

## European Governance

### *Governing with or without the State?*

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#### I. INTRODUCTION

The European Union (EU) used to be considered a unique system of multi-level governance that cannot be compared to any other form of political order at the national or international level.<sup>1</sup> There is broad agreement that the EU is and has always been more than an international organisation of states, but it is not and probably never will be a state of its own right.<sup>2</sup> Political scientists have shown a remarkable creativity in developing new concepts to capture the allegedly *sui generis* nature of the EU, describing it as a 'new, post-Hobbesian order',<sup>3</sup> 'a post-modern state',<sup>4</sup> or 'a network of pooling and sharing sovereignty'.<sup>5</sup> In recent years, students of the EU have started to adopt a more comparative approach. The governance literature appears to be particularly attractive for studying the political institutions and policy processes in

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<sup>1</sup> D. J. Puchala, 'Of Blind Men, Elephants and International Integration' (1972) 10 *Journal of Common Market Studies* 267–84; J. A. Caparaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-modern?' (1996) 34 *Journal of Common Market Studies* 29–52.

<sup>2</sup> W. Wallace, 'Less than a Federation, More than a Regime: The Community as a Political System', in H. Wallace, W. Wallace, and C. Webb (eds), *Policy-Making in the European Community* (John Wiley: Chichester, 1983), 43–80; see also Puntser Rieckmann in this volume.

<sup>3</sup> P. C. Schmitter, *The European Community as an Emergent and Novel Form of Political Domination. Working Paper No. 26* (Madrid: Juan March Institute, 1991).

<sup>4</sup> J. G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organization* 139–74; J. A. Caporaso, 'The European Union and Forms of the State: Westphalia, Regulatory or Post-Modern?' (1996) 34 *Journal of Common Market Studies* 29–52.

<sup>5</sup> R. O. Keohane and S. Hoffmann (eds), *The New European Community: Decisionmaking and Institutional Change* (Boulder, Col.: Westview Press, 1991).

the EU by offering concepts that can be equally applied to interstate institutions and national states. Thus, the EU has been frequently portrayed as a system of 'network governance',<sup>6</sup> where the authoritative allocation of values is negotiated between state and societal actors,<sup>7</sup> which have also been invoked in reference to the 'negotiating state'<sup>8</sup> and international politics as 'governance without government'.<sup>9</sup>

This chapter, by contrast, argues that the EU's 'nature of the beast'<sup>10</sup> is not to be captured by one particular type of governance. Rather, the EU combines forms of governance, which involve the member states to different degrees and are best characterised as 'governance with the state'. First, governance without the state, where state and non-state actors cooperate on a non-hierarchical basis or non-state actors coordinate among themselves to make public policies, is hard to find in the EU. EU policies are largely formulated and implemented by state actors. Secondly, the EU seems to have the power to govern without the state. Its supranational institutions allow the adoption and enforcement of legally binding decisions without the consent of (individual) member states. While this is often overlooked in the literature, the EU still lacks coercive power—otherwise it would be a state. Being able to adopt decisions against the will of the member states, the EU still relies on their voluntary compliance and the willingness of *their* courts and enforcement authorities to make EU decisions effective. Thus, the EU is first of all governance with the state rather than without it. This has serious implications for the constitutional structure of the EU, both with regard to its effectiveness and its legitimacy.

The chapter starts with conceptualising the relationship between state and governance. It draws on the distinction between government or governance by the state and governance without the state. The second part uses this typology to study European governance. The analysis will show that EU policies are largely formulated and implemented in multiple overlapping negotiation systems that mostly involve supranational and state actors and give little room for business and civil society. While forms of private self-regulation or public–private co-regulation abound in the member states as well as in global politics, we hardly find such forms of governance without the state at the EU level. Thus, the EU is best described as governance with the state, whereby the role of the state varies significantly across policy areas. The

<sup>6</sup> B. Kohler-Koch, 'Catching up with Change: The Transformation of Governance in the European Union' (1996) 3 *Journal of European Public Policy* 359–80.

<sup>7</sup> Cf B. Kohler-Koch and R. Eising (eds), *The Transformation of Governance in Europe* (London: Routledge, 1999); C. Ansell, 'The Networked Polity: Regional Development in Western Europe' (2000) 13 *Governance* 303–33; A. Schout and A. Jordan, 'Coordinated European Governance: Self-Organizing or Centrally Steered?' (2005) 83 *Public Administration* 201–20.

<sup>8</sup> F. W. Scharpf, *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research* (Boulder, Col.: Westview Press, 1997).

<sup>9</sup> J. N. Rosenau and E.-O. Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992).

<sup>10</sup> T. Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union' (1996) 34 *Journal of Common Market Studies* 53–80.

chapter concludes by discussing some implications of this governance constellation for the European constitutional structure. Since questions of legitimacy are covered by the contributions of Scharpf and Puntischer Rieckmann, the focus will be placed on the ‘problem-solving gap’ caused by the lack of governance by the state and the challenges it poses for the constitutional design of the EU.

## II. GOVERNANCE AND THE STATE

The *governance* concept has made quite a career in European Studies. It would go beyond the scope of this chapter to provide an overview of the European governance literature.<sup>11</sup> This section builds on existing concepts and develops a governance typology which allows for a classification of European governance and its systematic comparison with state and interstate systems.

Following the work of Renate Mayntz and Fritz W. Scharpf, this chapter understands governance as institutionalised modes of coordination through which collectively binding decisions are adopted and implemented.<sup>12</sup> Governance consists of both structure and process.<sup>13</sup> In terms of structure, governance relates to institutions and actor constellations. Here, the literature usually distinguishes between hierarchy, market (competition systems),<sup>14</sup> and networks (negotiation systems).<sup>15</sup> These are ideal types, which differ with regard to the type of actors involved and the degree of coupling between them. Governance as process, in turn, points to the

<sup>11</sup> Cf I. Bache and M. Flinders (eds), *Multi-level Governance* (Oxford: Oxford University Press, 2004); B. Kohler-Koch and B. Rittberger, ‘The “Governance Turn” in EU Studies’ (2006) 44 *Journal of Common Market Studies* 27–49; L. Hooghe and G. Marks, *Multi-Level Governance and European Integration* (Lanham: Rowman & Littlefield, 2001).

<sup>12</sup> R. Mayntz and F. W. Scharpf, ‘Steuerung und Selbstorganisation in staatsnahen Sektoren’, in R. Mayntz and F. W. Scharpf (eds), *Gesellschaftliche Selbstregulierung und politische Steuerung* (Frankfurt: Campus, 1995), 9–38; R. Mayntz, ‘Governance im modernen Staat’, in A. Benz (ed), *Regieren in komplexen Regelsystemen: Eine Einführung* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2004), 65–75.

<sup>13</sup> Scharpf, above n 8; Mayntz and Scharpf, above n 12.

<sup>14</sup> In the political science literature, markets are not regarded as governance since they are a ‘spontaneous order’ (Hayek) that leaves ‘no place for “conscious, deliberate and purposeful” effort to craft formal structures’ (O. E. Williamson, *The Mechanisms of Governance* (Oxford: Oxford University Press, 1996), at 31). Yet, market mechanisms can be institutionalised to coordinate actors behaviour through competition (A. Benz, ‘Politischer Wettbewerb’, in A. Benz et al (eds), *Handbuch Governance Theoretische Grundlagen und empirische Anwendungsfelder* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), 54–67). This chapter uses the concept of competition systems to describe the institutionalisation of market-based modes of political coordination.

<sup>15</sup> The governance literature has identified other forms of social order, such as clans (W. G. Ouchi, ‘Market, Bureaucracies, and Clans’ (1980) 25 *Administrative Science Quarterly* 129–41) and associations (P. C. Schmitter and G. Lehmbruch (eds), *Trends towards Corporatist Intermediation* (London: Sage, 1979); W. Streeck and P. C. Schmitter (eds), *Private Interest Government: Beyond Market and State* (London: Sage, 1985). Like networks, this chapter conceptualises them as negotiation systems (see below).

modes of social coordination by which actors seek to achieve changes in (mutual) behaviour. Hierarchical coordination usually takes the form of authoritative decisions (eg administrative ordinances, court decisions). Actors must obey. Non-hierarchical coordination, by contrast, is based on voluntary compliance. Conflicts of interests are solved by negotiations. Voluntary agreement is either achieved by negotiating a compromise and granting mutual concessions (side-payments and issue-linkage) on the basis of fixed preferences (bargaining), or actors engage in processes of non-manipulative persuasion (arguing), through which they develop common interests and change their preferences accordingly.<sup>16</sup>

Institutions are crucial in shaping both governance structures and governance processes. On the one hand, they determine the degree of coupling between actors by defining their relationships and allocating resources to them. On the other hand, institutions set the framework for the modes of coordination on which actors draw.<sup>17</sup> In hierarchical structures, for instance, hierarchical and non-hierarchical modes of coordination can be used. Institutions bestow upon state actors the power to unilaterally impose decisions, but they can refrain from invoking their hierarchical authority when they bargain or argue with others. Negotiation and competition systems, by contrast, can only rely on bargaining and arguing. Which mode of coordination actors choose within their institutional limits, is, again, influenced by institutions, which render certain modes more appropriate or socially acceptable than others.

A comprehensive concept of governance as structure and process helps us delineate governance by, with, and without the state.<sup>18</sup>

The essence of governance by the state is hierarchy.<sup>19</sup> Hierarchies are based on an institutionalised relationship of domination and subordination, which significantly constrains the autonomy of subordinate actors (tight coupling) and allows for hierarchical coordination. Hierarchy can force actors to act against their self-interest.<sup>20</sup> They may be either physically coerced by the use of force or legally obliged by legitimate institutions (law). Hierarchical coordination does not leave actors either the possibility of exit or voice.<sup>21</sup> Unlike arguing and bargaining, hierarchical coordination does not seek to influence actors' choices but to unilaterally constrain or nullify them. Thus, hierarchy is based on coercion. While the state has many attributes, the

<sup>16</sup> A. Benz, *Kooperative Verwaltung: Funktionen, Voraussetzungen, Folgen* (Baden-Baden: Nomos, 1994), at 118–27; T. Risse, “‘Let’s Argue!’ Communicative Action in International Relations’ (2000) 54 *International Organization* 1–39.

<sup>17</sup> Scharpf, above n 8.

<sup>18</sup> The distinction draws on the work of Michael Zürn, who refers to governance by, with, and without government (M. Zürn, *Regieren jenseits des Nationalstaates* (Frankfurt am Main: Suhrkamp, 1998)).

<sup>19</sup> R. A. W. Rhodes, *Governing without Governance: Order and Change in British Politics* (Cambridge: Cambridge University Press, 1996); Scharpf, above n 8.

<sup>20</sup> Scharpf, above n 8, at 171.

<sup>21</sup> A. O. Hirschman, *Exit, Voice, and Loyalty: Responses to the Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970).

monopoly of coercive public power ultimately distinguishes it from other forms of political organisations.

Governance without the state, by contrast, is based on equal relations between actors and the absence of coercion. They may differ with regard to their bargaining power, but no actor is subject to the will of the other.<sup>22</sup> The institutions of competition systems do not provide for any structural coupling. Actors have full autonomy to coordinate themselves through the mutual adjustment of their actions. Negotiation systems, finally, are characterised by loose coupling. Social coordination is based on mutual agreement. Unlike in formalised negotiation systems, the symmetrical relations of networks are not defined by formal institutions, but constituted by mutual resource dependencies and/or informal norms of equality.<sup>23</sup>

In sum, governance without the state refers to the involvement of non-state actors (companies, civil society) in the provision of collective goods through non-hierarchical coordination. It ranges from consultation and co-optation, delegation, and co-regulation/co-production to private self-regulation in and outside the control of the state. Governance with and without the state, hence, can involve state actors as long as they refrain from using their coercive powers. In order to avoid conceptual overstretch, however, certain forms remain outside this definition (Fig 4.1). Governance without the state does not cover lobbying and mere advocacy activities of economic and social actors aimed at state actors or supranational and international organisations.<sup>24</sup> Non-state actors who are not active participants in negotiating or competition systems pose few challenges to existing concepts and theories in political science and international relations. Also excluded are those arrangements among non-state actors that

- are based on self-coordination and do not aim at the provision of common goods and services (markets);

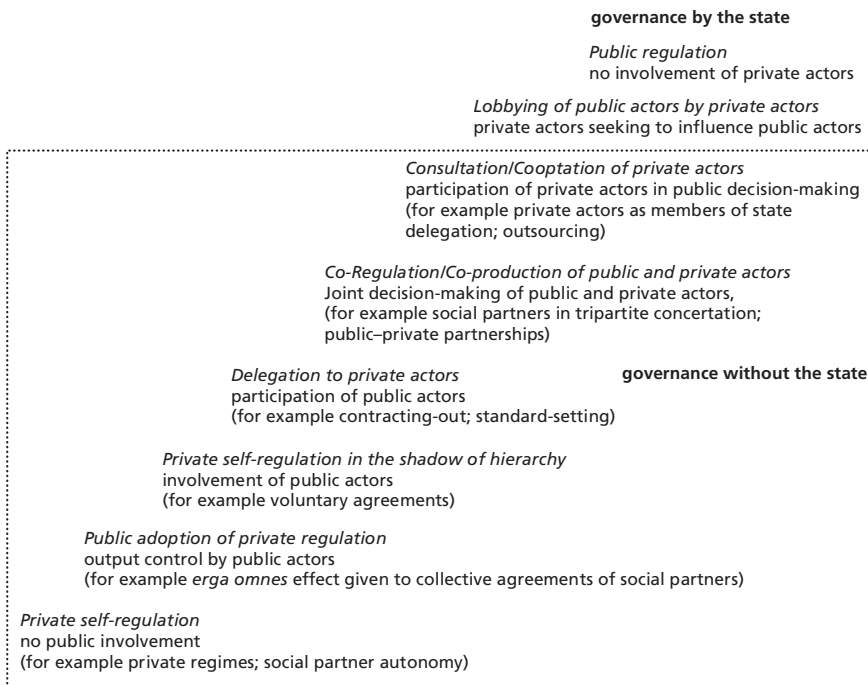
<sup>22</sup> Heavy power asymmetries can, however, reduce the choices of actors (by imposing prohibitive costs) so much so that coordination becomes largely hierarchical.

<sup>23</sup> Networks are then informal, ie non-formalised negotiation systems (cf B. Marin and R. Mayntz (eds), *Policy Network: Empirical Evidence and Theoretical Considerations* (Frankfurt am Main: Campus, 1991)). The literature discusses other characteristics of networks, including actor constellations that equally involve public and private actors (R. Mayntz, 'Modernization and the Logic of Interorganizational Networks', in J. Child, M. Crozier, and R. Mayntz (eds), *Societal Change between Market and Organization* (Aldershot: Avebury, 1993), 3–18) or relations based on trust, which favour problem solving over bargaining as the dominant action orientation (Scharpf, above n 8, at 137–8; A. Benz, *Der moderne Staat: Grundlagen der politologischen Analyse* (Munich: Oldenbourg, 2001), at 171). However, such a narrow concept of network governance is flawed both in theoretical and empirical terms (cf T. A. Börzel, 'Organising Babylon: On the Different Conceptions of Policy Networks' (1998) 76 *Public Administration* 253–73).

<sup>24</sup> Cf T. A. Börzel and T. Risse, 'Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance?' in E. Grande and L. W. Pauly (eds), *Complex Sovereignty: On the Reconstitution of Political Authority in the 21st Century* (Toronto: University of Toronto Press, 2005), 195–216.

- produce public goods and services as unintended consequences (for example rating agencies) or provide public ‘bads’ (mafia, drug cartels, transnational terrorism).

This chapter argues that the EU hardly features any forms of governance without the state. Nor do we find much governance by the state. Rather, the EU mostly constitutes forms of governance with the state.



Source: based on Börzel and Risse, above n 24.

*Figure 4.1*

Governance with(out) the state: the non-hierarchical involvement of non-state actors.

### III. EUROPEAN GOVERNANCE: GOVERNANCE WITH RATHER THAN WITHOUT THE STATE

The following analysis draws on some of my previous work in which I attempt to map the governance in the EU.<sup>25</sup> For the purpose of this chapter, I have simplified my original typology collapsing the different forms of EU governance into governance by, with, and without the state.

<sup>25</sup> T. A. Börzel, ‘European Governance: Markt, Hierarchie oder Netzwerk?’ in G. F. Schuppert, I. Pernice, and U. Haltern (eds), *Europawissenschaft* (Baden-Baden: Nomos,

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The EU is often treated as the prototype of governance without the state. Yet, if at all, we only find very weak forms of the non-hierarchical involvement of non-state actors in EU policy making. *Consultation and co-optation* of economic and social actors certainly abound in the EU, particularly in the committees and working groups of the Commission and the Council.<sup>26</sup> Yet, while non-state actors have some say in the formulation and implementation of EU policies, the member states and the Commission maintain a firm grip on the policy process and its outcomes.

*Co-regulation* is thus almost impossible to find. While non-state actors are regularly involved in EU policy-making, they are hardly engaged on 'a more equal footing'.<sup>27</sup> A rare exception is the partnership principle in structural policy, which explicitly requires the involvement of social partners in inter and transgovernmental negotiation systems. Their representatives are members of the management committee for the European Social Fund, in which the member states are represented as well and which is chaired by the European Commission.<sup>28</sup> There are also several EU regulations providing for the participation of the social and economic partners at the various stages of programming under the Social and the Regional Development Funds.<sup>29</sup> Moreover, a recent regulation extends the partnership principle to include civil society.<sup>30</sup> The extent to which business and civil society are actually involved, however, is contested in the literature and varies significantly across the member states. Overall, it seems that they still have a marginal role compared to national, regional, and local governments.<sup>31</sup>

Non-state actors are equally marginalised in the Open Method of Coordination (OMC), the epitome of so-called 'new' non-hierarchical modes of governance in the EU.<sup>32</sup> OMC was first applied in EU employment policy. It emerged as an innovative way to implement the so-called Lisbon Strategy, which the European Council

2005), 613–41; id, 'European Governance: Verhandlungen und Wettbewerb im Schatten von Hierarchie' (2007) *Politische Vierteljahresschrift, Sonderheft 'Die Europäische Union Governance und Policy-Making'* 61–91; cf T. A. Börzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' (forthcoming) *Journal of Common Market Studies*.

<sup>26</sup> T. Christiansen and S. Piattoni (eds), *Informal Governance in the European Union* (Cheltenham: Edward Elgar, 2003).

<sup>27</sup> B. Kohler-Koch, 'The Evolution and Transformation of European Governance', in B. Kohler-Koch and R. Eising (eds), *The Transformation of Governance in the European Union* (London: Routledge, 1999), 14–35, at 26.

<sup>28</sup> Treaty Establishing the European Community, Art 147.

<sup>29</sup> Cf European Council, Regulation 1260/99, Ch IV, Art 8.

<sup>30</sup> European Council, Regulation No 1083/2006.

<sup>31</sup> Cf Börzel forthcoming, above n 25.

<sup>32</sup> Cf D. Hodson and I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39 *Journal of Common Market Studies* 719–46.

adopted in 2000 to promote economic growth and competitiveness in the EU.<sup>33</sup> OMC has facilitated the coordination of national policies in areas where member states have been unwilling to grant the EU political powers and additional spending capacity, particularly in the field of economic and social policy.<sup>34</sup> In the meantime, it has travelled beyond Lisbon and is applied in justice and home affairs,<sup>35</sup> health policy,<sup>36</sup> environmental policy,<sup>37</sup> and tax policy.<sup>38</sup> OMC is in principle open for the participation of non-state actors. Yet, in practice, they are neither involved in the formulation of joint goals at the EU level nor in their implementation at the national level.<sup>39</sup> This is not surprising since it is precisely the intergovernmental and voluntaristic nature that makes OMC an acceptable mode of policy coordination for the member states in sensitive areas.

*Delegation* is more prominent in the EU, although it has been around for quite some time, at least when it comes to technical standardisation. The setting of EU technical standards is mostly voluntary since supranational harmonisation of health and security standards is confined to national regulations concerning the public interest.<sup>40</sup> For other areas, the Council has delegated the task to develop technical standards to three European private organisations, which are composed of representatives from the member states. Since national standardising organisations are mostly public, however, self-regulation is regulated by the EU and subject to the control of the member states through comitology. It hardly involves non-state actors.

This also holds for other areas of risk regulation, where regulatory networks have emerged in response to liberalisation and privatisation in the Single Market.

<sup>33</sup> Cf K. A. Armstrong, I. Begg, and J. Zeitlin, 'JCMS Symposium: EU Governance after Lisbon' (2008) 46 *Journal of Common Market Studies* 413–50.

<sup>34</sup> Hodson and Maher, above n 32.

<sup>35</sup> A. Caviedes, 'The Open Method of Co-ordination in Immigration Policy: A Tool for Prying Open Fortress Europe?' (2004) 11 *Journal of European Public Policy* 289–310.

<sup>36</sup> S. Smismans, 'New Modes of Governance and the Participatory Myth' (2006) 1 *European Governance Papers* <<http://www.connex-network.org/eurogov/pdf/egp-newgov-N-06-01.pdf>>.

<sup>37</sup> A. Lenschow, 'New Regulatory Approaches in "Greening" EU Politics' (2002) 8 *European Law Journal* 19–37.

<sup>38</sup> C. M. Radaelli and U. S. Kraemer, 'Governance Areas in EU Direct Tax Policy' (2008) 46 *Journal of Common Market Studies* 315–36.

<sup>39</sup> Hodson and Maher, above n 32; M. Rhodes, 'Employment Policy', in H. Wallace, W. Wallace, and M. A. Pollack (eds), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2005), 279–304, at 295–300; S. Borrás and K. Jacobsson, 'The open Method of Co-ordination and New Governance Patterns in the EU' (2004) 11 *Journal of European Public Policy* 185–208, at 193–4; M. Büchs, 'How Legitimate is the Open Method of Co-ordination?' (2008) 46 *Journal of Common Market Studies* 765–86.

<sup>40</sup> T. Gehring and M. Kerler, 'Institutional Stimulation of Deliberative Decision-Making: Division of Labour, Deliberative Legitimacy and Technical Regulation in the European Single Market' (2008) 46 *Journal of Common Market Studies* 1001–23.



These market-making processes require some form of re-regulation at the EU and the national level to ensure fair competition and in order to correct or compensate undesired market outcomes. Since the member states have been reluctant to transfer regulatory powers to supranational institutions, particularly in the area of economic regulation, market-creating and market-correcting competencies are usually delegated to independent regulatory agencies or ministries at the national level.<sup>41</sup> To fill the 'regulatory gap' at the EU level, national regulatory authorities have established informal networks to exchange information and develop 'best practice' rules and procedures to address common problems.<sup>42</sup> We find these networks in an increasing number of sectors, such as pharmaceuticals and foodstuffs, but also beyond risk regulation, including competition, public utilities, financial services or data protection, and law enforcement. While these regulatory and operational networks may be open to the participation of non-state actors (eg providers and consumers), they are transgovernmental rather than transnational in character.

The strongest form of delegation in the EU is the Social Dialogue.<sup>43</sup> In selected areas of social policy, the social partners have the right to conclude agreements, which can be turned into European Law. Moreover, the EU cannot take legal action without consulting the social partners. If the latter abstain from collective bargaining, however, the EU is free to legislate. While this form of Euro-corporatism is unique, the negotiation procedure under the Social Dialogue has hardly been invoked.<sup>44</sup> Despite qualified majority voting in the Council, member states still are too diverse to agree on EU legal standards. In the absence of a credible shadow of hierarchy, employers had little incentive to negotiate with the trade unions. Moreover, the social partners themselves have faced problems in reaching agreement among their members since industrial relations are still organised along national lines. As a result, delegation has hardly been used in social policy.

Other forms of delegated or regulated private self-regulation in the shadow of hierarchy are equally rare. While voluntary agreements at the national level abound, they have been hardly used by European business organisations to prevent EU regulation; if at all, they are found in the area of environmental and consumer protection.<sup>45</sup>

*Private self-regulation* or true governance without the state, finally, is almost impossible to find at the EU level. Non-state actors may coordinate themselves without having a mandate from or being under the supervision of supranational institutions. The EU is crowded with a multitude of non-state actors, representing both civil

<sup>41</sup> D. Coen and A. Héritier (eds), *Refining Regulatory Regimes in Europe: The Creation and Correction of Markets* (Cheltenham: Edward Elgar, 2006).

<sup>42</sup> D. Coen and M. Thatcher, 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' (2008) 28 *Journal of Public Policy* 49–71.

<sup>43</sup> Treaty Establishing the European Community, Arts 138–9.

<sup>44</sup> Rhodes, above n 39.

<sup>45</sup> Cf A. Héritier and S. Eckert, 'New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe' (2008) 28 *Journal of Public Policy* 113–38.

society and business. They have organised themselves at the EU level in umbrella organisations. The so-called Euro-groups have the possibility to take binding decisions for their members, eg by adopting codes of conduct, negotiating voluntary agreements, and monitoring compliance. But they seldom have embarked on collective action and, if they do, the shadow of hierarchy looms. The few EU-level voluntary agreements have been negotiated to avoid stricter EU regulation.<sup>46</sup> Rather than engaging in private interest government, business and civil society organisations focus on individual and collective lobbying of decision makers, both at the EU and the national level.<sup>47</sup> The emergence of governance without the state is further impaired by European peak associations and umbrella groups being organised around and often divided along national lines, which in turn renders consensus among its members difficult.

To conclude, governance without the state has proliferated far less in the EU than the ever-growing literature would lead us to expect. Business and civil society do play a role in EU policy making but political decisions are largely taken and implemented by inter and transgovernmental actors. Delegation and private self-regulation in and outside the shadow of hierarchy are equally rare. The dominance of state actors distinguishes European governance from both governance within and beyond the state. At the member state as well as at the international level, private actors play a much more prominent role in policy making than in the EU.<sup>48</sup>

#### *Governance with the state*

While the member states are still the Masters of the Treaties and dominate EU policy making at all levels, the EU does have the power of hierarchical coordination. The supranational institutions of the EC-Treaty (ECT) provide ample possibility for hierarchical coordination where supranational actors have the power to take legally binding decisions without requiring the consent of the member states. The most prominent case is the European Central Bank (ECB), which authoritatively determines EU monetary policy.<sup>49</sup> The presidents of the national central banks are represented in the ECB Council. However, they are not subject to any mandate by the member states.<sup>50</sup> Likewise, the Commission can conduct investigations into cases of suspected distortion of competition caused by member states (eg by state aid) and anti-competitive practices of private actors (eg cartel formation), impose sanctions, and take legal recourse to the European Court of Justice (ECJ).<sup>51</sup> The Commission can enforce competition rules set by Articles 81, 87 ECT, and a series of directives

<sup>46</sup> Ibid.

<sup>47</sup> D. Coen and J. Richardson (eds), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford: Oxford University Press, 2009).

<sup>48</sup> Cf Börzel forthcoming, above n 25.

<sup>49</sup> Treaty Establishing the European Community, Art 105 ECT.

<sup>50</sup> Ibid, Art 108.

<sup>51</sup> Ibid, Art 82 ECT; Art 88 ECT.

and regulations, which have been adopted by qualified majority in the Council (since the Amsterdam Treaty). In the case of public undertakings, it can also adopt legally binding regulations without the consent of the member states, if privileges of public undertakings constitute a major obstacle to the completion of the Single Market.<sup>52</sup>

Finally, the European Court of Justice (ECJ) can bind the member states against their will through their interpretation of European law—a power that extends beyond market-making policies. Through dynamic interpretation of the Treaties, the ECJ has expanded European regulation beyond negative integration. For instance, the ECJ empowered the EC to enact social and environmental regulations at a time when the member states had not yet bestowed the EC with the necessary competencies.<sup>53</sup> In a similar vein, the ECJ established the principle of state and damages liability for violations of European Law that requires the member states to provide financial compensation for damages caused by breaches of European law.<sup>54</sup>

In sum, the EU entails institutionalised rule structures which offer the Commission, the European Court of Justice, and the European Central Bank ample opportunities for hierarchical coordination. Yet, although the EU can legally bind the member states against their will, it lacks the coercive power to bring them into compliance. Unlike modern states, the EU does not have a legitimate monopoly of force.<sup>55</sup> Ultimately, the effectiveness of EU Law rests on the voluntary compliance of the member states. Member state governments can be held responsible by the Commission and the ECJ for any breaches of EU Law. And domestic courts and enforcement authorities have to execute ECJ judgments. This is particularly the case under the preliminary ruling procedures,<sup>56</sup> where domestic courts refer cases of conflict between national and European law to the ECJ to settle the issue. Yet member states and their enforcement authorities can openly or tacitly defy the rulings of the ECJ or the authoritative decisions of the Commission. This may entail material (eg loss of structural funds) and reputational costs. But if member states are willing to bear such costs, there is nothing the EU can do, particularly when dealing with the more powerful member states which are more likely to resist compliance with EU law.<sup>57</sup>

Even where the EU has exclusive hierarchical powers of decision, it must rely on member states for their enforcement. The role of the latter increases under the so-called Community Method, where the Commission holds the exclusive right of

<sup>52</sup> Ibid, Art 86, para 3.

<sup>53</sup> J. McCormick, *Environmental Policy in the European Union* (Basingstoke: Palgrave, 2001).

<sup>54</sup> P. P. Craig, 'Once More unto the Breach: The Community, the State and Damages Liability' (1997) 113 *Law Quarterly Review* 67–94.

<sup>55</sup> Cf J. A. Caporaso and J. Wittenbrinck, 'The New Modes of Governance and Political Authority in Europe' (2006) 13 *Journal of European Public Policy* 471–80.

<sup>56</sup> Treaty Establishing the European Community, Art 234.

<sup>57</sup> T. A. Börzel et al, *Recalcitrance, Inefficiency, and Support for European Integration: Why Member States Do (Not) Comply with European Law* (CES Working Paper 148; Cambridge, Mass.: Harvard University, 2007).

legal initiative but the Council decides by qualified majority. This applies to almost all policies under the First Pillar but also to the framework decisions under the Third Pillar.<sup>58</sup> Since majority voting entails an element of hierarchy by binding a minority of member states against their will, the core areas of EU policy making are embedded in hierarchical structures. At the same time, the member states retain a prominent role in the policy process. While the Community Method grants the Commission and the European Parliament a significant say, EU decision making is still dominated by the Council. The Committee of Permanent Representatives, numerous Council working groups, as well as the expert committees of the Commission prepare legal proposals and execute Council decisions (comitology). While the ECJ has the power of judicial review, it is again the member states which have to implement and enforce EU law.

The role of the member states is the strongest under the Second and Third Pillars. The (European) Council usually decides by unanimity and shares the right of initiative with the Commission. The Parliament is at best consulted and the ECJ has only limited power of judicial review.<sup>59</sup> The areas of inter and transgovernmental cooperation, which the member states explicitly sealed against even the shadow of supranational hierarchy, largely correspond to the ideal type of interstate negotiation systems. European decisions rest on the voluntary coordination of the member states (unanimity or consent) and often do not have legally binding character (ie they constitute ‘soft law’). They are prepared and accompanied by inter and transgovernmental networks, which act free from the shadow of hierarchy cast by supranational institutions. This is not only true for the Second and parts of the Third Pillar, but also for selected areas under the First Pillar (parts of social policy, macroeconomic and employment policy, research and development, culture, education, taxation), in which the EU has no or only very limited competencies and the influence of the supranational troika (Commission, Parliament, and Court) is severely restricted. Moreover, a new form of transgovernmental negotiation system or ‘state-centred multi-level governance’<sup>60</sup> has emerged, again under the First Pillar, in which member state authorities coordinate their regulatory activities, although they are not necessarily directly controlled by their governments.

#### IV. TOO MUCH OR TOO LITTLE STATE?

Governance in the EU is governance with rather than without or by the state. On the one hand, the role of non-state actors is much more limited than often suggested by the literature on the EU as the prototype of network or new modes of governance. On the other hand, the EU can draw on substantial forms of hierarchical governance,

<sup>58</sup> Treaty on European Union, Art 35, para 1.

<sup>59</sup> Ibid, Art 35, para 6.

<sup>60</sup> D. Levi-Faur, ‘The Governance of Competition: The Interplay of Technology, Economics, and Politics in European Union Electricity and Telecom Regimes’ (1999) 19 *Journal of Public Policy* 175–207, at 201.

which cast a strong shadow of hierarchy on both negotiations and competition in the First and parts of the Third Pillar.<sup>61</sup> Yet, the EU lacks (the monopoly of) coercive force and must rely on member states for the enforcement of its authoritative allocation of values. While the member states have increasingly shared powers with the European Commission, the European Parliament or (trans)national regulatory authorities, they remain the central decision makers and implementers of EU policies.

Conceptualising the EU as governance with the state not only allows for a more nuanced analysis of its nature focusing on the different degrees of state involvement; it also makes the EU look less unique and facilitates comparison with other governance systems within and beyond the state. Finally, it points to some severe limitations regarding the effectiveness of EU governance. The decline of governance by the state at the national level resulted in the search for more effective solutions at the EU level, creating serious problems for the legitimacy of both the EU and the member states.<sup>62</sup> The lack of governance by the state at the EU level, in turn, impairs the effectiveness of EU governance in those areas where societal problems have become more prominent and the problem-solving capacity of the member states appears to be increasingly wanting.

The EU governs the largest market in the world. The various forms of governance with the state have produced a comprehensive regulatory framework that has successfully prevented and corrected market failures. Even without coercive power, compliance with EU law appears to be generally sufficient to make the Common Policies work. Member states do not always comply, and some comply better than others.<sup>63</sup> Yet, a polity seeking to integrate twenty-seven and more states, which are ever more diverse, may need a certain amount of non-compliance or 'institutional hypocrisy'.<sup>64</sup> And sooner or later all member states comply with all EU laws, even though in some cases this has taken up to eighteen years.<sup>65</sup>

The problem-solving capacity of the EU is not challenged by a lack of power directly to enforce its policies. Rather, it is the incapacity to adopt new policies addressing economic and social problems that concern EU citizens most. Particularly in (re)distributive policy areas, member states have not been willing to yield decision-making powers to the EU in order to counteract politically undesirable outcomes of the Single Market. At the same time, EU market integration impedes

<sup>61</sup> Cf Börzel forthcoming, above n 25.

<sup>62</sup> Cf F. W. Scharpf, *Governing Europe: Effective and Legitimate?* (Oxford: Oxford University Press, 1999); Scharpf in this volume.

<sup>63</sup> Börzel et al, above n 57.

<sup>64</sup> E. A. Iankova and P. J. Katzenstein, 'European Enlargement and Institutional Hypocrisy', in T. A. Börzel and R. A. Cichowski (eds), *The State of the European Union*, vol.6: *Law, Politics, and Society* (Oxford: Oxford University Press, 2003), 269–90.

<sup>65</sup> Börzel et al, above n 57.

member states in maintaining such functions.<sup>66</sup> The Single Currency largely deprives the member states of their major instruments for national macroeconomic stabilisation, while the Maastricht convergence criteria place serious constraints on state expenditures. Softer modes of governance with a strong role of the member states are unlikely to respond to this 'European problem-solving gap'.<sup>67</sup> Attempts to use the OMC for institutionalising member state coordination in areas such as taxation of mobile capital, employment, or social policy, where the heterogeneity and political salience of member state preferences prohibits more hierarchical forms of governance, pale in light of the redistributive effects of the EU's hierarchical powers in monetary policy on the one hand and member state competition with regard to taxes and labour costs on the other. Redistributive or normative conflicts are hard to solve without the possibility of resorting to authoritative decision making.<sup>68</sup> The dilemma of European governance may be that 'soft' forms appear to require a shadow of supranational hierarchy to address policy problems, which the member states refuse to make subject to 'hard' hierarchical forms of EU governance in the first place. Due to the high legitimacy requirements for imposing policies with redistributive and normative consequences, on the one hand, and the already existing legitimacy crisis of the EU, on the other, granting the EU more powers is hardly a solution to closing the problem-solving gap. The dilemma remains and is exacerbated by the current financial and economic crisis, which neither the EU (even with the new powers of the Lisbon Treaty) nor the member states have so far been able effectively to address. It remains to be seen how the loss of savings and investments, rising unemployment, and cuts in social benefits will affect the legitimacy of the state. This time, it will be hard for national policy makers to blame Brussels, which for once may emerge in the public perception as the solution rather than the problem.

## V. THE CONSTITUTIONAL CHALLENGE

The EU as a form of governance with the state closely resembles a system of cooperative federalism of which Germany is considered to be a prototype.<sup>69</sup> While the central level makes the laws, the constituent units are responsible for implementing them. The vast majority of competencies are 'concurrent' or 'shared'. This

<sup>66</sup> F. W. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States', in G. Marks et al (eds), *Governance in the European Union* (London: Sage, 1996), 15–39; M. Ferrera, 'European Integration and National Social Citizenship: Changing Boundaries' (2003) 36 *Comparative Political Studies* 611–52.

<sup>67</sup> F. W. Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44 *Journal of Common Market Studies* 845–64, at 855.

<sup>68</sup> Scharpf, above n 9.

<sup>69</sup> Cf F. W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239–78; T. A. Börzel, 'What Can Federalism Teach Us about the European Union? The German Experience' (2005) 15 *Regional and Federal Studies* 245–57.

functional division of labour requires a strong representation of the interests of the member states at the EU level, not only to ensure an effective implementation and enforcement of EU policies for which the member states are responsible but also to prevent member states from being reduced to mere 'administrative agents' of the EU. Their reduced capacity of self-determination is compensated by strong participatory rights in the process of EU decision making, mainly in the framework of the Council, which is the equivalent of a Second Chamber. The Council as the chamber of territorial representation is organised according to the *Bundesrat* (Federal Council) principle, where the member states are represented by their governments (not by directly elected representatives or members of parliament), and in relation to their population size, with smaller states being over-represented. The functional interdependence of the EU and the member state levels of government not only gives rise to 'interlocking politics' and 'joint decision making' with a high need for consensus, but also favours the emergence of a policy-making system in which policies are formulated and implemented by the administrations on both levels of government ('executive federalism'). Functional (non-territorial) interests are only weakly represented in EU decision making and cannot even rely on alternative forms of interest intermediation, such as the party system and/or sectoral associations, as we find them in Germany or Austria.

All in all, governance with the state is based on a constitutional system of the EU, where competencies are mostly shared among the EU and the member states, where territorially defined executive interests dominate over functionally defined societal interests, and where political decisions require a high degree of consensus. It has resulted in the interpenetration of supranational and national constitutional structures that have proven impossible to be disentangled. Any attempts to delineate exclusive member state jurisdictions or re-transfer European competencies to the member state level have fallen into the joint decision trap, from which they are unlikely to escape.<sup>70</sup> Even if the Constitutional Treaty has failed, a demise of the European Constitution as it has evolved over time has been rendered impossible by the EU-induced transmutations of the member states' Constitutions. The transfer of national sovereignty rights to the EU level has given rise to the creation of a new supranational Constitution, which does not exist as an autonomous layer but is intractably interlocked with the national Constitutions. Member states have not only created the European Constitution; they must also implement its provisions to make it work. Instead of trying to 'ring-fence' member-state responsibilities, national and European constitutional provisions should focus on properly defining the role of the member states and their institutions in EU policy making. Member states have naturally lost autonomous decision-making power in the process of European integration. Yet, some state bodies have lost more than others. While national governments have been compensated by receiving ample co-decision rights in EU

<sup>70</sup> Scharpf, above n 69.

policy making, the losers are the national and regional parliaments.<sup>71</sup> They have been weakened in their constitutional relationship with the government and the courts. If political decisions are increasingly made in Brussels rather than in Berlin, London, Paris, or Warsaw, parliaments are deprived of their legislative function and seriously constrained in holding government accountable. Moreover, the supremacy and direct effect of European law gives national courts the power to overrule national legislation that does not conform to European requirements. Finally, the delegation of executive powers to independent regulatory agencies has further undermined the possibility of controlling the execution of national and European law. Upgrading the role of national parliaments or the European Parliament in EU policy making will do little to compensate for this comprehensive loss of power. Even if the Lisbon Treaty enters into force, the constitutional challenge remains: it is for member states to redefine the balance of power between the three branches of government at the domestic level taking into account the realities of multi-level constitutionalism in the European Union.

<sup>71</sup> A. Maurer and W. Wessels (eds), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden-Baden: Nomos, 2001).