘poverty and social exclusion risk remaining at the margins of EU cooperation’ and called for ‘A better integration of the inclusion and

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681 Ibid.
social cohesion objectives across all the Integrated Guidelines’. There is a need to separate the ‘social inclusion and combating poverty Guideline’ from the Employment Guidelines to guarantee that actions on social inclusion and tackling poverty are not limited to employment related measures. There is a need to make an explicit reference to the ‘Guideline on social inclusion and combating poverty’ to ensure access to rights, resources and services is in accordance with the already-agreed common objectives of the Social OMC.682

The SPC needs to take institutional role in the spirit of Article 160 and work towards achieving progress towards the EU objectives for social protection and social inclusion. In particular to monitor the implementation of the Guideline and the social impacts of the other Guidelines. Recital 19 also supports activity from the SPC as it states that ‘the Employment Committee and SPC should monitor progress in relation to the employment and social aspects of the Employment Guidelines in accordance with the Treaty mandates. This should in particular build on the activities of the OMC in the fields of social protection and social inclusion. The Employment Committee should maintain close contact with other relevant Council preparatory instances, including the field of education’.683

5) Revision of NAPs/ National Strategy Reports on Social Protection and Social Inclusion (NSRSPSIs)

The Member States need to place effective measures in their national action plans, to translate the EU’s social protection and social inclusion objectives into national policies. The previous NAPs/inclusion National Strategy Reports on Social Protection and Social Inclusion (NSRSPIs) have not been adequately structured, yet they have been the core of the Social OMC. Also, the NAPs are very important in encouraging a strategic approach to issues of poverty and social exclusion.

These national reports are important because, firstly, they allow the coordination in the social field of local and regional governments and provide them with a role to promote

inclusion. They allow for Member States to also work towards understanding the key concepts and key policies. Secondly, they allow the EU social objectives to be seen as connecting with citizens, and building a real Social EU involving strong participation of various actors. Thirdly, they can ensure that the Member States obtain the targets with arrangements to ensure that the reduction of poverty and social exclusion will be a long term goal. Fourthly, the reports ensure that the Europe 2020 targets will be dealt simultaneously to achieving overall social protection and inclusion objectives. Fifthly they provide ideas to inform mutual learning between Member States and promote the understanding of key concepts and policies. Finally, they are an important way to identify common issues that are present in a group of Member States and then require more depth examination at EU level.

In the context of Europe 2020, I propose such national reports could be utilised to further promote social inclusion and the end of poverty. The first suggestion could be that the NSRSPSIs may be developed similarly to the previous cycles but be enhanced for better integration of the NAPs/inclusion into national policy-making processes. This could involve reassessing the timing and structure of the NSRSPIs’ cycle with the Member States and stakeholders; this may create the opportunities to strengthen policies rather than using it as a means of reporting to the EU on existing and planned policies. The advantage of continuing with the NSRSPIs is that these allow the Member States to adopt and report on approaches to promote social inclusion and tackle poverty that are better integrated into their national policy systems. The possible disadvantage of continuing with the NSRSPIs would be that the linkages between the social dimension the economic and employment within Europe 2020 may remain fragmented and decrease the chances of effective feeding in and feeding out synergies. These issues would be addressed through the creation of formal mechanisms for examining and reporting on how Member States are ensuring synergies between their NSRSPSIs and NRPs.

My second suggestion is that the social protection and social inclusion dimension may become a distinct chapter of the Member States NAPs. The basis for this would be from Guideline No.10 and the ‘Horizontal Social Clause’ included in the Lisbon Treaty. The main advantage to this option would be that it would be simpler to enhance the integration between the Europe 2020 social, employment and economic strands of the
process. Thus, there would be the possibility of achieving stronger synergies between the processes. The Commission may also be able to provide recommendations to Member States for improvement to their policies. The problem with this option would be that it could lead to a very narrow interpretation of social issues and mainly focus on access to employment issues. If that is the case then it needs to be ensured that would look at issues faced by individuals outside the labour market. The EPAP and SPC should have an active role in monitoring the social dimensions that are dealt with in Member States.

A final proposal may be to combine the social chapter of the NRPs. This would be based on quality NSRSPSIs in a coherent way covering social protection and social inclusion. The NRPs could include five chapters with four thematic chapters addressing objectives and policies on economy, employment, social protection and social inclusion. This should be followed by an overarching chapter which would exhibits the mutually reinforcing relations of the four elements. This would be the most ambitious out of the three options but the most likely to increase the EU’s social dimension.

5) Exchange learning and communication
The Community Programme for Employment and Social Solidarity (PROGRESS) 2007-2013 allows for exchange and learning. However, the process of policy learning and exchange of good practice should be strengthened via activities such as peer reviews, exchange projects and EU funded networks. There needs to be further systematic involvement from local actors to ensure that the information retrieved through the Europe 2020 monitoring platform reflects local concerns and actions taken to achieve the Europe 2020 targets.684

6) Measures to achieve a more Social Europe 2020 (Enhancing the Governance Architecture).

The Commission documents relay that fiscal and macro-economic surveillance will be conducted by the Economic and Financial Affairs Council (ECOFIN). The NRPs need to focus on the macro-economic stability and growth-enhancing reforms. The Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), together with the Member States will monitor the progress towards headline targets and flagship incentives. The country-specific recommendations will be based on the Treaty articles dealing with the Stability and Growth Pact, the Employment Guidelines and the Broad Economic Policy Guidelines. It is not clear how they will implement the social inclusion guideline, which does not fit in well with the idea of breaking growth bottle necks. Also, it is not clear how the social objectives will be monitored, along with the mutual interaction between the policy fields. Hence there is a need for clarity with governance architecture Europe 2020 and the Social OMC and the EPAP whose institutional contours remain not dealt with.

Europe 2020 may become more social if the previously developed governance architecture elements of EU social policy coordination are applied. This may be done as follows:

a) The commonly agreed social objectives may be applied in Europe 2020. These common objectives may provide a solid framework for policy development and mutual learning. They could give a better definition to the new Strategy’s overarching commitment to ‘inclusive and sustainable growth’. However, as Zeitlin argues it is important that ‘the common objectives are updated from Lisbon to Europe 2020 to incorporate recent developments such as the 2008 Recommendation on active inclusion’.

b) The Member States need to report and evaluate their national performances against the common social indicators (other than the indicator for social inclusion and poverty), in order to assess the progress towards the common social objectives. As well as develop indicators that could monitor the developments between social, economic employment and environmental policies. Evidently, more work is also required to develop common indicators

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for health and pensions. There is a problematic fit with the governance architecture of Europe 2020 and social coordination as it has developed through the Social OMC. The headline target in Europe 2020 focuses on reducing poverty and social inclusion. Zeitlin points out the very limited role for healthcare and pensions as he states:

‘The other common social objectives for pensions and health care enter into the new social inclusion guideline primarily in so far as they contribute to these goals, even if the latter also refers to the need for modernisation of social protection systems so that they can provide adequate income support and access to healthcare while remaining financially sustainable.’

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c) The NRPs need to be based on the participation of a broad spectrum level of society in order to sustain balanced monitoring review and assessment of Member State policies and performances across a range of common social objectives and indicators. The findings of the NAPs should be penetrated in parliamentary debates. This would strengthen the Social OMC as it would be based on the reflexive reform Strategy. There is a need to institutionalise arrangements for involving civil society organisations, national and regional authorities. This is a vital step towards promoting the OMC’s capacity to promote horizontal and bottom up forms of learning by allowing a wider range of information sources.

The revised governance architecture would be built on the reflexive reform strategy, which is based on reinforcing mutual learning and enhancing stakeholder participation. Reinforced mutual learning would require peer review with a ‘deliberative approach’, including learning from other Member States. 688 The common indicators could be used to identify the problems within policies rather than utilising it as ‘shaming’ tool. 689

The Social OMC has a good track record for stakeholder participation. Yet, the creation of the EPAP has allowed for the enhancement of civil society participation. The

687 Ibid page 214.
688 Ibid page 214.
689 SPC (2008). Child poverty and well being in the EU current status and way forward. Luxembourg OPOCE.
European Anti-Poverty Network has provided proposals for better participation, the first being that a stakeholder forum should be established that would be attached with the EPAP and the Social OMC at national and regional levels. Such a forum would contain members from the social partners, independent experts and local authorities, and would ensure stakeholder participation at all levels, including the development stages of the NRPs. This forum could be used to establish a bottom-up expertise on formation and best practice, as well as provide a follow-up procedure from OMC mutual learning processes. Secondly, participatory governance guidelines and indicators could be established for regulating and evaluating performance within the OMC and Europe 2020. The EPAP could become the visible face of Social Europe. It could work with the Social OMC to determine the use of the structural funds, by monitoring and assessing them in line with the ‘Horizontal Social Clause’ of the Lisbon Treaty. These results could then feed in to the Commission’s Annual Growth Survey and EU policy guidance to Member States on their NAPs.

7) Utilising Hybridity to strengthen the governance architecture

It seems that the OMC may not be the sole government instrument for the Lisbon Strategy rather it should be utilised with other EU policy tools including legislation, social dialogue, Community Action Programmes and the structural Funds. This means that there is scope to develop the Social OMC via hybrid governance as mentioned in Chapter Three. The process of hybridity is the mutual combination of instruments. It is most likely to be taken as law and governance instruments reacting with each other. It can be argued that, the new governance instruments, the ‘European Year Against Poverty and Social Exclusion’ in 2010 and the Commission Recommendation on ‘active inclusion’ together utilised with the OMC can be viewed as hybrid governance.

The legal basis for setting 2010 as the ‘European Year Against Poverty and Social Exclusion’ was Article 153 TFEU (former 137 EC). The aim was to provide strength to the OMC and EU governance by the instrument to act as a catalyst and raise

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690 EAPN proposals on the ‘European Platform against Poverty’. Brussels. EAPN
Armstrong pointed out that the less politicized activities carried under this programme could have been better developed within a social citizenship paradigm, rather than the greater focus on the activation paradigm. This presented problems for the coordination between the activities of the OMC reporting cycle and the action programme. This could have caused a normative distance between both and resulted in lower mutually transformative hybrid governance and resulted in normative rivalry or incoherence.

In relation to ‘active inclusion’, the Commission’s proposal in 2007 on active inclusion was to support hybridity by deepening the OMC via adopting a recommendation in 2008 based on the 1992 Recommendations. (The 1992 Recommendations encouraged the convergence of national social assistance measures). The hybrid arrangement consisted through the use of the OMC and the Recommendation. The 2008 Recommendation required Member States to adopt principles relating to the inclusive labour markets, adequate income support and access to equality with their national systems. The monitoring and evaluation procedures would be conducted under the OMC processes. The Recommendation aims for a balance to be retained between the access to services and inclusive labour markets. As the Recommendation is non-binding it may be attractive to include language that will appeal to a variety of actors. It is acknowledged that the presence of multiple paradigms may be a less of a virtue and more of a hindrance. For instance, the negotiations through the OMC can cause rivalry. However, on the other hand, as the Recommendation is non-binding, it can also be argued that it has at least opened the doors for a social rights discourse which may have been absent from social policy, as a result of fear that this might lead to ‘legalization and Judicialization’. This illustrates that soft forms of governance may produce institutional changes through flexible forms of influence. The use of a hybrid arrangement between the Recommendation on Active Inclusion and the Social OMC is further supported by the Commission through its latest Social

\[^{693}\text{P279.Armstrong (2010).}\]
\[^{694}\text{COM (2007) 620.}\]
\[^{695}\text{1992 Council Recommendation on ‘Common criteria concerning sufficient resources and social assistance in social protection systems’. Of June 1992 (92/441/EEC).}\]
\[^{696}\text{Commission Recommendation of 3/10/2008 on the active inclusion of people excluded from the labour market (2008/867/EC).}\]
The Commission takes responsibility for the adequate implementation of the Recommendation on Active Inclusion as it insists that it (in partnership with the SPC) will devise adequate budgets to account for the social needs identified at the local/regional national levels. However, the Member States will have to report their progress in relation to active inclusion through their NAPs. The Commission provides further financial commitment to the implementation of active inclusion policies as it states that the Member States can utilise its allocated 2014-2020 funds appropriately to achieve these objectives. In particular it mentions the use of funds through the European Structural Funds (ESI), PROGRESS 2007-13, Fund for European Aid to the Most Deprived (FEAD) and the Programme for Social Change and Innovation (PSCI).

Frazer and Marlier suggest there is a need for better links among the future EU social process with the other EU processes, in order for them to be mutually enforcing. For example, better integration of the EU’s and Member States’ social objectives and EU Structural Funds may improve the influence of the new Europe 2020 on national reforms. In this instance hybridity could be utilised for the missing linkages. The scholars assessing the adequacy of the Social OMC do not seem to acknowledge the instrument hybridity as mentioned in chapter three, or the interactions between the OMC and other EU instruments. An example of the OMC working with the EU instruments is illustrated within the ESF Regulation for 2007-2013 programming period referring to the OMC which may provide financial support to the Social OMC. The ESF strengthens the OMC and the OMC acts to influence cohesion policy. The idea that the EU structural Funds should be made available only if the objectives Social OMC are achieved should be explored in the post 2013 EU financial perspectives. Similarly the area of child poverty may provide a hybrid combination with the OMC in order to

698 Ibid page 11.
achieve greater coherence in the Europe 2020 social arena. It is envisaged that a Recommendation will follow under the Platform against Poverty.\textsuperscript{701} Hence, this Recommendation could work with the Social OMC to tackle child poverty.

4.10 Conclusion

Learning from the Past: Coordinating Coordination.

Zeitlin criticised the relaunch of the Lisbon Strategy for not drawing upon past experiences of policy coordination to strengthen the Social OMC.\textsuperscript{702} One particular example was not implementing the NAP on employment. Lessons need to be drawn from previous experiences to ensure that the potential of the Social OMC is utilised.

It is firstly important to provide a clear process for social policy goals in the larger economic project. Social cohesion was downgraded during the ten years of the Lisbon process, from a stand-alone position at the beginning to one that would follow economic and employment development. There is potential in Europe 2020 to upgrade social exclusion and poverty to a fourth pillar (alongside economic development, employment, and environment).

One of the lessons that we can draw from the relunched Lisbon Strategy, is that it is better if the social coordination processes are not streamlined. In other words, if social inclusion, pension and healthcare were separate processes. The merging of the Social OMC with the overarching Europe 2020 coordination would not be very effective. This would undermine the role of the Social OMC in trying to bring about a political development from bottom-up. Also, there is the danger that EU social processes would be set aside in favour of economic and fiscal governance processes. Daly,\textsuperscript{703} on the other hand, argues the need for better links between the three strands of the Social OMC. These have been developed within three separate tracks, illustrating policy-

making patterns at different Member State level. The linkages between them have to be more clearly drawn out for a streamlined process to develop.

The structure of the NAPs on inclusion (NSRSPIs) could be improved. The NAPs are produced as reports; the cyclical nature of the OMC encourages this form. However, the NAPs could be better formulated as a report including the Member States’ strategic policy environment and the policies/practices developed in the context of that strategic environment. This would provide the Member States with the opportunity to share and report within the NAPs their existing strategies. The point is that the OMC should not be just about the implementation of the EU anti-poverty strategy; rather, it should be about the fair governance of the governance procedure (i.e. monitoring/evaluating how far the Member States have adopted the strategic aims). This method would allow the NAPs to be included as part of the ‘dynamic accountability’ as mentioned in Chapter three.  

The NAPs reported on strategies and initiatives and the joint reports then replicated the same information. Armstrong further points out that the concern is that the Joint Report from the Commission and Council can be viewed as problematic and the Members States are the account givers and account holders. It could be argued the Commission should have a heightened role in order to provide a more critical political message. However, there may be resistance to provide the Commission a greater role as the OMC is perceived as a tool provide more power on a supranational level. The Europe 2020 Communication itself highlights the Commission and Council’s wish to drive the process forward. The Commission could utilise the expert policy assessments to produce Communication, the content of which would include political messages and country specified issues.

An important lesson is to draw upon the strengths of the Social OMC to reach out to civil society actors at transnational, national and subnational levels. The noted weakness of the Social OMC has been its lack of engagement with the parliamentary structures. The OMC itself is not a tool for direct first order governing, which rests with the

legitimate structures of domestic collective will formation. The discursive treatment of the OMC as soft law treats it like first order governing through hard law, but only by other means. It is essential to allow the coordinative discourses of national and EU officials to be exposed to the communicative discourses of the civil society and parliamentarians. For civil society this may be achieved by producing more formalised civic forums, whilst the EP should familiarise itself with the data and information used in the OMC cycle.

To conclude, it can be agreed that the Lisbon Agenda has presented a decisive step in the EU approach to social and economic progression. However, there are tensions related with the political and economic tiers of the EU project and the reform of the European Social Model in the global sphere. The Lisbon agenda has brought about a new compromise with limits on its ability to adjust social cohesion, economic competitiveness, fiscal stability and structural reforms. There are specific problems with the broad policy agenda of the future Europe 2020, there are tensions between the budget, economic, employment and welfare reforms. There is also the need to pay attention to the social and labour market policies. This is important for the EU legitimacy, while economic integration ‘by stealth’ does not seem an option for the future of the EU.

Europe 2020 has given the opportunity for improvements. However, the governance in Europe 2020 requires further amendments. The recent economic crisis has shown that EU governance is still weak. Further integration of the single market and the revision of the EU cohesion policy are required to improve the EU socio-economic governance. The Lisbon Strategy, in particular the Social OMC, did work towards promoting new forms of meaningful participation at national level. For Europe 2020 to enhance EU integration, political commitment needs to be coupled with increased participation of stakeholders and the citizens. Europe 2020 should also aim for effective hybrid integration of policy tools and work towards a better link between coordination and structural funds.

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Due to the OMC healthcare merging within the Social OMC, and the structural defects of OMC SPSI the next chapter will examine the new experimentalist modes of governance mentioned in Chapter Two namely, the OMC, comitology and networks, they will be utilised in healthcare through a governance paradigm.
Chapter Five


5.1 Introduction

The previous chapters examined the OMC SPSI on a theoretical and empirical basis, and provided suggestions to strengthen the OMC and the Social OMC to guarantee its revival within the Europe 2020 Strategy. In this chapter, I seek to highlight the importance of judicial politics within the context of healthcare governance. I will do this by providing a discussion on the activism of the CJEU through its historic case law on cross-border healthcare. The issues revolved around the preservation of the social security of patients beyond their national borders, so that they could utilise their right of mobility and continue to be socially insured beneficiaries of care within a collective and socialised framework. Regulation 1408/71 (now superseded by Regulation 883/2004) allowed patients this access to care. Through the use of coordination techniques it allows national care systems to exist whilst making provisions for patients to be covered as if they were insured by the State of stay. This treatment applies to scheduled treatment and unexpected treatment.

The Court through its decided cases breached this mechanism and found alternative methods to reimburse medical treatments. The Directive on cross-border care was introduced in order to codify the case law generated by the CJEU. The Directive will be discussed in greater detail within the chapter as it aims to put together a coherent framework to ensure that EU action in public health is more coherent. It codifies

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709 Directive 2011/24/EU on the application of patient’s rights in cross-border healthcare.
solutions derived from the free movement of services; facilitation of the exercise of patient mobility and cooperation between the Member States under Article 168 TFEU.

The Directive has offered so much more as it creates an impact beyond the area of cross-border. It has done so by developing an excessive structure of cooperation in the field of healthcare. It encourages cooperation between the Member States in matters of healthcare and supports the development of reference networks. The networks will be organised and developed on a voluntary basis. The networks are to be formulated with the objectives of pooling and spreading expertise, encouraging benchmarks and promoting best practices both in and outside the networks. These networks may lead to the use of soft law in particular flexible OMCs as the Directive does not specify any indicators. The pooling and sharing of information within the networks, may lead to the “Europeanizing of healthcare”.

The discussion on the case law and the codification through the Directive will serve as an illustration of the achievements of the Community Method. It will also highlight the need to sustain and bolster the Community Method. However, as discussed in the previous chapters the inflexibility of the Community Method led to the EU turning to the new forms of governance. The last preceding focused on the use of the OMC SPSI and proposed changes to strengthen the OMC method. In terms of healthcare the OMC Healthcare 2004 was streamlined in the Social OMC therefore it did not develop on its own rather it was amalgamated within the Social OMC. Therefore, I advance the discussion in this chapter by proposing a governance paradigm, which would apply to healthcare. This comprises the utilisation of governance structures stipulated in Chapter Two namely, policy networks (based on the fluidity and flexibility referred to networks), comitology (supported by the theory of deliberative supranationalism) and agencies (based on the theory of the regulatory state).

In the application of network governance I suggest that the European cancer network may provide a network model for future health policy development. The lessons I propose from the fight against cancer are that new governance based policies offer a number of routes forward for the EU’s emerging health governance agenda. The use of bottom-up dynamics and the creation of patient and expert networks value EU involvement as a potential method to make healthcare systems more efficient and
effective. I further suggest that the use of the network model may be used within the Health Strategy 2008-2013. The uses of agencies are examined as an alternative mode of governance to the OMC. The role of agencies (as a mode of governance) in particular the European Food and Safety Authority (EFSA) and the European Medicines Agency (EMA) will be explored in this section. They will serve as illustrations for current functioning agencies with EU healthcare. However it has to be noted that even though agencies have autonomy, they are made subject to several powers of the Commission, limiting their scope and authority. Finally, comitology will be discussed through the inspection of the GMO (genetically modified organisms) committees. These governance structures have their limitations namely that they are soft law; therefore, I propose that, if certainty is required we turn to a combination of ‘hard’ and ‘soft’ law mechanisms.

The final part of this Chapter will examine the Organs Directive\(^\text{710}\), which at first I propose could be seen as a form of hybrid governance and used within healthcare other than the sole reliance on the OMC. The European Commission published it Paper in December 2008 containing its policies within the Action Plan on Organ Donation and Transplantation (2009-2015) (the Action Plan).\(^\text{711}\) The Plan looks at the need to improve quality and safety, increase organ availability and make organ transplantations more efficient with the EU. The Plan came with the legislative proposal, which has now been adopted. The Organs Directive which is now legally binding and will complement the Plan. Hence there will be a hybrid combination of hard and soft law operating together.

The Directive (the hard law component) will deal with the organ exchange between the Member States, promoting standardisation to facilitate patient mobility, as well as ensuring the health and safety of potential of organ recipients. It is hoped that the Plan (the soft law component) will deal with the gaps left by the Directive (such as details on allocation of the organs). Secondly, I propose the ‘integrated model’ to be utilised when applying the Organs Directive. The integrated model presents a fusion of the three governance structures the OMC, comitology and agencies. In the case of the Organs Directive it presents a ‘hybrid within a hybrid’.

5.2 Cross-Border Healthcare

Cross-border healthcare has become an important area of concern in the European Union. Factors such as deficiencies within the home healthcare system are causing patients to increasingly utilise healthcare benefits beyond their national borders. The European Union has attempted to regulate this area using the traditional methods of law making, by utilising Article 49EC (New Article 56 TFEU) and Article 28 (New Article 34 TFEU). The Treaty established the core principles of free movement within the Community. Regulation 1408/71/EEC was established to provide entitlement of rights to citizens/migrants and their families moving to another Member State. Article 22 of the Regulation provided for ‘conditional access to care outside the state of affiliation: either people require care that has become medically necessary during a temporary stay or they receive authorization from their competent institution to obtain treatment in another Member State’.\(^7\)

The aim of the ‘coordination route’ was to support the European labour market. The task of this system is that harmonization is not intended and that the legislation in place within the Member States should not be affected. Therefore, European workers could seek employment in another Member State whilst being safeguarded by social security protection and transferability of accrued entitlements or qualifying periods. It included a system for authorization and reimbursement for hospital cross-border care and the European Health Insurance Card (EHIC).

The new legislative package which has been in force since May 2010 presents ‘modernized coordination’. The coordination principles remain the same; however, the administration process has changed in order to deliver effectively citizen’s rights. This amendment has resulted in the replacement of Regulations 1408/71 and 574/72 by Regulation 883/04 as amended by Regulation 988/2009 and the Implementing Regulation 978/2009. In July 2008, the Commission proposed a Directive on the application of patients’ rights in cross-border healthcare which led to the adoption in March 2011 of the new Directive on the application of patients’ rights in cross-border healthcare. This is discussed in the following section.

5.2.1 The Court’s Activism from Kohll to Watts

The discussion in this section will aim to demonstrate that in summary the CJEU’s jurisprudence provides cross-border rights to hospital care to patients, which cannot be restricted on the sole reliance of economic constraints. This right is enforceable as soon as it is recognised that the patient’s health need which is recognised by international medical science cannot be treated within the home State without undue delay. In such circumstances, the patient may be able to receive treatment at a host state and provide the bill to his home health authority. This presents an individualistic turn in healthcare resource allocation. Although the cases foresee the requirement for the general planning of healthcare resources but on the overall it requires the prioritisation of finite resources and increases the competition between patients for access to care.

The Luxembourg citizens Mr Kohll and Mr Decker, both travelled to Germany for treatment. Their health insurance funds refused to reimburse their costs relying on Luxembourg legislation that required prior authorisation in order to obtain reimbursement of cross-border care. The Kohll case illustrated that prior authorization was not required in relation to primary treatment. The Court’s jurisprudence allowed treatment abroad without consent by applying Article 49 EC of the EC Treaty (now Article 56 TFEU) on the freedom of services. The Kohll and Decker cases established breach of Article 28 (New Article 34TFEU) on the provision of free movement of goods. It held that ‘measures adopted by Member States in social security matters which may affect the marketing of medical products and indirectly influence the possibilities of importing those products are subject to the Treaty rules on the free movement of goods’. The Court rejected the argument of public protection under Article 30 EC (New Article 36 TFEU). In the Kohll case it was established that medical products and medical treatments are covered with in the Treaty. Moreover, national legislation that made the reimbursement of expenses incurred in the care-providing State dependant on obtaining prior authorization became subject to the judicial doctrines of the internal market. The Court ruled that prior authorization is

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715 Decker, Case C-120 at para 24.
considered a restriction on the free movement of the patient as it deters the patient to obtain treatment from any other State than the State of affiliation. This restriction must be justified on grounds of the protection of public interest or overriding general interests as per the Treaty.  

In the case of **Geraets-Smits** and **Peerbooms** the Court established that hospital treatment fell within the scope of Articles 49EC (New Article 56TFEU) and 50EC (New Article 57TFEU). It considered whether or not the prior authorization rules could be justified. The Court recognised that the ‘number of hospitals, their geographical distribution, the mode of their organization and the equipment with which they are provided, and even the nature of medical services which they are able to offer are all matters for which planning must be possible’. It held that although to place a system of prior authorization is seen as acceptable. The conditions attached to the grant of authorization are necessary to safeguard the financial stability of social security schemes or to maintain a ‘balanced medical and hospital service open to all’.

The Court further stated that the types of medication excluded from the treatment must be drawn up in accordance with an objective criterion. For the prior authorization to be justified it must be based on objective, non-discriminatory criteria. The procedural system for prior authorization needs to be accessible and allow impartial reasonable time and allow refusals to grant authorization to be challenged.

The Court accepted that the requirement concerning the necessity of treatment could be justified under Article 49 EC(Article 56 TFEU) as long as the authorization is refused only ‘when the same or equally effective treatment can be obtained without undue delay’ from a contracted establishment and that national authorities ‘have regard to all the circumstances of each specific case’ and ‘take account not only of the patient’s medical condition at the time when the authorization is sought but also his past record’.

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716 Kohll supra note para 34.
718 Ibid 76.
719 Ibid 89-90.
720 Ibid 105.
It stated that such a condition ‘can allow an adequate, balanced and permanent supply of high-quality hospital treatment to be maintained on the national territory and the financial stability of the sickness insurance scheme to be assured.’ If contracted providers cannot be given priority, the consequent outflow of patients ‘would be liable to put at risk the very principle of having contractual arrangements with hospitals’ and consequently, ‘undermine all the planning and rationalisation carried out in this vital sector in an effort to avoid the phenomena of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage’.

The Court also added that once it is established that medical care cannot be provided by a contracted provider, it is not allowed to make any distinction between non-contracted hospitals established on the national territory and non contracted hospitals in the other Member States.

In the Vanbraekel case, the Court considered the Article 22 of Regulation 1408/71. Whilst Article 36 allows the insured’s sickness fund to fully reimburse the competent institution in the ‘providing’ state on the basis of the tariffs applicable in that state. The Court acknowledged that ‘both the practical effect and the ‘spirit’ of Article 22 of Regulation 1408/71 required that where it is established that an initial refusal to grant authorization was held to be unfolded, the person in question was entitled ‘to be reimbursed directly by the competent institution by an amount to that which it would ordinarily have borne if authorization had properly been granted in the first place’.

The Court stated that Article 22 is not intended to regulate reimbursements at the tariffs applicable in the state of insurance. Therefore it could not assist the Vanbrekels to claim extra reimbursement to cover the difference between the amount reimbursable under the Belgian law and the amount due under French legislation.

The Court went on to decide whether or not providing additional reimbursement could be justified under Article 49EC (Article 56 TFEU). The Court did observe that if a person is provided lower coverage, than what he/she would receive in his home state would deter him from receiving services in another state. The question was whether this

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721 Ibid 106.
722 Ibid 106.
724 Ibid para 34.
lower coverage could be justified in order to safeguard insurance schemes or the aim of maintaining a medical/hospital service to all. The Court held that the above two reasons could not justify the refusal in reimbursement, since the national court had recognised that prior authorization should have been provided.\(^{725}\) In the case where insured persons have not been granted prior authorization sickness funds may be allowed to limit their reimbursement up to the maximum provided under their legislation. They must pay the outstanding amount.

The Court has also upheld that the Member States can impose some restrictions such as waiting lists, as long as these restrictions are necessary and proportionate.\(^{726}\) However, for hospital services obtaining prior authorization was seen as necessary as without it the planning of hospital services could be adversely affected. However, prior authorization rules can be subjected to scrutiny. Article 22 Regulation 1408/71 enabled consideration of the time period in which a patient may be expected to wait for treatment in their home state. The Court held that it can assess what constitutes as ‘undue delay’ to the patient in treatment. It established that each patient’s individual case needs to be examined to see whether or not waiting for treatment in the home state would result in undue delay rather than accepting that there were waiting lists.\(^{727}\)

In the *Watts*\(^{728}\) case the CJEU held that patients facing ‘undue delay’ can receive treatments from another Member State and then claim reimbursement. The criteria for establishing undue delay under Article 49 EC (Article 56 TFEU) or whether there was a situation in which treatment ‘could not be given within the time normally necessary for obtaining the treatment in question within Article 22(2) Regulation 1408 were the same.\(^{729}\) Therefore the waiting time would only be acceptable if under either provision where it was the case that the waiting list target did not exceed a period which was not acceptable on the basis of an objective medical assessment of the patient’s medical needs.\(^{730}\) The impact of the patient’s occupation would be important to assess the ‘undue

\(^{725}\) Ibid 51-52.

\(^{726}\) Case C 385/99 Muller-Faure and Van Riet 920030 ECR I-4509.


\(^{728}\) Case C 372/04 Yvonne Watts v Bedford Primary Care Trust, Secretary of State for Health. [2006] ECR I-4325.

\(^{729}\) Ibid para. 60.

\(^{730}\) Ibid para.75.
delay’ requirements.\textsuperscript{731} The CJEU confirmed that waiting lists could be used. However they should be dynamic and flexible. Each case should be objectively assessed and expert evidence used if the need be.

The Court also recognised that the national authorities can impose limitations on treatment provisions, regardless of the free movement provisions. The Court established the idea of resource allocation amongst social security systems as long as these are not in contravention with EU law.\textsuperscript{732} The scheme would need to be proportionate. Prior authorization must be justified on criteria which are objective and non-discriminatory.\textsuperscript{733}

The CJEU’s jurisprudence discussed above has devised the notion that the EU citizens may be allowed to utilise healthcare rights promoting the concept of social citizenship with the Court supporting the rights of the individual raising issues such bio-citizenship and the need to balance individual interests against the rights of others as discussed below.

5.2.2 Patient Europeanization and development of Euro-Biocitizens

Patients can be viewed as purposive actors whose reflexive monitoring of social reality joins with change agents such as lawyers and patients rights groups. Flear\textsuperscript{734} mentions that there are change agents who exploit the ‘misfit’ between the freedom to provide services under Article 49EC (Article 56 TFEU) and the requirement of prior authorization for treatment. This misfit presents a clash between the patient’s aims to the providers who argue against the freedom of services. These change agents enhance patients’ knowledge and socialization.

Patient motivation can be reduced to a rationalist perspective, since patients seek treatment abroad because it is cheaper, faster or better, otherwise they would stay in

\textsuperscript{731} Ibid para 162.
\textsuperscript{733} Ibid page 275.
their own country. Patients are more than self interested under their right to migrate for healthcare services, so are also their strategies in meeting their aims. A rational choice institutionalist perspective might seem apt to describe patients’ behaviour, because only their strategies change in order to achieve their aims. However under a sociological institutionalist reading, it can be said that not only the patients’ strategies for achieving their aims change, but also their aims and motives.

The potential for the patients’ agency to change is in line with sociological institutionalism as referred to in Chapter One. Patients are seen to have a passive voice and little scope of exit. Healthcare systems tend to conceive patients as passive; the right to migrate for healthcare services preconceives patients as more active. The right to migrate for healthcare services allows patients to enhance their voice. The developments of patient rights groups as well as their participation in the decision-making processes at the EU level, are a consequence of the right to migrate for healthcare services. It is the patients’ reflexivity combined with the change agents and the socialization and learning engendered, that assists to facilitate the voice and exit opportunities.

There is the potential for rebalancing in motivation towards self-interest and for change in patients’ agency towards empowerment. As a corollary of these potential changes in motivations and agency, there is the potential for changes in patients’ self-understanding, identity, and citizenship. However, Barnard points out that those ethical issues of equality may be raised as only a minority will use their right of mobility as she states:

‘If....................(the home) health budget is being diverted to fund operations for national in other states this may have serious consequences for the comprehensive provisions of healthcare in the home state....... this may well have dampening consequences for the ‘citizenship’ feelings experienced by non-mobile EU citizens wanting operations in their own countries. It might also arouse feelings of hostility on the part of the

736 Page 252.
737 Ibid page 253.
population of the host states if, as a result of providing operations for migrants, their own nationals are forced to wait’.  

It can be argued that whilst the arguments are cogent, the ‘solidaristic basis of healthcare need not be imperilled by the changes the right to migrate for healthcare services might engender’. Where the EU right is perceived as a token of Euro biocitizenship that could facilitate further learning opportunities and the rebalancing of the patients might strengthen the solidaristic element of healthcare systems.

The right for patients to migrate for healthcare services might be even seen as a ‘destabilization right’. These rights disentrench the healthcare systems if they fail to meet the standards. It allows for renegotiation at domestic levels and might help to avoid the potential for inequitable resource allocation.

The proposed idea discussed in Chapter Two that new governance structures in the area of cross-border patient healthcare can provide a solution is ‘potentially illusionary’. The use of new governance in this area would produce further rigorous regulation as new governance itself requires gathering of information. In contrast ‘as well as empowering patients, extant processes, derived from actors’ interaction with the right to migrate for healthcare services and market forces, are potentially less intrusive, and for that reason at least better’.

Biocitizenship can be seen as a new kind of citizenship taking in to account biomedicine, biotechnology and genomics. It is a term used to describe citizenship projects that have linked their conceptions of citizens as humans, individuals, families, communities and finally as species. The elements that endanger the Europeanization of patients are seen as elements of biocitizenship in the European context. This specific expression of EU citizenship is termed Eurobiocitizenship. Flear notes that the right to migrate for healthcare services changes patients to ‘Euro-biocitizens’. The overall

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740 Ibid. Page 259.
pressure exerted by the right to migrate will depend on the force of the other pressures facing healthcare systems, which include treating patients as consumers (Euro-biocitizen-consumers). The Europeanization of patients and Euro-biocitizenship are at an early stage in development. However it can be noted that active Euro-biocitizens are obliged to exercise their right to migrate responsibly. He/she may have to abide by the routines built within the public healthcare measures in the name of maximisation of health.

Finally whilst developing Euro-biocitizenship solidarity may also be strengthened through the use of more transnational networks observing individual and collective actions. These networks are built by patients’ right groups who bound together via their shared beliefs, norms and identities. Simultaneously, as noted previously the use of new governance in this area may be welcomed but it involves the risk of being potentially illusory. As the subsequent discussion examined the CJEU’s efforts to develop Euro-biocitizens through the cross-border cases, it is now imperative to focus on the impacts of social citizenships and solidarity following the Court’s judgements.

5.2.3 The Effects of Solidarity and Social Citizenship in Healthcare

Solidarity ‘animates the European idea of healthcare to this date. It encompasses the mutual responsibility of citizens for the healthcare of each other, equitable access to healthcare, and it assumes that, in the face of illness and the threat of death, we are bound together by common needs that require a community response’. 743 The CJEU has created a system of healthcare rights whereby citizens can enforce their healthcare claims without taking in to account the implications to other individuals.

Marshall and Bottomore 744 claimed that citizenship evolved from civil, to political through to social citizenship. There are problems in relation to social citizenship or social rights, as they are not absolute. They bear similarities to healthcare systems as they create rights which are dependent upon the public authority and the legislator. The access to treatment depends on the rights and whether or not the treatment is affordable.

These rights seem to be procedural rather than civil rights, which are substantive. The nature and extent of the welfare rights are determined by economics and government policy and not solely on fundamental principles.

In a public healthcare system decision-making cannot be neutral, as public interests are promoted and there are complex issues relating to healthcare priorities and welfare redistribution. This involves more than a simple aggregation of individual interests. Rudolf Klein correctly points out that ‘As medical technology, the economic and demographic environments, and social attitudes change, so almost certainly will our priorities’.

The European Social and Economic Committee also acknowledged that the European Union is based on the concepts of solidarity and social cohesion. ‘......The achievements of the European Social Model, which has evolved over a long time, are substantial in economic, social and environmental terms. The emergence of a European Welfare Area is the most tangible result’. However, it needs to be noted that the EU’s jurisdiction in social policy is limited and that the EU Treaty reserves the Member States the right to legislate in healthcare. The CJEU provided case law in which it restricted the right of access to cross-border public service. In Smits and Peerbooms, the Advocate General pointed out that access to cross-border health should not be allowed as it would lead to hardships in financial planning and management. Therefore, prior authorization should be compulsory to preserve stability within the Member States.

The CJEU changed its stance by ruling that the right to treatment abroad is permitted, provided that the treatment is ‘normal’: i.e. it is sufficiently tried and tested by international medical science and the same or equally effective treatment cannot be obtained within the Member State of the patient. The Court recognised the risk of unplanned demands on national security systems that could contribute to providing an

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746 Opinion of the European Economic and Social Committee on Social Cohesion: Fleshing out a European Mode, 2006. O.J (C309) 25, {{1.6, 2.12.1}}.
747 Article152 EC new Article168 TFEU.
748 Case C-157/99.
overriding reason to justify an obstacle to freedom of services.\textsuperscript{749} This limitation would be for the substantive interests of individuals and not the community at large. The \textit{Watts} case\textsuperscript{750} was decided to the contrary by the CJEU, confirming the individual right’s approach. It was decided that market interests could not obstruct individual social rights. The CJEU held that the institutions need to determine that the patient’s waiting time does not exceed the acceptable period in light of the objective medical assessment of the clinical needs of the person concerned in the light of his/her medical condition and the history and the probable course of his/her illness, the degree of his pain and the nature of his/her disability at the time when the authorization was sought.\textsuperscript{751} This means that setting reasonable times to allow fair distribution of resources cannot obstruct the individual from receiving treatment.

In accordance to the Dworkinian conception of a substantive justice, individual ‘right of access to cross-border healthcare’ is not based on fairness or consistency between patients.\textsuperscript{752} The CJEU has favoured this substantive rights approach rather than the procedural rights approach. It has ‘successfully fundamentalized citizenship, in the sense of transforming it into the most fundamental of all fundamental freedoms’.\textsuperscript{753} The amount that we benefit from our healthcare systems while exit is available in a geographical sense cannot be measured. As Davies states, the CJEU’s ‘vaguely Marxist Community approach to its competence, in which the end justifies the means’, dilutes the sense of social citizenship in national health care systems.\textsuperscript{754} He further comments:

‘If all are subject to the NHS, then all have an interest in its maintenance. However the individual who learned to exit (sic) that system and receive treatment elsewhere may come to see national authorities as merely a source of funds, and will have a reduced personal interest in the quality of availability of national services........... motivation to support solidarity is reduced once an exit-option is introduced in to healthcare

\textsuperscript{749} \textit{Watts} (ECJ), 2006 ECR I-4325Case C-372/04.
\textsuperscript{750} \textit{Watts} (ECJ), 2006 ECR I-4325 para 92.
\textsuperscript{751} Ibid para 68.
\textsuperscript{752} Pages 787, 794. Somek, A. (2007). Solidarity Decomposed: Being and Time in European Citizenship, 32 EUR.L.Rev,
provision. Creating consumers out of patients is therefore not just about creating autonomous choice capable individuals, but about reducing social bonds’.\footnote{Page 235. Davies. (2007).}

I do not agree with the statement since allowing patients’ access to treatment abroad would assist and enhance individual choice and in some cases will only be used as a necessity. Indeed individuals would prefer treatment in their home state for practical reasons such as travel and accommodation.

It can be further argued that the CJEU has not understood the way in which the national healthcare systems operate. An example of this would be that the CJEU concedes the rights of Member States to set fees and ambit of healthcare packages. However, the Accession states could not be expected to invest, for example, in access to pharmaceutical technology, and long-term nursing. Therefore, the CJEU suggests that the Member States may charge for care packages, allowing them some control over their priorities and designating their care to those who in their opinion need it the most.\footnote{Page 861. Newdick. (2009). It is claimed by Newdick\footnote{Ibid. Page 861.} that this type of mechanism is not going to have any effects as healthcare systems do not seem to use restrictive lists in that way. Access to treatments are covered by generic terms such as ‘necessary’ or ‘comprehensive’ care or excluding treatment which is experimental and it is the individual’s Member State’s discretion to decide how to apply these terms. The CJEU cannot interfere in this system. If the system is ineffective, it could restrict patients receiving new treatments in other places. New considerations would be needed for emerging evidence. The negative or black lists of disapproved treatments would carry the risk of excluding responses which may be useful to patients. Therefore, the CJEU would be wrong to limit healthcare coverage by limiting access to treatments to the lists of treatments.}

5.3 Towards a Community Framework for cross-border healthcare

Following the Kohll & Decker judgements and Smits & Peerbooms decisions the Commission felt that there was a need for clarification of the legal framework.\footnote{COM (2004) 301 final. Provides the Follow up of the High Level reflection process on patient mobility and healthcare developments in the EU.}
consultations led to the adoption of the Directive on application of patients’ rights in cross-border healthcare. The Directive was adopted under Article 114 TFEU on the basis of the internal market and Article 168 TFEU which provides the legal basis for the cooperation instruments under the Directive. This section aims to outline the responsibilities of Member States with regards to cross-border healthcare. These responsibilities were outlined in the jurisprudence of the CJEU and now have been codified within the Directive. The Directive seeks to go beyond a mere codification exercise, to do this it highlights the significance of European Union values in the field of health and puts them in the perspective of the recognition of new rights for patients. A discussion on provisions of the Directive that enhance future cooperation via European networks and promote e-Health will be provided. By creating national contact points and centres the aim of the Directive is for Member States to share information and experience to enhance patient care.

The CJEU has through its judgements, made attempts to restore legal clarity and coherence in order to protect the rights of citizens who seek healthcare outside the country where they are insured or to which they are affiliated. In the Inizan case\textsuperscript{759} the Court held that providing prior authorization under the coordination procedure would offer citizens rights in a much secure way. The initial attempt was to integrate the new Treaty-based reimbursement procedure created by the Court rulings into the existing framework of European social security coordination rules (which were modernised under the new Regulation 883/04). The revised framework which came in to force on 1 May 2010 did not manage to incorporate the procedure set by the Court.

As the EP voted for the exclusion of healthcare within the Services Directive, the Commission in it its 2007 Annual Policy Strategy,\textsuperscript{760} announced its plans to develop a separate initiative in healthcare covering areas such as patient mobility. The 2007 Health and Consumer Protection Directorate-General Report\textsuperscript{761} which involved the contributions of stakeholders and Member States concluded that Member States needed to ‘better safeguard the common values of European health systems and respect the

\textsuperscript{759} Case C-56/01, Inizan, [2003] ECR I-12403.
Member States’ prime responsibility in the organization of access to healthcare for their citizens. This material was then fed in the internal impact assessment procedure which is required for major proposals.

In July 2008 the Commission developed its proposal for a Directive on the application of patients’ rights in cross-border healthcare.\(^{762}\) The Commission used a wider approach by defining cross-border health care as to include use of services abroad (patient moving), cross-border provision of services (service moving) and temporary/permanent provision of services (provider moving). The proposal was drawn up with a bottom-up approach. It emphasised limiting EU action to only where the cases required clarification and the correct sharing of information.

After the Commission’s proposal was adopted, the Directive was agreed under the ordinary legislative procedure. The Directive on the application of patients’ rights in cross-border healthcare was adopted on 9\(^{th}\) March 2011\(^{763}\) will now need to be transposed by 25\(^{th}\) October 2013.

In my opinion the overall use of the Directive to codify the case law rather than new governance processes in cross border care for patients may be due to the Directive being a concrete method to supporting negative integration. It has affirmed the work of the CJEU within this area. Greer defines negative integration as ‘knocking down regulatory barriers in the name of non-discrimination’ and the market has been more of an effective integrating tool.\(^{764}\) However it needs to be noted that negative integration involves the removal of barriers to create a European single market. Whilst market is market competition that involves individuals choice of providers which are motivated by new competitive strategies, financial gains or entrance in to new markets by the firms.\(^{765}\) Greer points out that ‘health has been subjected to negative integration mostly by the CJEU’.\(^{766}\) However the CJEU has not caused any signs of promoting a market. The results are only in areas where the states seek it. Therefore negative integration is a distance from market making especially in the areas of social services. Markets are only


\(^{765}\) Ibid page 798.

\(^{766}\) Ibid page 798.
produced to the extent that the local political actors require it causing slow progression of competition.

The economic nature of healthcare remains a problem to many Member States, as it carries with itself wider implications than just cross-border healthcare. This may be also the reason why the application of the EU internal market rules to healthcare services was taken away from the proposal. Originally the Commission used Article 95 EC (now Article 114TFEU) as the basis of the proposal. This seemed to suggest that economic factors would prevail over public health matters and national responsibilities to organise and finance health as per Article 152 EC (Article 168 TFEU). This was addressed via the preamble of the Directive, which denotes the importance of healthcare, but also by leaving the critical decisions with the Member States.

The scope of the Directive seems to have narrowed in comparison with the original draft of the Commission. The definition of ‘cross-border’ now includes healthcare goods and services provided and prescribed in a Member state other than the Member State of affiliation. Matters such as the access to organs, long term care, public vaccinations, which are subject to planning measures, are excluded from the scope of the Directive. Initially the Directive would have applied to all healthcare provisions including the four dimensions of cross-border care. Some Member States insisted that even though the Directive will apply to the NHS and Social insurance systems it should not be applied to private healthcare providers in case they fail to meet standards. A compromise was agreed as the Council allowed the Member States to refuse prior authorization if there were concerns in relation to the safety and standards used by the providers.

The proposal set obligations on the Member States to ensure that the patient’s privacy is protected and that patients have access to information in order to gain treatment. The Member States have to ensure that health providers provide information including the price, outcome of the treatment and details of their insurance cover. The Directive will oblige the Member States to have national contact points for cross-border healthcare. The contact points will provide information to patients on specific providers, their rights regarding cross-border healthcare including reimbursement, administrative procedures
and grounds of appeal. The Member State of affiliation only needs to provide information in relation to the reimbursement of cross-border care, including where prior authorization applies. The issue of concern is that patients will not be gaining information in their language, as the contact points are not under any obligation to provide information in other languages.

Due to the variations in the progress amongst the Member States in this field, the Commission agreed on a non-regulatory and process-oriented approach. The Member States are required to utilise the subsidiarity principle and set their standards for healthcare providers and then monitor and sanction their progress. Also they are required to monitor the quality and standards on healthcare, as well as allow patients to obtain remedies if the patient suffered due to the treatment. The provisions were reformed asking the Member States to inform patients of the standards and guidelines and the ways in which these standards and guidelines are implemented.

The reimbursement of cross-border care is the responsibility of the Member State of affiliation. It needs to determine the general conditions, eligibility criteria and formalities on to which reimbursement depends in a way that does not obstruct free movement and is not discriminatory. The Member States can determine whether or not to reimburse costs if they exceed the reimbursement tariff. The cross-border treatment will only be reimbursed if it is part of the benefits package of the Member State of affiliation and up to the level which is applied, without the actual cost paid in the Member State of treatment.

Reimbursement conditions, such as treatment criteria, eligibility criteria or administrative requirements of the Member State of affiliation apply. These conditions may not be discriminatory or cause an obstruction to the free movement of patients, services or goods. They need to be objectively justified by the planning requirements relating to ensure efficient and permanent access to a balanced range of high quality treatment or to the wish to control costs and avoid the wastage of financial, technical and human resources.

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768 Article 7.
The Directive states that reimbursement of cross-border healthcare shall be subject to prior authorization. Article 8 of the Directive states that in order to avoid wastage of financial and human resources prior authorization would be required for overnight hospital care; care that required use of sophisticated medical equipment or the treatment poses risk for the patient or population. The scope of prior authorization is widened as the Council agreed that prior authorization can be required and denied for treatment if there are concerns in relation to the risk for the patient, safety risk for the population and concerns about the healthcare provider.  

The duality of the reimbursement system remains.Alongside Directive 2011/24 Regulation 883/2004 remains intact. The Directive foresees a priority measure for the procedure of Regulation 883/2004 by requiring the Member State of affiliation to confirm whether the conditions under Regulation 883/2004 are met when they provide prior authorization. Accordingly after prior authorization is provided of his/her competent authority the patient can receive benefits in kind on behalf of the competent authority according to the legislation of the Member State in which the treatment takes place. The competent authority will directly pay the foreign healthcare provider. Hence patients will not be needed to pay in advance and the reimbursement tariffs of the Member State of treatment apply. Prior authorization cannot be refused if the treatment is in the basket of reimbursable treatments of the Member State of affiliation or the treatment cannot be provided within a reasonable time within the Member State of affiliation.

Chapter IV of the Directive aims to facilitate cooperation between the States in the area of healthcare. The Directive establishes a duty of cooperation in areas such as, data collection, European reference networks, e-health and health technology assessment. Such access to information should allow certain groups of patients’ better access to treatment abroad. The Directive is effectively allowing enhanced cooperation in these areas. The European reference networks will be useful for patients requiring specialised treatments. The networks will assist in evaluation training and development,

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769 Article 8.6.  
770 Article 12.  
771 Article 14.  
772 Article 15.
especially for rare diseases. Such network collaboration is also promoting a new governance approach in these areas, as participation in on a voluntary basis.

The emphasis on mechanisms for cooperation within the Directive under Article 10 merits particular attention. As they provide an opportunity for the Union to utilise its complementary competence in healthcare. The Member States are asked to facilitate cooperation at regional/local levels as well as through ICT. Such cooperation may require the use of joint planning, mutual recognition or adaption of procedures. The Commission may identify major obstacles, make recommendations, and disseminate information and best practices on methods to overcome the obstacles.

Whilst the establishment of technology assessment networks under Article 15 encourage the use of the OMC practices. The networks will require States to share information, best practices and common experiences within a framework designed by the Commission. This can be considered as a flexible form of OMC as it aims to make use of benchmarking procedures without attaching common objectives and guidelines. In order to achieve constituency the practices of this network should be applied with the use of the OMC in health as derived under Article 168(4) TFEU. The OMC therefore could also evolve and be a tool to monitor the Directive’s implementation with the national systems.

It is noted that as the establishment of the technology assessment networks are on a voluntary basis. The Directive does not make references to setting up common committees for the application of the OMC, such as the Committee on Social Protection which is required under the OMC on Social Inclusion. The Member States themselves will need to take a proactive stance in order to achieve a credible level of cooperation required for convergence in healthcare.

Article 12 seeks for the establishment of European reference networks by the Member States. The Directive aims are to build up a framework for knowledge exchange and sharing the most efficient treatments among States. The Commission shall support the Member States in the development of these networks especially in the case of rare

773 Article 10.2.
diseases. The Commission will set the criteria and conditions for the networks to adhere to.\textsuperscript{774} It will ensure that the reference networks are formed with the objectives of being multi-disciplinary; have a solid level of expertise to produce/implement guidelines; collaborate with other networks.\textsuperscript{775} The Member States will have the independence to coordinate the networks and are encouraged to facilitate the development of the networks. The networks need have at least three of the objectives. The objectives are related to pooling and spreading of expertise. They concern the contribution to the pooling of knowledge, maximising the cost effectiveness of resources, development of safety benchmarks and spread of best practice. The creation of networks will also apply to e-Health under Article 14 of the Directive. The cooperation of Member States is required for the operation these networks that will connect national authorities working in e-Health. The problem is however that the Directive does not provide an operating mechanism for the two networks. The Member States have the discretion in their choice of tools (i.e. indicators, objectives or guidelines for monitoring), for the cooperation between national policies. This may result in the effectiveness of the whole cooperation processes.

In sum this section aimed at highlighting that the traditional role of the Commission as an independent initiator and the Court’s mandate to observe compliance are perceived as separate entities of integration. The inherent position is that the Member States formulate legislation through the perspective of liberal intergovernmentalism as discussed in Chapter One. However, the cross-border example illustrates that law-making may take place within the shadow of judicial politics. If the Commission would utilise the Community Method which allows the independent court to prosper, judicial politics could gain further strength. Here the legislative process was pressurised by the private litigation which led to codification (i.e. legal certainty). This is an illustration to the fact that by no means is the traditional method obsolete. However, even though this supranational institution is not controlled by the Member States it cannot produce arbitrary decisions and has to be aware of its own legitimacy. As mentioned in Chapter two the turn to governance approach and the White Paper on Governance have encouraged the new modes of governance where central legislation may not be the best choice because the outcomes are uncertain. The OMC in Healthcare was introduced in

\textsuperscript{774} Article 12.4.
\textsuperscript{775} Article 12.2.
2002 but was streamlined within the social OMC since 2005. I have discussed ways in which the Social OMC could be better improved in the previous chapter as the healthcare now falls within the Social OMC it does merit special attention because the indicators were not fully developed, there were no policy changes introduced by the Member States and political saliency was low. Therefore with the failure of the OMC in healthcare I propose a governance paradigm that uses the other new forms of governance within healthcare.

5.4 The Governance Paradigm

The governance paradigm looks to utilising the new modes of governance mentioned in Chapter two namely networks, comitology and agencies within healthcare rather than sole reliance on the OMC. Networks allow public and private actors to pool resources to achieve solutions to common problems. Networks are defined as institutionalised modes of coordination through which collectively binding decisions are adopted and implemented.776 In this section attention will be paid to the Europe Against Cancer program which I propose is a successful illustration of the network model, secondly it will be proposed that Health Strategy 2008-2013 could benefit from utilising network governance. Thirdly regulatory networks will be examined. All the three network illustrations are examples of experimental governance as mentioned in Chapter Three.

The EFSA and the EMA will be used as examples of the functioning of agencies with EU healthcare. However it is noted that agencies have limitations as they limited in competence and the ultimate decisions for action remain with the Commission. The institutions make the decisions to act under the management stage, whereas the agencies’ opinions are only noted at the risk assessment stage. Finally, comitology will be assessed through its use within the Genetically Modified Organisms (GMO) committees.

5.4.1 Networks: The future?

a) Network Governance: Action Against Cancer

The new Directive on cross-border healthcare not only sets the framework for cross-border healthcare, but it also aims to reshape Member States’ health systems by creating European Reference Networks. The Commission and the Member States have the responsibility to maintain and develop these networks. I take my aspirations from the Directive and the White Paper on Governance and propose that in the future networked governance could be utilised further rather than solely relying upon the OMC as an alternative mode of governance to the CCM. Network governance can also be used to implement the Health Strategy 2008-2013. The Health Strategy is already supporting the use of network governance as it is providing funding for Joint Actions and conferences for network collaboration. The network collaboration established via the Europe Against Cancer (EAC) programme is a successful example for how network governance and could serve as an illustration of the possible ways in which networks may develop within EU healthcare. The Communication from the Commission on Action Against Cancer: European Partnership supports this strategy as it states: ‘Another area of EU added-value would be the cooperation on European Networks, for example in the field of rare diseases, which include many rare cancers. European Reference Networks provided for in the Proposal for a Directive of the European Parliament and of the Council on the Application of Patients’ Rights in Cross-border Healthcare should provide healthcare to all patients who have conditions requiring a particular concentration of resources or expertise in order to provide affordable, high-quality and cost-effective care, and can also be focal points for medical training and research, information dissemination and evaluation’.  

I acknowledge that an increased cooperation at the EU level with the participation from different representatives, including doctors and patients at the EU level could bring about diverse and effective solutions. The use of networked governance as mentioned in the cross-border Directive may be important in building the future health policy. The Europe Against Cancer (EAC), a forum of doctors and patients’ organization may be seen as a successful example such governance. Policy makers could utilise the experiences and views of healthcare professionals and this networked governance

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approach to improve healthcare. This multi-level mechanism may help patients, practitioners and policy makers learn from the diversity of Europe’s political systems.

The EAC was established with the aims to provide training, information and public awareness and cancer prevention. The actors involved within the EAC gather information in order to implement cancer control systems to reduce the mortality rates of cancer. They achieved this by creating a reflexive system of networked governance which provides space for policy learning.

This multi-level network has allowed the growth of policy learning with continued solidarity. Ferrara points to the EAC as an example of the ‘emergence of inter-regional associations which often include among their objectives the strengthening of cooperation and exchanges in the field of social policy’. The networks provide soft laws via codes and guidelines, but also provide the impetus for hard law.

Hervey et al claim that:
‘this multi-level, reflexive system of coordination presents a model of governance that may be suited to address the gap in governance created recently by the need to respond to the ECJ cases. The solution to that gap, however, must fall within the confines of the boundaries set by the constrained competence of the EU in health policy and the political agreement that supra-nationalized healthcare is neither a desirable nor feasible solution. Its experimental and pragmatic nature allows for the possibility and the EU and the Member States together can balance economic integration that is an inevitable part of the future of healthcare with the long standing and effective solidarity that is at the core of the ‘European Social Model’.’

The EAC worked by establishing action plans for the periods of (1987-1989), (1990-1994), and (1996-2000). The aims of the action plans were to promote the quality of life

778 Resolution of the Council and the Representatives of the Governments of the Member States Meeting within the Council of 7th July 1986, on a Programme of Action of the European Communities Against Cancer, 1986 OJ(C184) 19,20.
and reduce the social and economic consequences of cancer. It focused on data
collection and research, information and health education, early detection and screening
and training and quality of control. The European Partnership For Action Against
Cancer (2009-2013) follows similar objectives. It is established by the Commission
to provide Member States with a framework in order to deal with cancer more
efficiently.

Networked governance supported by the cancer experts produced the European
Network of Cancer Registries (ENCR). Medical experts utilised the information from
the registries to set up the CaMon Program which provided a cancer surveillance system
that provided data on the cancer incidence and mortality rates in Europe. The
EUROCARE project was also set up to monitor the survival rates of cancer patients and
data on cancer and mortality in Europe. All this data was then formulated to produce
the protocols on cancer treatment, screening and prevention known as the ‘European
Code Against Cancer’. These protocols have become standard in cancer treatment in
Europe and are updated to reflect new information on cancer control.

Consequently the ‘European Code Against Cancer’ EUROCARE and CaMon
collaborated together as networks and conducted monitoring, benchmarking and
standard setting exercises which were then fed back as proposals for traditional forms of
EU legislation. An example of this process is the European Directive on Tobacco

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781 Ibid page 816.
784 CAMON-Comprehensive Cancer Monitoring Programme, http://www-dep.iarc.fr/http/camon.htm (last
visited June 22 2012).
785 Coleman,M.P et al EUROCARE-3 Summary: Cancer Survival in Europe at the End of the 20th
Century, 14 (supp.5) ANNALS OF ONCOLOGY v128 v147 (2003) available at
786 Europe Against Cancer, European Code Against Cancer and Scientific Justification: Third Version
Improvements in Clinical Care for All European Cancer Patients. 40 EUR. J. CANCER .
788 European Public Health Alliance, Europe Against Cancer Programme Saves Lives,
http://www.epha.org/a/591 (last visited 22 June 2012).
Advertising which was developed from the EAC’s established European Experts Cancer Committee. The Committee’s report ultimately led to the adoption of the Tobacco Directive in 2001.

It is noted that the development of the cancer network shows that networked governance required the cooperation between the Member States and the Commission. The EAC assisted with the creation of the European Cancer Registries Network, which relied on national registries. The national actors worked with results produced by the league tables which were an important addition in order to determine the effectiveness of the information and procedures.

Alongside the EAC, funding was received via the Framework Programmes for Research which aimed to support new cross-national networks. Even though the funds were nominal, they were significant as they were directed towards cross-border collaborative activities. The ability to attract funds would be increased by increasing the number of partners in the project. Hervey marks the success of the EAC by stating:

‘So, while participatory forms of governance, whether new governance or democratic decision making more generally, can often be critiqued for the inequities in participation of less powerful groups, the funding of the EAC had the effect of bringing to the table groups that theretofore had been outweighed politically. More entrenched interests have often been a drag on the use of the classic community method in the fight against cancer’.

The EAC subdued along with other health initiatives as part of the 2003-2008 public health programme. This was due to the lack of funding from the EU. However in 2006, 44 Members of the EP formed the ‘MEPs against Cancer’ (MAC). The aim of MAC

*790 Directive 2003/33 on approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.
792 Page 823, Hervey. (2009).*
was to ‘promote action on cancer as an EU priority and harnessing European health policy to that end’.  

The EAC has benefited from patient activism by taking inputs from the European Cancer Patients Coalition (ECPC) that was formed in 2003. The ECPC consisting of various cancer advocacy groups worked as a medium between the EU and the Member States, whilst MAC ensured the funding required. The EUROCARE report suggested that public measures were required as the ‘number one priority in Europe’, alongside cross-EU learning on screening, use of palliative care and cancer research. The European Partnership for Action Against Cancer 2009-2013 aims to relaunch the European Week Against Cancer (EWAC). The partnership has laid out goals such as achieving 100% population coverage of screening for breast, cervical and colorectal cancer by 2013; increase funding and the reduction of Cancer by 15% by 2020. The EWAC will be linked to the European Cancer Code (ECC). The ECC will aim to work with the partners and engage with MAC II. The aim of this coordination will be to initiate strategy plans, share best practices, and support early detection in the fight against cancer. The use of best practices and plans in the coordination relates to use of experimentalist governance as referred in Chapter Three since there is potential deliberation among the technical experts rather than technical elites.

The work of The European Partnership began in February 2011 in the form of Joint Action and will continue until 2014. It will obtain additional administrative and scientific support from the Commission. The Work Package will address the limitations by bringing together the Member States, NGOs, and health professionals to develop a concerted approach to cancer and achieve coordination of one third of research from all funding sources by 2013. The Health Strategy 2008-2013 will provide funding for Joint Actions and conferences for network collaboration. The Health Strategy also

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794 http://www.ecpc-online.org/ (last accessed on 2 Dec 2012).
797 Ibid. Page 7.
798 Commission Decision 22/2/ 2011 concerning the financing decision for 2011 in the framework of the second programme of Community action in the field of health (2008-2013) and on the selection, award and other criteria for financial contributions to the actions to this programme.
supports the Commission to provide a follow up on the actions from the Programme Against Cancer by adopting a Commission Communication on Cancer to include new guidelines on prevention, early diagnosis, control, workplace exposure and access to treatment and information, as well as the revised version of the European Code of Cancer. This would also be combined with coordinated action in rare diseases which would include rare forms of cancers.799 The adoption of the Cancer Code illustrates proceduralisation as discussed in Chapter three, while the coordination processes ranging from cancer to rare diseases exhibits the fluid nature of networks discussed in Chapter two which allows policy actors to interact on an informal basis.

The aim of the Work Package is to result in the adoption of National Cancer Plans (NCP) by the Member States by 2013. The NCPs would work towards reducing cancer by 15% by 2020.800 The NCPs will contain strategies and innovative solutions for prevention, early detection, diagnosis, rehabilitation and palliative care.

Finally, as illustrated through the functioning of the EAC, networked governance can be quite effective in ensuring real improvements in healthcare. By modelling future EU healthcare initiatives on this networked governance model utilised in the field of cancer; policy makers could devise a decision-making system that incorporates the experience and insight of actors within the healthcare sector ranging from doctors and patients to EU policy making bodies. The Network Governance model may also be advanced within the Health Strategy.

b) Proposal to utilise Network Governance within the Health Strategy 2008-2013

It is clear that the CJEU’s decisions dealt with cross-border care. The focus now has broadened to include the correlation between the EU’s current policy, the competitive internal market in health care services, and consumer/patient protection in the internal market. The Commission’s White Paper ‘Together for Health: A Strategic Approach for

800 Ibid. Page 3.
the EU 2008-2013 points out that health policy will be seen as a key agent in Europe’s productive workforce. Enterprise actors are motivated by increasing the standards of healthcare whilst maintaining competition, whilst some enterprises have little incentives to increase healthcare protection.

The Health Strategy 2008-2013, which is adopted under Article 152 EC (Article 168 TFEU) is wide in ambit, puts forward proposals for the Commission’s cooperation with various actors. It is supported by DG Sanco and encompasses work in all sectors. The three main objectives of the Health Strategy are: to improve citizens’ health and security; to promote health, including the reduction of health inequalities; to generate and disseminate health information and knowledge. The Strategy contains three core principles. The first is that health is the greatest wealth. The second is that health in all policies and the third is to promote health in global policies. The Commission decided to set up a cooperation mechanism that will assist it in order to define indicators, produce guidelines, and exchange good practice for the implementation of the Strategy. This is utilising reflexive governance as mentioned in Chapter three.

The Directive and the Strategy promote the potential for new technologies including E-health to revolutionise health systems. However, the Commission recognised the need to evaluate them for their cost effectiveness, equity and health professional training and has recommended the need for coordinated action in the following areas including framework for safe, high quality and efficient health services; and supporting Member States in managing innovation in health services; supporting the Member States to implement and evaluate e-health solutions in health systems. Hence it seems that the Directive is supporting the Health Strategy by informing the Member States to establish European reference networks, enhance cooperation between members in areas such as e-Health and rare diseases.

I suggest that the network governance model used by the European Cancer Network could be seen as a positive model for this new cooperation from the Commission and

the working of the Health Strategy. As the Commission looks for stakeholders’ participation and develop current partnerships with bodies such as Health Forum, European Alcohol and Health Forum and Platform on diet, physical activity and health.\textsuperscript{806} The Commission acknowledges that health policy must be based on the best scientific knowledge available. Hence it will encourage the adoption of health indicators with common mechanisms for collecting comparable data at all levels.\textsuperscript{807} Its Working Document\textsuperscript{808} recommends gathering the input from the civil society, NGOs, patient groups and advocacy groups.\textsuperscript{809} This experimental governance model will allow monitoring and reviewing to take place through multiple institutional devices, and utilise experimentalist tools such as open consultations.

As mentioned in Chapter two, the outcomes of the network model are heavily reliant on the interactions that take place between its participating members. The European Patients Forum (EPF) and European Public Health Association (EPHA) are two of the actors which are involved with providing input from patients and NGOs in the Health Strategy. They illustrate a collective dimension to patients’ strategic engagement with EU governance and their population. The EPF has been keen to collaborate with the EU institutions including the European Medicines Agency and stakeholders, whilst the EPHA monitors the impacts of the EU policy making on public health and developments in the OMC.

The EPHA is involved in the EU’s growing network of civil society actors such as the Social Platform that deal with healthcare issues. The Health Forum also contains member organisations and acts as a platform for discussion amongst groups in key policy areas. Even though the Forum, EPA and EPHA are not mentioned in the document ‘Together For Health’. The document makes indirect reference to them by the discourse of human rights. It uses the Charter to emphasise the importance of citizen participation in decision-making.\textsuperscript{810} The involvement of these actors can also be deduced

\begin{footnotesize}
\textsuperscript{806} Ibid. Page 10.
\textsuperscript{808} SEC (2007) 1376.
\textsuperscript{809} Refer to Chapter Three, for example the Commission aims promote measures on the health of young people combat, poverty and social exclusion and promote participation. It will develop these measures with the input stakeholder and young people.
\textsuperscript{810} Page 4. COM (2007).
\end{footnotesize}
from the emphasis given in the White Paper on European Governance,\textsuperscript{811} which requires
civil society involvement in order to enhance input legitimacy.

I agree with Majone’s recommendations that effective administrative procedures are
needed to ensure accountability and legitimacy.\textsuperscript{812} Networks can contribute to legitimacy
gains concerning both the process and the output of decision-making. As regards to the
former networks provide an integrative forum for a plurality of contending positions to
be articulated and given a hearing. They provide social actors opportunities for direct
participation and implementation of services.\textsuperscript{813} With regards to the latter, by including
actors who are affected ultimately by the decisions results in widely accepted outcomes.
Thirdly transnational networking among national political party foundations is a way to
achieve legitimacy and access to European institutions. The Commission officials are
keen to take on board solutions which assist them to respond to the public requirements
for more dialogue with citizens.\textsuperscript{814} The White Paper on Governance also reinforces the
importance of openness and transparency. However, I acknowledge that reforms are
required to the implementation processes which include updating information on
policies and the establishment of minimum standards for consultation on EU policy.
Walter and Haahr in agreement with the document ‘Together For Health’ point out ‘that
improved participation will provide a more convincing and therefore a more national
basis for policy’.\textsuperscript{815}

Although the notion of the active patient (promoting better patient involvement in the
EU policy-making) is referred to in ‘Together for Health’, activism is perceived as the
continuation of the public rationality set in “European Governance” in which references
to involvement and consultation do not determine a genuine interaction with those
members of society.\textsuperscript{816} Smismans\textsuperscript{817} points out that ‘European Governance’ and

\textsuperscript{811} COM (2001).428.
\textsuperscript{813} Peters, B. (2007).Forms of informal governance: Searching for efficiency and democracy in
Christiansen and Larsson, T (eds). The Role of Committees in the Policy Process of the European Union
contributions. Journal of Public Policy.29 (2).
\textsuperscript{815} Page 76. Walters and Haahr, J. (2005).Governing Europe: Discouer Governmentality and European
\textsuperscript{816} Page 897. Flear (2009).
'Together For Health’ both refer to the use of functional representation i.e. representation via associations and interest groups and does not involve citizen participation. The participation of the actors seems to be enhancing EU legitimacy and not active citizenship. This involvement of actors as Walters and Haahr's point out is seen as ‘a vehicle for persuasion for rhetorical action in which the point is to convince the objects of rhetoric of certain beliefs, preferences and identification’ and ‘not first and foremost a vehicle for the achievement of rational agreement on the basis of the free and equal exchange of arguments oriented towards understanding’. 818

It is noted that the effectiveness of the civil society actors need to be questioned when they are engaging with EU governance actors and structures. ‘Together For Health’ shows the importance of the different stakeholders in EU governance. The EU discourse constructs the power/knowledge dynamics among actors because it prioritises science over daily dealings with the illness. Flear comments that:

‘the point of this observation in not to query the content or methods of science or other forms of expertise privileged in EU governance, but rather to highlight the power effects of establishing expertise, particular that of science, as the norm and truth’. 819

In my opinion, such a selection of participants questions how much of an influence can the EPF and EPHA members have in comparison to the scientific experts, health professionals, national and Commission delegates. Merely having a voice does not mean that the input will be taken seriously, or at worst the input may be disqualified on the grounds that it does not meet the criteria set by the experts.

On a final note, it is important to highlight that the efficiency of the networks are dependent on the participant groups involved within the networks. It needs to be mentioned that as the participant groups are not selected through popular election. The risk is that the networks may form private interest coalitions that place the decision-

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making in the hands of strong pressure groups. In addition the network participants could be seen as unaccountable, unrepresentative as they are not accountable to the general public. The legitimacy of the networks will depend on the scope conditions. In my opinion the more inclusive they are the more likely the networks will foster the acceptability and acceptance of EU policies. Following the subsequent discussion on the use of networks within cancer care and the Health Strategy, it is now imperative to focus on regulatory networks which are also utilised within the field of EU biotechnologies.

Regulatory networks are complex, expert-based networks in existence in the areas of biotechnology, finance and competition. They contain participants from public bodies, governments, independent authorities, technical agencies, foreign public and private organisations. Their aims are for organisations to establish relationships and coordinate their activities. Spina points out two elements within networks that separate them from other collaborative arrangements. Firstly, each interconnected organisation is self-sufficient in performing its functions without the need for the network. Secondly, this integration of the organisations does not result in one superior organisation. The network creates coordination but does not work to adversely affect the autonomy of the organisations involved. This network model can be seen as practical way to establish a harmonious legal framework within the EU and possible aim to become the institutional model to achieve ‘coordination without hierarchy’. These obvious advantages may support the development of regulatory networks within EU healthcare.

Due to the scientific uncertainties related to biotechnological products, the opinions are formulated by a collective body and ‘subject to multiple examinations’ to protect it from failures which are more prominent in individual organisations. The system of checks and balances that the network is supporting significantly reduces the likelihood of influence from external actors.

824 Ibid. Page 200.
In the field of biotechnology, despite the lack of formal structures to create regulatory networks, national authorities utilise the scientific opinions to avoid duplication of assessments and achieve domestic actions. Networked governance allows for integrated and interdisciplinary scientific knowledge. For example, a GMO product when being authorised, should follow the environmental safety requirements under Directive 2001/18 and the quality/safety requirement under Regulation 726/2004. While the European Medicines Agency has to issue the scientific opinion, it will do so in line with the risk assessment under Directive 2001. The regulatory framework requires the interaction between the authorities to exchange information and the network model is allowing this to take place.

The EMA and the EFSA facilitate the interaction that takes place within the network of public authorities who are responsible for the risk assessment. The National Competent Authorities (NCA) operate in the form of a network through a mixed procedure, where competences are shared between the Union and national administrators. As the NCA is notified of the application, it will evaluate it, but other NCAs and the Commission can provide reasoned objections against the opinions. This network collaboration can act to harmonise regulatory actions in respect of the placement of the products within the market. Also, this may provide a synchronized system for the assessment of the environmental risks. In addition, the Directive 75/319 established a non-binding multi-state system to coordinate the evaluation of medicinal products, whilst the Committee of Proprietary Medicinal Products (CPMP) assists the mutual recognition of the market authorisation for new products set by NCAs.

The European Medicines Agency brought about a transition towards regulatory harmonisation within the pharmaceutical industry. It releases opinions obtained by the Committee for Medicinal Products for Human Use (CHMP), which consists of Member State representatives. CHMP members act independently and are not answerable to the Member States. The CHMP members constitute a network of pharmaceutical experts from Member States, who provide scientific evaluations and also coordinate the work between the Agency and the NCAs. The Agency ensures that there are national experts

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who can cooperate the CHMP. The scientific opinion then will become a binding decision once it is approved by the Commission.  

The CHMP demonstrates the decision-making procedure of networking organisations (i.e. exchange of duties and gradual progression to the implementation of the final decision). The opinion is prepared by a couple of the members, but it is evaluated by the whole of the CHMP. The peer-review process within the network permits changes to the original format of the opinion. The whole process allows the opinion to fit within the scientific consensus. The European Medicines Agency also coordinates the pharmacovigilance network through a web-based forum called Eudravigilance. The Member States need to ensure that national pharmacovigilence systems are created to collect information and share it within the network in order to keep a tab on the data for authorised products.

The EFSA has a coordinating role in the framework of GM food and feed. As an advisory forum has been established to act as a networking organ designed to ‘promote coordination through European networks of organizations operating in the related fields of the agency’ and contains members who have similar roles nationally.

The centralised procedure for the evaluation of GM products contains many arrangements that illustrate network coordination. The scientific opinions are produced after the Authority acts with the national food assessment bodies created under Regulation 178/2002 and NCAs under Directive 2001/18. The Authority forwards all the information provided by the applicant to the NCAs. In establishing its opinion the Authority may require the national food assessment body to conduct safety assessments of the GM product. The decision of the Commission will be based on the opinion of the EFSA.

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828 Ibid Article 8.2
830 178/2002 Regulation Laying down the principles and requirements of food law, establishing the EFSA and laying down procedure in matters of food safety. Article.27 (4) (c).
The EFSA needs to establish ‘a system of networks of organizations operating in the field within its mission and be responsible for their operation’.\textsuperscript{832} Article 36 of Regulation 178/2002 also emphasizes the network model, as its aims are ‘the scientific cooperation framework by the coordination of activities, the exchange of information, the development and implementation of joint projects, the exchange of expertise and best practices’. Article 36 has been implemented in Regulation 2230/2004, allowing the procedure for the operation of networks and the financial assistance that they can achieve from the EFSA.

These networked scientific organisations facilitate the scientific and technical assistance, data collection and initial work for the scientific opinions. One of the obvious disadvantages with this type of networking could be due to the fact that some members may influence the decision-making process more than others causing some members to provide a limited input. This would affect the dynamics of this model and cause it to be of less value.\textsuperscript{833} The other problem may be that the harmonisation of scientific opinions which are supported by the network governance may cause standards to remain constant or even dip. When a good may become standard due to network diffusion, then it is harder to use other even better goods. In this way the regulatory networks can cause the acceptance of below average standards.\textsuperscript{834}

Regulatory networks are not subjected to legal accountability because their scientific opinions are not aimed to produce legal effects. However the processes which took place in order to achieve that opinion need to be transparent. Black\textsuperscript{835} further, argues that polycentric transnational networks should represent the true nature of accountability and not just the formal requirements. Accountability is based on a relationship where one party provides an account and the other sets the consequences. In a network, there is a need to make the whole decision-making procedure available and then made subject to the consequences by the collective organisations. Therefore, regulatory regimes need to provide more openness to make their final outcomes more accountable. Following the

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\textsuperscript{832} Regulation 178/2002 Article.23 (1) (g).
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discussion on networks as possible mode of governance I will now discuss the potential of agencies as a mode of governance.

5.4.2 Agencies: Another option for governance?

The term ‘agency’ does not have a formal definition in EU legislation. The Commission in its 2002 paper on regulating agencies, 836 commented that certain agencies are created via secondary legislation; they have a degree of financial autonomy and legal personality. The draft institutional agreement on the operating framework for the European regulatory agencies 837 defined a regulatory agency as ‘any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy’. Executive agencies were excluded from this definition. The Executive Agency for Health and Consumers is one of the executive agencies formed under DG Sanco to manage the Health Strategy until 2013. 838 This section of the chapter will aim to utilise Majone’s theory of the regulatory state as mentioned in Chapter two and illustrate that the regulatory agencies such as the EFSA and the European Agency for the Evaluation of Medicinal Products (EMEA) now known as European Medicines Agency (EMA) act as a mode of governance within healthcare.

It seems that Member States prefer providing powers to the agency as they have representatives on the boards of the agencies. The Commission needs to maintain a balance between controlling the agency and establishing that Member States do not overrule the agency. The medicines and food agencies seem like examples of soft, reflexive modes of governance. They may have the ability to contribute to further protect human health in the EU.

As mentioned in Chapter Two the introduction of supranational regulatory agencies was one the most significant institutional innovations in the European Union. The aim of these agencies was to replace traditional committee systems as the main regulatory

institution of the EU. Agencies also work to lighten the load of the Commission in policy areas. The Commission recognised the significance of delegation and decentralisation of the daily executive duties, whilst identifying the requirement of an open government and accountability, to be built on new forms of partnerships between the different levels of European governance.\(^{839}\)

Agency networks involving all interested actors could effectively play a strong part towards ‘a Europe closer to the citizen’ to promote better public trust in EU activities. Vos also argues that the accountability of agencies and the legitimacy of agency regulation can be advanced via their participation in networks.\(^{840}\) All the existing agencies have so far created networks by means of which they conduct their relationship with the outside bodies and stakeholders. The agencies build on the work of the existing institutions via the networks. These networks endorse the interaction with both governmental/non-governmental actors, even though the legitimacy of these European governance structures needs to be analysed.

The legitimacy of EU regulatory agencies depends on their acceptance by the Member States and the public. Agencies are created due to the need for setting independent bodies with specialist knowledge and expertise. This knowledge is utilised for the collective benefit and to reduce disputes between Member States in a cost effective way.

It is claimed by Majone\(^{841}\) that the modern regulatory theory ensures that independent agencies are better equipped to regulate matters than state bureaucracies because they can rectify inconsistent preferences. Pharmaceutical authorization raises inconsistent preferences. As in the case of the authorisation of medicines, patients are awaiting the authorization of the pharmaceuticals whilst the producers may depend economically on the product. These chemicals may be biologically and chemically active substances and consumers may not be able to assess the products themselves. Therefore the regulation of these products to decent standards would be of long term benefit to society.

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The fully independent agency may not produce effective results as the bureaucracies within the agency may take preference to some stakeholders and invoke their personal interests. The Pharmaceutical companies might be able to create more pressure on a regulator than the heterogeneous group of consumers of these products. The sanctioning abilities of the principal are susceptible to weaken credible commitment to long term objectives and reduce delegation gains. In this instance the right approach would need to retain a balance in order to allow the agency the ability to complete its tasks whilst staying within it competencies. The Commission and the CJEU are quite often provided the functions to monitor the need to for independent regulatory decision-making and the need for the tight control by the principal. However, the question to be asked is who will monitor the guardians.

In the area of regulating medicines within the EU, the EMA is regarded as a supranational agency and may be construed as a model for future agencies mentioned in the Commission White Paper. The agency coordinates the day to day decision-making process of medicinal products in the single market. It was established in 1993, in order to produce a single market for medicinal products following the failure of mutual recognition. It was revised in 2004 in order to ensure that authorised pharmaceuticals are not endangering public health in Europe. A 2001 Commission survey established that over 90% and all the regulatory companies of the then Member States were satisfied with the procedure of the EMA. At this stage it is worth noting that the mandate of the EMA heavily supports the single market, therefore there always be work needed to improve measures available to the agency to improve public health interests.

The authorisation decisions are accepted by the Commission and the Standing Committee, therefore the EMA is not formally independent. However the non-scientific

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843 COM 2001 (428) final.
actors, including the Commission and the Standing Committee, cannot take advantage of their positions because they need to obey the legally enforceable decision criteria. Therefore, the agency can exercise its independence in its day to day functioning. However, EMA opinions can be stopped from becoming legally binding decisions if the stakeholder or an outvoted member of the expert committee informs the Commission/Member States. This creates extra onus on the EMA to produce scientific opinions. The EMA itself is legally bound to adhere to the decision criteria, which can be enforced by bodies with legal standing in the courts.

This centralized authorization procedure creates a regulatory system, highlighting the principle that the authorization of pharmaceuticals is about the quest for influential decisions. The system creates limitations on the discretion of the agency forcing it to rely on scientific and regulatory expertise. It is relying on the substantive criteria and disregarding other aspects which could have had an impact on the application. Other non-scientific actors, such as the Commission or the Member States, are also limited to authorize decisions to ensure that the agency can function without pressure. This system is in place to protect the decision making procedure against particularistic interests. However it does not exclude actors with vested interests from this procedure.847

Now turning to the area of food safety governance, the promotion of health is one of the objectives taken in to account when formulating food policies. Previously technocratic governance prevailed in food safety regulation. The scientific advice in the food sector was provided by a group of scientific committees. The risk management decisions were taken by the representatives of the Member States in the standing committees via the comitology procedure. The committees were examples of technocratic policy-making. Their decisions were used for decision making with little input from the public or the EP. This type of governance would be classified as deliberative supranationalism as mentioned in Chapter Two. The technocratic committee met following the BSE crisis and confirmed that decision-makers rely on experts, as they themselves do not have the scientific and technological knowledge. The Commission’s 1997 Paper on Consumer Health and Food Safety further supported the technocratic model by stating that

scientific expertise is required in every single phase of the process. This Paper also brought in three principles for its scientific committees which included all three models of policy-making (these are the decisionist, technocratic and reflexive models of policy-making. The three principles were independence, transparency and policy based on scientific elements. It stated that:

‘The three principles which must be at the basis of good performance of the scientific committees are the excellence of their members, their independence and the transparency of their advice’.

The first principle is rather technocratic. The second seems decisionist whilst the last principle of transparency is in line with the reflexive model. The Commission further supports the reflexive model in the Paper as it states why the technocratic model would not produce good governance:

‘In some cases, there may be demands-for instance, due to ethical or environmental considerations or specific control and production methods- to go further in the area of health protection measures than the scientific evidence suggests is necessary. Conversely in other cases there may be reasons to balance the scientific or identifiable risks with society’s tolerance of the risks concerned- unhealthy diets and lifestyles being such examples. In still some cases, the scientific advice may not be sufficiently conclusive or complete to allow firm conclusions to be drawn. Finally, scientific advice is not infallible and subject to change in the light of new developments and knowledge and must therefore be kept under review’.

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848 Consumer Health and Food Safety, COM (97) 183 final.
850 Page38. Kaiser, M and Lien, M.(2006). Ethics and the politics of food. Wageningen: The Netherlands. The technocratic model is based on the slogan that policy-making should be based on sound science. The assumption is that science and technical considerations are sufficient for policy-making.
851 Page 37. Kaiser and Lien. (2006).The decisionist model is devised by Weber and Durkheim. TheWeberian model states that policy-making should compromise of two separate deliberations and correspondingly two distinct lines of accountability. Ministers should be responsible to elected representatives for their choice of goals and through them to the electorate. Bureaucrats and experts, on the other hand should be accountable to ministers for effectively pursuing the goals set from above, and to other experts for the knowledge and judgements that they bring to bear in the discharge of their responsibilities.
The Green Paper on the General Principles of food law in the EU<sup>853</sup> endorsed the role of scientific evidence over political issues. However the Commission was clear that it would stand by the principle of institutional separation. The Green Paper again endorsed the three principles of independence, transparency and policy based on scientific elements.

The European agencies, such as the EMA and European Environmental Agency, are following the decisionist model rather than the technocratic one. This does not undermine their independence. However they are not strong regulatory agencies. Hence I suggest that rather they should be set as independent regulatory agencies without having risk evaluation competences. This would allow them to better utilise the decisionist model.

The Commission subsequently altered its model in the White Paper on Food Safety<sup>854</sup> as it preferred an ‘independent assessment agency’ without the competences for risk management. This could be seen as an adjustment to the Member States resistance to transferring powers to the European level. In the White Paper the Commission refers back to the reflexive model, as it aims to maintain transparency and interactive communication with the consumer.

After the positive outcomes from the EMA, the Commission in its White Paper on European Governance<sup>855</sup> recommended the creation of more supranational regulatory agencies. The EFSA was the first agency founded in 2002 to reform the EU foodstuff regulation following the BSE crisis. The BSE regulation was not adopted before 2000 when the disease had already spread in the UK. The EFSA is similar to design with the EMA.

The agencies have taken over the existing institutional structures of the committee system. In the operation of both agencies the Commission sets the agenda and the policy proposals with the assistance of the experts/ scientific committees. These are then presented to the Member States committees and the Council.

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<sup>853</sup>The general principles of food law in the European Union COM (97) 176.
<sup>855</sup>COM(2001) 428 final.
It should be noted that the Commission has not lost competencies but actually gained its regulatory competencies by the establishment of the agencies. These agencies allowed the Commission a strong role in the decision-making processes including agenda setting. Therefore without the Commission’s consent the agencies cannot introduce policies. The Member States also retain their strong position as the Committee (which contains members from the Member States) involved in this procedure need to pass the vote for approval (via qualified majority) otherwise the Council will take the decision. In the case of the pharmaceutical laws, the Member States gain hold on the expert committees as they contain two representatives from the authorisation bodies for pharmaceuticals for each Member State. This allows the establishment of a network of the Member States’ regulatory authorities for pharmaceuticals. In contrast the European Parliament is not involved within the functioning of both the agencies, as it has an advisory role in the pharmaceutical regulation and little influence within the EFSA.

Krapohl argues that both agencies are just advisory bodies for the Commission. They gain their advisory powers through their expertise which is organised in committees. They are subjected to a decision-making procedure which is heavily influenced by the Member States. Hence, in reality the agencies do not seem to have institutional independence.

The differences between the EFSA and EMA include the composition of the management boards and the committees of the agencies; obligatory involvement of the agencies; possibilities for the Commission to act independently and the strength of control by the Member State committee.

The personnel in the EFSA are recruited more independently from the Member States than that of the EMA. The obligatory involvements of the agencies differ at the first stage of the decision-making process. In the pharmaceuticals case, the company sends...
its application to the EMA which in return formulate a scientific opinion on it. The foodstuffs regulation occur post-market control. The Commission is not under any obligation to include the EFSA in the decision-making process. The scientific committee of the EFSA only provides advice to the Commission with the Commission setting the proposals. Therefore, this makes the EMA more influential at agenda setting than the EFSA. The Commission has to follow the opinion of the EMA and has to provide reasons for any deviation. If the Commission does diverge from the expert committee opinion then the standing committee will have stricter control on the Commission. The Member States’ committees control the decision-making procedure in the operation of both industries. However, the voting procedure differs between them. The Member State committee for the pharmaceuticals is weaker than the foodstuffs.

The differences illustrate that risk regulation involves risk analysis and risk management. Risk analysis involves the expertise of scientists’ analysis, whilst risk management is a political matter which requires political legitimacy. In relation to the EFSA, the scientific committees ‘analyse the risks of the foodstuffs’ whilst the Commission and Member States are the political actors. In the case of the EMA itself looks after the risk analysis and risk management as it develops the policies and then presents them to the Commission. Consequently the expert committee here organises a network of the Member States’ domestic authorisation bodies for pharmaceuticals.860

The substantive decision-making criteria of pharmaceuticals and their review by the European Courts act to further build the role of the expert body in decision-making, leaving less room for Member States’ interests. While the substantive criteria for the regulation on foodstuffs is a lot wider and allows for more political actions. Therefore, this limits the EFSA’s role as the agenda setter. Permanand861 points out that for the EFSA there are areas where the Commission and the agency’s action intersect and separation is hard between them. Both agencies try to avoid review under Article 263 TFEU by stating that their acts are not mentioned in the Article.

The EFSA seems to follow a mixture of the three ideals. The institution deals with risk assessment/communication whilst the political risk management remains with the Commission and the Committees which contain Member State representatives. Therefore the EFSA works under the decisionist model, but carrying some resemblance with the technocratic model as the function of the EFSA is to harmonise scientific expertise at the EU platform. Conversely, the EFSA needs to relay risks to stakeholders and the public, and communicate with the EP via the Management Board, which brings it in line with the reflexive model.

The Commission in its Communication on the Precautionary Principle\textsuperscript{862} points out that risk management and risk assessment are two distinct stages of decision-making. The precautionary principle applies at the risk management stage.\textsuperscript{863} This means that the principle shall assist the decision makers in establishing the need to act or not, they would look at the scientific uncertainties and consequences of inaction. The risk management measures are ‘thus the result of a political decision, a function of the risk level that is ‘acceptable’ to the society on which the risk is imposed’.\textsuperscript{864} The risk assessment stage will identify the factors which will allow the implementation of the precautionary principle at the risk management stage. The precautionary principle will apply ‘where scientific evidence is insufficient, inconclusive or uncertain and there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection’.\textsuperscript{865}

The political phase within risk analysis is the risk management stage, which involves setting the risk at an acceptable level. In food safety governance, the precautionary principle requires that decisions are made as close as can be to the scientific assessments which are carried out by EFSA. The European Courts guarantee legislative developments by ensuring risk assessments are considered thoroughly. Risk management assumes that the authorities from the beginning of the cycle set the ‘level

\textsuperscript{862} Communication from the Commission on the Precautionary Principle, COM (2000)1.
\textsuperscript{863} Ibid. Page3 and page13.
\textsuperscript{864} Ibid. Page16.
\textsuperscript{865} Ibid. Page10.
of protection which they deem appropriate for society’.\textsuperscript{866} The \textit{Pfizer} case also established this principle as it confirmed that the authority needed to pay attention to

‘the severity of the impact on human health were the risk to occur, including the extent of possible adverse effects, the persistency or reversibility of those effects and the possibility of delayed effects as well as of the more or less concrete perception of the risk based on available scientific knowledge’.\textsuperscript{867}

Hence the authorities dealing with the risks need to stay interacted with the scientists in order to establish the possible adverse effects or the reversibility of the adverse effects. This requirement makes the EFSA’s opinion more important at this stage as it is the initial place for evaluating the scientific opinions. The \textit{Monsanto}\textsuperscript{868} case established that when establishing that the product may be unsafe for the consumer the institutions need to adhere to the precautionary principle in the decision-making process. Here, the EFSA’s opinion though non-binding may still be influential. As the precautionary principle assumes that the risk assessment (which is inputted in the system by the EFSA) provides scientific evidence to conclude that due to the results of research it is necessary to avoid products that may pose risks to human health on the market.

The Court of First Instance regarded risk assessment (carried out by the EFSA) to be established on excellence, transparency and independence as being ‘an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures’\textsuperscript{869} The principle can be applied when the assessment has identified a risk and not just a hypothesis.\textsuperscript{870} The public authorities can utilise the political and democratic legitimacy of the Community institutions to deviate from the scientific expert opinions. In Pfizer the scientific committee of the Commission was referred to ‘whilst the Commission’s exercise of public authority is rendered legitimate pursuant to Article 155 EC (now Article 211 EC) by the EP’s political control, the members of SCAN, although they have scientific

\textsuperscript{867} Ibid.Page 160.
\textsuperscript{868} Case C-236-1, \textit{Monsanto} Agricoltura Italia SpA v Presidenza del Consiglio del Ministri (2003) ECR I-8105.
\textsuperscript{869} Ibid. Para 172.
\textsuperscript{870} Page 632.
legitimacy, have neither democratic legitimacy nor political responsibilities. Scientific legitimacy is not a sufficient basis for the exercise of public authority.\textsuperscript{871}

Consequently it is confirmed that the opinions of the EFSA and scientific committees are non-binding. Hence the EU institutions cannot be faulted to re-examine the scientific issues. The institutions may decide to disregard such conclusions. Any unlawfulness of the requested opinion could be seen as breaching an essential procedural requirement hence rendering the institutions’ decision as unlawful. The courts may review the legality of the scientific opinion.\textsuperscript{872} If institutions decide to set aside the scientific opinion they need ‘provide specific reasons for their findings by comparisons with those made in the opinion and its statement of reasons must explain why it is disregarding the latter’. In addition, as a matter of procedure ‘the statement of reasons must be of a scientific level at least commensurate with that of the opinion in question’.\textsuperscript{873}

In the regulation of GMOs regular comitology procedures determine the licensing of the GMOs. This method allows Member States some control over the supranational policy. Member States exercise this control by forming a QM to stop the Commission from acting at the Council of Ministers stage. Authorisation begins with the Commission presenting the opinion to the Member State representatives. A QMV procedure allows the Commission to adopt this draft measure. This draft measure must then be submitted to the Council, who can oppose it via a QMV.\textsuperscript{874}

If the Member States disagree with the measure they need to issue an opinion against the Commission within the three month period. The Commission under the comitology method as described in Chapter two needs to find a solution if it cannot then it has to utilise its judiciary duties and accept the proposal that it had initiated.

In order to combat the Member States’ safe guard plans the Commission utilises the EFSA advice; thereby, establishing the fact that the EFSA’s role is crucial in the risk

\textsuperscript{871} Pfizer. Para 168.
\textsuperscript{872} Case T-74/00, \textit{Artegodan}. Paras 199-200.
\textsuperscript{873} Case T-13/99 \textit{Pfizer}. Para 161.
assessment stage. The EFSA has faced criticisms as its opinions have been targeted by Member States who argue that it has ‘adopted an unwarranted scientific rationality inconsistent with the uncertainty that surrounds GMOs’ environmental risks’. The Commission also has tried to take action against the EFSA for not taking in account the precautionary principle at the risk assessment stage. This was done by demanding that the EFSA’s GMO panel explained why it opinions differed from other agencies.

Although the EFSA is the core actor responsible to deliver risk assessments on GM products to the Commission, itself does not have the privilege to determine scientific uncertainty and does not bring about the ultimate legislative changes utilising the precautionary principle. The Commission can diverge from the EFSA’s opinion as long as it can justify the action. The EFSA does not have the authority to put aside national scientific opinions it only has the ability to integrate them therefore the Commission via precaution can consider other scientific evidence alongside the EFSA’s. Once the Commission establishes scientific uncertainty it can determine the measures for protection using other legitimate factors.

The Pioneer and BASF cases demonstrate the Commission’s inconsistency in the authorisation procedures as here the Commission preferred the Member States observations and assumed scientific uncertainty rather than the EFSA’s opinions and its positive assessments. The Commission has justified its inaction under the precautionary principle, and acknowledged that the all the public health, biodiversity or environmental risks were unknown.

In summary the Commission has utilised a scientific approach by departing from the EFSA’s findings to determine whether there is scientific uncertainty of the risks of the GM product in question. On occasion, the Commission may not utilise the precautionary principle and stay inclined to the EFSA’s positive assessments. However in some cases the Commission will apply the principle even in case of long-term risks.

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875 Ibid. Page 907.
876 Ibid. Page 907.
877 Pfizer, Para 199.
878 Pfizer Para 204.
Member States insert pressure on the Commission causing it not to react under the principle which may lead to ‘the stagnation of technological advances’.

It is argued that the procedural understanding of the precautionary principle requires the institutions to allow reflexive and justificatory risk discourses for the authorised products. The risk discourse requires the creation of institutional structures of public consultation, stakeholder participation and network cooperation between various scientific experts. This could be characterised as precautionary governance structures.

More generally, it is the principle of institutional balance which limits the growth of true regulatory agencies. The principle of institutional balance, which is at the core of the discussion in relation delegation of powers to EU agencies, cannot be automatically derived from the Meroni ruling. The concept of institutional balance was introduced by case law the courts built on Meroni. The case involved the applicant company challenging the way the High Authority organised the financial arrangements of the ferrous scrap regime. Meroni questioned the decision in which the High Authority delegated the powers of financial operation to two authorities under Belgian law (the Brussels Agencies). Meroni argued that under Article 8 of the ECSC Treaty the High Authority could not delegate its powers. The Court held that Article 3 ECSC stated that the institutions should achieve their objectives ‘within the framework of their respective powers and responsibilities and in the common interest’. In Meroni the principle of the balance of powers was upheld in order to protect individuals and the decision-making process anticipated in the Treaty. The Court held that this balance of powers is characteristic of the institutional structure of the Community and was no less than a ‘fundamental guarantee granted by the Treaty, in particular to the undertakings and associations of undertakings to which it applies’. The Court concluded that this guarantee would become ineffective if discretionary powers were to be entrusted to bodies other than those established by the Treaty. The Meroni judgement’s relevance to

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882 Case 9/56 Meroni & Co, Industrie Metallurgiche SpA v High Authority(1958) ECR 133
the delegation issue is its eagerness to confirm with the principle of judicial protection.\textsuperscript{884}

A legal framework does not exist for agencies. However the Treaty of Lisbon makes its first reference to agencies via Article 263 TFEU as it allows the CJEU to review the legality of ‘acts of bodies, offices or agencies of the Union’. The Commission’s White Paper on Governance noted that by 2002 it needed to define the criteria and framework of operation for new agencies.\textsuperscript{885} The Commission’s draft institutional agreement was introduced in 2005.\textsuperscript{886} The Commission took the principles of good governance as the starting point for the proposal. It anticipated that the institutional agreement would only apply to future agencies. An impact assessment would be required before the establishment of the agency. This raised the argument as to whether or not agencies would be required if they were to result in such high setting up costs.\textsuperscript{887} The Commission proposed a legal basis rather than Article 308 (now Article 352 TFEU) for the formation of agencies.

The Commission argued that the following powers should not be provided to the agencies: the powers to adopt general regulatory measures, the power to arbitrate in conflicts of public interests or exercise political discretion and powers provided to the Commission from the Treaties.\textsuperscript{888} The aim of the Commission was to separate political and technical issues which is not that simple. The Commission’s reliance on Meroni showed that it aimed to defend further encroachment of its powers. Due to the deadlock in negotiations in March 2009 the Commission withdrew its proposal. In its 2008 communication the Commission invited the Parliament and Council to contribute to the role of agencies in European governance using the draft proposal.\textsuperscript{889}

\textsuperscript{884} Page 297. Charmon (2011).
\textsuperscript{885} Page 24. COM (2001) 428.
\textsuperscript{886} Page 2. COM (2005) 59 final.
\textsuperscript{888} Page 300. Charmon. (2011).
Even though the Commission refers to the principles of good governance, at the same time the Commission is eager to codify the powers that should be ascertained to the agencies. The proposal did not deal with the major issues faced by agencies. The actions of the Treaty institutions seem to reflect self interests and enhance their own control over the agencies. Charmon argues that if Meroni was re-read it would lead to a two-fold result for the Commission’s proposal. He states that:

‘For one it would mean the Commission would need to make a bigger effort in setting out the limits to the possible conferral of powers to agencies as it would no longer be able to hide behind the too simplistic distinction between executive or discretionary powers……….It would emphasize ….the need for transparency in the functioning of the agencies and, because of a clarified delimitation of powers, the question of accountability of both Commission and agencies would be addressed in a more satisfactory way, contributing to the realization of good governance’. 890

Hence if agencies are to be utilised further in health governance and provide greater input than the current mere advisory role of the EFSA, then agencies need to be governed more efficiently. There is a need for the agencies to be transparent, accountable and demonstrate participation from all relevant sectors. Simultaneously, EU institutions particularly the Commission need to ensure that the powers provided to the agency are codified and not restrained by the Commission in utilising their powers. Following the subsequent discussion on agencies as a mode of governance, the discussion will now focus on comitology as a mode of governance within healthcare, specifically, in the area of GMOs.

5.4.3 The Dilemmas of Comitology within GMO regulation: A Power and Constitutional Struggle

As mentioned previously, GMO products are approved through the comitology procedure. The aim here is to illustrate the use of comitology as mode of governance, therefore attention will only be paid on comitology procedure within GMOs and not the regulatory structure utilised in GMO regulation. The use of comitology remains

890 Page 304. Charmon.
problematic, the Commission provides the final decision: hence, again remains in control of the GMO authorization. Member States remain angered when they cannot reach QMV in response to the Commission’s proposals. Member States behaviour is rooted in political bargaining but away from achieving a constructive promise, as well as the ideals of deliberative decision-making. This has a negative impact on the effectiveness and legitimacy of the GMO governance procedure.

The final decisions taken by the Commission have intensified Member States bargaining obduracy. The Commission’s authoritative position seems to have reduced the Member States abilities to take decisions. Therefore, the ‘shadow of hierarchy’ has not produced a shift towards seeking consensus behaviour and the ‘shadow of hierarchy’ has not led to consensus led behaviour or deliberation. Therefore the current comitology position seems resemble the classical method which is based on QMV, political bargaining and the power of the Commission more than deliberative supranationalism as mentioned in Chapter Two. The key question is how to ensure that decision-making in these committees may become more consensual in terms of reflecting the will of the Member States and more deliberative in terms of modifying preferences to a shared solution providing for the highest level of protection against GMO risks.

The constitutional reality that frames risk management decisions on GMO approvals at the EU level is characterized by the following proponents. Firstly the New Comitology Decision (1999) requires a QMV of Member States votes to approve or reject the Commission’s proposals in either Committees or the Council. When a QM is reached by the Council, the New Comitology Decision obliges the Commission to re-examine its proposals and then resubmit to the Council, otherwise the Commission maintains the final word and the Parliament is kept informed. The declaration annexed to this decision which states that when the Commission proposes measures in particular

sensitive measures such as GMOs it should find a balanced solution that ‘avoids going against any prominent position which might emerge within the Council against the appropriateness of an implementing measure’, has not gained any significance due to doubts on the meaning of a ‘predominant position’. Certain Member States perceive this as a simple majority; the Commission Legal Service considers these rules to offer no legal flexibility to take action in the absence of a QMV.

This rigid position is rooted in the second important constitutional issue affecting GMO commercialization, the GATT/WTO framework requiring the definite risk assessments to justify refusals or delays of authorizations. The report of the WTO panel confirmed that the EU acted inconsistently with its obligations under the SPS agreement by applying a de facto moratorium and by delaying the procedural ground for the products. Following the end of the de facto moratorium in 2006 there were authorizations for GMO product release. However in none of the decisions was QMV reached by the Member States as the situations were driven by political disagreements. As a result many Member States showed their dissatisfaction with the way the GMO decisions were achieved.

Further reforms have been informed such as revising the votes in comitology to a simple majority and other procedural shifts such as Denmark’s suggestion that decisions should always be taken at the Council level. Toller and Hoffman suggest utilising procedural code for comitology deadlocks. In 2002 it was recognised that amendments were proposed to the regulatory committee procedure if the Council cannot reach QM and there are oppositions to the Commission’s proposal. However such

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895 General Agreement on Tariffs and Trade 1994 (GATT), World Trade Organisation (WTO).
896 The Sanitary and Phytosanitary Agreement (SPS).
reforms were removed from the 2006 agenda as there were no agreements reached in terms of procedural steps and power sharing in administrative procedures.\(^{901}\)

There are issues with regards to the transparency of the committees. The Court has facilitated transparency by allowing the public scrutiny of the committees by allowing access to specific comitology documents.\(^{902}\) Individuals or actors can gain access to the documents on the comitology register. In the case of GMOs there are online registers and mailing lists which can be prescribed to. However, the Commission is overall responsible to decide whether this access is possible. If access is denied then individuals have the right to go the Ombudsman. It is still a cumbersome procedure as individuals need to search on the register to establish presence of the document.\(^{903}\) It is acknowledged that access to information on the web can constitute means of accountability for the public authorities. It allows private companies that are involved in the commercialisation of GMOs to be more accountable and subjected to public scrutiny. However the information the information obtained may be under the ‘shadow of administrative secrecy’ which places doubts on the information available.\(^{904}\)

On the whole the GMO regulatory framework and approval procedures offer mechanisms for proactive conciliation before the comitology stage is reached and even then a consensual inclusion of various concerns and preferences is not legally excluded. It is unlikely that the comitology measure will change in the near future. Moreover, Member States struggle to make the decisions politically but cannot attain a QMV position. The continuation of efficient decision-making by the Commission on GMOs threatens to trigger a political crisis and has intensified intransigent bargaining among the Member States, while remaining exposed to accusations of illegitimate and inadequate governance. The failure of authoritative centralised decision-making suggests that more horizontal cooperation, deliberation and learning from differences in values are required to achieve consensual decisions in this field.

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There are problems associated with the structure of the comitology process. In accordance with the deliberative supranationalism theory mentioned in chapter two it appears that the meetings are dominated by persuasion, argumentation and discursive processes. The technical nature of the questions requires the representatives to possess knowledge otherwise the questions raised are unclear. The meetings are also held on a frequent basis and negotiations are also lengthy leaving therefore leave a powerful effect on the participants.\textsuperscript{905}

In sum, the governance structures within the governance paradigm have their limitations. The Commission seems to dominate the comitology structure and retain control of the agencies utilised in health governance, while decisions achieved through network governance may be influenced from who is participating. Therefore the discussion in the remaining part of the chapter will now proceed on the basis that the EU health governance is need of another model, this model needs to combine the advantages of the soft law mechanism with the hard law (hybridity).

5.5. EU Governance in Organs: Proposing A Leap to Hybrid Governance

Having identified the limitations of the experimental modes of governance proposed with the governance paradigm, I will now seek to utilise the hybridity theories as mentioned in Chapter three. The use of soft law has extended the boundaries of EU involvement in healthcare. This has pushed the Europeanisation process as one which involves learning and adoption rather than institution building. Radaelli describes the process as generating indirect pressures for adaption at the national level via non-binding instruments.\textsuperscript{906} However, as we saw in Chapter two the problem with soft law is that there are great variations in its outcomes. It seems to produce better results in areas where the actors share similar objectives, best practices are easily practiced and cultural sensitivities are low. Hence it seems that soft law on its own merits may not be sufficient for Europeanisation and that an element of hard law is required to ensure

optimim outcomes. Therefore the best solution would be to apply the hybrid model. The existence of soft law as the only mechanism for law making in the field of EU healthcare is fairly unlikely, but it is noted by Hervey that ‘law and soft modes of health governance are becoming increasingly interwoven, thereby opening the door for hybrid EU policy instruments’.

In subsequent discussion I will make two proposals. Firstly, that the Organs Directive along with the Commission’s Action Plan 2009-2015 can be viewed as a form of hybrid governance. The Organs Directive is the first legally binding supranational risk regulation devised in the field of organ donation and transplantation. The Directive is modelled on the earlier Directive dealing with blood, tissue and cells. The Action Plan which is soft law will complement the Directive. It needs to be noted that the implementation of the Directive and Action Plan will require additional administration procedures from the Member States. The Commission will need to regularly monitor the implementation of the work programme to ensure that it is manageable for the Member States.

Before examining the Directive I will examine the Impact Assessment carried out by the Commission on organ donations to determine the rationale behind the adoption of the stringent Directive with the Action Plan. The social, economic and health impacts of the four options for regulation available to the Commission are considered. The Directive and the Action Plan which are finally adopted will be discussed in finer details, and then the arguments will be placed highlighting the fact that the Directive and Action Plan display a mode of hybrid governance. Finally the advantages and disadvantages of hybrid governance will be highlighted and conclusions will be drawn to whether the hybrid model was the best form of action in EU healthcare.

Secondly, following the examination of priority areas of the Action plan and Directive I propose the emergence of an ‘integrated model’ within the Organs Directive. This is

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based on the fusion of the three governance structures namely the OMC, comitology and agencies.

5.5.1 EU Governance in Organs

In order to tackle the shortage of donors in the Member States, the EU has now steadily been progressing in the area of organ donation and transplantation. This section will look at the development in EU’s governance within this area of healthcare which recently has produced the interaction of new governance and the classical methods of governance.

The EU has competence to legislate in relation to organ transplantation. Article 168(4)(a) TFEU has empowered the Community to take ‘measures setting high standards of quality and safety of organs and substances of human origin blood and blood derivatives’. In accordance with Article 168(7) TFEU: ‘The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood’.

The term ‘national provisions’ highlights the differences in the legal systems of Member States concerning donor consent. The term ‘medical use’ refers to organ donations for transplantation. The sub article stating ‘The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them’ highlights the special status of organ transplantation.

The Commission justified European Union action by pointing out that unified European action would result in the use of European diversity, allowing European regions to learn from each other. The Commission claimed the advantages of Union action as follows:

‘The EU facilitation of consensus building allowing quicker implementation: economies of scale, lower transition costs in establishing the New Quality and Safety system and
reduced running costs; greater fairness and contribution to solidarity; enhanced donor and recipient confidence stemming from legal clarity.  

However, it is noticed that the requirement for a similar quality and safety regime from each Member State may require a lot of adjustments to be successful at the local hospital level. On the positive side, it would ensure that if quality and standards are standardised at the European level, then it would ensure equal access for all European citizens.

The Commission’s first publication in this regard in 2007, looked at the policy options and set objectives to promote greater coordination between Member States. The Commission highlighted in this document that the Community needed to react under Article 168(4) (a) TFEU in order to deal with the below challenges facing organ transplantation:

The transfer of organs can lead to transmission of diseases such as Hepatitis B and C, HIV, various parasites and cancer. There are a number of cross-border treatments; however the legal quality and safety requirements differ amongst the Member States. Therefore there was a need for the system to be standardised in order to ensure that the patients are being protected throughout Europe. The Commission urged that measures needed to be introduced throughout the procedure to improve the quality and safety of organs, from pre-transplant evaluation procedures set for donors, to setting procedures for procurement and requirements for organ preservation and transport. There was a need for a system to be in place which allowed the donor to be traced in case there were complications. National authorities were also encouraged to take an active role and establish authorised centres in Europe that would monitor safety and quality criteria.

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911 Ibid. Page 3.
912 Ibid. Page 5.
The Commission concluded that it would ‘define the precise, balanced scope of the EU legal framework on quality and safety for human organs taking in account the dialogue it has had so far with the Member States on the issues’. 913

As there is a shortage of donors the Communication914 suggested that the Member States may be able to create a system by which donors could be identified. As after their death donors are lost due to lack of referral, or because the option was not presented to their relations. If healthcare professionals were trained to identify potential donors this would increase the rate of donors. In addition providing information to the healthcare professionals on transplantation may affect the donors’ willingness to donate. 81% of Europeans agreed that the use of a donor card would make it easier to donate organs after their death. 915

Given the need to establish adequate transplant systems at national levels;916 good organisational and technical support are essential. The Document stated917 that a ‘flexible system combining a decentralised network formed by local organisations mainly focused on organ procurement, and the promotion of donation with large organisations focused on promoting organ sharing and cooperation seems to be the most effective organisational approach’. This would give rise to the formation of networks as mentioned in Chapter Two, and experimental governance as mentioned in Chapter Three, as experimentalist tools such as open consultations would be utilised to achieve the goals of promoting organ donation.

The Commission emphasised918 the need to share best practices among the Member States to increase the number of donors and educate health care professionals. It would also encourage action at the EU level for the interchange of organs between national levels. The Commission proposed an Action Plan that would include qualitative, and quantitative indicators, and regular reporting in order to promote greater coordination. It restated the preference for the use of the OMC type methodology utilising the DDP theory and signalled the shift away from the traditional command and control

913 Ibid. Page 10.
915 Ibid. Page 7.
916 Ibid. Page 7.
917 Ibid. Page 8.
918 Ibid. Page 9.
mechanisms of governance used in blood and to a lesser extent, in tissues and cells regulation.

Thereafter the Commission conducted a series of meetings with stakeholders and experts in order to receive feedback on the proposed Action Plan, as well as input on the drafting of the proposal for a Directive in this area. The adoption of the OMC within this area raised issues with certain stakeholders, who felt that this method would divert personnel and resources away from the actual strategies and therefore was unnecessary.919 It was also felt that there was a greater need for flexibility to be built into any EU regulation regime. This meant that clinicians and patients needed to be allowed the adequate freedom to make decisions about the risks associated with the use of organ transplantation, given factors such as waiting lists and organ shortage.

In relation to stakeholders’ participation in organ donation and transplantation policies, DG Sanco launched an open consultation from June to September 2006. The Commission received 73 contributions from regulators, medical and patient organisations.920 The Commission created a key stakeholder group from around 16 European Associations. The group met in 2008 and shared information which was then incorporated within the definitions of the policy options. The Commission since 2007 has held various meetings with national experts of all Member States, including Eurotransplant and Scandiatransplant, and discussed the key priorities.921

I argue that the Commission’s interactions with the stakeholders and experts for feedback along with its efforts to bring the actors to reflect on the current issues of organ donations and develop legislation through networks which displayed network deliberative decision-making a concept devised by Zeitlin.922 The theory purports to shift away from the ideals of representative democracy where law is only perceived as

legitimate if they are formulated by the electorate. Informal deliberation is not conceived from the technical elites but rather through a multitude of actors this was particularly true as at this stage options for regulation were considered but it was not necessarily assumed at the outset that hard law would be utilised.

At the time of the Impact Assessment (IA),\(^{923}\) it was recognised that 25 out of the 29 countries (EU, Turkey and Norway) surveyed had a national register which contained the data on the origin and destination of the organs. Only eight countries made reporting adverse conditions compulsory. Once a disease is found in the recipient, there is an urgent need to trace the donor to prevent the disease. However, there was no system that would allow the tracing in cross-border cases, even though annually more than 4000 organs are exchanged between Member States. Organs will inevitably be related to cells and tissues. It is therefore vitally important that information about adverse effects and infections in a solid organ transplant can be quickly traced to a donor and immediately relayed to the tissue vigilance system which is foreseen by the European tissue and cell directive. Currently such a system does not exist.\(^ {924}\)

In the IA,\(^ {925}\) DG Sanco identified four regulatory approaches in the area of organ donation and transplantation which were devised through experimental methods.\(^ {926}\) The first option involved the Commission to continue to take action as it was already doing so, which involved research programmes and international cooperation. The second option involved a non regulatory approach by developing a European Action Plan on Organ Donation and transplantation for the period 2009-2015. The third option involved the combination of an Action Plan as option 2 along with a ‘flexible directive’. The fourth option involved the combination of an Action Plan with a stringent directive. This directive will be modelled on the Tissue and Cells Directive and therefore will contain detailed regulation about the safety and quality of care that needs to be enforced within the Member States.

\(^{926}\) Ibid Page 3.
These options were assessed via a couple of methods. The first point of analysis of impact was a literature review. Secondly, country studies were reviewed with regards to six sample countries. Thirdly, interviews were conducted of stakeholders including national and general experts in the field of organ donation. Fourthly, in order to examine the improvements four scenarios of different changes in living and deceased donation rates were developed, which were used to identify the economic and health impacts of the proposals. Fifthly, a cost consequence framework in the form of an impact matrix was used to analyse the evidence, identify the key impacts and compare them across the four options.

All the policy options are likely to increase donation rates. According to the IA in the best scenario there would be roughly 21000 organ transplantation operations per year saving 230,000 lives.

The IA suggested that options 2 and 4 can lead to better economic benefits. However the Member States need to invest to improve the national infrastructure in this field. The evidence shows that the organ transplantation allows patients to participate in social and working life. Option 3 was seen as the best option to reconcile the objectives with the principles of subsidiarity and proportionality. A flexible Directive combined with an Action Plan would allow the decision-making process to be distributed as to include actors at the hospital, Member States and European levels.

Different scenarios were used to establish the likely results that could be achieved from the different policy options. The reasoning is as follows:

-Proposals usually depend on national transplant systems. There is often a lack of clarity between policy outcome and actual impacts.
-The multilevel governance approach in organ transplantation creates uncertainty in outcomes. The improvements to organ transplantation procedures are delivered in hospitals. As option 2 and 3 allow voluntary action, it is questionable how much of the European procedures would enter hospital systems.
The Spanish model was used as a comparator to assess potential impacts. As it is the best example to illustrate that organ donation and procurement can increase and sustain organ donation rates.

The results of this comparison showed that option 3 and option 4 contained the most elements for success of the Spanish model.

The Spanish comparator was used as to produce the ideal results. The assumption was that if the Member States were to fully implement the European options then they achieve the Spanish results.

The IA realised that these were optimistic results, therefore three other scenarios were utilised: All countries achieve at least European average transplantation rate; all countries improve transplantation rate by 10%; and all countries improve transplantation rate by 30%.  

The below table will show that the policy options need to adhere to the commitment/capacity that the Member States are willing to submit to.

Scenario and Policy Options:

<table>
<thead>
<tr>
<th>Element</th>
<th>Option 1</th>
<th>Option 2 (AP)</th>
<th>Option 3 (AP and Flexible Directive)</th>
<th>Option 4 (AP and Stringent Directive)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low commitment/capacity Member States</td>
<td>No change</td>
<td>No increase</td>
<td>Average increase scenario 2 and 4</td>
<td>Average increase scenario 2 and 4</td>
</tr>
<tr>
<td>High commitment/capacity of Member States</td>
<td>No change</td>
<td>High increase scenario 1 and 3</td>
<td>High increase scenario 1 and 3</td>
<td>High increase scenario 1 and 3</td>
</tr>
</tbody>
</table>

Options 3 and 4 make compulsory changes; therefore, the results are more visible than option 2. If the options are compared with the Spanish model then under, option 1 there would be no increase in organ donation rates. Option 2 would lead to an increase if Member States would be willing to implement the Action Plans. However if there is no commitment from the Member State then not much can be expected in the way of results. The results under options 3 and 4 are more positive as enforce mandatory

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931 Page 60 Sec (2008) 2956
932 Table taken from Page 63. Ibid
national implementation. The problem with option 4 is that with the stringent directive in place it may make organisations become reluctant in participating in organ procurement and reduce organ donation rate.

If the policy options are benchmarked against the Spanish model then it can be seen that all the options would promote the role of transplant donor coordinators (TDCs) in hospitals. Also to improve knowledge skills of health professionals and patient groups in order to promote public awareness. Options 3 and 4 demand legal mandates, the establishment of programmes and systems and training. The problems remain with the implementation as the Member States have a lower discretion within options 3 and 4.

The following table will outline the options in accordance to their health, social and EU impact budgets.  

<table>
<thead>
<tr>
<th>Option</th>
<th>Health impacts</th>
<th>Social Impacts</th>
<th>EU Budgetary impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1 No change</td>
<td>No change expected to address the current shortage in organ donations.</td>
<td>-Quality of life: Marginal increase. -Social participation and employment: No change. -Trust and Confidence in Transplant system: Very different across Member States.</td>
<td>-Costs for national infrastructures and better processes: no costs. -Costs for setting up and running national registers and traceability systems: incompatible reporting systems in place. -Reporting obligations and administrative burdens: Same costs as before with data collection. -Treatment costs: Long term costs increase if waiting times increase. -Productivity: Loss in long term if people have to wait longer. -Economic impact of living donor: Economic risk as need</td>
</tr>
</tbody>
</table>

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933 Data derived from pages 71,72,73.ibid
| Option 2 | Donation rate: From 0-7,908-21,006 organs expected depending on the commitment of the Member State. -Lower predictions show no change, higher show 231,006 life years saved. -Living Donors: Knowledge will increase living donors. -Cross border: Definite benefits to small Member States due to improved processes and removal of barriers. | -Quality of life: Better care for donors/higher number of transplantation therefore better quality of care. -Social participation and employment: Does not address obstacles to social participation and employment for individuals. There would be some increase in social participation due to the increase in transplanted organs. -Trust and Confidence in transplantation: Public awareness and better training of transplant coordinators might increase confidence of donor families. | -Costs for national infrastructures and better processes: Low to medium costs for voluntary measures to designate accredit establishments and more transplant coordinators. -Costs for setting up and running national registers and traceability systems: saving costs through standardised reporting of medical information. -Reporting obligations and administrative burdens: Low costs for reporting requirements under the OMC. –Treatment costs: Savings in treatment costs if Member States commit properly then up to 1.2 billion Euros. -Productivity Impact: 2.4 billion if Member State commitment is low. -Economic impact on living donor: Reduced economic risks to health care. |
| Option 3 | -Donor rate: medium to -Quality of care: | -Costs for national |
| Flexible Directive and AP | high. Between 54,320-231,006 life years saved in the upper range. | Legally prescribed better access to care for living donors - Social participation and employment: Same as option 3. - Trust and Confidence in transplantation: Better training plus quality and safety standards may increase patient safety and empower patients. | infrastructures and better processes: Medium costs for running national quality systems. Very low costs to setting competent authorities. Low to medium costs for designating or authorising establishments. - Costs setting national registers and traceability systems: Low/medium for adapting national traceability and adverse reporting systems. - Reporting obligations and administrative burdens: Low costs of reporting of activities at transplantation centres. - Treatment of costs: Savings of 1.2 billion Euros at the best. - Productivity: 882 billion Euros as a result of modest increase in donations. - Economic Impacts on living donor: Same as option 2. |
| Option 4 Stringent Directive and AP | - Donor rate: Medium to high Same results as option 3 for life years saved. - Living Donors: Same as option 3 - Cross Border exchange: Same as option 3. | - Quality of care: Same as option 3. - Social participation and employment: Same as option 2. - Trust and Confidence in transplantation: Same as option 3. | - Costs for national infrastructures and better processes: Medium/High costs for legal quality system at hospital level. Costs for setting up national registers and traceability systems: Low costs for establishing a national register of establishments. High costs for introduction to |
The table above illustrates, in terms of health impacts, the options will increase donation rates. The options will increase cross border exchange of organs which will facilitate the health of urgent patients and the most vulnerable patients (i.e. children/highly sensitised). There is a degree of uncertainty with the results anticipated with option 2 because it is dependent on the discretion of the Member State’s implementation. Option 3 and 4 present the highest health benefits.

In terms of social impacts the table points out that the patients will have improved social lives with transplantations. European action will further allow patient trust to grow within the systems, the highest social benefits again arise out of options 3 and 4. From a theoretical lens it can be observed that option 3 and 4 have the greatest social and health impacts as combing the Directive with the Action Plan is allowing for the integration of the new governance and traditional law instruments. This in return provides the maximum benefits from traditional methods and new governance. This is termed as ‘transformation’ by Trubek et al, and as they state ‘the introduction of new governance may be a part of the conscious design to get the best of the old and the new, by yoking the two together in an integrated process’.  

Looking at it through an economic perspective, it can be seen that options 2 and 4 have the potential to process the greatest economic benefits. Member States need to invest in

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the national infrastructure of organ donation in order to realise these gains. Option 3 will have costs attached to it as it requires a national vigilance system along with national registers. However, as it will be mandatory it will bring with it cost savings. The same is true for option 4, but the problem with it is that, as it carries a higher implementation costs, Member States have less choice to revise their own existing national systems.

In option 2 the adoption of the Action Plan will be based on the cooperation of the Member States through the national action plans. The resources would be reserved with the Public Health Programme and it would be its responsibility to coordinate in this field. Option 4 entails the adoption of the stringent directive which be modelled under the Tissue Directive will require further detailed meetings and even more comitology meetings. Hence more costs attached to the start up procedure. I argue that to reduce the costs incurred by the Member States, the Commission could utilise the existing work done by the Council of Europe to avoid the duplication of research conducted by the experts especially in areas of sharing data, as better use should be made of the ‘epistemic community’ of experts that are present within the area of organ research.

5.5.2 Action Plan (2009-2015) and Organs Directive

This section aims to provide an outline of the contents of the Action Plan and the directive.

The Action Plan

As discussed above, the Commission published a further Communication in 2008 along with the proposed directive. The Communication contained the revised Action Plan. The Plan as discussed, in the IA, is designed to cover the work programme in the field of organ transplantation in 2009-2015. 10 priorities were identified to address the current problem in order to enhance the quality and safety of organs, as well as the

efficiency and accessibility of organ transplantations. The OMC was used to set the plan to identify common objectives, set targets/indicators/benchmarking and Member States would have the independence to achieve the outlined objectives.

The following table will summarise the strategies under the 10 priorities:

<table>
<thead>
<tr>
<th>Priority</th>
<th>Strategies under the priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1</td>
<td>Priority 1-5 deal with Organ availability. Ultimate aim is to increase organ procurement from deceased donors. Appointment of transplant donor co-ordinators like the Spanish system. To ensure uniformity in training these co-ordinators work will be done by following international standards.</td>
</tr>
<tr>
<td>P2</td>
<td>Development of agreed indicators and best practices for quality improvement programmes at national level. This will be done by specialists in intensive care and the transplant co-ordinators.</td>
</tr>
<tr>
<td>P3</td>
<td>Enhancing living donation especially for kidneys.</td>
</tr>
<tr>
<td>P4</td>
<td>Increasing public awareness (through media) in relation to organ donation.</td>
</tr>
<tr>
<td>P5</td>
<td>Develop mechanisms to facilitate the identification of cross border donors.</td>
</tr>
<tr>
<td>P6-9</td>
<td>An organisational model needs to be developed in order to enhance organ procurement. The Spanish Model the model will be followed. This will involve setting up a central coordinating administrative agency, a transplant network that will operate nationally/regionally, promotion campaigns and audits on organ transplantation. Promotion of cross border exchange of organs.</td>
</tr>
<tr>
<td>P10</td>
<td>Promote common accreditation system for transplant/organ donation</td>
</tr>
</tbody>
</table>

The 2007 Commission Communication\(^\text{940}\) recognised that organ donation and the transplantation regulatory framework would need to be flexible, but would provide a basic quality and safety framework. It would follow a similar format to the Blood and Tissues Directive taking in account the specific issues in organ donation and transplantation. As mentioned before, concerns were expressed that if the Directive was

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\(^{939}\) Ibid Pp 5-9  
\(^{940}\) Pp 9-10. 30/5/07
too rigid, then it would create too many administrative burdens at national levels and create obstacles.

The Organs Directive was adopted and the Member States have transposed it in to national laws for 27 August 2012. The Directive is divided into chapters containing:

- Subject matter, scope and definition;
- Quality and safety standards for organs;
- Donor and recipient protection for donor selection and evaluation;
- Obligations of competent authorities and exchange of information;
- Organ exchange with third countries and European organ exchange organisations;
- General and final provisions.

The key provisions of the Directive allow the Member States to establish a framework which would include procedures for identifying the donor, the consent of the donor (or family consent), set a system for traceability of organs, reporting mechanism for serious adverse events and reactions.

The procedure of organ exchange between Member States requires a system to ensure that the traceability, quality and safety conditions are met including the safety if potential recipients. Farrell comments that the legally binding part of the Directive does not further ‘elaborate’ on the allocation criteria. In paragraph 20 of the Recital it is verified that the allocation of organs should be based on scientific, non-discriminatory and transparent criteria. This criterion should be taken into account by the Commission in the implementation of the Action Plan. The hope is that this will be further elaborated by the Commission when implementing the Action Plan.

Similarly to the Action Plan the Directive ensures that organ procurement takes place appropriately. The Member States need to ensure that they can provide information on

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941 Article 31(1) Organ Directive.
942 Article 4 Organs Directive.
943 Article 10 ibid.
944 Article 20 ibid.
the authorization of such bodies. They need to ensure that suitable equipment, materials and surgical facilities are used during procurement.

Chapter III of the Directive deals with the requirements with the donor and recipient protection including donor selection and evaluation. The consent regime at the national level will be respected and procurement will occur after the laws have been observed. Member States need to ensure that organ donation is conducted on a non profit basis. For living donors assessments are required by trained and competent professionals. Member States are required to ensure the highest protection of living donors in order to secure quality and safety of organs for transplantation. It is acknowledged that there is a need for further guidelines in relation to the circumstances where living organ donation can take place, and precise listings for the type of protection that will be provided to the living donor. Donations can be refused on grounds of unacceptable health risks.

5.5.3 Is New Governance the right way forward in the Organs case?

Whether or not the Action Plan (which is the soft law portion of the legislation) will achieve its aims seems questionable. At a national level, it has raised concerns that it will increase the administrative burdens on the on national institutions in order for them to fulfil their obligations under the Directive and Action Plan. The experts’ meeting overlooked by the Commission concluded that the ten priorities are substantive and will require planning and evaluation overtime.

The attraction to soft law is that it could easily become hard law. For instance the legal effects are created by the expectations laid down in the soft law provisions. The soft law will then be incorporated in to hard law provisions as in this instance the Action Plan

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946 Article 5.
947 Article 6.
948 Article 14.
949 Article 13.
950 Article 15(1).
951 Article 15(2).
will complement the Organs Directive. Finally, the Commission’s role to cooperate with non-state actors at national levels produces legal effects for soft law provisions.

One of the reasons new governance may seem attractive be because the CJEU has also regarded the outcomes of new governance as part of the acquis communautaire. It has been established through the CJEU’s case law that the national courts need to take in account recommendations even though they are not binding under Article 288(5) TFEU.\textsuperscript{953} The Court has limited the EU institutions’ discretion to depart from the soft law instruments, as the institutions may be in breach of general principles of law.\textsuperscript{954} Klabbers, further affirms that as soon as soft law is applied in judicial/non judicial circumstances, the concept collapses into hard law or no law whatsoever.\textsuperscript{955} Member States will also be obliged to accept the soft law if they have participated in the drafting procedure of the recommendations.\textsuperscript{956}

It was argued in Chapter Two that new governance mechanisms rely on the input of a variety of actors in law-making thereby enhancing the democratic legitimacy of outputs. For instance under Article 155 TFEU (ex Article 139 EC), an agreement concluded between the social partners can be ‘implemented by the (signatories) in accordance with the procedures and practices specific to management and labour in the Member States’. Implementation also takes place via a Council decision in which the Council issues a Directive which is referring to the agreement between the social partners. Member States do not need to apply the agreements reached by the social partners which are not adopted via directives, as this represents soft law for Member States.\textsuperscript{957} There is some uncertainty as to the legal status of the agreements informally concluded by social partners. Betten comments that they ‘do not have another legal status other than that of an agreement between two parties falling outside the scope of Community law’. \textsuperscript{958}

\textsuperscript{953} C-322/88 Grimaldi (1989) ECR I 4407.
\textsuperscript{954} C-213/02 Dansk Rorindeustrie and others v Commission (2005) ECR I-5425,211.
\textsuperscript{955} Klabbers, J. (1988) .The undesirability of soft law Nordic Journal of International Law, 382.
\textsuperscript{956} C-311/94 Issel-Viliet (1996) ECR I-5023.
It can be argued that non state actors could assist the Commission in relation to the implementation of the soft policy coordination instruments, in particular the OMC. The stakeholders could monitor the national measures that are in place for the OMC enforcement. The effectiveness of this type of supervision will be based on the conduct of the national administration. On the other hand, the Commission does not have sufficient material resources or legal basis to monitor the Member States in the implementation of the OMC.  

It is highlighted by Lobel that the governance model will supersede the classic regulatory model as the former ‘addresses the changes in both the goals and capabilities of legal regulation, and avoids the central deficiencies of substantive law. [It] fundamentally transforms legal control into dynamic, reflexive and flexible regime’. This has led to the need for change in aspirations of law and policy. However, new governance is far from perfect therefore the question remains should it be applied to the organs case?

5.5.4 Is New Governance a threat to the foundations of the Classical Community Method?

As mentioned in Chapter three De Burca and Klabbers argued that new experimentalist governance practices act to diminish the relationship between law constitutionalism and European integration. There are also concerns that this may lead to a trade of between democratic accountability and policy efficiency.

By observing the Community Method it is clear that there are also flaws in relation to accountability within it. The decision-making methods of the COREPERs are open to questions. In the same way, the Council is not accountable to a body even though there is some supervision from the Parliament under the ordinary procedure. Accountability and transparency are also questionable within the comitology procedure, where

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959 Hatzopoulos. V. (2007)”Why the OMC is bad for you” ELJ 309.
decision-making is carried out by technocratic officials from Member States and headed by a Commission official.

Velluti\textsuperscript{964} points out that a model of democratic accountability within the EU system may be developed if mutual accountability is combined with political and classical democratic accountability. The model would allow decisions from a ‘functional separation of powers between policy formation in networks and by constituent and veto power dedicated to institutions that are authorized and accountable to citizens’.\textsuperscript{965} The formally authorized institutions would set the ‘meta-governance’ monitor, audit and conceive the tools for administration and provide the procedures in order to ensure fair governance.

This procedure could provide the formal institutions with the command to provide evaluations of the proposals issued by governance networks. This could allow veto functions to be performed at national/regional levels. Participants in the new governance processes would need to satisfy the veto players of their policies whilst the veto players would also need to ensure that they were providing adequate supervision.\textsuperscript{966} This model may unite new governance with legitimate representative structures which would not compromise on policy outcomes and enhance the classical and experimental forms of governance.\textsuperscript{967} In the case of the Organs Directive the national competent authorities could take this role as the institution which could evaluate whether or not the procedures for developing the indicators and best practice measures are transparent or are they formulated by a closed network; whether or not the working groups have been formed; if they have formed whether or not they contain participation from different organisations and whether their official proposals are based on consensus. A clearer report on whether or not there have been appropriate interactions at the national/regional levels will be more visible following the first completion of the Member States and the Commission in 2014.\textsuperscript{968}

\textsuperscript{965} Ibid page 12.
\textsuperscript{966} Ibid page 12.

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5.5.5 Hybrid form of Regulation: The case of the Organs Directive

As mentioned earlier in this chapter new governance has its limitations. Democratic accountability is only guaranteed, if the decision-making outputs of the new modes are subject to control by elected governmental actors. Who are elected through democratically legitimate policy-making procedures under a representative government. Stakeholder democracy, which is the most frequently used under new the modes of governance, does not allow control for the negative external effects of functionally delimited new modes of governance. Due to the obvious deficiencies related with soft law EU healthcare governance could benefit from the transformation of old and new governance, where the new governance and traditional law are put together in an integrated system. Each form of governance relies on the other for its success. This method views the hybrid of old and new governance as mentioned in Chapter Three in which hybridity as an external to law is discussed.

In the light of the discussion so far I would argue that Action Plan with the Organ Directive may also be seen as hybrid governance. The Directive may be the hard law part whilst the Action Plan would be seen as the soft law mechanism. The hybrid package combines both the hard law and soft law instruments. Harder instruments lend force to the softer instruments. Hybrid governance is linked to Hervey and Trubek’s suggestion for a ‘Transformative Directive’ in the field of cross-border healthcare. They suggested that both the old and the new could be harnessed together to develop a hybrid structure. This would ensure the benefits of experimentalism without retreating totally beyond the legal constraints.

Trubek and Hervey proposed a hybrid solution in the form of a ‘Transformative Directive’ as they justified it as ‘much to offer in terms of developing and circulating solutions to the problems arising from managing healthcare provision in the context of an internal market and Europe’s social model’. The internal market needs to be taken

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970 Ibid. Page 627.
971 Ibid. Page 625.
972 Ibid. Page 624.
in account (which is predominantly treaty based) with the field of cross-border healthcare, therefore a hybrid structure might seem more appropriate which would take in account the classical methods and new methods of governance. Sabel and Zeitlin view the Directive to set the parameters and establish transparency and accountability via DDP. The Directive creates obligations for accountability and hence allows participation in the context of soft law. This allows for a new architecture of EU governance that operates through a hybrid mixture of soft and hard law.

Trubek and Hervey suggest that this ‘Transformative Directive’ would be in two parts. The first part would consist of the hard law part which would take the form of a Directive. Its preamble would reflect the European social model. It would deal with the legal provisions on cross border healthcare and healthcare services. The second part of the ‘Transformative Directive’ would form new governance institutions which would create legal rules by utilising soft law through iterative participatory processes. This would then result in a Strategy which would allow coordination from Member States and the Commission. The Strategy would focus on the exchange of information, develop guidance, participation of stakeholders and peer review which are essentials in new governance and are envisaged for the OMC in healthcare and long-term care. In the spirit of the hybrid governance structure the Transformative Directive would regulate the standards for the Strategy (the soft law). It would promote procedural duties including accountability and transparency, demanding the methods of the strategy to be transparent. The Directive would contain requirements for the Strategy to contain guidelines for the dealing with cross border care. An example of hybrid governance is shown in The Unfair Commercial Practices Directive which incorporates codes of conduct to make them binding. The Directive transforms the voluntary codes of binding on traders.

975 P636 Hervey and Trubek (2007)
976 Ibid. Page 638.
977 Ibid. Page 639.
There are examples of hybrid governance in environmental protection. Notably Directive 2008/1/EC on integrated pollution prevention and control (the IPPC directive) requires that the permit can only be obtained if environmental obligations are complied with. The obligations must be based on Best Available Techniques (BAT). Exchange of information on BAT is dealt by the Commission, Member States and stakeholders to establish BAT reference documents (BREFs). The Commission then provides the publication of the BAT reference documents. The BAT documents are non-binding and offer details to relevant bodies on BAT based permit conditions. The BAT reference documents are highly influential. The Commission in its proposal for an IPPC Directive\(^{979}\) noted that there were gaps in the BAT, therefore laid down provisions to clarify the use of BAT. In particular Article 3 of the proposal which requires Member States to ‘take the necessary measures to provide that the competent authorities ensure that installations are operated in such a way that: a) all the appropriate preventative measures are taken against pollution, in particular through application of the BAT’, may give the Commission with the legal authority it needs to limit national discretion in implementation.

The Environmental Impact Assessment Directive (EIA) and the Water Framework Directive (WFD) are described as instances where law is transformed by its relationship with new governance.\(^{980}\) The EIA Directive provides tools for evaluation and adaptation allowing regular exchange between the Commission and the Member States.\(^{981}\) The Commission must issue implementation reports that provide any proposed amendments to the EIA Directive to ensure it is utilised in an appropriate manner.\(^{982}\) The WFD has devised an informal governance forum in the form of the Common Implementation Strategy, which allows for the open coordination between the Member States and the Commission in the implementation of the Directive.\(^{983}\)


\(^{981}\) Page 224. (2006). Holder, J and Scott. Law and New Environmental Governance in the EU in ‘Law and New Governance in the EU and the US. (De Burca, G & Scott, J. eds)


Velluti further argues that ‘a strong hybridized system of co-regulation could also reduce the putative weakness of new governance’ for its lack in accountability and judicial scrutiny. The problems lie in the fact that law and constitutionalism are linked to ‘stateness’ which are not found in new governance processes. The solutions seem to lie with trying to establish the use of hybridity as effective regulatory model. Hybridity aims to develop an interconnection of the adjudication, legislation, implementation, and enforcement stages instead of seeing them as singular processes. The first stages could begin with trying to develop a model of regulation which is sensitive to the realities in the EU system. The hybridity models would allow the EU coexist within a multi-tiered structure but also require the need to strike a balance to ensure economic efficiency, democracy and accountability.

I envisage that the Organs Directive and Action Plan could be modelled with this Transformation Directive. The 10 priorities of the Action Plan (soft law element) deal with benchmarking, development of indicators and best practices. The Directive (hard law element) covers the scope of the Directive, definitions, procedures for consent, and quality and safety of the organs. The Directive sets out the framework and the legal duties for the Action Plan to operate within. These include placing the duty on the Member States to set National Quality Programmes which will include the rules on the operating procedures and traceability of the organs. The institutional requirements under the Directive are firstly, the Member States are required to designate tasks to a competent authority, whose role will involve ensuring that the procurement centres and transplantation centres are audited regularly, and may suspend the centres that do not comply with the requirements of the Directive. Secondly, the Directive requires the establishment of a Committee on organ transplantation which will provide the Commission with assistance. The procedural requirements of the Directive include the requirement for the National quality programmes to provide procedures to verify donors, or donor’s family consent in accordance to the national rules. There need to be

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986 Article 4 Organs Directive.
987 Ibid. Article 18.
989 Article 4.
procedures in place for the reporting obligations to trace donors; allow procurement and traceability.\textsuperscript{990}

Following Scott and Holder’s\textsuperscript{991} conceptual framework on new governance’s outcomes, the Action Plan would operate on a three-fold basis: It would provide the platform for production and exchange of data, secondly it would establish guidance and thirdly it would commit to reviewing, testing and validating the current practices. The exchange and production of data are essential in the new governance procedure because without the data there are no grounds for testing the national practices. Similarly to the Environmental Assessment Directive\textsuperscript{992} the OMC type procedures will establish and devise benchmarks, indicators to mechanisms for reporting in order to test and validate national procedures. This is visible through Priority Action 2 which requires the Transplant Donor Coordinators (TDCs) in hospitals to identify best practices (to increase organ availability) for deliberation among the Member States. They will be provided training on all aspects of organ donations. Priority 2 aims for the Member States to develop indicators to improve programmes at the national level. Priority 3 furthers this ambition by devising programmes to promote organ donation and creating national registers to hold data on the donors.

The role of these programmes is to contribute to best practices. The establishment of guidance would be possible through Priority Action 4 which requires regular meetings with stakeholders, journalists, national experts and patient support groups to devise strategies to increase organ availability. Finally current practices would be reviewed, tested and validated through peer-reviews. This will be possible through the use of Priorities 6-9 which focus on identifying efficient practices and improving national models. This is made possible through peers-reviews and utilising the information from the transplant network coordinators.

I also argue that that the DDP would also apply to the Organs case as the experimentalist tools such as the indicators and benchmarks utilised in the Action Plan will be subject to peer-reviews, the network coordination between the TDCs and various

\textsuperscript{990} Articles 4, 5, 10.
\textsuperscript{991} Scott and Holder. (2006).
support groups, and the committees operating nationally and on an EU level all point to direct deliberation.

The problem with the Action Plan is that it seems over ambitious in its scope and coverage, therefore seems questionable to whether or not it all will be achieved with the six years. The same national bodies that are working on the priorities of the Action Plan will be responsible for implementation of the Directive. They face additional burdens to meet the requirements under the Directive and Action Plan. The substantive aspects of the Action Plan require detailed planning for implementation and evaluation. There are the concerns raised by the national representatives on how the OMC will be utilised under the work programmes of the Action Plan. The Commission has preferred the use of the OMC for the development of the expert consensus on indicators and best practices. Again the fear is that it may resolve to negotiations between technocratic elites, there needs be an assurance that patient interests are adequately presented, the indicators and best practices need to be peer-reviewed by all sections of society to ensure dynamic accountability as mentioned in Chapter three.

The hybrid Organs Directive and the Action Plan package may have the opportunity to uphold certain constitutional and substantive values. In regards to procedural values transparency could be achieved if the operating procedures of the National programmes are visible; if the minutes and audits of the Transplantation Centres are available; if the reports and registers are available to access. Participation would be required from the necessary stakeholders these would include the necessary patient rights groups, and healthcare professionals. In relation to substantive principles, all the actors involved the process would be required to respect principles such as equality, and solidarity.

One of the issues regarding accountability would be to determine the mechanisms that would be for the actors involved. Accountability needs to be done by outside bodies which would give out judgements. The best option would exist though peer-review in

993 Article 168(2) TFEU.
994 Article 4, Article 9 Directive.
order to review the decisions taken through dynamic accountability as discussed in Chapter three. Another objection, as Smisman states is the fact that participation does not imply that all stakeholders are involved therefore it could turn to be a semi closed network.\textsuperscript{997}

It is also important to consider that the EU’s legal order is about economic order and not about social-protection policy. Scharpf argues that the OMC is a response to constitutional imbalance between the both.\textsuperscript{998} However I argue that the Directive would balance the health interests of patients and strengthen the OMC by bringing it within the scope of the internal market. The Directive in my opinion will enhance individual rights as patients waiting for organs would be better informed due to priority 4 which promotes greater public awareness or at least their care team/hospital would have the facilities to gain information.

5.6 Proposal of The integrated Model –A Fusion of the Three Governance Structures

Following the discussion on hybrid governance through the Organs Directive and Action Plan I propose that the Organs Directive (Action Plan) it illustrates a ‘integrated model’ of governance combining elements of the three forms of governance structures namely the agencies, comitology and the OMC in a coherent manner. This may be considered as a possible model for the EU’s governance dimension because not only effect because it not only reflects the hybrid character of the Union. This is possible because the Organs Directive is a risk regulating structure which reflects the general transformation of society away from danger to a risk producing structure, as the procedures relating to organs carry risks.

As considered earlier in the chapter it was seen that comitology structures serve as instruments that increase reflexivity as they institutionalise forms of mutual observations and information sharing between Member States. Partly due to the legal


framing of comitology these structures tend, moreover to be more stable and dense compared to the OMC processes. The committees deal with complex and technical matters. Comitology also serves to ensure implementation. It provides Member States with a stake of the implementation of EU legislation. Comitology is based on soft power and persuasion which in the absence of the necessary competencies and resources serve as functional equivalents to traditional demand and control mechanisms. The comitology machinery is aimed towards the Commission’s efforts to ensure compliance with EU legislation thus reducing the structural deficit of the EU as regards the implementation and compliance mechanisms.

Earlier considerations made in this chapter and Chapter Two highlighted that agencies tend to be networked, they are established in complex areas where it is hard for the Commission to ensure the stability of networks. Therefore the secretarial and networking coordination roles have been delegated to agencies which act like mini Commissions. Their intrinsic lack of discretionary competencies, limits their role to generating information and monitoring network coordination. The role of initiating and developing policies has remained largely with the Commission. Networks seem to fulfil the same function in policy areas as the agencies because they are also dominated by the Commission. Networks and agencies have similar roles in the areas dominated by the comitology as they operate to link hierarchical organisations Commission, agencies and the Member State administrations, thereby ensuring that these organisations are embedded within the broader social realm.

It follows from the above discussion that governance structures can be defined as institutional formations relying on the network form and characterised by organisational and legal heterarchy, which act as structural couplings between hierarchically organised organisations, increasing the reflexive capacities of the organisations in question and thereby offsetting the structural deficits of one or more of those organisations. In addition and especially in those areas where agencies have emerged Teubner’s distinction between networks and hybrids gains renewed relevance.\textsuperscript{999} Whereas the OMC processes can be understood as pure networks which merely link organisations, especially in the more the mature areas especially those where the agencies have

emerged and are increasingly characterised by governance structures which go beyond networks. Such hybrids combine hierarchical models of organisation with heterarchial structures such as Comitology and OMC instruments. Hence ongoing developments of an ‘integrated model’ of governance which includes elements from all three form of the governance structures namely agencies, comitology and the OMC.

Following the above discussion on the integrated model of governance I seek to demonstrate the combination of the three modes of governance (comitology, agencies and OMC) that are integrated and operate within the Directive. The OMC as an operational mode of governance is visible in Priority 2. It aims to promote quality improvement programmes in order to increase organ availability and therefore required to locate best practices. In addition, priority 6 also seeks to encourage Member States to develop and constantly improve their national models they will be assisted through the provisions of peer-reviews set by the EU together these actions emulate the OMC type processes. The use of comitology as a governance structure is evident through Priorities 6-9 which provide the scope for utilising the committee structures that would replicate the EU type comitology structure. The Commission will be able to gain access to the services of the expert advisory committee of the Council of Europe as it will be able draw on the previous work of the Council of Europe including the setting up of a coordination network which requires a committee like structure for the interaction of different actors public and private. In addition, Article 26 of the Directive also require the establishment of committee structure as it allows for the Commission to be provided assistance from the Committee on Organ transplantation.

The need for an administrative agency is also visible in Article 10 of the Directive which requires the formation of competent authorities that would process data. My suggestions would be that a full functioning EU administrative agency could be created. That would possess the status of a quasi-regulatory agency which would fall short of Majone’s ideal of fully independent agency. It would carry out technical, scientific and

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1000 OMC processes act as a specific form of structural coupling working to eliminate the lack of cognitive resources. OMC networks in effect linking Member State administrations to mutually observe each other. Therefore, OMC processes are oriented towards increasing reflexivity and potentially facilitating mutual adoption and learning, ideally transplanting experiences from one setting to the other. Page 70.Kjaer, P, (2006). Systems in Context: On the outcome of the Habermas/Luhman debate. Ancilla Iuris 66

1001 Work Programme of the Committee of Experts on the Organisational Aspects of Co-operation in Organ Transplantation (SP-CTO).
administrative tasks. This would require a management board headed by an Executive Director who would be responsible for day to day management. The agency would be a valuable resource to the organ’s settings as it could retrieve information for all the national centres. The agency budget shall consist of a subsidy from the Community budget and fees paid by the national contact centres to register. To ensure transparency the budget of the Agency could then be scrutinised by the EP and Council and EU on public access to documents would apply.\textsuperscript{1002} The Agency’s budget could also be available along with the audits that are required by the Directive in this sense the emergence of the governance structures together means that the organ policy would mutate in a hybrid that would rely on all three forms of governance structures.

I would suggest that such an ‘integrated model’ may also be visible within the EFSA or EMEA, as these conglomerates exist of elements derived from Member State administrations, the Commission, the agency secretariats, agency committees, so called forums which serve as a basis for OMC type processes, comitology committees and private actors. None of these structures function as the decisional centre. In organisational terms the agency acts as the centre while decision-making is with comitology. The continuing struggle between the Member States for ownership between looms behind the comitology. Therefore such conglomerates cannot be considered as intergovernmental or supranational as they are not an extension of the Commission or the Member State. Rather these structures are a third form which tries to fit in with the old intergovernmental/supranational paradigm.

These structures are partly based on hierarchy and partly based on heterarchy. They operate within a framework of semi hierarchy and can rely on direct effect and supremacy but not on competence-competence. Rather the CJEU relies on persuasive jurisprudence to operate. These conglomerates are characterised by the need to combine elements of control and command with the insurance of commitment by intentional norms which sanctions obstructions of the conglomerates ability to operate. The distinction between the OMC and the comitology committee is blurred and agencies

have their own personality. Therefore, the emergence of such conglomerate indicates towards a fusion of the hard and soft law as discussed in Chapter three.

5.7 Concluding Thoughts

All Member States have to deal with challenges within their health systems depending on their resources, levels of developments and financial pressures. These challenges include ‘older populations, changing disease patterns (multi and chronic disease outstripping infectious disease), new expensive technologies (i.e. biotechnology), changing consumer/patient expectations, changing patterns of employment and contribution to welfare institutions, welfare austerity. Whilst being confronted with these issues Member States constantly aim to strike a balance between financial sustainability and modernizing their health systems. Hervey notes that one way to move towards ‘efficient provision is to use new regulation and practices’. New governance involves processes which move away from the traditional command and control mechanisms and their results in achieving effective social goals.

The cross-border healthcare Directive was introduced to combat the uncertainty created by the use of Treaty provisions and case law of the CJEU. In the end, it seems that the Europe of health should look like a tangle of networks and processes, combining formal mechanisms for monitoring the Directive, OMC networks organized by the Commission and networks coordinated by Member States. The Directive has laid down possibilities for soft law structure by the creation of European Networks. Member States have to facilitate the development and functioning of a network connecting the national authorities or bodies responsible for health technology assessment. The Commission and the Member States are held responsible under the Directive to develop and implement these networks.

The Directive seems to reflect a model of governance that is network based and multi-level. This model bears similarities to the one followed in the Europe Against Cancer

1003 CFI ruling stated comitology are not Community institutions just as they are not third part category in Rothmans V Commission T-188/97 ECR II 2463
Program. The cancer program illustrates that well organized networks of experts using data, coordinating research and guiding clinical care can obtain good results. It may be that these coordination mechanisms set up by the Directive will Europeanize health practices and contribute in the Europeanization of national health policies.

The problem with network governance is the participation element as discussed previously. Agencies may also be seen as form of new governance as they work to institutionalise cooperation and integration between the Member States and the Commission. Agencies are also acting as a form of decentralised governance. However it remains to be seen as to ‘how decentralised’ they really are as Scott\textsuperscript{1006} points out that most of the powers are not delegated by the Commission to any other institution other than what was already done so at national level. The success of the EFSA may be interpreted due to the Commission supporting the decisionist and reflexive models including transparency. The Commission takes the decisions to act at the risk management stage, whilst the EFSA’s opinions are just taken as advice.

Hence the future could alternatively lie with hybrid governance as suggested by Trubek and Hervey and as I discussed in the Organs Directive framework. I also proposed the use of the ‘integrated model’ which fused all three governance structures namely comitology, agencies and the OMC within the Organs Directive. This may allow the best use of all the experimental modes within the legislative framework.

Conclusion

The Social OMC- The Past, Present and Future Ahead

The foregoing discussion so far has shown that the analysis of the European integration theories from a historical perspective highlighted the need for the development paradigm as the previous theories such as supranationalism have lost their strength. The study of European integration is now involved in observing political theory, electoral theories, policy analysis, interest group behaviour and this has become greater than one coherent field of study. The debate between neo-functionalism and intergovernmentalism still continues, but they now have lost their ability to act as a structuring force. This failure gave way to the governance approach which has become the alternative to the classical theories as it focused on the effects, problems and development paths of governance in the Euro-polity. The new modes of governance were as a response to the deadlock in Community decision-making. These governance structures included comitology, networks agencies and the OMC.

On a conceptual basis the law and governance are not competing values rather governance should be viewed as existing inside legal categories as the law is evolving. This way of thinking is encouraged by the three theoretical models which were proceduralisation, DDP and reflexive law. All the three theories highlighted that the OMC SPSI is faced with a complex regulatory environment, functional and territorial environment; hence none of the models will provide a perfect fit but serve as an analytical template.

The theoretical framework for the OMC SPSI, and the empirical analysis of the operation of the OMC SISPI produced mixed results. There were major institutional shortcomings within the Lisbon Strategy related to EU governance and the OMC. Firstly, the poor performance of the EU has been related to the fact that the EU failed to
develop coherent institutions required to encourage growth. There was ineffective macro-economic management. The Greek crisis highlighted the critical understanding of the Lisbon governance. This is the case in regards to the mechanisms employed through the Stability and Growth Pact and its interaction with the economic and employment guidelines. The debate looked at crisis prevention (auditing, budgetary policy reforms) on one hand and on crisis management (financial assistance, loans) on the other. Secondly, there were concerns that the OMC processes did not provide fair participation opportunities for actors it remained elite driven. There are no opportunities for the media to get involved and rely the results to the citizens, the social partners were particularly ignored within the coordination processes. Also the access for the civil society members was not adequately monitored and did not fulfil the democratic norm of both liberal deliberative democracy.

In examining the healthcare strand of the OMC it is visible that the common objectives are useful when there are no agreements in place, they create an opening for new EU competencies while stressing that there would have been greater efforts to block the common objectives (in health) had the objectives been clear. Yet the normative orientations of these healthcare objectives is clear for they not only extend market rationality and facilitate governing at a distance by providing inducements for self-management, but they also promote moves away from equity and solidarity.

The adequacy of the NAPs and National Strategic Reports on Social Protection and Social Inclusion can be considered as an indicator for the quality of the guidance provided. One hand they were perceived not as a strategic document but rather a report to Brussels. On the other hand they triggered domestic responses, and in the case of Ireland the NAPs and the social inclusion OMC including their targets and consultations have been integrated. The adequacy of the common indicators act as tools for measuring progress towards the common objectives and for providing useful guidance for self

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corrective action by domestic actors is another key dimension of the OMC’s adequacy. Jacobson explains that while the Swedish and Danish governments are supportive of the OMC, both countries resist indicators/targets to assess poverty and exclusion due to the norms of the universal welfare state.\textsuperscript{1011}

The impact of the Social OMC on domestic and EU policies and politics can be examined in two strands. Firstly by examining the substantive impact of the OMC (i.e changes in policy thinking and Member States’ policies) it can be argued that the OMC has managed to put new issues on the domestic agenda. For example despite the strong resistance in France and Belgium against the issue of child poverty the issue gained a place in domestic politics and was set as one of the top priorities during the Belgian Presidency in 2010.\textsuperscript{1012} Secondly, when examining the procedural impact of the OMC it is evident that the obligation to draft NAPs in many countries has strengthened the horizontal integration of interdependent policy fields through the creation of new formal coordination bodies and inter-ministerial groups. In Belgium the preparation of the NAP/inclusion has given rise to new bodies for coordinating policy initiatives at the national/regional level. There has also been vertical integration through the OMC. Armstrong provides the example of UK, where regional actors fully utilise the OMC when formulating regional policy development.\textsuperscript{1013}

To summarise the OMC has had an impact on the Member States and the EU politics, which include vertical/horizontal integration, increased stakeholder involvement and enhanced commitment (i.e increased efforts in fighting poverty, homelessness, unemployment). However there is less agreement in the direction and scope of the impact of the OMC as the impact varies among states. This brings to the conclusion that ‘open coordination did not prevent national and regional governments and social


partners from buying selective bits and pieces of the new paradigm, but not its
gestalt'.

The strengths of the Social OMC are that it has kept the social inclusion, healthcare and pensions on the EU agenda. It has allowed the Member States inputs via the NAPs. It has encouraged EU wide networks to get involved in combating poverty and social exclusion. It has allowed participation of organisations such as AGE Platform Europe, the European Anti-Poverty Network, the European Federation of National Organisations Working with the Homelessness (FEANTSA), Eurochild, the European Social Network and the Confederation of Family Organisations in the EU (COFACE). This has allowed improvements in governance as there is greater coordination and integration of policies.

One of the weaknesses of the Social OMC is that it has low political status due to the lack of leadership at the EU. In theory it was expected that the Social OMC would interact closely with the Growth and Jobs agenda in reality there had been little feeding in (to growth and employment objectives) while it was expected that the growth and employment programmes would feed out to advance social cohesion/inclusion goals. Secondly, the Social OMC has remained a soft process with no sanctions against Member States, the Commission has no made recommendations against Member States when they fail to make progress. The European Commission itself acknowledged that the OMC was used as the Member States as a reporting device rather of policy development. Also in practice there has been little monitoring, evaluation and reporting of Member States performances in part due to weak analytical tools and resources. The EAPN criticised that the 2007-2013 programming period was not made a more effective instrument to combat poverty and social inclusion. The European

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Commission’s own estimates were that only 24% of the European Social Fund was allocated to social inclusion measures.\textsuperscript{1017}

Policy Recommendations for Europe 2020 and the Social OMC

Chapter Four of this thesis has dealt with the Lisbon Strategy and the need for the launch of Europe 2020 in detail. The aim of this section is to highlight some issues with Europe 2020 and the proposals I made that can be taken in the future to improve the Social OMC and offer proposals for the OMC and like methods as its failure has been due to its ability to allow deliberation and popular scrutiny.

In sum Europe 2020 contains five headline targets which need to be translated into national targets. The targets relating to social exclusion are: a) rising the employment rate to 75% for women aged 20-64; B) Improving education levels by reducing school drop out rates by 10%, and increasing the share of 30-34 year olds with tertiary/equivalent education to at least 40%; C) Promoting social inclusion by reducing poverty and aiming to lift 20 million people out of poverty and exclusion. The seven flagship incentives which should encompass a range of actions at national/EU/international levels include the European Platform against Poverty and Social Exclusion (EPAP). The ten Integrated Guidelines which aim to provide Member States with assistance in defining their NRPs and reform consistently with the Stability and Growth Pact. The Guidelines relating to social exclusion are: Guideline 7 deals with market participation of women and men to reduce structural unemployment and promote job quality; Guideline 8 aims to promote a skilled workforce and promote lifelong learning; Guideline 9 asks for improvements in the education and training systems by increasing participation in tertiary/equivalent education; Guideline 10 aims to promote social inclusion and combating poverty. As mentioned in the thesis Member States are expected to report in their NRP on their efforts to implement the Strategy.

Europe 2020 has without doubt, under the EPAP and the guidelines, provided the opportunity to develop strategies to enhance social protection and social inclusion. However, there seems to be a point of concern between the governance architecture of

Europe 2020 and the development of EU social policy coordination through the Social OMC. The fear is that the progression may only be related to social inclusion and solely promote access to employment. The danger is that the EPAP will engulf the Social OMC and the worst scenario, the Social OMC may be abandoned, as the roles of the key features of the Social OMC (including its indicators, Joint Reports, National Strategic Reports) remain unclear.

Europe 2020 puts its focus on the attainment of targets and monitoring of the progression throughout. Frazer and Marlier\textsuperscript{1018} state that ‘the target is less ambitious than many hoped, the fact that the Commission and all EU countries could adopt it is a major step forward in demonstrating the political social commitment of the EU. It has to be noted that the social dimensions may be overlooked by the economic objectives, and the danger is that the social dimensions will be subdued into the growth objectives of the new strategy. The NRPs will be linked with the Stability and Convergence Programmes and their objectives will be to build on macro-economic stability and growth enhancing reforms along with attaining the targets and objectives. The thematic coordination will take place via sectoral Council formations, as they will focus with the Member States to achieving the targets and flagship incentives. The country specific recommendations will be set bearing in mind the Treaty obligations on the Stability Growth Pact, the BEPGs. Also there are still gaps within the substantive framework as there is no guidance as to how the monitoring of the EU common social objectives will take place or what will become of the national reporting against the common indicators. These gaps present serious risks to the social policy coordination that was achieved by the previous Social OMC.

Many of the weaknesses of the Social OMC such as the parity with other EU policy objectives, political commitment, mainstreaming and horizontal coordination may be remedied by the revised governance architecture of Europe 2020. The way forward for Europe 2020 would involve ensuring a greater role for stakeholders. Social protection includes healthcare and pensions. It is important that the SPC plays a vital role alongside the EU Economic Policy Committee (EPC) and the EU Employment Committee (EMCO) in the implementation of the Europe 2020 Strategy. This will

provide some assurance that all these committees would have an input in the
development of healthcare policies. Greater involvement of the stakeholders is
supported by Recital 16 accompanying the Integrated Guidelines.\textsuperscript{1019} Member States
with the Commission need to develop guidelines that deal with stakeholder involvement
to ensure that there is constant monitoring of the level of involvement in the processes.
A stakeholder forum could be established which would be attached to the EPAP and the
Social OMC at national and EU levels, existing of social partners, independent experts
and civil society representatives. This forum could ensure that there is adequate
stakeholder participation with the preparation and implementation of the NAPs. This
forum utilised as a mechanism for observing follow ups from OMC mutual learning
activities. This forum may also develop participatory governance guidelines and
indicators for monitoring and benchmarking national performances within the OMC and
Europe 2020.

A stronger Social OMC may be possible if there is more deliberation on the part of the
Member States to utilise mutual surveillance and institutionalise the involvement of
independent experts at both national and EU levels. The Social OMC may be further
strengthened if it concentrated on policy themes which encourage mutual learning such
as active inclusion and health inequalities.

There needs to be better peer reviewing of the National Strategy Reports on Social
Protection and Inclusion in order for them to be more productive. There should be a
stronger thematic focus building on initiatives by the SPC, experts’ opinions and
exchange of good practices. The policy coordination needs to concentrate on specific
issues learning from comparative analysis of national experience are greatest such as
poverty and active inclusion.\textsuperscript{1020} The common indicators need to be used more
diagnostically. Benchmarking of the Member State performances against the common
indicators need to be used as a tool for identifying the weaknesses in policies, rather

\textsuperscript{1019} Council of the EU(2010). Council Decision on guidelines for the employment policies of the Member
\textsuperscript{1020} FEANTSA 2007. Untapped potential : Using the full potential of the OMC to address poverty in
Europe, Brussels: FEANTSA.
than relying on soft sanctions or shaming devices to secure compliance of the EU targets set within Europe 2020.1021

Another suggestion to ensure the maximum implementation of Europe 2020 would be as per Recital 19 of the Integrated Guidelines,1022 to provide monitoring tools to the EMCO and SPC. This would allow them to measure the progress of the social/employment aspects of the Employment Guidelines. This should be built on the activities of the OMC in the fields of employment and social protection. Member States and the Commission should evaluate the national and EU performances through the fully agreed social protection and social inclusion indicators.

There is no doubt that the Member States and the Commission have tried to take ownership of the Europe 2020 Strategy. However serious considerations need to be placed on the economic objectives of the strategy due to the current economic crisis. The risk is that work will only be done towards achieving social inclusion alone rather than providing protection in the wider context of social protection and social inclusion. The future of the Social OMC is at risk even though it seems unlikely to be abandoned, as it is under the danger of being constantly weakened due to the impact of the public sector and employment cutbacks. There is some budgetary relief offered to Europe 2020 via the Structural Funds. Recital 15 confirms this commitment, as it states that ‘cohesion policy and its structural funds are amongst a number of important delivery mechanisms to achieve the priorities of smart, sustainable and inclusive growth in Member States and regions’. Only time will tell whether or not obtaining the EU structural funds by the relevant bodies was based on meeting the objectives of the Social OMC. The harsh austerity measures by Member States have affected employment and social security schemes in the EU Member States. The European Anti Poverty Network Report1023 confirms the harsh realities of the recession, as it comments that ‘the majority of governments have reacted to the economic and financial crisis with the same neoliberal approach: with priority given to reducing public deficits, mainly through

1022 Ibid.
austerity cuts in public expenditure, focused on reducing social benefits and public services’. Hence in the current climate there is a need to reinforce the common social objectives in Europe 2020 as framework for inclusive growth. This can be achieved if the Member States show a political commitment to mutually reinforce relations between the EU’s social, economic, employment and environmental goals.

There is a need to sustain the national social protection and inclusion strategies this is because the NRPs have been considerably streamlined. The use of the strategies will allow efficient monitoring of the Member States performances, support the participation of the civil society and allow the development of the new national social strategies.

I suggest that formally the EPAP should be linked with the Social OMC. This will then place a greater responsibility on the EPAP/OMC to ensure that there are regular monitoring, reviewing and assessment procedures which can guarantee that the Europe 2020 targets are met. There is a need for continuous development of the common indicators not just the poverty target. Indicators need to be devised in the other strands such as pensions and health and not just relating to poverty(i.e before and after social impact assessments). The indicators need to support the monitoring of the interactions between social and other policies. Finally indicators can only be formulated if data is provided on time.

For the overall improvement of the OMC type methods I suggest that constitutionalising the OMC via the EU Charter of Fundamental Rights could allow law to provide legal and procedural conditions that may result in better policy coordination. The constitutionalising process needs to take in to account that the basic view of the constitution providing basic rights does not provide all the solutions required by the OMC from law. The OMC has been perceived to promote integration through law, yet the OMC activities cannot escape political influences. The solutions for the OMC cannot just be led by the court. Rather the OMC’s toolkit compromising of reports, indicators, and recommendations need to be reviewed by the parliament and external institutions such as the EO in order to ensure democratic accountability. To constitutionalise the OMC would require law and new governance to work together to redefine each other and allow the broadening of the OMC procedures.
As Chapters Three and Four focused on the use of the OMC SPSI and proposed changes to strengthen the OMC method. However in terms of healthcare the OMC healthcare 2004 was streamlined in the Social OMC therefore it did not develop on its own rather it was amalgamated within the Social OMC. Therefore I proposed a governance paradigm which would apply in healthcare and could be applied should the Social OMC be abandoned. It comprises of the utilisation of governance structures stipulated in Chapter one namely policy networks (based on the fluidity and flexibility referred to networks), comitology (supported by the theory of deliberative supranationalism) and agencies (based on the theory of the regulatory state).

In the application of network governance I proposed that the European cancer network may provide a network model for future health policy development. The lessons I propose from the fight against cancer are that new governance based policies offer a number of routes forward for the EU’s emerging health governance agenda. The use of bottom-up dynamics and the creation of patient and expert networks value EU involvement as a potential method to make healthcare systems more efficient and effective. I suggested that the use of the network model may be used within the Health Strategy 2008-2013. The uses of agencies were examined as an alternative mode of governance to the OMC. The role of agencies (as a mode of governance) in particular the EFSA and EMA were explored. However it has to be noted that even though agencies have autonomy, they are made subject to several powers of the Commission, limiting their scope and authority. Finally comitology was discussed through the inspection of the GMO (genetically modified organisms) committees. These governance structures have their limitations namely that they are soft law therefore I proposed that if certainty is required we need to turn to a combed governance consisting of ‘hard’ and ‘soft’ law mechanisms.

Hence I examined the Organs Directive, which I proposed displayed hybrid governance. The European Commission published it paper in December 2008 containing its policies within the Action Plan on Organ Donation and Transplantation

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The Plan looks at the need to improve quality and safety, increase organ availability and make organ transplantations more efficient with the EU. The Plan came with the legislative proposal which has now been adopted. The Organs Directive which is now legally binding and will complement the Plan. Hence there will be a hybrid combination of hard and soft law operating together. The Directive will deal with organ exchange between Member States, promoting standardisation to facilitate patient mobility, as well as ensuring the health and safety of potential of organ recipients. It is hoped that the Plan will deal with gaps left by the Directive (such as details on allocation). Secondly I proposed the ‘integrated model’ to be utilised when applying the Organs Directive. The integrated model presents a fusion of the three governance structures the OMC, comitology and agencies. In the case of the Organs Directive it presents a ‘hybrid within a hybrid. This may also be an alternative to the sole reliance of the OMC as utilising more than one experimental mode of governance may assure that targets are more likely to be achieved.

**What Next? Proposals for Future Research**

Following the Europe 2020 Strategy, it is visible that the continued barriers of national compliance and of entrenched resistance among governments to harmonise social standards means that open coordination is here to stay. However, I see its best usage within the EU context through combined governance either with hard law mechanisms or with other experimental modes of governance.

As discussed earlier in the thesis, the limitations of a strategy for revitalizing the European social dimension that was to be entrusted solely (or mainly) to soft and procedural law mechanisms remained obvious: a stronger and more normative anchorage of the OMC seemed inevitable. However, now it seems to me that in order to bridge the obvious differences between economic and employment policies, the EU needs to arrange resources that are effectively capable of supporting promotional actions tailored to each local system and likely to activate its ability to react positively.

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1025 Commission of the European Communities, Communication from the Commission: between Member States (COM(2008)) 819/3.
Chapter Five of this thesis emphasised the fact that the OMC has been utilised as a template for soft law mechanisms in healthcare. Also provided detailed analysis of the application of hybrid governance within healthcare as OMC processes are utilised with the organs directive. This may be a positive initiative in health governance, as even though the Europe 2020 Strategy deals with healthcare under Integrated Guideline 10, it only does insofar as the objectives contribute to social inclusion goals. The danger is that the social dimension will be overridden by the growth objectives of the strategy. Therefore, relying on combined governance may be the best option in healthcare governance.

The Directive on the application of patient’s rights in cross-border healthcare (the Directive), which has been discussed in detail in chapter five contains an entire Chapter on ‘Cooperation in Healthcare’ may be combined with the OMC. The Directive contains cooperation mechanisms which are inspired by the OMC. These include Article 10 whereby Member States indulge in mutual assistance and cooperation to exchange information and quality and safety, whilst Article 14 refers to exchange of information between Member States on e-Health. Article 12 deals with European reference networks which aim to develop quality and safety benchmarks and develop best practice within and outside the network. Article 13 looks at the Commission supporting Member States in cooperation and development in relation to the research and development in the field of rare diseases. These articles allow harmonization in these areas and encourage access to rights, by encouraging mutual exchange of information and development of benchmarking. Future research could examine if the integrated model (fusing together multiple modes of governance) could apply to the area of rare diseases in EU law-making as the Patient’s Directive encourages deliberation and coordination between the Member States in the area of rare diseases and e-Health.

Concluding Thoughts

The course of EU governance is now better termed as multi-level governance. It comprises of complex political systems where power is spread across multiple sites and policies are formed by negotiations between national and supranational actors and

1026 Directive 2011/24/EU.
institutions. The elites, whilst embracing the new governance paradigm ignore factors such as loss of accountability and the absence of demos, and relate the EU model of European governance with informal instruments and self-regulation.

The liberal political rationality aims to govern through freedom, however, advanced liberalism may not be compatible with authoritarian practices of rule. Therefore, the Commission can utilise the OMC as a more democratic way of governance. Governance learning may require changing to another mode or reinventing an existing mode. The EU utilized networks to supplement or accompany legislation. Networks work to support horizontal objectives such as subsidiarity, flexibility and regulatory quality. However the linkage between governance and instruments is not simple as the modes are connected. The OMC may not necessarily result in less legislation, and the legislation may be part of process towards the shift to network governance as demonstrated in the Europe Against Cancer (EAC) campaign mentioned in Chapter Five. Markets require several modes or all the instruments in different formats. Rather than sole reliance on the OMC, a better use of instruments can be attained as a result of a broadened instrumental toolkit with OMC, networks, agencies, combined governance and a fusion of the experimental modes of governance.
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