

**NEW GOVERNANCE FATIGUE? ADMINISTRATION IN THE
EUROPEAN UNION**

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Work in progress; please, read it as such.

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INTRODUCTION

This paper explores a narrative of *governance as administration* in the EU. The contrapuntal framework for analysis is provided by a widely used paradigm in EU policy analysis: that which is composed of the interrelated notions of ‘new governance’, ‘multilevel governance’, and ‘network governance’. A case study is developed with regard to the Open Method of Coordination for the purpose of testing the political/legal strength and feasibility of such views of the EU, an examination that will be further particularized in the new EU policy on higher education, that is, the legal reform process that surrounds the goal of creating a European Higher Education Area by 2010.

This paper is not a comprehensive study of the approaches just mentioned. A specific question draws the analysis: how to fulfill two indispensable –yet often conflicting– goals of regulatory *efficiency* and democratic *legitimacy*. This leads to focus on two key elements of new governance: the reliance on the principles of *flexibility* and *partnership* in the design and implementation of regulatory tools. With the risk of oversimplification, flexibility seemingly deals with the efficiency problem; partnership solves that of legitimacy. In addition, *accountability*, which results from *transparency* and improved *participation*, contributes to the overall upgrading of the system and aids in the exposure and trial of *innovative* techniques. Yet, I show in my paper that new governance turns out weakest precisely on these grounds, either by brushing off the democratic implications of the paradigm through some reference to the automatic legitimating value of enhanced participation, by believing in the fulfillment of accountability through process transparency, or due to the absence of solid empirical backing to the assertion of feasibility of the model(s). I further argue that some difficulties encountered in this regard by new governance might be related to a certain aversion of these approaches towards the notions of government and administration. Having detected some insufficiencies and obsolescence of certain formulations of the administrative state, new governance seemingly disposes of it in its entirety. The new

governance paradigm(s) find themselves not only facing the challenges of proposing a new way of thinking about a problem, but also constrained by that ‘newness’ mode in the strategic choice of regulatory solutions. Thus, new governance suffers from a ‘double blind’: the insufficiencies of a model yet to be perfected, and the unwillingness to resource to elements that can be identified with ‘old’ paradigms of the regulatory state. My answer to these dilemmas can be considered a form of return to administration, albeit one transformed by the need to address contemporary problems. Borrowing from what has recently been argued in the emerging field of global of administrative law, most institutions that engage in what comes under the aegis of ‘governance’

“perform functions that most national public lawyers would recognize as having a genuinely administrative character: they operate below the level of highly publicized diplomatic conferences and treaty-making, but in fact regulate and manage vast sectors of economic and social life through specific decisions and rule-making.”¹

This move may facilitate a virtuous cycle of feedback between the two approaches; the purpose is not to side with either discourse, but to establish a common code of understanding that may encourage further engagement. Of course, a mere return to administration does not solve the question that this paper addresses. The dilemma of the tension between efficiency and legitimacy has been the kernel of administrative law for many a decade. This fact both helps us by providing a wealth of thinking on this matter, but also charges us with the heaviness of a problem many times addressed, never fully resolved. I argue that it becomes necessary to push administrative law thinking further in the direction of democratic theory and, more specifically for the problem at hand, to resort to a normative notion of the *public* in ‘administrative terms’. This will provide a yardstick to address the hard questions of who is/should be empowered (or left out) by the specific regulatory arrangements under scrutiny. A panoramic view of regulatory power in the EU space coupled with a notion of the public sheds new light on the dilemmas of legitimacy and accountability in the EU administrative arena, refining the models proposed by scholars in some cases, suggesting a different path in certain

¹ Benedict Kingsbury, Nico Krisch, Richard Stewart, *The emergence of Global Administrative Law* 6 (IILJ Working Paper 2004/1 (Global Administrative Law Series)(www.iilj.org)) [update 68 (3) *Law & Contemp. Probs.* 2005)

points. Here a key conceptual move is the repeated exposure of the interplay between commonality and difference that impregnates the EU regulatory space(s). This interplay is reflected in various institutional and decisionmaking arrangements that represent a micro-cosmos of politics in a Europe of multiple demoi. Exploring this venue serves the double purpose of de-mystifying the partnership governance paradigm and opens up space for an alternative view that acknowledges the pervasiveness of difference, conflict, and fragmentation.

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I. 'NEW GOVERNANCE' IN THE EUROPEAN UNION

1. NEW GOVERNANCE: A CONTESTED NOTION

The literature on new governance is vast and variegated. This part looks only at a sample of significant works whose specific focus is the EU, as well as to a few others that, while conceived for different contexts, provide useful insights for the problems that this paper addresses.

In the familiar story of the emergence of new governance as a paradigm to understand world politics, the traditional conceptual framework of the Nation-State has been substantially transformed by the (supposed) emergence of global, transnational, cosmopolitan, international, or virtual civil societies and justice claims that defy attempts to confine the operational grounds of politics and establish a straightforward correlation between political activism and a response on the part of government institutions. Power persistently moves upward to the supranational, downward to the local, and outward to the transnational and the private. At the same time, the "State strikes back", as scholars strive to account for these changes while putting forward re-conceived notions of the state that would hold for it, if not a comprehensive role, that of *primus inter pares* amongst political actors.² In the EU additional events complete the story. The momentum gathered by the integration process coexists with a prevailing sense of 'normalization'.³ The perception that the EU can be considered as a *polity* has taken root and, correspondingly, an emerging European democracy serves as a stage for the assessment of new and old theories of politics. A The EU has thus become a favored

² Anne-Marie Slaughter, *The Real New World Order*, 76 *Foreign Affairs* (No. 5) 183 (1997)

³ Markus Jachtenfuchs, *The governance approach to European integration*, 39(2) *JCMS* 245, at 248 (2001)

subject for a range of scholars –policy analysts, constitutional and administrative scholars, etc.- who are not interested in the question of integration per se.⁴

It is in this context that the paradigm of *new governance* has found a welcoming breeding ground. The image of a system of *governance*—a term, I should indicate, of nearly impossible translation to some languages - appears suited to scenarios that do not fit neatly with standard notions of government, but where an appeal is made to the preservation of a certain order through the formulation and enforcement of rules, as it is the case of private or international settings. Generally, governance is linked to pluralistic views of the state where attention is turned to the multiple links between the public and private spheres, that is, between government agencies and interest groups that constitute the fabric of contemporary regulatory regimes. In this setting, the language of coercion and legalism is replaced by ideas of managerialism and voluntary cooperation: “if

⁴ Still, the term polity, so deeply charged in Europe by its historical connection to the formation and consolidation of the system of Nation-States, seemingly needs to be seasoned by qualifications that serve to detach them from these *statal* connotations, as well as for the purpose of leaving behind the traditional two poles of intergovernmentalism and supranationalism. See: Philippe Schmitter, *Examining the Present Euro-Polity with the Help of Past Theories*, in: GARY MARKS, FRITZ SCHARPF, PHILIPPE SCHMITTER, WOLFGANG STREECK, *GOVERNANCE IN THE EUROPEAN UNION* 1-2 (1996)) Through the last decade, this “continuing paradoxical relationship between a non-state polity and a touch of stateness presented often implicitly in analyses of this polity” (Shaw & Weiner, 2000) has led to highlight the Union’s embryonic, unique, or simply weird nature through labels such as “part-formed” (Laffan, 1999), “emerging polity” (Hooghe & Marks, 2001), “contested polity” (Banchoff & Smith, 1999), “polity of a new kind” (Streeck, 1996), “huge new political entity” (Haller, 2001), “*sui generis* political system” (Eising & Kohler-Koch, 1999) , “strange sort of polity” (Abromeit, 1998), “political system but not a state” (Hix, 1999), “mixed polity” (Bellamy & Castiglione, 2000); “composite polity” (Tarrow, 2001); “single, though diverse, polity” (Hooghe & Marks, 2001), “dispersed polity” (Schmitter, 1996), that “moves in the direction of an autonomous European political order” (Börzel & Risse, 2000). (see: Jo Shaw and Antje Weiner, *The paradox of the European Polity*, in: MARIA GREEN COWLES & MICHAEL SMITH (eds.), *THE STATE OF THE EUROPEAN UNION (VOL. 5) RISKS, REFORM, RESISTANCE, AND REVIVAL* 87 (2000); Brigid Laffan, *Democracy and the European Union*, in: LAURA CRAM, DESMON DINAN, and NEILL NUGENT (eds.): *DEVELOPMENTS IN THE EUROPEAN UNION* 330 (1999); LIESBET HOOGHE and GARY MARKS, *MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION* 34 (2001); THOMAS BANCHOFF and MITCHELL SMITH, *LEGITIMACY AND THE EUROPEAN UNION. THE CONTESTED POLITY* (1999); Wolfgang Streeck, *Neo-voluntarism: a new European social policy regime?*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER AND WOLFGANG STREECK, *GOVERNANCE IN THE EUROPEAN UNION* 64 (1996); Max Haller, *Servants of Power or Providers of Indispensable Ideas? The Role of Scientists and the Use of Social Science in the Making of the European Union*, in: MAX HALLER (ed.): *THE MAKING OF THE EUROPEAN UNION. CONTRIBUTIONS OF THE SOCIAL SCIENCES* 3 (2001)); Rainer Eising and Beate Kohler-Koch, *Network Governance in the European Union*, in: BEATE KOHLER-KOCH and REINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 3 (1999); HEIDRUN ABROMEIT: *DEMOCRACY IN EUROPE. LEGITIMISING POLITICS IN A NON-STATE POLITY* 3 (1998)); SIMON HIX: *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 2 (1999); Richard Bellamy and Dario Castiglione, *The Uses of Democracy. Reflections on the European Democratic Deficit*, in: ERIK ODDVAR ERIKSEN and JOHN ERIK FOSSUM (eds.), *DEMOCRACY IN THE EUROPEAN UNION. INTEGRATION THROUGH DELIBERATION?* 69(2000)), Sidney Tarrow, *Contentious Politics in a Composite Polity*, in: DOUG IMIG and SIDNEY TARROW (eds.): *CONTENTIOUS EUROPEANS. PROTEST AND POLITICS IN AN EMERGING POLITY* 233 (2001); LIESBET HOOGHE and GARY MARKS, *MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION* 119 (2001), Philippe Schmitter, *Imagining the Future of the Euro-polity with the Help of New Concepts*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER AND WOLFGANG STREECK, *GOVERNANCE IN THE EUROPEAN UNION* 127 (1996); Tanja Börzel and Thomas Risse, *Who is afraid of a European Federation? How to Constitutionalize a Multi-level Governance System*, in: CHRISTIAN JOERGES, YVES MÉNY, and J.H.H. WEILER (eds.), *WHAT CONSTITUTION FOR WHAT KIND OF POLITY?* RESPONSES TO JOSCHKA FISCHER 45 (2000))

government denotes the formal exercise of power by established institutions, governance denotes cooperative problem-solving by a changing and often uncertain cast.”⁵

In European integration studies, governance became a handy term for those attempting to move away from the historically loaded language of the Nation-State, shifting the debate away from “zero-sum notions associated with discourses of sovereignty.”⁶ Governance, argue its proponents, has “opened up a new conceptual space for thinking about political order, which goes beyond anarchy and hierarchy.”⁷ Broadly speaking, governance is simply the “ability to make collectively binding decisions”, in which case, warns Jachtenfuchs, its coverage is close to that of politics.⁸ Kohler-Koch understands governance as the general allocation of resources: “[g]overnance is synthetic: it results from a mix of factors, including political leadership, state-society relations, institutional competition, electoral politics, and so on.”⁹ In other words, governance would refer to the translation of individual citizen preferences into collective policy choices.¹⁰

Here is where the convenience of the term ends. What governance exactly translates into –in observable political processes, institutional arrangements, or systems of rules-, what differentiates ‘new’ from ‘old’ governance in the EU, remains the subject of much academic territory claiming. In a book on the topic, Eising and Kohler-Koch survey the fields of IR and comparative politics.¹¹ For these authors, ‘governance’ is no more than a broad term for patterns of governing, with or without the presence of a government proper. Yet, they point out, many governance scholars are in reality emphasizing ‘new’ process of governing where the absence of a central authority is a

⁵ Anne-Marie Slaughter, *The Real New World Order*, 76 *Foreign Affairs* (5) 184 (1997)

⁶ BEN ROSAMOND, *THEORIES OF EUROPEAN INTEGRATION* 17 (2000)

⁷ Jürgen Neyer: *Discourse and Order in the EU: a Deliberative Approach to Multi-Level Governance* 41(4) *JCMS* 687, at 288 (2003)

⁸ Markus Jachtenfuchs, *The governance approach to European integration*, 39(2) *JCMS* 245, at 246 (2001)

⁹ JOHN PETERSON and ELIZABETH BOMBERG, *DECISION-MAKING IN THE EUROPEAN UNION* 5 (1999)

¹⁰ Beate Kohler-Koch, *The evolution and transformation of European governance*, in: BEATE KOHLER-KOCH & RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 14 (1999) A post-structuralist analysis of EC governance defines it as “a contested process of introducing organisation and order into an unstable discursive environment. Regimes of governance are locations where people, individuals, nature and artifacts are transformed into objects of interventions and become ‘governable’.” (Herbert Gottweis, *Regulating genetic engineering in the European Union. A post-structuralist perspective*, in BEATE KOHLER-KOCH & RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 63 (1999))

¹¹ BEATE KOHLER-KOCH & RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* (1999)

pervasive feature, resulting in a political arena “populated by formally autonomous actors who are linked by multi-faceted interdependencies.”¹²

In the US context, Karkkainen argues that new governance refers to a “loosely related” cluster of approaches, each formulated as “a corrective to the perceived pathologies of regulation”, and characterized by a rejection of “fixity, state-centrism, hierarchy, excessive reliance of bureaucratic expertise, and intrusive prescription”, aiming instead at being “open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic”, often with an emphasis on “the capacity and the necessity to continuously generate new learning and to adjust in response to new information and changing conditions, systematically employing information feedback loops, benchmarking, rolling standards of best practice, and principles of continuous improvement.”¹³ For Neyer, governance is coupled with the promotion of a “deliberative style” that can lead to efficient, effective and qualitatively better outcomes.¹⁴

Combined, these phenomena suggest a layout of political power characterized by: absence of central authority, uneven geometry, and deep contextualization. Political actors: are multiple, assemble in networks, enjoy relative autonomy, cooperate with each other, and aim at consensus. Regulatory approaches favor: high participation, flexibility, innovation, and reconsideration of interests, problems, and solutions.¹⁵ Next, I untangle this conception of new governance through the examination of the notions of the EU as a system of *multi-level governance* and *network governance*.

¹² “They suggest further that political arenas and societal sub-systems develop their own rationale and logic of decision-making and are only loosely coupled to other political arenas. And last, not least, they call attention to the maintenance of order and patters of co-operation despite the absence of central organising and regulatory authority. From a theoretical point of view, both sub-disciplines emphasise the role of ideas and the relevance of institutions for the structuring of expectations and behaviour and the shaping of interests and identities.” (BEATE KOHLER-KOCH & RAINER EISING (eds.), THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION 4 (1999))

¹³ Karkkainen, Bradely C., “New governance” in legal thought and in the world: some splitting as antidote to overzealous lumping”, 89 Minn. L. Rev. 471, at, 472, 474 (2004)

¹⁴ Jürgen Neyer: *Discourse and Order in the EU: a Deliberative Approach to Multi-Level Governance* 41(4) JCMS 687, at 688 (2003) [add other Neyer biblio]

¹⁵ In some cases, new governance is defined strictly in opposition to the traditional Community Method, comparison from where its features (expended participation, power-sharing, multi-level integration, respect for diversity, decentralization, enhanced deliberation amongst stakeholders, flexibility, revisability (sic), experimentalism, and knowledge creation) are drawn (Joanne Scott and David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union* 8(1) ELJ 1 (2002).

2. THE EUROPEAN UNION AS A SYSTEM OF MULTI-LEVEL NETWORK GOVERNANCE

2.1. An International Relations background

International relations and its sub-field of European integration studies have contributed decisively to the development of the new governance paradigm(s). Here, the traditional central issue has traditionally been “the fate of the nation-state.”¹⁶ This quest has often been spurred by a fear of its destruction.¹⁷ Through the 1970’s, ‘interdependence’ and ‘trans-nationality’ made their appearance.¹⁸ Very roughly stated, these notions sought to reveal a world where relationships of economic and political cooperation took place amongst multiple actors, including states, supra and sub-national government entities, transnational interest groups, and the booming NGOs.¹⁹ In this scheme, loosely structured network-type organizations challenge long-standing ideas about hierarchical institutions. State bureaucracies are continuously penetrated by a

¹⁶ Stanley Hoffmann, *Decline or Renewal? France Since the 1930s* (1960), reprinted at: STANLEY HOFFMANN, THE EUROPEAN SISYPHUS. ESSAYS ON EUROPE 1964-1994, 71 (1995)

¹⁷ Such destruction would be caused by forces capable to “subvert its political independence, to undermine the collective identity on which it is based, and to weaken its democracy.” (KJELL GOLDMANN, TRANSFORMING THE EUROPEAN NATION-STATE 1 (2001)) Thus, a central issue in European integration analysis has been whether the Communities/Union constitutes a “new ‘post-national’ political system in which the authority of national governments was destined to recede.” (BEN ROSAMOND, THEORIES OF EUROPEAN INTEGRATION 10 (2000)) William Wallace offers a contemporary version of the primary question: “Are underlying patterns of industrial production, technological innovation, financial integration and social interchange undermining the foundations of European nation-states, or have national frameworks successfully adapted without losing their autonomy and legitimacy?” (WILLIAM WALLACE, THE TRANSFORMATION OF WESTERN EUROPE 1 (1990)) The principal task attached to this effort has been to determine whether it was possible to unveil some logic behind such processes, or even a universal dynamics of regional integration. This enterprise would serve the ultimate goal of discovering “what is generalizable about EC history” and “ultimately, beyond Europe.” (ANDREW MORAVCSIK, THE CHOICE FOR EUROPE. SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 1, 2 (1998)) The history of IR is permeated by several ‘great debates’ concerning its demarcation and appropriate methodology and its permeability to political and social theories. For an accessible overview, see: Ole Wæver, *Figures of international thought: introducing persons instead of paradigms*, in: IVER NEUMANN AND OLE WÆVER, (eds.), THE FUTURE OF INTERNATIONAL RELATIONS. MASTERS IN THE MAKING? 8(1997). For a comprehensive compilation of landmark articles in the field of IR, see: ANDREW LINKLATER (ed), INTERNATIONAL RELATIONS. CRITICAL CONCEPTS IN POLITICAL SCIENCE (5 Vols.),(2000). For a much more limited but also interesting selection, see: JAMES DER DERIAN (ed.), INTERNATIONAL THEORY. CRITICAL INVESTIGATIONS (1995)

¹⁸ See, generally: ROBERT KEOHANE and JOSEPH NYE (eds.), TRANSNATIONAL RELATIONS AND WORLD POLITICS (1972); Robert Keohane and Joseph Nye, *Transgovernmental Relations and International Organizations* XXVII World Politics (1) 39 (1974); ROBERT KEOHANE & JOSEPH NYE. POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 23 (1997); ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE (3rd. ed., 2001)

¹⁹ See Joseph Nye and Robert Keohane’s original formulation of ‘complex interdependence’ in: ROBERT KEOHANE and JOSEPH NYE. POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 25 (1977)

multitude of stakeholders whose identification was virtually impossible. The boundaries between state and civil society are constantly redrawn.²⁰

This theme of *complexity* found fertile ground in the Community context. Here, a combination of increased regional interaction –economic, political, geo-strategic, and otherwise–, and the atypical institutional and decisional arrangements of the Communities coalesced around the interdependence paradigm sketched above. In this scheme of things, trans-nationality cut across traditional political and jurisdictional boundaries in the shape of *policy networks* sewn by governmental actors and interest groups, where relationships were perceived as informal yet stable, and deeply symbiotic despite being driven by the strategic impulses of rational self-interest.²¹ Yet, from the 1970’s until the mid-1980’s, were also the years when Community processes appeared –through the lenses of IR!²²– more firmly cemented on an intergovernmental course. With the re-launching of the integration process in the mid-1980’s, the institutional framework and powers of the Communities/Union came ever closer to those of a traditional state, yet retaining a distinct flare. Thus, it has invariably been the conceptual framework of the Nation-State that has continued to provide the reference on which to build some form of

²⁰ As a result, explains Wæver, the international system was presented as: “a pluralist system of numerous sub-state and trans-state actors who made up a much more complicated image than the usual state-to-state one. States did not exist as such - various actors within the state interacted to produce what looked like state policy, and sometimes even dodged the state and made their own linkages across frontiers. Not only were there other actors than the state, but also the state was not the state, it was split up into networks of bureaucracies, interest groups and individuals. Nor was the system a system, because power was no longer ‘fungible’ in the monetary sense, and instead of all the political arenas being connected in one great game, it was necessary to study specific issue areas, their distinctive distributions of power, maybe their specific forms of power, and then to work out separate theories about how issue linkages were made, how issues were politicized and de-politicized, and agendas set (realists did not need to do this because they assumed that all areas and all power deposits were always potentially linked).” (Ole Wæver, *Figures of international thought: introducing persons instead of paradigms*, in: IVER NEUMANN AND OLE WÆVER (eds.), *THE FUTURE OF INTERNATIONAL RELATIONS. MASTERS IN THE MAKING?* 13 (1997))(REFERENCES OMITTED)

²¹ Key interrelated implications of these approaches were to downplay the centrality of states in the political arena, blur the distinction between the international and the domestic, and resuscitate the relevance of institutions for the facilitation of cooperation. At the same time, the teleological orientation of integration theory began to recede, as it became increasingly apparent that, in the view of the moods and swings in the life and times of the Communities, stable relations of cooperation may or may not move in the direction of further integration.

²² As Weiler explains: “The period of the mid-1970’s to the mid-1980’s is traditionally considered a stagnant epoch in European integration. The momentum created by the accession of Great Britain, Ireland, and Denmark did not last long. The Oil Crisis of late 1973 displayed a Community unable to develop a common external posture. Internally the three new Member States, two of which, the UK and Denmark, were often recalcitrant partners, burdened the decisionmaking process, forcing it to a grinding pace. It is not surprising that much attention was given in that period to proposals to address a seriously deteriorating institutional framework and to relaunch the Community. [] And yet it is in this politically stagnant period that another large scale mutation in the constitutional architecture of the Community took place...” ... “The principal feature of the period lasting from the mid-70’s into the 80’s is that precisely in this period, one of political stagnation and decisional malaise, another important, if less visible, constitutional mutation, the erosion of the limits to Community competences- took place” (Joseph Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403 at 2431, 2453 (1991))

critique, complement, or partial replacement. Thinking and re-thinking politics within a Nation-State system might be unavoidable. In the end, as Linklater and MacMillan argue, “change has to pass through states although it may have originated elsewhere.”²³

If the debates of the previous decades had been presented in terms of a mutually exclusive split between state-centrism (intergovernmentalism) and supranationalism, the decade of the 1990’s saw the acceptance by many of their juxtaposition. Seemingly contradictory rationales coexist and encroach on each other in a creative dialectical process. EU policies are seen as the result of forces that emerge in political arenas at various territorial levels (sub-national, national, supra- and trans-national) in forms that defy traditional pyramidal views regarding the dynamics of power. Incremental change takes place as much through landmark legal reforms as through everyday practices of policy formulation and implementation.²⁴ The EU is seasoned with abundance of allusions to complexity, hybridism, ambiguity, contingency, informality, diversity, asymmetry, experimentalism, syncretism, ambivalence, fragmentation, fluidity, elusiveness, variable geometry, multiple speeds.

2.2. Multi-level governance

In this context, the term multi-level governance has become a popular –if often taken as self-explanatory- token to describe the political system of the Union, a term that has permeated the jargon of institutional documents. Today, multi-level governance has become a versatile metaphor that covers an ever-growing range of political environments, actors, and legal processes: from the cohesion policy to the environmental policy, from the role of regions in the design of European policies to the implementation of Union law through the administrative apparatuses of the MSs, from the Open Method of Coordination to the interlocking of the constitutional systems of the Member States and

²³ Andrew Linklater and John MacMillan, *Boundaries in Question*, in: JOHN MACMILLAN and ANDREW LINKLATER, *BOUNDARIES IN QUESTION. NEW DIRECTIONS IN INTERNATIONAL RELATIONS* 14 (1995)

²⁴ For a distinction between formal and informal integration, see: WILLIAM WALLACE, *THE TRANSFORMATION OF WESTERN EUROPE* 54 (1990))

the Union.²⁵ While some studies are explicit in the use of the multi-level governance framework and others employ the term as little more than a metaphor, multi-level governance can be connected to a thriving range of works that focus on themes intrinsic to the consideration of the EU as a regulatory ‘state’ –theories of regulation, policy networks, interest intermediation, issue-specific regulatory schemes, etc.-, the application of constitutional themes to the legal structure of the Union, and the assault of integration theory on classic themes in the study democracy.²⁶ For our purposes, multi-level governance promotes a shift of research agendas from the problem of integration per se, to the use of the empirical ground of the EU for the assessment of theories of law and politics, thus bringing the level of analysis down to the specifics of day-to-day policymaking.

As formulated through the 1990’s, nevertheless, multi-level governance was an explicit response to the perceived insufficiency of state-centered approaches to explain the “independent influence of supranational institutions and the mobilization of domestic actors directly in the European arena”.²⁷ Multi-level governance thus set off to describe the “dispersion of authoritative decision making across multiple territorial levels”.²⁸ This

²⁵ In the years following these initial formulations, developments such as the policy expansion articulated from the Treaty of Maastricht onwards, the enhancement of the powers of the European Parliament, the establishment of the Committee of the Regions, the growing use of qualified majority voting in the Council, the independence of the Commission as a regulator, the activism displayed by the European Court of Justice, the substantial internal decentralization taken by some Member States, the tangible mobilization of regional governments in Brussels, or the more visible presence of interest group lobbying in the European arena- have been seen as indicators of the expandability of MULTI-LEVEL GOVERNANCE as a general descriptor of the policy universe of the EU. (See: LIESBET HOOGHE and GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION 1-32 (2001))

²⁶ While today one can find a flow of papers applying the MULTI-LEVEL GOVERNANCE rationale –or variations thereof- to a variety of regulatory settings, analysts such as Helen Wallace and William Wallace acknowledge MULTI-LEVEL GOVERNANCE as one in a range of coexisting ‘policy modes’, and restrict MULTI-LEVEL GOVERNANCE to distributional policies. (See: *Helen Wallace, The Institutional Setting. Five Variations on a theme*, in: HELEN WALLACE AND WILLIAM WALLACE, POLICY-MAKING IN THE EUROPEAN UNION 1-37 (2000)) Other scholars take pains at emphasizing the multi-faceted nature of policy-making in the Union, and predict that in the future “there will be no single dominant style of policy-making for the simple reason that there will be no single Europe. In each of the multiple, partial and overlapping ‘Europes’ that are emerging, there will be a distinctive style of collective action depending on the mixture of territorial units and functional constituencies involved ... Whatever emerges, it will not so much resemble the policy style of any of the existing national member states as constitute something novel.” (emphases omitted) (Philippe Schmitter, *Imagining the future of the Euro-polity with the help of new concepts*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER AND WOLFGAN STREECK, GOVERNANCE IN THE EUROPEAN UNION 145 (1996))

²⁷ Gary Marks, François Nielsen, Leonard Ray and Jane Salk, *Competencies, cracks and conflicts: regional mobilization in the European Union*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER AND WOLFGAN STREECK, GOVERNANCE IN THE EUROPEAN UNION 41 (1996).

²⁸ Liesbet Hooghe and Gary Marks, *Multi-level Governance and European Integration* xi (2001) Due to its formulation within the confines of the IR debate over the autonomy of Nation-States, this initial formulation of

new form of looking at the European political space claims the loss of the monopoly of political power by the states and the existence of overlapping and interconnected (rather than nested) political arenas.²⁹ The image of the EU space is that of a ‘European polity’ that “stretches beneath and above the central state.”³⁰ The polities within the Member States are reshaped as a result of the mechanisms of policy-making at the EU level.³¹ *Complexity* seems to be the ubiquitous feature of the EU arena. A central problem becomes the “diversity and sheer number of powerful actors who have to be mobilized, negotiated with, cajoled, or defeated in the process of power redistribution and institutional creation.”³²

2.3. Network governance

While the literature on policy networks has a long and varied tradition, and the term itself has expanded to the point of referring broadly to the existence of “repeated relations of exchange contributing to outcomes in public policy”³³, policy networks are now often seen as an expression of the ‘new governance’ mode that seemingly characterizes the EU. The use of the vast literature on policy networks has allowed for a

MULTI-LEVEL GOVERNANCE was particularly intent in investigating the magnitude, causes, and dynamics of sub-national mobilization directly in the EU arena. Gary Marks and Doug McAdam, *Social Movements and the Changing Structure of Political Opportunity in the European Union*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER and WOLFGAN STREECK, GOVERNANCE IN THE EUROPEAN UNION 109 (1996); Gary Marks, François Nielsen, Leonard Ray and Jane Salk, *Competencies, Cracks and Conflicts: Regional Mobilization in the European Union*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER AND WOLFGAN STREECK, GOVERNANCE IN THE EUROPEAN UNION 62, 40-63, 63 (1996) For a seminal analysis cohesion policy as the basis to develop the MULTI-LEVEL GOVERNANCE conceptual framework, see: LIESBET HOOGHE (ed.), COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTI-LEVEL GOVERNANCE, specially pp. 1-24 (1996) See, also: LIESBET HOOGHE and GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION 81-92. Also, see: Stephen Ward and Richard Williams, *From Hierarchy to Networks? Sub-central Government and EU Urban Environment Policy*, 35(3) JCMS 439 (1997)

²⁹ Gary Marks, François Nielsen, Leonard Ray and Jane Salk, *Competencies, cracks and conflicts: regional mobilization in the European Union*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER and WOLFGAN STREECK, GOVERNANCE IN THE EUROPEAN UNION 41-42 (1996)

³⁰ LIESBET HOOGHE and GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION 78 (2001) A system composed of multiple levels of government is the result of ‘centripetal process’ that takes decisionmaking power away from the national level, both upward to the EU and downward to subnational governments. (Gary Marks and Doug McAdam, *Social Movements and the Changing Structure of Political Opportunity in the European Union*, in: GARY MARKS, FRITZ W. SCHARPF, PHILIPPE SCHMITTER and WOLFGAN STREECK, GOVERNANCE IN THE EUROPEAN UNION 102 (1996))

³¹ HELEN WALLACE AND WILLIAM WALLACE, POLICY-MAKING IN THE EUROPEAN UNION 31-32 (2000)

³² LIESBET HOOGHE and GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION 35 (2001)

³³ Alison Woodward, *Challenges for Democratic organization and Citizen Voice in the European Process*, in: MAX HALLER (ed.): THE MAKING OF THE EUROPEAN UNION. CONTRIBUTIONS OF THE SOCIAL SCIENCES 203 (2001)

substantial expansion of the coverage of the multi-level governance framework, from its original formulation as an strictly vertical evaluation of the relative powers of territorial governments at the EU level, to a holistic consideration of political dynamics in the EU space, now seen as a complex set of policy networks of varied character, coverage, and functionality.³⁴ The notion of policy network functions as a basal organizational node for policy decisionmaking in the EU.³⁵ Observing the EU from a policy network perspective allows shifting the level of analysis to that of a policy analyst. This view exposes and intricate map where public authority appears scattered across territorial and functional levels, revealing a diversity of actors and decisional patters not susceptible of simplification into one single model. Let me offer a definitional sample.

For Eising and Kohler-Koch, the notion of ‘new governance’ is restricted to that of ‘network governance’:

“The core idea of ‘network governance’ is that political actors consider problem-solving the essence of politics and that the setting of policy-making is defined by the existence of highly organised social sub-systems. In such a setting, efficient and effective governing has to pay tribute to the specific rationalities of these sub-systems. The ‘state’ is vertically and horizontally segmented and its role has changed from authoritative allocation ‘from above’ to the role of an ‘activator’. Governing the EC involves bringing together the relevant state and societal actors and building issue-specific constituencies. Thus, in these patterns of interaction, state actors and a multitude of interest organisations are involved in multilateral negotiations about the allocation of functionally specific ‘values’. As a consequence, within the networks the level of political action ranges from the central EC-level to decentral sub-national levels in the member states. The dominant orientation of the involved actors is towards the upgrading

³⁴ As Jachtenfuchs indicates, the “network concept appeared particularly well suited to grasp the essence of multi-level governance in the European Union... [T]he network metaphor became a fruitful heuristic device” that allowed for a much better understanding of the actual practices of policy-making.(Markus Jachtenfuchs, *The governance approach to European integration*, 39(2) JCMS 245, at 254 (2001) See, also: Markus Jachtenfuchs, *Theoretical Perspectives on European Governance*, 1(2) ELJ 115 (1995))

³⁵ For Anne-Marie Slaughter -writing on global governance- government networks “have become the signature form of governance of the European Union, which is itself pioneering a new form of regional collective governance that is likely to prove far more relevant to global governance than the experience of traditional federal states.” (ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 11 (2004) Furthermore, Slaughter certain takes certain aspects of the EU as a model for world governance because the predominance of trans-nationality (as translated into the network organizing mode) is the “genius of the European Union”, an arrangement that allows the Member States to maintain their autonomy while “reaping the benefits of collective governance through government networks.” Her ideal “disaggregated” world order “...would be a world latticed by countless government networks. In form, these networks would include both horizontal and vertical networks. In function, they would include networks for collecting and sharing information of all kinds, enforcement cooperation, technical assistance and training, as well as policy coordination and rule harmonization. In scope, they would be bilateral, plurilateral, regional and global. [] The defining feature of government networks is that they are composed of government officials and institutions –either national to national in horizontal networks, or national to supranational, in vertical networks. Yet they coexist and increasingly interact with networks of nongovernmental actors, both from the private and nonprofit sectors. Similarly, members of government networks interact with one another informally, at least in the eyes of the law and traditional diplomacy of the international system. Yet, their networks exist alongside and within formal international organizations.” (ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 134, 131-133 (2004)

of common interests in the pursuit of individual interests. Incorporated in this concept is the idea that interests are not given as it is assumed in ideal-type assumptions about pluralism and corporatism, but that they may evolve and get redefined in the process of negotiation between the participants of the network.”³⁶ (Kohler-Koch & Eising, 1999)

For Börzel, a lowest common denominator definition is

“a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests acknowledging that co-operation is the best way to achieve common goals.”³⁷

Network governance, thus, is meant to speak about the nature of political struggles, the distribution of political power and, particularly, about the actors involved, the relationships developed amongst them, and the dynamics of power and decision-making resulting thereof. Slaughter, speaking of global government networks, points to the activities of these networks and the concomitant interest of its members in their formation and preservation, such as the expansion of the regulatory reach of government officials, building relationships of trust amongst the participants, creating incentives for the establishment of good reputations, pooling of information and development of best practices.³⁸ In such context, the State re-emerges in its disaggregated form, decomposed into a multiplicity of relatively autonomous decision-makers, political arenas, and policy networks. For Slaughter, the functionally diverse parts that compose the new state network with their foreign counterparts, “creating a dense web of relations that constitutes a new, transgovernmental order.”³⁹

2.4. Join the network! Effective governance under the partnership principle

³⁶ Rainer Eising and Beate Kohler-Koch, *Network Governance in the European Union*, in: BEATE KOHLER-KOCH & RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 5-6 (1999)

³⁷ Tanja Börzel, *Organizing Babylon. On the different conceptions of policy networks*, 76 *Public Administration* 253, 254 (1998) Risse-Kappen’s review of the international relations and comparative politics literatures points to a convergence in their conceptualization of the EU as a multi-level structure of governance where “private, governmental, transnational and supranational actors deal with each other in highly complex networks of varying density, as well as horizontal and vertical depth” (Thomas Risse-Kappen, *Exploring the nature of the beast: international relations theory and comparative policy analysis meet the European Union*, 34 *JCMS* 53, 62 (1996))

³⁸ ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 3 (2004)

³⁹ Anne-Marie Slaughter, *The Real New World Order*, 76 *Foreign Affairs* (5) 184 (1997)

The nature and dynamics of the relationships amongst the members of policy networks –including both public and private actors- in a system of governance are crucial defining elements. The idea of *partnership* sums up the many qualities that analysts attribute to such relationships. For practical purposes, then, I refer to *partnership governance* as a mode of governing where actors (public and private) assemble in policy networks where relationships within are characterized by (variable degrees) of cooperation, trust, and equality. In such system, politics is conceived as joint problem-solving. It is, therefore, openly participatory and a high premium is placed on those techniques that foster the pooling of knowledge and innovation.

It is indeed the overarching possibility of *cooperation* that defines the dynamics of the system and leads to promote and consolidate relationships between public and private entities characterized by *trust*. The repeated player rationale contributes to consolidate this mode of dealing. Actors are “tied up in a stable negotiating system which puts a high premium on ‘Community friendly’ behavior.”⁴⁰ The ability of policy networks to juggle internal divergence and collaboration leads to characterize the relationships amongst its member as forms of *partnership* that lead to the overcoming of collective action problems. The resulting relationships are inherently symbiotic.⁴¹ Some scholars do not see this dynamics as conducive to the repression of difference. For Christian Joerges, for example, the non-hierarchical coordination that characterizes the operations of networks “does not seek to overcome divergences in the analytical premises and foci, or differences in the conceptual frameworks and normative ideas. Instead, it seeks to exploit this diversity productively.”⁴² In such settings, networks can be defined as patterns of interaction with specific characteristics, such as *decentralization*,

⁴⁰ Beate Kohler-Koch, *The Evolution and Transformation of European Governance*, in: BEATE KOHLER-KOCH AND RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 26 (1999).

⁴¹ The network approach, argues Ballmann, reveals “symbiotic exchange relationships with a real exchange of resources on the basis of equivalence and mutuality. They are characterized by a high frequency of interactions, thus making the continuity of the relation a value in itself for which it is worth to bring sacrifices and employ resources.” (Alexander Ballmann, *Infranationalism and the Community Governing Process*, Annex to: EUROPEAN PARLIAMENT (DIRECTORATE GENERAL FOR RESEARCH), *CERTAIN RECTANGULAR PROBLEMS OF EUROPEAN INTEGRATION*, Project IV/95/02 (prepared under the direction of J.H.H. Weiler))

⁴² Christian Joerges, *The Law’s Problems with the Governance of the European Market*, in: Christian Joerges and Renaud Dehousse (eds.), *Good Governance in Europe’s Integrated Market* 3 (2002).

informality, and *non-hierarchy*.⁴³ Negotiating arenas are multiple and overlapping, and the role of the State is reduced to that of a facilitator, activator, coordinator, or mediator in the processes of negotiation and joint problem-solving that take place within each policy network. The abandonment of traditional “interventionist and legalistic” policy styles in favor of an open approach to relationships with private groups, as well as the normalization of broad consultative processes, are said to enhance *legitimacy* and *accountability* of the system, “break down boundaries between policy areas, so prevalent at the [European Community] level, and broaden as well as deepen communication channels between previously insulated policy makers.”⁴⁴ This leads to “cooperative rather than competitive interaction patterns among a large variety of actors.”⁴⁵ This *cooperative* or collaborative mode of operating owes a great deal to the common vocabulary propitiated by the *expertise* shared by the members of the network. In this sense, policy networks are very proximate to the notion of epistemic community.⁴⁶ The degree of internal cohesion, then, will be a function of the common ground found through collective understandings and modes of operation that are specific to the area of expertise of the members of the community.⁴⁷ The exchange of the resource knowledge operates as a major incentive for the active participation in the network.

⁴³ Thomas Risse-Kappen, *Exploring the nature of the beast: international relations theory and comparative policy analysis meet the European Union*, 34 *JCMS* 53 (1996)

⁴⁴ Andrea Lenschow, *Transformation in European Environmental Governance*, in: BEATE KOHLER-KOCH AND RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 47 (1999).

⁴⁵ Gerda Falkner, *European Social Policy. Towards multi-level and multi-actor governance*, in: BEATE KOHLER-KOCH AND RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 93 (1999)

⁴⁶ An epistemic community is defined by Peter Haas as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and (4) a common policy enterprise – that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.” (Peter Haas, *Epistemic communities and international policy coordination*, 46(1) *International Organization* 1, at 3 (1992)

⁴⁷ Some scholars point out that trust also commands the conditions for entry, which would hence depend more on the recommendation of existing members “than it does on position in a formal or constitutional system.” IPaul Burton, *Policy Networks and the Implementation of the European Union’s Structural Funds*, in: STRATOS KONSTADINIDIS (ed.), *A PEOPLE’S EUROPE. TUNING A CONCEPT INTO CONTENT* 234 (1999) Others emphasize the role of communicative action and trust as constitutive elements of interactions among such members. Risse-Kappen, for example, argues that communicative action is promoted in settings characterized by informality and non-hierarchy, yet within a highly institutionalized environment that is conducive to establish some degree of trust among the actors (as would be the case

As a corollary, joint ‘*problem-solving*’ through negotiation replaces the more traditional language of adversarial relationships managed through legal coercion.⁴⁸ One scholar argues that such systems of governance based on regulatory cooperation are “pragmatic response[s] to the desire of more powerful methods of problem solving” where government entities of all levels and the public “can work together to build integrated systems for rule-making and implementation” through the sharing of information and ideas and the coordination of the “design, analysis, drafting, and enforcement of regulations”.⁴⁹ Consequently, a tool as well as a by-product of this approach to problem-solving is *joint learning* in a specialized environment.⁵⁰ In sum, a notable portion of the literature portrays networks as arenas for interest intermediation characterized by interdependence, equality, trust, reciprocity of benefits, and sharing of information. Interactions within, nourished by a sense of continuity and stability among the members of the network lead a “real exchange of resources on the basis of equivalence and mutuality.”⁵¹

of the EU) (Thomas Risse-Kappen, *Exploring the nature of the beast: international relations theory and comparative policy analysis meet the European Union*, 34 *Journal of Common Market Studies* 53, 68-72 (1996))

⁴⁸ “Optimising performance calls for a sympathetic treatment of target groups. This is not meant to imply that their partial interests should prevail but rather that it is reasonable to proceed in a way which makes them adapt in a productive fashion to the new situation. The Community tends to be a negotiating system, specifically a negotiating system with a variable geometry because, depending on the issue at stake, different actors have to be considered. It is not only member governments who negotiate; various public and private actors are also part of the game.” (Beate Kohler-Koch, *The Evolution and Transformation of European Governance*, in: BEATE KOHLER-KOCH AND RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 25 (1999))

⁴⁹ Scott Jacobs, *Regulatory cooperation for an interdependent world: issues for government*, in: OECD, *REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD* 15 (1994)

⁵⁰ “In general, these new instruments and institutional innovations will perform the function of facilitating problem recognition and resolution, rather than imposing a diagnosis and prescriptions from above. The emphasis on information collection and provision, research and education help the creation of equal partnerships in policy-making, joint learning but also mutual control. The plurality of actors associated with the different instruments will result in a new complexity in territorial and public-private terms, counteracting old hierarchical chains of command” (Andrea Lenschow, *Transformation in European Environmental Governance*, in: BEATE KOHLER-KOCH AND RAINER EISING (eds.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 48 (1999).) Overall, as Renaud Dehousse observes, similar behavior of all agencies involved is facilitated when their actions are supported by shared data and mutual information, there is a convergence of expert assessment of the matters involved, and compatible procedures are developed. (Renaud Dehousse, *Regulation by networks in the European Community: the role of European agencies*, 4 (2) *Journal of Public Policy* 246, at 254 (1997)) Majone, an expert in EU policy analysis, advocates the formation of transnational policy networks/epistemic-communities amongst those institutions that pursue similar objectives and face comparable problems for the purpose of assuring political independence and maximizing policy learning, networks that should be characterized by a high degree of professional specialization, mutual trust, and comparable operational capabilities among actors (See: GIANDOMENICO MAJONE, *REGULATING EUROPE* 265-283 (1996))

⁵¹ Alexander Ballmann, *Infranationalism and the Community Governing Process*, Annex to: J.H.H. WEILER, ALEXANDER BALLMANN, ULRICH HALTERN, HERWIG HOFMANN, FRANZ MAYER & SIEGLINDE SCHREINER-LINFORD (EUROPEAN PARLIAMENT (DIRECTORATE GENERAL FOR RESEARCH), CERTAIN RECTANGULAR PROBLEMS OF EUROPEAN INTEGRATION, Project IV/95/02) (1995) To sum-up with one more example, in survey of developments in the US Orly Lobel defines ‘new governance’ as organized by the principles of: participation and partnership (whereby “normative

2.5. A preliminary assessment of multilevel network governance: discovering the administrative state?

Multi-level network governance appears before us with the glamour of its technical language and the seductiveness of its optimism. We are presented with a comprehensive, yet supple view of actors and political dynamics in the Union, although, as Jachtenfuchs indicates, governance “offers a *problematique* but does not constitute a coherent theory. It does not even attempt to become one.”⁵² It is an image that tempts both the modernist and the postmodernist through its embracement of rationality within fragmentation, completeness within multiplicity, stability within fluidity, and autonomy within interdependence. It speaks simultaneously of the relentless pursuit of self-interest and the frequent possibility of collaboration and trust. It presents complicated games of power with the happy prospect that it all works out to the efficient achievement of regulatory goals and the enhancement of social learning. It is sufficiently sophisticated to know that boundaries (between the public and the private, the domestic and the international, amongst actors, etc.) are blurry and dynamic, that power is dispersed, that political arenas are multiple and interconnected. It offers an un-assuming egalitarian face through conscientious inclusiveness and the leveling of all participants in the game of politics. The emphasis on governance and the corresponding rejection of government reinforces the notions of private initiative, voluntary cooperation, non-coercive implementation. Multi-level network governance knows that the business of governing today requires a convoluted display of expertise and ideals, neutrality and principled commitment, a fragile balance between unyielding faith in the natural progress of civilization, and the casual despair of politics as usual.

authority is pluralized” by the involvement of more actors); collaboration (a move to ‘partnership’ that involves a sharing of responsibility and the encouragement of “dialogue at all levels”; decentralization (which promotes, amongst other values, participation, experimentation, localness, partiality of human knowledge, and the building of deliberative and collaborative capacities); the integration of policy domains by virtue of a holistic approach to problem solving that fosters changes in the terms of the debate; and “softness-in-law” (Orly Lobel, *The Renew Deal: the fall of regulation and the rise of governance in contemporary legal thought*, 89 Minn. L. Rev. 342, at 373, 378, 382, 384, 386, 387, 388 (2004))

⁵² Markus Jachtenfuchs, *The governance approach to European integration*, 39(2) JCMS 245, at 259 (2001)

Multitude of actors, decision-making patterns, and modes of governing are seemingly embraced by the inclusiveness and egalitarian stance of this framework. It invites us to adopt a broad view of politics, one that confers as much relevance to the high politics of treaty-making as to the dull incidences of regulatory design, to the visible heads of national governments as to the anonymous faces of civil servants, to the power-display of Heads of State summits as to the quiet laboring of minute interregional initiatives in remote corners of the Union. The relevance of Member States is seemingly downplayed as they become immersed in webs of relationships, loose control of certain actors, ease their grip on the fate of politics. The disaggregated state is no more than a collection of policy networks, each actively involved in trans-national and trans-governmental relations with the many actors that are gathered into the network. In such a system, other actors, public and private, find their way upwards and side-ways, become politically visible, and are recognized as legitimate and equal participants in the design of public policies.⁵³

Multi-level network governance can be seen either as formulated with the intention of taking a particular stance in certain debates within integration theory, or as a proposal for the understanding of policymaking in highly technocratic regulatory environments. The latter approach enables us, without losing sight of the particular historical context in which it emerges –in particular, the stirring power of the integration process-, to test multi-level governance as a model for policy-making across and beneath the EU space. While this approach might eventually lead us to abandon its ambition of comprehensiveness as an overarching model of actors and processes in the European arena –depending on its empirical strength-, it would allow us to claim a broader descriptive power at the micro level. To put it simply: it would turn our attention to the administrative state.

While some scholars note the meager popularity of the use of the word ‘administration’ in the EU, multi-level network governance evokes an all-too-familiar

⁵³ Still, it seems clear that the state – or, more precisely, its fate in the political architecture of Europe- remains a central preoccupation: the unveiling of the reasons for its dispersion, disaggregation, erosion, fragmentation, retreat, or re-emergence in this new multi-faceted shape is the final target

picture to administrative scholars.⁵⁴ We are presented with a map of actors, political arenas and policy-making process, with an emphasis on their numerical and substantive multiplicity and diversity, both territorially and functionally. We are offered a panoramic of the distribution of political power that stresses the existence of disaggregation, a certain overlapping of competences, shared decision-making authority, strong links with interest groups, variable patterns of political control in different policy areas, and an overall diffusiveness of authority. The nature of the relationships among actors –and in particular the ties between public and private actors- is deeply marked by patterns of interdependence and relative autonomy, as well as -at least, formally- a leveled playing field, the need to adapt to the peculiar rationality of each sub-system, a strong emphasis on arguments that invoke expertise, and the necessity to engage simultaneously with multiple other actors. Interactions are characterized by relative informality, non-hierarchy, high frequency, internal cohesion achieved through shared expertise, the sense that cooperation leads to the fulfillment of self-interested expectations, and the willingness to accept that preferences/interests might shift in the course of negotiating, communicating, and social learning. The system is presented as dynamic, yet stable, because institutions, highly organized sub-systems, greatly specialized decision-making processes, and the complex and unique constellation of actors that needs to converge for decisions to be made, all act simultaneously as influential constrainers and activators of behavior. The overall picture is one of ordered, yet flexible, cooperation towards a common goal. Such a framework seems to evoke ideas of equality and legitimacy. The system appears as one permeable to all interests, accessible by all instances. The user-friendly language of joint learning, cooperation, trust, and open membership cannot but connote a positive evaluation with regard to the requisites of democracy. The state retreats from its heavy-handedness and contents itself with the roles of activator and facilitator of the system. A symbiotic relationship develops between government

⁵⁴ Bignami tells us that “[i]n the European Union, the word ‘administration’ is decidedly old-fashioned. ‘Networks’, ‘multi-level governance’, ‘administrative governance’, the ‘regulatory process’ are the preferred vocabulary for how products are certified as safe, how subsidies are delivered to farmers, how interest rates are set, and how the other business of the European Union gets done. This linguistic transformation reflects an appreciation that public authority without the state is fundamentally different. Today, behind almost every analysis of the European administrative process is the claim that it is new.” (Francesca Bignami, *Foreword*, 68 (1) *Law & Contemp. Probs.* 1, at 1 (2004))

agencies and interest groups when the realization comes that cooperation becomes possible only if hierarchy is abandoned and the need to support issue-specific constituencies is built onto the system. The system is no more than a vessel for multi-lateral negotiations dominated by expertise. The essence of politics is, quite straightforwardly, problem-solving.

This depiction is recognizable to any administrative law scholar, especially those from the United States. It is no more than the administrative state, yet one whose organizational characteristics and decisional dynamics fit more than one model of regulation (for example, what differentiates network governance from old-fashioned interest group pluralism, except for a stronger appeal to fragmentation and complexity and a timid acceptance of the possibility the very process of decision-making might have an impact in the surfacing and transformation of preferences?) and that, in any event, has been the subject of long-standing critiques on multiple fronts. From what we have seen so far, it is difficult to tell what is new about network governance, what theory of interest representation it accommodates.

Even more, its democratic underpinnings remain too latent for comfort. Any and all policymakers face a classic dilemma: how to overcome what is perceived as a deep-seated tension between the two indispensable political goals of *efficiency* and democratic *legitimacy*. The conceptual framework behind new governance appears, on its face, well equipped to address this question by virtue of a focused attention on accountability and participation in policymaking mechanisms while emphasizing the feasibility and performance components of the model. Yet, as will be better demonstrated in the analysis of the OMC, a survey of the literature shows that new governance turns out weakest precisely on these grounds, either by brushing off the democratic implications of the paradigm through some reference to the automatic legitimating value of enhanced participation, the assurance of accountability through process transparency, by being unable to give substance to the admitted need for better accountability mechanisms, or due to the absence of solid empirical backing to the assertions of feasibility and predominance of the model(s). **[conclusions still under construction]**

II. REALITY CHECK: THE OPEN METHOD OF COORDINATION

1. GENERAL FEATURES OF THE METHOD

The Open Method of Coordination (OMC) has become a preferred target of study for analysts of new regulatory approaches in the EU. It has been welcome as a perfect incarnation of the new *multilevel collaborative network governance*, a tool for joint problem-solving and cross-jurisdictional community building that brings together formerly autonomous and self-regarding political actors, and ties them in a symbiotic relationship aimed at addressing common problems in a manner that is prone to innovation and experimentalism, and fundamentally flexible in its conception, operation, procedural variants, as well as in the possibility of introducing changes in goals and means as problems are being more clearly identified, the preferences of the actors shaped and changed, and new strategies appear in the horizon. The OMC serves the purposes of this paper by virtue of its empirical scope, the significance of the academic support it receives, as well as for its suitability for forging a landscape of de facto regulatory power in the EU space and exposing the dilemmas of efficiency and accountability. In a later section, I will re-visit the OMC to test it in the new EU policy on higher education.

The OMC can be broadly defined as a technique for the coordination at the EU level of Member States policies over which primary competence resides and remains in the hands of the national legal systems, and where the reach of the EU institutions can, in principle, go no further than mere ‘coordination’ of what is done primarily at the national level. It is the Member States that decide (within the institutional canopy of the EU) on common objectives that are then implemented in the manner of their choosing. A central feature of this method should be emphasized: it is a technique designed from the premise of the *management of difference* –in interests, actors, political goals, regulatory cultures-

across the European space.⁵⁵ The OMC, argue de Búrca and Zeitlin, is a “template” for the formulation of policies in “complex, domestically sensitive areas where diversity among the Member States precludes harmonization but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as at the European level.”⁵⁶ While this might suggest that the principle of subsidiarity plays here, the fact is that the OMC has ‘uploaded’ to the EU arena the task of defining collective goals.”⁵⁷

The term OMC covers a variety of sector-specific procedures with varying degrees of formalization and overall development.⁵⁸ Emanating from the fields of employment policy and macro-economic indicators, its coverage expands continuously, now reaching policies as pensions and social exclusion, research and development, information society, education and lifelong learning, or some aspects of environmental protection.⁵⁹ The OMC was named as such at the Lisbon European Council (thus the expression ‘Lisbon strategy’) of March 2000, although practices of coordination pre-date

⁵⁵ As Kohler-Koch reminds us, politics in the European Union is “not about the reproduction of identity, but the managing of differentiation”. (Beate Kohler-Koch, *The evolution and transformation of European governance*, in: BEATE KOHLER-KOCH and RAINER EISING (EDS.), *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 24 (1999)). Another scholar refers to the compatibility of the “network metaphor” with a “vision of a new sort of European society that could come into existence while national and cultural identities are preserved.” (Alison Woodward, *Challenges for Democratic organization and Citizen Voice in the European Process*, in: MAX HALLER (ed.): *THE MAKING OF THE EUROPEAN UNION. CONTRIBUTIONS OF THE SOCIAL SCIENCES* 214 (2001))

⁵⁶ Grainne de Búrca & Jonathan Zeitlin, *Constitutionalising the Open Method of Coordination: What should the Convention Propose?* CEPS Policy Brief No. 31 (March 2003), p.2

⁵⁷ Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, 190, 197 (2004). The principle of subsidiarity states that “[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.[] In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. []Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” (TREATY ESTABLISHING THE EUROPEAN COMMUNITY art. 5 (consolidated version, Dec. 24, 2002, O.J. (C325))

⁵⁸ For a good grasp of the topic, see: JONATHAN ZEITLIN & PHILIPPE POCHE (eds.), with LARS MAGNUSSON, *THE OPEN METHOD OF CO-ORDINATION IN ACTION. THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES* 19 (2005); Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, 190, 197 (2004); mian Chalmers & Martin Lodge, *The open method of Co-ordination and the European Welfare State*, CARR Discussion Paper (2003) (<http://www.lse.ac.uk/collections/CARR/whosWho/profiles/m.lodge@lse.ac.uk.htm#id2985989>) (accessed 24 August 2005) [complete biblio reference]

⁵⁹ Borrás and Jacobsson point to several events that, taken together, make the OMC a suitable tool for further, if limited, integration: increased internal diversity of the EU after enlargement; the fact that EU intervention was approaching what for many is the residual core of national powers (the social chapter), thus making it highly unlikely that the traditional Community Method would gain widespread acceptance; the democracy ‘crisis’ of the EU, where subsequent governance reform debates had come to understand the OMC as a “new and flexible instrument able to introduce more democratic parameters in decision-making.” (Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, at 190 (2004)

Lisbon.⁶⁰ The European Council set a 2010 strategic goal for the Union to become “the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.”⁶¹ The overall aim was that of setting up a “comprehensive, interdependent and self-reinforcing series of reforms.”⁶² Existing policy mechanisms were to be complemented with a ‘new method’ for the achievement of these goals with an:

“Implementation of the strategic goal will be facilitated by applying a new open method of coordination as the means of spreading best practice and achieving greater convergence towards the main EU goals. This method, which is designed to help Member States to progressively develop their own policies, involves:

- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- 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 practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organized as mutual learning processes.”⁶³

⁶⁰ Yet, the Constitution for Europe has avoided a direct reference and definition of this method : Art 15. 1. The Member States shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies. [] Specific provisions shall apply to those Member States whose currency is the euro. 2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. 3. The Union may take initiatives to ensure coordination of Member States' social policies. (Treaty Establishing a Constitution for Europe (2004/C 310/01) (OJ C310 Vol. 47, 16 December 2004) For an argument in favor of the inclusion of a generic provision defining the OMC in the Constitution, see De Búrca and Zeitin’s brief submitted to the European Convention (Grainne de Búrca & Jonathan Zeitlin, *Constitutionalising the Open Method of Coordination: What should the Convention Propose?* (CEPS Policy Brief No. 31 (March 2003))

⁶¹ LISBON EUROPEAN COUNCIL, 23 AND 24 MARCH 2000. PRESIDENCY CONCLUSIONS, Conclusion 5. Proposed measures to achieve this goal include: a comprehensive shift to an information society (through the adoption of a legal framework on e-commerce; facilitation of universal internet access in the education system, etc.); creation of a ‘European research area’; final completion of the internal market; improved environment for start-ups; integration of financial markets; coordination of macro-economic policies (fiscal consolidation, sustainable public finances); reform of the social model (modernization of education systems through increased transparency of qualifications, enhanced mobility for students and teachers, promotion of life-long learning, etc.); increased focus on raising employment levels (a target of 70% average employment and 60% of women employment by 2010); promotion of social inclusion. (See: LISBON EUROPEAN COUNCIL, 23 AND 24 MARCH 2000. PRESIDENCY CONCLUSIONS) The basic deal was to “mak[e] the labor markets more flexible, stimulate innovation, encourage more people to become entrepreneurs, spend more on research and development and complete the single market.” (Alasdair Murray and Aurore Wanlin, *The Lisbon Scorecard V. Can Europe Compete?* (Centre for European Reform 2005)) The Centre for European Reform, based in the UK, is a high –profile think-tank with close connections to the Commission (www.cer.org.uk) They issue yearly ‘Lisbon scorecards’ where they assess each country’s progress towards each of the Lisbon targets (pointing out ‘heroes’ and ‘villains’ as well as giving school-like grades), as well as (since 2005) an overall rating for each country and their relative progress since 1999.

⁶² Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 8 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁶³ LISBON EUROPEAN COUNCIL, 23 AND 24 MARCH 2000. PRESIDENCY CONCLUSIONS, Conclusion 37

In other words, the idea of the OMC is to upgrade to the EU a number of areas over which it had no formal competence, articulating a mode of coordination whereby Member States “agree to voluntarily cooperate ... and make use of best practice from other Member States, which could be customized to suit their particular national circumstances”, assigning to the Commission tasks of coordination, facilitation and monitoring by making information available and publicized across the board, thus pushing for benchmarking and peer pressure.⁶⁴ While the OMC continues to be a coordinating tool of choice, the 2000 Lisbon ‘growth and employment’ strategy has proved to be, to put it mildly, highly unrealistic, “too broad to be understood as an interconnected narrative ... Everybody is responsible and thus no one.”⁶⁵ Posterior European Councils and other institutional documents have in one way or another re-arranged and re-furbished the formulation of the measures to be adopted.⁶⁶ [to be added: Brussels European Council of March 2005) **; Communication from Commission on new start for Lisbon strategy (2005); integrated guidelines (Brussels European Council June 2005)]

Next I turn to examine in more detail some features of the method.

2. PARTNERSHIP AND FLEXIBILITY

⁶⁴ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p.9 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁶⁵ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 16 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁶⁶ The European Council Presidency Conclusions can be found at: (<http://ue.eu.int/showPage.asp?id=432&lang=en&mode=g>). The March 2004 Brussels European Council admitted that, four years underway, “the picture is a mixed one” and called for an urgent stepping up of the process. (Brussels European Council 25 and 26 March 2004, Presidency Conclusions, Conclusions 6-7 (POLGEN 20 CONCL 1)(9048/04)) A high-level group chaired by Wim Kok was set up to conduct an independent examination of the key substantive and procedural components of the strategy.(Brussels European Council 25 and 26 March 2004, Presidency Conclusions, Conclusions 47-48 (POLGEN 20 CONCL 1)(9048/04)) The Kok Report, while claiming the continued validity of the Lisbon target, acknowledged that “much needs to be done in order to prevent Lisbon from becoming a synonym for missed objectives and failed promises.” The task is to “develop national policies in each Member State, supported by an appropriate European-wide framework, that address a particular Member State’s concerns and then to act in a more concerted and determined way. The European Commission must be prepared to report clearly and precisely on success and failure in each Member State. National and European Union policies, including their budgets, must better reflect the Lisbon strategy.”) Posterior reform includes: Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament. Common Actions for Growth and Employment: the Community Lisbon Action Programme* (COM (2005) 330 final) (SEC (2005) 981)

Very much in the line of new governance discourse, the OMC has been described as governed by principles such as: multi-level integration, participation, power-sharing, diversity, decentralization, deliberation, flexibility, reversibility (due to its non-binding nature), experimentation, and knowledge-creation.⁶⁷ Moreover, it is an essentially procedural mechanism, in the sense that its main goal is to institutionalize certain operational routines aimed at the pooling of knowledge, such as the determination of guidelines and indicators, best practices, periodic monitoring, etc.⁶⁸

It thus appears exemplar of what I have been referring to as ‘partnership governance’, that is, a mode of governing where actors (public and private) assemble in policy networks where relationships within are characterized by (variable degrees) of cooperation, trust, and equality. In such system, politics is conceived as joint problem-solving. Enhanced participation and a high premium on the idea of flexibility act as natural promoters of the pooling of knowledge, experimentation, and regulatory innovation.⁶⁹ Therefore, while the notions of *partnership* and *flexibility* are conceptually

⁶⁷ See: David M Trubek, Patrick Cotrell, & Mark Nance, “Soft Law”, “Hard Law”, and *European Integration: Toward a Theory of Hybridity*”, Jean Monnet Working Paper 02/05, p. 19 (2005); Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy 2-3* (Notre Europe, policy paper No. 12, March 2005). Notre Europe is a high-profile think tank founded by Jacques Delors and currently presided by Pascal Lamy. (<http://www.notre-europe.asso.fr/sommaire.php3?lang=fr>)

⁶⁸ Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy 2-3* (Notre Europe, policy paper No. 12, March 2005).

⁶⁹ One aspect of the OMC that has received a great deal of attention is only tangentially related to the notion of partnership. I am referring to its nature as a *soft law* mechanism, that is, its seeming reliance on “persuasion but not coercion.” (Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, at 187 (2004)) When analyzing the OMC, the question is “whether it is possible to have national policy change driven by mimetic and normative processes, in the absence of clear coercive mechanisms.” (Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, at 195 (2004)) David Trubek, Patrick Cotrell, and Mark Nance efficiently summarize the pros and cons pointed out by scholars in the recourse to soft law in the EU social chapter. Common objections are: its absence of predictability, its relative weakness as compared with the hard law provisions of the common market, its potential to encourage races to the bottom, its inability to bring out any real change, as well as the facts that it may be used to by-pass the community method and covertly expand the Union’s reach while not providing sufficient accountability mechanisms. On the positive side of soft law: “Hard law tends toward uniformity of treatment while many current issues demand tolerance for significant diversity among Member States. Hard law presupposes a fixed condition based in prior knowledge while situations of uncertainty may demand constant experimentation and adjustment. Hard law is very difficult to change yet in many cases frequent change of norms may be essential to achieve optimal results. If actors do not internalize the norms of hard law, enforcement may be difficult; if they do, it may be unnecessary.” (David M Trubek, Patrick Cotrell, & Mark Nance, “Soft Law”, “Hard Law”, and *European Integration: Toward a Theory of Hybridity*”, Jean Monnet Working Paper 02/05, pp. 6-7 (2005)) Also, see: Pertti Aho, *Soft Governance, Agile Union?* European Institute of Public Administration working paper 01PAH (2001) Yet, I understand that, regardless of the virtues or evils of soft-law mechanisms generally, it is clear that the OMC, always plays in conjunction with ‘hard law’, either because the measures taken by the Member States to

independent, they often come together in the innovation package: an open attitude towards of actors and modes of interaction is linked to an equally open disposition to collaborative decisionmaking and the promotion of experimentation and flexibility in the adoption of regulatory tools. These components interact and are hoped to reinforce each other. The system is completed with the provision of new forms of accountability, that range from transparency in the form of complete access to documentation and agenda, efforts to involve new actors besides the traditional social actors and well-established interest groups, a commitment to mutual exposure to the other Member States, and, above all, the regularization of the system of peer review. These forms of accountability teamed up with enhanced participation provide an up-graded overall *legitimacy* and *efficiency*.

Indeed, branded as the development in European integration that has aroused greatest interest and controversy in recent years⁷⁰, the OMC is seen by some scholars as the “most fundamental departure” from the dominating form of hierarchical intervention that leads the Union to “assume a completely new governance function in facilitating coordination and mutual learning among national policy elites.”⁷¹ The argument would be more or less as follows: “softer forms of governance such as the OMC increase the social basis of legitimacy of the EU by allowing stakeholders to participate in the policy process and thereby facilitating knowledge diffusion and engendering a feeling of enfranchisement and investment in the system.”⁷² Many analysts stress the enhanced participatory component of the OMC, either as compared with the community method, or in relation to traditional regulatory approaches generally. The OMC, in these accounts, would have a better potential to open new venues and mechanisms of political involvement.⁷³ Yet, institutional documents make repeated calls to the building of

adopt the objectives fixed in a given policy take the form of binding rules (as demanded by the respective national legal system), and/or because the OMC does not cover policy areas in their entirety, but instead coexist with binding mechanisms that address other components of the sector in question.

⁷⁰ Jonathan Zeitlin, The Open Method of Coordination in question, in: JONATHAN ZEITLIN & PHILIPPE POCHE (eds.), with LARS MAGNUSSEN, THE OPEN METHOD OF CO-ORDINATION IN ACTION. THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES 19 (2005)

⁷¹ Christoph Knill & Andrea Lenschow, *Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation*, EIoP Vol. 7 (2003) No.1, p. 4.

⁷² David M Trubek, Patrick Cotrell, & Mark Nance, “Soft Law”, “Hard Law”, and European Integration: Toward a Theory of Hybridity”, Jean Monnet Working Paper 02/05, p. 5 (2005) **[note on the politics of ‘empowerment’ goes here]**

⁷³ “The prominent transnational and multi-level dimensions of the OMC decision and implementation procedures might transform the basis for participation beyond representative parliamentary mechanisms, by opening up new

‘partnerships’ between governments, social actors and the civil society at large if the OMC (and the broader political will to implement the Lisbon strategy) is to be successful. The 2004 Kok Report placed emphasis on the need to strengthen ‘political ownership’ of the process through decisive involvement of each Member State, their national parliaments, social actors, as well as the wider public.⁷⁴

As to the deliberative component of the process, Borrás and Jacobsson, for example, argue that the OMC relies on the expectation that the collective learning process will be the result of: changes introduced at the domestic level in fulfillment of the agreements achieved at the EU level; enhanced knowledge and comparability; periodical review and monitoring.⁷⁵ The pooling of knowledge, facilitated by benchmarking and peer review are “supposed to facilitate a gradual learning process, leading in the long run to forms of cognitive convergence, and possibly to policy transfers”, aiming towards the “development of a community of views among experts and policy-makers.”⁷⁶ In tune with this approach, D. Trubek, Cottrell, and Nance relate the operation of the OMC to that of epistemic communities and transnational networks and argue that it could “promote transformative processes of norm diffusion, persuasion and learning that have a positive impact on policy outcomes by allowing a wider spectrum for deliberation in the governing process.”⁷⁷

mechanisms of ‘voice’ and political involvement. New networks of social partners, non-governmental organizations (NGOs), subnational governments and other important political stakeholders, might constitute strong pressure groups as well as a solid democratic platform for decision-making and implementation.” (Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, at 200 (2004))

⁷⁴ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 8 (http://europa.eu.int/comm/lisbon_strategy/index_en.html) Also: or “Support and advocacy for change must reach beyond Governments. In order to generate this support, the European Council calls on Member States to build Reform Partnerships involving the social partners, civil society, and the public authorities, in accordance with national arrangements and traditions.” (Brussels European Council 25 and 26 March 2004, Presidency Conclusions, Conclusion 43 (POLGEN 20 CONCL 1)(9048/04))

⁷⁵ Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, at 195 (2004)

⁷⁶ Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy* 11 (Notre Europe, policy paper No. 12, March 2005)

⁷⁷ David M Trubek, Patrick Cottrell, & Mark Nance, “Soft Law”, “Hard Law”, and *European Integration: Toward a Theory of Hybridity*”, Jean Monnet Working Paper 02/05, p. 17 (2005)

At the same time, by offering a *flexible* coordinating scheme that can tailor to the specific circumstances and needs of each Member States, the OMC offers the Member a low degree of commitment, wide domestic discretion and the possibility to economize in devising regulatory techniques through the pooling of information. This, in turn, is seen as a fertile soil for policy deliberation, joint learning, and experimentation that, in conjunction with enhanced participation, may lead to improve the democratic legitimacy of policymaking processes. Also in this case, the virtues of the OMC are closely related to the critique of the ‘Community method’, often equated with command-and-control regulation, which is viewed as “incapable of addressing societal complexity, static and unable to adapt well to changing circumstances, and limited in their production of the knowledge needed to solve problems.”⁷⁸ The OMC, “treated in the literature as the Lazarus of European integration” would come to save the Union from such burdens by disposing with the hardship, inadaptability and elitist features attributed to the Community Method.⁷⁹

The same goes for the *deliberative* component of the OMC. Borrás and Jacobsson, for example, argue that the OMC relies on the expectation that the collective learning process will be the result of: changes introduced at the domestic level in fulfillment of the agreements achieved at the EU level; enhanced knowledge and comparability; periodical review and monitoring.⁸⁰ Jacobsson focuses on “discursive regulatory mechanisms”, by which she means those “related to language-use and knowledge making and thus fundamentally to meaning making.”⁸¹ The pooling of knowledge, facilitated by benchmarking and peer review are “supposed to facilitate a gradual learning process, leading in the long run to forms of cognitive convergence, and possibly to policy transfers”, aiming towards the “development of a community of views

⁷⁸ David M Trubek, Patrick Cotrell, & Mark Nance, “*Soft Law*”, “*Hard Law*”, and *European Integration: Toward a Theory of Hybridity*”, Jean Monnet Working Paper 02/05, p. 18 (2005)

⁷⁹ Damian Chalmers & Martin Lodge, *The open method of Co-ordination and the European Welfare State*, CARR Discussion Paper (2003) (<http://www.lse.ac.uk/collections/CARR/whosWho/profiles/m.lodge@lse.ac.uk.htm#id2985989>) (accessed 24 August 2005) p.1 .

⁸⁰ Susana Borrás and Kerstin Jacobsson, *The open method of coordination and new governance patterns in the EU*, 11(2) *Journal of European Public Policy* 185, at 195 (2004)

⁸¹ Kerstin Jacobsson, *Soft Regulation and the subtle transformation of states: the case of the EU employment policy*, 14(4) *Journal of European Social Policy* 355, at 356 (2004)

among experts and policy-makers.”⁸² In tune with this approach, D. Trubek, Cottrell, and Nance relate the operation of the OMC to that of epistemic communities and transnational networks and argue that it could “promote transformative processes of norm diffusion, persuasion and learning that have a positive impact on policy outcomes by allowing a wider spectrum for deliberation in the governing process.”⁸³

[this part is still under construction]

3. DOES THE METHOD ACTUALLY WORK?

But, is the OMC working? Some scholars point out the existence of a “widespread recognition” of the “usefulness, efficiency, and flexibility” of the OMC.⁸⁴ Institutional documents, on the other hand, point out that it has “fallen short of expectations.”⁸⁵ De Búrca and Zeitlin argue that because it does not impose specific rules or institutions, but rather a mere convergence of objectives and performance standards, it is particularly appropriate to encourage the identification of common interests of the MSs, while preserving their autonomy. Furthermore, the OMC is “genuinely joint and multilevel in its operation” and, “[b]y committing the Member States to share information, compare themselves to one another, and reassess current policies against their relative performance, the OMC is also proving to be a valuable tool for promoting deliberative problem-solving and crossnational learning across the EU.”⁸⁶ Trubek and Trubek give us a list of modes by which the OMC may be conducive to behavioral changes:

⁸² Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy* 11 (Notre Europe, policy paper No. 12, March 2005)

⁸³ David M Trubek, Patrick Cotrell, & Mark Nance, “Soft Law”, “Hard Law”, and *European Integration: Toward a Theory of Hybridity*”, Jean Monnet Working Paper 02/05, p. 17 (2005)

⁸⁴ See: Grainne de Búrca & Jonathan Zetlin, *Constitutionalising the Open Method of Coordination: What should the Convention Propose?* CEPS Policy Brief No. 31 (March 2003), p.2

⁸⁵ Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 42 (http://europa.eu.int/comm/lisbon_strategy/index_en.html)

⁸⁶ Grainne de Búrca & Jonathan Zetlin, *Constitutionalising the Open Method of Coordination: What should the Convention Propose?* CEPS Policy Brief No. 31, p. 2 (March 2003)

- shaming (compliance in order to avoid negative reports);
- mimesis (when a consistent policy framework is put before policy makers, they might tent to adopt it);
- discourse (the OMC “may result in the construction of a new cognitive framework or a new perspective from which reality can be described, phenomena classified, positions taken, and actions justified”),
- networking;
- deliberation (consisting in the “exchange of policy knowledge and experience, [which] allows actors to get to know each other’s governing systems and ways of thinking, and promotes a common identity through continued interaction, socialization, and persuasion”;
- learning.⁸⁷

Yet, this does not tell us whether the OMC *actually* works. Answering this question is in fact a difficult undertaking. Firstly, it yardsticks need to be identified that would indicate whether the method has induced change in the ‘real’ world. Secondly, it has to be determined whether such change is in the desired direction, that is, whether it is ‘successful’ change. Thirdly, a comparison would have to be made between the effects of this method in comparison to other regulatory approaches that could apply in the same factual situation. Finally, the concatenated responses obtained from the previous inquiries would lead to proposals for institutional reform. Yet, it seems difficult to respond to any -let alone all- these questions.

For starters, some features of the method make it difficult to identify clear standards to determine whether the method can be implemented at all and, if such is the case, how to measure such implementation. Ahonen, for example, points out to a number of factors, ranging from the vagueness of the objectives, to the low quality of national action plans, to the scarce input by consultative parties such as the social partners.⁸⁸ Moreover, Member States will naturally be tempted to address the easies targets first in order to show progress, might feel queasy about shaming their peers, or may have incentives for ‘window-dressing’ in their reports.⁸⁹ The Kok report, on its part, places a

⁸⁷ David Trubek and Louise Trubek (forthcoming 2005) [lost exact citation?]

⁸⁸ The list includes: “frequently vague objectives; hard-to-define and hard-to-estimate indicators to monitor the implementation of the objectives; discrepancies between national employment policy systems; low quality national action plans (NAPs); opaque national budget allocations for the NAPs implementation; and difficulties to make social partners interested in innovative co-operation in Member State level (Pertti Ahonen, *Soft Governance, Agile Union?* (European Institute of Public Administration working paper 01PAH (2001) p. 11)

⁸⁹ See: Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy* (Notre Europe, policy paper No. 12, March 2005)

strong emphasis in the sanitary nature of “naming, shaming and faming” and points out the difficult trade-off that needs to be made between keeping the Lisbon strategy simple and “captur[e] its ambition and comprehensiveness.”⁹⁰

Then, success itself has to be defined when speaking of a method that takes off on the basis of non-binding agreements. Some scholars use indicators such as domestic legal transposition rates or administrative organization changes put in place. Yet, it is clear that neither means anything per se; without knowing at which point a Member States was at the beginning of the process, the mere fact of transposition may translate into little or no legal reform at all. Moreover, even after incorporating these considerations, neither the fact that legal transposition has taken place nor that administrative structures have been designed to facilitate the operation of the benchmarking and peer review mechanisms mean that ‘progress’ has actually taken place without implementation of the norms adopted in the first case, and actual incorporation of such practices in the latter case. In the end, there is the risk of reaching immaterial conclusions, such as that the higher the convergence of domestic policy preferences with those set in the OMC, the easier it is to make progress.⁹¹

The few empirical studies available indicate scarce success and institutional documents have echoed such findings.⁹² For some, the assumption that the OMC furnishes a way to solve policy problems in areas characterized by significant divergence by administering “disciplined and collaborative exploration” is unrealistic.⁹³ Others

⁹⁰ The report denounces that the evaluation of the method has sprawled out to more than a hundred indicators, which makes it “likely that every country will be ranked as best at one indicator or another” and adheres the Council reduction to 14 indicators. (Report from the High Level Group: *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (2004), p. 43 (http://europa.eu.int/comm/lisbon_strategy/index_en.html))

⁹¹ Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy* 8 (Notre Europe, policy paper No. 12, March 2005)

⁹² In a study of the social inclusion and employment policies, for example, De la Porte concludes that the use of this method in areas so politically sensitive as these “raises many questions as to its effectiveness and its pertinence[.]” and puts Member States under a “pressure” to converge that might lead to structural transformations quite distant from the proclaimed respect for the regulatory and organizational frameworks of the MSs. (Caroline de la Porte, *Is the Open Method of Coordination Appropriate for organizing activities at European Level in Sensitive Policy Areas?* 8(1) ELJ 38, at 56 (2002))

⁹³ Damian Chalmers & Martin Lodge, *The open method of Co-ordination and the European Welfare State*, CARR Discussion Paper (2003) (<http://www.lse.ac.uk/collections/CARR/whosWho/profiles/m.lodge@lse.ac.uk.htm#id2985989>) (accessed 24 August 2005), p. 15.

question the usefulness of the method in cases where the OMC is introduced in policy areas dominated by binding mechanisms (environmental protection, for example). In such case, it has been indicated that “the added value of the OMC has not been demonstrated.”⁹⁴ The core problems reside not at the first stage of agreement of common targets, but in the implementation of such commitments on the part of the Member States: slow translation into specific domestic measures, poor channels for the exchange of information and best practices, and weak monitoring mechanisms.⁹⁵ The unsolved question is whether this is simply a matter of lack of political will, or there are real difficulties in taking such steps, either substantive or cost-wise. Chalmers and Lodge denounce a ‘dissonance’ between the rhetoric that surrounds the OMC and its practice and point to several flaws in the implementation stage: insufficiency of peer-group pressure and benchmarking to induce substantive policy changes; vagueness of some benchmarks; constant issuance of new benchmarks and targets that overload the reporting duties of the Member States and diminish their ability to concentrate on individual initiatives; doubts with regard to whether the selection of European standards and national targets have in fact been made after a careful exploration of all available alternatives; the fallacy of the belief that “cross-national benchmarking opens up national self-referential policy-making” in view of the fact that many national action plans simply reformulate well established policies; the poorness of cross-national evaluation of policy alternatives; or the disappointing participatory component given that, so far, only well established social actors seem to have had access and input.⁹⁶ This latter point suggests a more rigorous consideration of the supposed enhanced participatory quality attributed to

⁹⁴ Stefan Collignon, Renaud Dehousse, Jean Gabolde, Marjorie Jouen, Philippe Pochet, Robert Salais, Rolf-Ulrich Sprenger, & Hugo Zsolt the Sousa, *The Lisbon Strategy and the Open Method of Coordination. 12 Recommendations for an effective multi-level strategy* 8 (Notre Europe, policy paper No. 12, March 2005)

⁹⁵ Brussels European Council 25 and 26 March 2004, Presidency Conclusions, Conclusion 10 (POLGEN 20 CONCL 1(9048/04)

⁹⁶ See: Damian Chalmers & Martin Lodge, *The open method of Co-ordination and the European Welfare State*, , CARR Discussion Paper (2003) (<http://www.lse.ac.uk/collections/CARR/whosWho/profiles/m.lodge@lse.ac.uk.htm#id2985989>) (accessed 24 August 2005), pp. 14-19, 16. Chalmers and Lodge argue that the OMC is “subservient to the ideologies, path-dependencies and structures of Economic and Monetary Union...As such, it is not a coherent strategy ... but a tactical response with limited maneuver... Many of the strategies are inchoate, at best, and focus less on substantive policy reform and more on bureaucratic readjustment.” (Damian Chalmers & Martin Lodge, *The open method of Co-ordination and the European Welfare State*, CARR Discussion Paper (2003)) (<http://www.lse.ac.uk/collections/CARR/whosWho/profiles/m.lodge@lse.ac.uk.htm#id2985989>) (accessed 24 August 2005) p.2

the process, and its connection to legitimacy. Allowing more actors in the regulatory process or giving them an enhanced opportunity for input does neither mean that the resulting decision is going to be substantively better, more efficiently adopted, or more democratic. Actors in regulatory processes might deploy dominance strategies that reduce to mere formalism the presence of other -less powerful- participants, devoid the process of the necessary expediency, or overload the docket with redundant, unverified, irrelevant, or insufficiently contrasted information. These are problems embedded in the fabric of any regulatory state, over which an enormous academic effort has been poured over the years.⁹⁷ At a more theoretical level, these are questions that cannot be answered without a theory of democracy that provides guidelines as to who should be entitled to participate, in what condition, and what is to be done with the information provided by them.

As has been shown, the study of the OMC was selected for its supposed embodiment of the new governance paradigm, the significance of the academic and governmental support it receives, as well as for its suitability for forging a landscape of de facto regulatory power in the EU space. Then, it has turned out to be a critical piece not only to reassess the main contentions of new governance, but also to expose some democratic dilemmas incited by this regulatory landscape: who are/should be the actors in policy-making processes, the nature of the relationships amongst them, or the possibility of unsettling the boundaries of political communities in the European landscape. **[conclusions need to be further elaborated]**

In order to offer a more complete narrative of the landscape of regulatory power in the EU, I next develop an analysis of the interpenetration of administrative legal systems in the Union's space, with the purpose of offering a tangible legal image of diversity within interconnectedness that is not restricted to any given policy area or regulatory mechanism, a key conceptual bite to convey the idea of a geography of political and legal power where the preservation of difference becomes a crucial goal in the process of solving common problems.

⁹⁷ **biblio reference goes here**

III. ADMINISTRATION AND ADMINISTRATIVE LAW IN THE EU

1. THE EU ADMINISTRATIVE STATE

This part examines the European Union from a different perspective: that of *governance as administration*. As indicated in the introductory part of this paper, Krisch, Kingsbury and Stewart forcefully argue that most institutions that engage in what comes under the aegis of ‘governance’ “perform functions that most national public lawyers would recognize as having a genuinely administrative character”⁹⁸ Following this lead, I take a closer look at the EU administrative space, with particular attention paid to the interpenetration of administrative legal systems. This serves not only the purpose of rendering a panoramic view of the distribution of regulatory power in the EU space, but, most importantly for the purposes of this paper, of its actors and modes of interaction.. Thus, the question of the nature and dynamics of interaction that was explored under the conceptual umbrella of multi-level network governance is re-visited from a standard administrative law angle.

We all live immersed in administrative ‘states’.⁹⁹ The mundane and grave occurrences of our lives are both constrained and facilitated by these institutional and legal frameworks. The administrative state of today is a fuzzy and dynamic compound of numerous actors and processes, yet stabilized by the (imperfect) certainty attached to the law. To a considerable extent, political struggles –the practice of democracy- emerge, consolidate, and dissolve through the channels of will-formation and decisionmaking provided by the regulatory state, either promoted by or in response to formal and

⁹⁸ Benedict Kingsbury, Nico Krisch, Richard Stewart, *The emergence of Global Administrative Law* 6 (IILJ Working Paper 2004/1 (Global Administrative Law Series)(www.iilj.org)) [update 68 (3) *Law & Contemp. Probs.* 2005)

⁹⁹ Quite plainly, “modern government is administrative government” (STEPHEN BREYER, RICHARD STEWART, CASS SUNSTEIN & MATTHEW SPITZER, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 1 (5th ed., 2002))

informal administrative action, but always in reference to a particular legal regulatory setting. While in a strict sense administrative law refers to those general norms that demarcate the powers of administrative agencies, the acknowledgment of the institutional context – the web of public and private entities that transact with agencies- is crucial.¹⁰⁰ Agencies are not free-standing wills: they have limited resources, more or less defined legal goals, and are constrained by specific legal procedures for the adoption of decisions. They embody regulatory cultures that are the result of multiple factors, notably their political and institutional environment, the discursive layers furnished by administrative law, and the routine practices of policy-formulation. Further still, an expansive meaning of administrative law extends well beyond a focus on the legal procedures leading to final agency actions (those which can be reviewed by a court of law); it is equally concerned with informal action, both that which is preparatory of formal decisions and that which is developed for the purpose of building the agency's expertise or fact-gathering activities, informative to the public, experimental of novel regulatory approaches, promotional of certain conducts, etc. This broader view offers a more complete image of the nature of the relationships that ties agencies to other political actors, as well as the regulatory culture in which interactions amongst these actors occur. The democratic potential of this type of administrative state resides in its mundane nature.

Let us now turn to the EU. While many of those who are citizens of the European Union perhaps wonder if Europe exists at all -culturally, historically, politically-, or whether this is a worthwhile question, the Union is an undeniable fact of life. In a sense, we seem to be part of a common, yet fragmented, political and social space. We experience Europe everyday, intertwined with the multiple other occurrences of our life that might be local, regional, national, virtual, place-less. The legal system of the EU comprises a rich array of policies whose impact is visible in minute details of our daily life: nutritional labels, product safety warnings, standardized sizes in shoes and clothes, passports, automobile plates, university exchange programs and degree requirements,

¹⁰⁰ See: STEPHEN BREYER, RICHARD STEWART, CASS SUNSTEIN & MATTHEW SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 3 (4th ed., 1998)); JERRY L. MASHAW: RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW. THE AMERICAN PUBLIC LAW SYSTEM. CASES AND MATERIALS 1 (4th Ed., 1998))

household recycling, EU-wide health care cards, and a long etcetera.¹⁰¹ In fact, the long arms of the EU extend to areas where formal competence remains in the hands of the Member States, as it is the case of the areas where the Open Method of Coordination.

Let us narrow down the focus to the European Commission. A small bureaucracy with scarce resources and no presence in the Member States the Commission bears enormous formal and informal responsibilities.¹⁰² In addition to its work as initiator and drafter of legislative decisions ‘proper’ –those adopted by the Council and the Parliament-, it yearly issues thousands of legal instruments of its own and a myriad of non-enforceable policy documents with varying degree of significance and formality: White Papers, Green Papers, work programs, communications, reports on specific policies, and booklets, all of which are intended to explain its position in a given matter, promote certain conducts on the part of ‘stakeholders’, inform and guide the public in its dealings with the Union and, why not, strategically reinforce its visibility and presence in the Union. Moreover, it also conducts an array of activities, such as pilot projects, academic programs, conferences, promotional and educational campaigns, delivering of formal speeches concerning its political priorities and its vision of ‘European construction’, etc. All of this constitutes the regulatory/institutional culture in which the narrower category of formal and legally binding decisions is produced, and all of it is essential for the understanding of how the reach of the administrative state affects the practice of citizenship.

¹⁰¹ Giandomenico Majone argues that the legal system of the EU acts as “not the only, but certainly the most important stimulus to current regulatory developments in Europe.” (GIANDOMENICO MAJONE, *REGULATING EUROPE* 266 (1996))

¹⁰² These include: direct enforcer of some European policies (for example, it is in charge of direct implementation of competition law, including the authority of imposing fines on business or public authorities and vetting subsidies that might result in the distortion of competition); drafter of legislative decisions to be formally taken by the Council and the European Parliament; regulator, producing annually thousands of rules and regulations which provide the backbone of each sector European policy; ‘guardian of the treaties’, with an essential role in instituting legal proceeding against violators of EC law and bringing cases before the European Court of Justice; manager of the Union’s annual budget (including that of the Common Foreign and Security Policy and a significant role in the distribution and administration of the Structural Funds, as well as the programs of technical and economic assistance, such as PHARE -to applicant and new Member States, as part of the pre-accession strategies- and TACIS -to countries of Eastern Europe and Central Asia, mostly republics of the former Soviet Union-); negotiator of trade and cooperation agreements with third countries on behalf of the Union; negotiator of the enlargement process; involvement in Common Foreign and Security Policy and in Justice and Home Affairs.

On the whole, it reveals a “crowded and confused picture.”¹⁰³ The EU regulatory arena is in fact a multi-layered, diversified, and intricate range of institutional arrangements and bodies of law that by no means can be restricted to the laws and institutions of the Union proper. This is precisely what has led many analysts to elude the term ‘administration’ and resort to the language of governance-cum-something.¹⁰⁴ While no single pattern of policy-making can be identified across the broad range of regulatory activities deployed by the institutions of the Union, scholars argue that there is a well-established, stable, relatively inertial, yet internally dynamic, flexible, and diverse process.¹⁰⁵ The procedural routines, discursive practices, constraints, preferences, and predispositions of this machinery are decisive shapers of the decisionmaking patterns of the system as a whole. Such process is performed through and molded by rules and operating procedures “firmly entrenched” in its institutional framework.¹⁰⁶

We are confronted with a collective structure -or system, regime, organization, framework- where the preservation of difference is brought to coexist with the uncontested premise of the possibility of cooperation, that is, the belief in a basal compatibility of legal systems and core political values, as well as in the existence of a shared interest in working together, as embodied in the ever-present notion of integration. The incidence of these contrasting features –difference and commonality, distance and proximity, separation and integration- is built into the institutional framework and

¹⁰³ William Wallace, *Collective Governance. The EU political process*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 528 (4th ed., 2000)

¹⁰⁴ As Bignami indicates, there is a certain perplexity with regard to how to define that “organizational apparatus that is replacing autonomous national bureaucracies”, a system of public authority that is “diverse, plural and non-hierarchical.” (Francesca Bignami, *Foreword*, 68 (1) *Law & Contemp. Probs.* 1, at 1 (2004)). In Majone’s analysis, the reach of the EC regulatory state forces the Member States not only adopt specific legislative and administrative measures, but also influences national policy-styles and the choice of policy instruments by upsetting “historically rooted institutional equilibria” and changing the “rules of the domestic policy game”, thus becoming a strong impetus to policy learning and leading national administrators to reconsider the rationales that underlie specific policies. (GIANDOMENICO MAJONE, *REGULATING EUROPE* 266 (1996).

¹⁰⁵ While the dynamics of policy-making in the Union are notoriously difficult to bring into a single explanatory model, Helen Wallace offers a catalog of broad features that are said to permeate the system as a whole, namely: relevance of decisionmaking procedures in the configuration of outcomes (notwithstanding their varying degree of formalization in the structuring of behavior and the determination of opportunity structures); segmentation of policy domains as well as of the patterns of interaction within; presence of an overriding interest in the achievement of consensus regardless of the institutional framework and particular circumstances in which decisions are taken and; institutional loyalties tend to depend on cognitive attachments, which serve as vehicles for consensus-building and long-term clientelism. (Helen Wallace, *The policy process. A moving pendulum*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 62-63 (4th ed., 2000))

¹⁰⁶ The EU, argues William Wallace, is a “process of mutual learning, resting on mutual trust, in which ideas as well as interests shape the search for consensus.” (William Wallace, *Collective Governance. The EU political process*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 524 (4th ed., 2000)

decision-making machinery of the Union, both at the highest formal decisional levels, and inside the universe of mundane regulatory activities. They converge in a dynamic process that evolves in time and that, at any given moment, varies across policy fields and territorial jurisdictional boundaries, resulting in a swinging ‘policy pendulum’ that conveys “both the sense of movement in the EU policy process and a kind of uncertainty about its outcomes.”¹⁰⁷ This explains why the notion of multi-level governance is profusely used to describe this environment.¹⁰⁸

With regard to the specific policy tools employed by the relevant decision-makers, we observe in the EU a coexistence of:

- traditional prescriptive legal instruments (licensing, mandatory technical production standards, performance standards, price controls, mandatory disclosure of product-related information, taxation, or market-based instruments such as emission trading systems)
- subsidizing
- co-regulation (what in the US is known as ‘reg-neg’)
- non-binding and informal instruments, such as framework directives, actions taken for the promotion of self-regulation, networking and information activities, as well as practices that can be brought under the broad label of ‘coordination’, such as the famed ‘open method of coordination’ (OMC), whereby compatible or even analogous policy approaches within each Member States are the result of extensive sharing of expertise and data, as is the case of the widespread use of benchmarking.

2. ACTORS IN THE EU REGULATORY ARENA(S): INTERPENETRATION OF ADMINISTRATIVE SYSTEMS

How can the Commission handle all of this? Three combined elements provide the answer and render an image of the Commission as a kind of *primus inter pares* amongst administrative entities in the EU arena:

- it promotes the formation of ‘expert policy networks’ and places a strong emphasis on consensus in their mode of operation
- in its role as regulator, it relies on committees drawn from the Member States (comitology)

¹⁰⁷ Helen Wallace, *The policy process. A moving pendulum*, in: HELEN WALLACE AND WILLIAM WALLACE, POLICY-MAKING IN THE EUROPEAN UNION 41 (4th ed., 2000)

¹⁰⁸ Some scholars prefer to speak of the existence of multiple ‘locations’ of policy-making, an idea that explicitly intends to avoid the notion of hierarchy suggested by the use of the term ‘level’, as well as to restrict MULTI-LEVEL GOVERNANCE as an explanatory model for a specific subset of practices, namely the administration of the structural funds (Helen Wallace, *Analysing and explaining policies*, in: HELEN WALLACE AND WILLIAM WALLACE, POLICY-MAKING IN THE EUROPEAN UNION 73 (4th ed., 2000))

- the EU is a system of decentralized administration; the execution of EU policies resides in the hands of the administrative apparatuses of the member states

This is due in part to the architecture of the Union itself, that is, to features such as the use of national bureaucracies in the production of regulations (what is known as comitology), the reliance on the administrative systems of the Member States for the implementation of most EU policies, or the existence of high-level advisory bodies such as the Committee of the Regions that bring regional and local administrators to the European arena. The presence and activities of the Union, then, permeates the political life of the Member States, and vice-versa. All of this is conducive to the inter-penetration of the administrative systems of the Union, the Member States and their component parts. Continuous interaction between the domestic and the European arenas takes place within several -partially interconnected- planes, creating multiple breeding grounds for engagement, cross-fertilization and imitation, as well as conflict, ‘misinterpretation’ and resistance. Next, I examine this idea of interpenetration of administrative systems in more detail; other issues arising from the structures conducive to such interpenetration (such as the many questions emanating from the system of comitology) fall beyond the scope of this paper.

2.1. The Commission’s involvement in policy networks.

Numerous actors congregate in the formulation of EU public policies and exert varying degrees of influence over process and outcomes. The frequent projection of the notion of policy networks onto the workings of the Commission is no more than an attempt to depict the disaggregated and asymmetrical nature of power, the multiplicity of actors that converge in each decisionmaking process, the relative informality that characterizes their exchanges, and the transformed opportunity structures that spring from such framework. The resulting networks are often “fairly open, complex, organized and include[] a systematic array of power and influence”, and each may be structured in very

different ways.¹⁰⁹ The Commission, often portrayed as a savvy strategist and an energetic policy entrepreneur, has learnt to develop flexible and innovative ways to enhance its influence, and adopting a range of different strategies of involvement depending on issue, timing and other opportunity-influencing considerations. It encourages the participation of government units, expert committees, ad hoc working groups, outside consultants (research centers, academic institutions, thin-tanks), interest groups –domestic, transnational, European-, trade unions, professional and consumer organizations.¹¹⁰ . These networks are valuable in the tasks of gathering information, developing policy alternatives, and promoting cooperative environment that ensures the reach of agreements and a smooth implementation of legal mandates. At a minimum, such networks are a valuable source of information -the Commission has no physical presence in the MSs- and a tool to ensure a uniform implementation of Union policies, which lies in the hands of the administrative apparatuses of the MSs. Throughout regulatory processes, it works in close cooperation with the administrations of the MSs, as well as interest groups of multiple kinds, whose formation has often been encouraged by the Commission itself.

The Member States are critical actors in the EU policy process (in its legislative, regulative and implementing dimensions). National officials intervene in their domestic capacity through instances such as comitology.¹¹¹ In this framework, there is a deeply

¹⁰⁹ Alison Woodward, *Challenges for Democratic organization and Citizen Voice in the European Process*, in: MAX HALLER (ed.): *THE MAKING OF THE EUROPEAN UNION. CONTRIBUTIONS OF THE SOCIAL SCIENCES* 211 (2001)

¹¹⁰ The Commission thus appears as internally fragmented, even considered by some as a “multi-organization.” (LAURA CRAM, *POLICY-MAKING IN THE EUROPEAN UNION. CONCEPTUAL LENSES AND THE INTEGRATION PROCESS* 155 (1997)) **[add Commission Communication on streamlining of outside consultation]**

¹¹¹ With regard to committees working with/for the Commission, a basic distinction can be made between: (1) comitology committees –which are created by the Council- and (2) those established by the Commission itself. In application of articles 202 and 211 of the EC Treaty, the Commission is to be generally conferred ‘implementing’ powers by the Council. (TREATY ESTABLISHING THE EUROPEAN COMMUNITY arts. 202 3rd indent & 211 4th indent (consolidated version, Dec. 24, 2002, O.J. (C325)). The so-called ‘implementing rules’ are typically what in national legal systems is known as regulations, that is, legal norms of a general nature issued by administrative agencies. Most of these norms are produced through comitology, a scheme established by the Council to retain eventual control over its ‘delegated’ powers. Comitology committees are expert institutions whose members are drawn from the bureaucracies of the Member States. In Ellen Vos analysis, comitology committees fulfill three goals: 1) the satisfaction of the Commission’s “voracious demand” for expertise with regard to the complex risk assessment and risk management processes involved in policy areas such as health, safety, etc., 2) the provision of a forum where ‘normative’ (i.e., political) issues are aired and, 3) the furnishing of a technique whereby the Member States–via the Council- continue to exercise a measure of control over decisionmaking in those situations when the Council has delegated ‘implementing’ powers (Ellen Vos, *The Rise of Committees*, 3(3) *European Law Journal* 210, at 212 (1997) See the 1987 Comitology Decision (Council Decision 87/373 laying down the procedures for the exercise of

symbiotic relationship between these committees and the Commission; and very few rules are ever referred back to the Council. The national officials that compose comitology committees are often the same that participate in Council working groups.¹¹² Comitology embodies and promotes the interpenetration of administrative legal apparatuses at EU and national levels. Domestic bureaucracies, carrying with them their own peculiar regulatory culture and accustomed to being guided exclusively by national interests, are brought to participate in the design of European policies as part of teams that force them to share tasks, cooperate with, and confront their peers from the other Member States, as well as the Europe-oriented Commission. Comitology creates an arena for policy learning among national bureaucrats and enhanced exposure to other regulatory cultures, which, in Wessels' view, promotes the continuing 'merging' of administrative and political systems in the Union's space.¹¹³

implementing powers conferred on the Commission, 13 July 1987 (OJ L 197/33). The system has been partially amended by the 1999 Comitology Decision (Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17 July 1999)). The Commission has proposed a reform of the 1999 Council Decision: Commission of the European Communities. (Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (COM(2002) 719 final)(2002/0298 (CNS)) [**update with Constitution**]. For illuminating explanations, see: Alexander Türk, *Case Law in the Area of the Implementation of EC Law*, in: ROBIN PEDLER & GUNTHER SCHAEFER (eds.), *SHAPING EUROPEAN LAW AND POLICY: THE ROLE OF COMMITTEES AND COMITOLOGY IN THE POLITICAL PROCESS* 167 (1996); Ellen Vos, *The Rise of Committees*, 3 *European Law Journal* (no. 3) 210 (1997); Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Process: the Constitutionalisation of Comitology*, 3 *European Law Journal* (no. 3) 273 (1997); M.P.C.M. VAN SCHENDELEN (ed.), *EU COMMITTEES AS INFLUENTIAL POLICYMAKERS* (1998); Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 *Journal of European Public Policy* 209 (1998); CHRISTIAN JOERGES & ELLEN VOS (eds.), *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* (1999); Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: a call for notice and comment in comitology*, 40 *Harv. Int'l L.J.* 451 (1999); Georg Haibach, *The history of Comitology*, in: MADS ANDENAS & ALEXANDER TÜRK (eds.), *DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC* 185 (2000); Günter F. Schäfer, Georg Haibach & Alexander Türk, *Policy Implementation and Comitology Committees*, in: EIPA, *Governance by Committee. The role of Committees in European policy-making and policy implementation* pp. 39 et seq. (Research Paper 00/GHA)(2000); MADS ANDENAS & ALEXANDER TÜRK (eds.), *DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC* (2000); EIPA, *Governance by Committee. The role of Committees in European policy-making and policy implementation* (Research Paper 00/GHA)(2000)

¹¹² In other words, the Commission drafts legislation that is approved by the Council –whose workload is carried by working groups composed of senior-level national officials- and then further develops it through rulemaking with the assistance of the same people, now re-grouped in a comitology committee

¹¹³ Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 *Journal of European Public Policy* 209 (1998) Yet, it has often been pointed out that severe legitimacy problems afflict comitology along the axes of accountability and participation. For many, summarize Annette Toeller and Herwig Hofmann, comitology is a "fairly undemocratic structure where uncontrolled experts make decisions about technical details which may have far-reaching impact. In this view, comitology is a synonym for European technocratic governance." (Annette Elisabeth Toeller and Herwig C.H. Hofmann, *Democracy and the reform of comitology* in: MADS ANDENAS & ALEXANDER TÜRK (eds.), *DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC* 25 (2000)) In a study of the matter, Francesca Bignami makes the case for a comparative study of US notice-and-comment rulemaking, as both systems are seen as characterized by the need to provide accountability to a "divided

In a way, there is a “continuum of policy-making that spreads from the country, through the European arena, to the global level.”¹¹⁴ Policy-making in the EU, then, can “by not stretch of analytical imagination” be understood aside from the institutional arrangements, administrative practices, and political environment of its Member States and its respective component parts.¹¹⁵ Traits of domestic processes impregnate the Union while, simultaneously, the previously domestic arenas become more and more ‘Europeanized’.¹¹⁶ The consideration of the Union as a policy arena reveals that it rests on a “kind of amalgam” between the supra-, national-, and subnational levels of government.¹¹⁷ The European framework, thus, can be seen as a group of ‘collective regimes’ that are molded in part by domestically generated policy considerations, and that, in any case, revert to the national level at the implementation stage, thus producing different end-products.¹¹⁸ Risse-Kappen arrives at the notion of ‘interlocking politics’ – borrowed from German federalism- to characterize policy-making processes in the EU, a notion that evokes the existence of intermediating structures that link the political processes of formerly autonomous organizations.¹¹⁹

A multi-directional dynamic is thus set in motion, whereby national and subnational administrators—and its component parts- as well as with interest groups of

lawmaking principal” and a pluralist model of interest group participation. As a matter of legal reform, Bignami proposes that US notice-and-comment procedures be applied to Community rulemaking, “although slightly tempered to reduce the role of courts and interest groups in light of cross-cultural differences in beliefs and interest organization.” (Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: a call for notice and comment in comitology*, 40 Harv. Int’l L.J. 451, at 514, 506 (1999))

¹¹⁴ Helen Wallace, *The institutional setting. Five variations on a theme*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 7 (4th ed., 2000)

¹¹⁵ Markus Jachtenfuchs, *The governance approach to European integration*, 39(2) *JCMS* 245, at 250 (2001) Helen Wallace, on her part, emphasizes that, since “the EU is part of, not separate from, the politics and policy processes of the member states”, the analysis of relevant, European-wide, institutions and practices must take into account the national and subnational levels as much as those established by the EU.(Helen Wallace, *The institutional setting. Five variations on a theme*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 3 (4th ed., 2000))

¹¹⁶ **[add biblio on Europeanization of domestic administrations: Knill, etc.]**

¹¹⁷ Helen Wallace, *The institutional setting. Five variations on a theme*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 7 (4th ed., 2000)

¹¹⁸ Helen Wallace, *The institutional setting. Five variations on a theme*, in: HELEN WALLACE AND WILLIAM WALLACE, *POLICY-MAKING IN THE EUROPEAN UNION* 7 (4th ed., 2000)

¹¹⁹ A corollary of this stance is that a correct grasping of the European Union, argues Risse, requires the adoption of a comprehensive stance, examining the complex fabric of inter-state relations, supranational institutions, and trans-national and trans-governmental relationships (between public and private actors) that congregate in the Union. Domestic processes of preference formation are influenced by trans-national relations, and vice-versa. (Thomas Risse-Kappen, *Exploring the nature of the beast: international relations theory and comparative policy analysis meet the European Union*, 34 *JCMS* 53, 61 (1996))

varied nature interact with the Commission. Such processes of negotiation and decision-making necessarily alter the perceptions and the ‘autonomy’ of each of the actors involved. Participation in Union policy-making is bound to affect the perceptions and, ultimately, the interests of all actors involved -including those of the Union institutions- resulting in a dynamic, multi-directional process of mutual recognition, influence, and power. Beyond the reach of specific policies, the Union is said to permeate the policy environment of the MSs, influencing national regulatory cultures and the choice of policy instruments, and stimulating policy learning and technical updating.¹²⁰ The system as a whole becomes permeable to mutual influences, a multi-directional and multi-faceted compound that has often lead to a high degree of ‘convergence’ as manifested in facts such as the high degree of voluntary harmonization that can be detected in policy areas beyond the reach of binding EU mandates. Amongst scholars, the prevailing assessment of these phenomena is that it generates uniformity: “those involved in this process, and thus in constant interaction with one another and with the Commission, are likely to develop a shared set of assumptions and values, even a common set of aspirations and, most importantly perhaps, a common belief in the importance of the EU as a forum through which to press their demands.”¹²¹

2.2. The Commission’s reform agenda: partnership governance or administrative reshuffling?

The language of governance reform has cropped up in multitude of institutional documents, where it acquires an interesting twist through its immersion in the rhetoric of democratization; the same themes that once filled the democratic deficit discourse have now been relocated in the realm of administration under the slogan of ‘good governance’. The establishment of administrative processes that allow for a palatable degree of citizen input in the adoption of policies and in the monitoring of their implementation appears to have become a baseline requisite for restoring the Union’s

¹²⁰ See: GIANDOMENICO MAJONE, *REGULATING EUROPE* (1996), especially chapter 12 (pp. 265-283)

¹²¹ LAURA CRAM, *POLICY-MAKING IN THE EUROPEAN UNION. CONCEPTUAL LENSES AND THE INTEGRATION PROCESS* 153 (1997).

legitimacy and promoting general support for the integration process. A Commission's 2001 White Paper on Governance (hereinafter, the 'White Paper') has been followed by a range of implementing measures.¹²² Governance in the White Paper are the "rules, processes and behavior that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence."¹²³ Under such definition, one cannot help but wonder what would differentiate *governance* from plain old-fashioned *government* under the rule of law.

A democratic twist inserted in the governance paradigm deserves mentioning. The White Paper attempts to establish a direct correlation between governance reform and democracy:

"Five principles underpin good governance and the changes proposed in this White Paper: openness, participation, accountability, effectiveness and coherence. Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local."¹²⁴

Unsurprisingly, the professed democratic ambitions are then reduced to rather modest measures, while leaving the question of the model of democracy to which the institution aspires completely outside the analysis.¹²⁵ It is possible to re-arrange and simplify the five principles of good governance around two pillars that constitute the kernel of administrative law discourse: legitimacy (= accountability + participation) and efficiency.

¹²² Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final) For the much finer work reflected in the working groups reports, go to: http://www.europa.eu.int/comm/governance/docs/archives_en.htm#working (accessed 25 July 2005) To redress the seemingly widespread afflictions of increasing distrust, alienation, disinterest, and poor understanding of the system, the Commission proposes to "connect Europe with its citizens" and to bring forward a "more coherent Union" by "opening up the policy-making process" and promoting greater accountability. (Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final) pp. 3-9)

¹²³ Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 8. The Commission's official website speaks of *governance* as being a 'very versatile' term that "originates from the need of economics (as regards corporate governance) and political science (as regards State governance) for an all-embracing concept capable of conveying diverse meanings not covered by the traditional term 'government' and that corresponds to the "so-called post-modern form of economic and political organizations."http://www.europa.eu.int/comm/governance/governance/index_en.htm#1 (accessed 25 July 2005))

¹²⁴ Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p 10. For a more explicit fusion of the notions of governance reform and democratization, see the 2000 Work Programme for the *White Paper on Governance* (Commission of the European Communities, Work Programme for the White Paper on Governance, Brussels, 11 October 2000, SEC(2000) 1547/7 final, pp. 3-4).

¹²⁵ This gap has been acknowledged by the Commission in its 2003 Report on Governance (Commission of the European Communities. Report from the Commission on European Governance (Luxemburg, 2003). **[correct citation]**

1) **LEGITIMACY.** In administrative law, legitimacy is more or less equated to *accountability*, which is in turn a combination of factors (transparency and neutrality in decisionmaking processes, availability of judicial review for final decisions, participation of all ‘stakeholders’ in regulatory procedures, etc.). The White Paper emphasizes some of these elements: 1) transparency throughout the policy cycle¹²⁶; 2) involvement of regional and local governments of the Member States –thus creating a ‘multilevel partnership’- through organized dialogue with subnational entities¹²⁷; 3) a more rationalized intervention of ‘interested parties’, as well as the ‘civil society’ at large, a move that is seen as reinforcing efficiency in addition to legitimacy.¹²⁸ In order to avoid the formal channels of rule adoption; it proposes informal self-regulation through the

¹²⁶ This entails: 1) a new communication policy (Commission of the European Communities. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on An Information and Communication Strategy for the European Union (COM (2002) 250 final/2)(2002)); 2) extended use of the *Europa* (the Union’s official website) to place all policy-related documents at the disposal of the public at large and substantial overhaul in the services provided by the website (<http://www.europa.eu.int>) (Public access to European Parliament, Council and Commission documents is guaranteed by Regulation (EC) 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents 2001 O.J. (L 145/43)). EU legislation can be accessed through EUR-Lex, opened in June 2001 and recently transformed into a single access-point for all official documents. (<http://www.europa.eu.int/eur-lex/en/index.html>); 3) enhanced transparency in consultation processes Commission of the European Communities. Communication from the Commission. *Towards a reinforced culture of consultation and dialogue- General principles and minimum standards for consultation of interested parties by the Commission.* (COM(2002) 704 final) (2002); 4) guidelines on the collection and use of outside expert advice Commission of the European Communities. Communication from the Commission. *On the collection and use of expertise by the Commission: principles and guidelines* (COM(2002) 713 final) (2002).

¹²⁷ The European Commission has signed a *Cooperation Protocol Concerning the Arrangements for cooperation between the European Commission and the Committee of the Regions* (Brussels, 20 September 2001). A Commission 2003 Working Paper formalizes a call to formulate the terms a condition for a systematic dialogue with regional and local authorities in early stages of rulemaking processes. Yet, given that, after enlargement, there are around 250 regions in the Union and more than 100 000 local authorities, the Commission understands that ‘dialogue partners’ can only be “national and European associations of local and regional government.: (Commission of the European Communities. Working Paper. *Ongoing and systematic policy dialogue with local-government associations* (2003) p. 5) In addition, the White Paper speaks of the promotion of staff exchanges and joint training, the establishment of pilot ‘tripartite contracts’ between MSs, subnational governments, and the Commission through which the participant subnational government adopts a greater regulatory and implementing role than that that would otherwise apply under current legislation (Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), pp. 12-14); Commission of the European Communities. Communication from the Commission. *A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities.* (COM (2002) 709 final)(2002)

¹²⁸ “Civil society’ is defined in the White Paper as including “trade unions and employers’ organizations (‘social partners’); non-governmental organizations, professional associations, charities, grass-roots organizations, organizations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.” (Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 14) See: Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), pp. 15-17

issuance of a ‘code of conduct’ that would set minimum standards for consultation¹²⁹, complemented by a proposal to develop ad-hoc ‘partnership arrangements’ for specific cases.¹³⁰ In the end, the

“legitimacy [of the Union] today depends on involvement and participation. This means that *the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels.*”¹³¹ (emphasis added)

Legitimacy, consequently, is directly connected with the vocabulary of multi-level governance through network:

“European integration, new technologies, cultural changes and global interdependence have led to the creation of a tremendous variety of European and international networks focused on specific objectives. Some have been supported by Community funding. These networks link business, communities, research centers, and regional and local authorities. They provide new foundations for integration within the Union and for building bridges to the applicant countries in the world. They also act as multipliers spreading awareness of the EU and showing policies in action.”¹³²

2) EFFICIENCY. Here, the Commission advocates techniques that, in one way or another, take part of the decisionmaking burden off its shoulders, while allowing it to retain control and ultimate authority, as well as those that streamline ‘rational’ and expert-dominated regulatory procedures. Flexibility in the choice and configuration of regulatory techniques, expertise, and streamlining of regulatory impact instruments summarize the ‘new’ philosophy. Thus, the Commission advocates: 1) the use of ‘co-regulation’, the equivalent of ‘reg-neg’ in the US system¹³³; the need to promote “structured and open networks” of experts at the European level that would operate as a

¹²⁹ Commission of the European Communities. Communication from the Commission. Towards a reinforced culture of consultation and dialogue. General Principles and minimum standards for consultation of interested parties by the Commission (COM(2002) 704 final)

¹³⁰ This would entail on the part of the Commission an commitment to “additional consultations compared to the minimum standards” and, in return, it would prompt interest groups to “furnish guarantees of openness and representativity, and prove their capacity to relay information or lead debates in the Member States.”(Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 17; Commission of the European Communities. Report from the Commission on Governance (2003), p. 16))

¹³¹ Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 11

¹³² Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 18 ‘Networks’ are understood as “interaction between individuals and/or organization (communities, regional and local authorities, undertakings, administrations, research centres and so on) in a non-hierarchical way and where every participant is responsible for a part of the resources needed to achieve the common objective, electronic communication being their most preferred tool.” (Commission of the European Communities. Report from the Commission on European Governance (2003) p. 17)

¹³³ Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), pp. 17, 21)

“scientific reference system to support EU policymaking”¹³⁴; the use of *ex ante* Regulatory Impact Assessments¹³⁵; extended use of non-binding tools such as recommendations, guidelines, and the Open Method of Coordination.

* * *

There is a fundamental gap between an overly-ambitious rhetoric and the very limited nature of the actual reform measures proposed and gradually implemented. The White Paper, described as having an “anodyne, plastic quality”¹³⁶, has made the Commission, yet again, the focus of extensive criticism on every imaginable ground: self-aggrandizing ambition, inappropriately visionary rhetoric, unrealistic assessment of the politico-legal situation of the Union, thinness of effective reform measures, lack of legal finesse, etc.¹³⁷ Scott and Trubek point out the existence of a gap between those portions of the White Paper that adopt the new governance rhetoric and, in particular, the endorsement of soft law approaches, and the reticence exuded when analyzing specific techniques such as the OMC. They conclude that the authors of the White Paper

“Are being confronted with governance developments which have, in the main, emerged through experimentation and pragmatic accommodation and which, to one degree or another, seek to provide new approaches both to (sic) *efficiency and legitimacy*. But in their confrontation with these developments ... the authors of the White Paper tend to deploy models of law, politics, or public administration which contain built-in, *a priori* answers to what is legitimate and what is not. Because the traditional models are unable to accommodate governance systems built on different principles and premises ... the White Paper’s authors have had trouble dealing with new governance. And thus some ...

¹³⁴ Commission states its complete trust in “specialist expertise”, which aids to “anticipate and identify the nature of the problems and uncertainties that the Union faces, to take decisions and to ensure that the risks can be explained clearly and simply to the public” (Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 19)

¹³⁵ Commission of the European Communities. Report on European Governance (L-2985) (2003) p. 20 Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 20. (See the implementing measure: Commission of the European Communities. Communication from the Commission on Impact Assessment. COM(2002) 276 final (2002))

¹³⁶ J.H.H. Weiler, *The Commission as Euro-Skeptic: a Task-Oriented Commission for a Project-Based Union*, in: CHRISTIAN JOERGES, IVES MÉNY, J.H.H WEILER (EDS.), MOUNTAIN OR MOLEHILL? A CRITICAL APPRAISAL OF THE COMMISSION WHITE PAPER ON GOVERNANCE (2001) (<http://www.jeanmonnetprogram.org/papers/01/010601.html>)

¹³⁷ See, for all, the collection of articles published by the Robert Schuman Centre for Advanced Studies (European University Institute) and the Jean Monnet Program (Harvard Law School and NYU School of Law): CHRISTIAN JOERGES, IVES MÉNY, J.H.H WEILER (EDS.), MOUNTAIN OR MOLEHILL? A CRITICAL APPRAISAL OF THE COMMISSION WHITE PAPER ON GOVERNANCE (2001) (<http://www.jeanmonnetprogram.org/papers/01/010601.html>) The Commission, in its 2003 Report on European Governance, has admitted that public response to the paper has pointed to the limited scope of the reform agenda and the Commission’s attempt the ‘short-cut’ of equating the governance debate with the democratic deficit debate” (Commission of the European Communities. Report from the Commission on European Governance (2003), pp. 34-35. To access all responses to the White Paper, visit the official governance website: (http://www.europa.eu.int/comm/governance/governance/index_en.htm#1)

parts of the White Paper seem to display symptoms of cognitive dissonance.”¹³⁸
(emphasis added)

The Commission seems to believe –that the compound of accountability, effectiveness and participation in a framework dominated by the principles of ‘partnership’ and ‘flexibility’ are the panacea for the achievement of a multi-level system of collaborative governance that will, in turn, deliver democracy and identity. Stakeholders –‘interested parties’- will thus be transformed into European citizens, and the democratic deficit of the Union will be, incrementally, unquestionably, and definitely, overcome.¹³⁹ In such a system, there are certain structural preconditions, such as transparency of and access to processes of policy-making, conditions that would lead to the creation of a Union-wide public sphere and promote the much awaited ‘sense of belonging’ that transforms stakeholder into citizens, members of a polity:

“Democracy depends on people being able to take part in public debate... Providing more information and more effective communication are a pre-condition for *generating a sense of belonging to Europe*. The aim should be to create a transnational ‘space’ where citizens from different countries can discuss what they perceive as the important challenges for the Union.”¹⁴⁰

The dissonance between rhetoric and practice is nevertheless to be expected. As I suggested in my assessment of new multilevel network governance, the problem seems to rest in great part in its inability to deal with the difficult questions of efficiency and legitimacy. Thus, the path to follow might be a different one, one that transforms administration from within, instead of a wholesale replacement of its conceptual framework with the insertion of a scheme that, inevitably, sounds alien to those who operate the machinery. **[conclusions to be completed]**

¹³⁸ Joanne Scott and David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8(1) ELJ 1, at 18 (2002)

¹³⁹ Indeed, the Commission envisions a “tangible Europe that is in full development; a Union based on multi-level governance in which each contributes in line with his or her capabilities or knowledge to the success of the overall exercise. In a multi-level system the real challenge is establishing clear rules on how competence is shared- not separated; only that non-exclusive vision can secure the best interests of all the Member States and all the Union’s citizens.” (Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), p. 35)

¹⁴⁰ Commission of the European Communities: European Governance. A White Paper. Brussels, 25 July 2001 (COM(2001) 428 final), pp. 11-12

2.3. A common European administrative law?

Historically, administrative law scholars have approached the European Union tardy. Yet, as Bignami argues, the question of administration and administrative law in the world of the European public authority is a crucial question because “without a good map of the changing topography of European public authority, we are powerless to think critically about European integration.”¹⁴¹ I would add that such inability extends to critical thinking about law, politics, and democracy.

The first attempts to systematize the administrative law of the Union –efforts that concentrate mostly in adjudicatory proceedings and judicial review of administrative actions- materialized in the establishment of a basic distinction between ‘European administrative law’ (the administrative law for the European Union) and ‘Europeanized’ administrative law, which referred to domestic administrative law under EU influence. Jürgen Schwarze coined ‘European administrative law’ to allude to the administrative law system for the European Union.¹⁴² In other words, it refers to the rules and principles that guide decision-making by the administrative apparatus of the Union in spheres of its direct competence, what is commonly referred to as *direct administration*.¹⁴³ In the absence of a legal regime established by treaty or secondary legislation, this administrative law is a collage of rules and principles (administrative impartiality, duty to notify the initiation of proceedings, right to be heard, proportionality, diligence, good administration, access to files, etc.) formulated through case law (European Court of Justice and Court of First Instance), through a method of “evaluative comparison of the national legal principles”, with the aim of articulating that solution which can better fulfill the goals of Union legislation.¹⁴⁴

¹⁴¹ Francesca Bignami, *Foreword*, 68 (1) *Law & Contemp. Probs.* 1, at 2 (2004).

¹⁴² See: JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* (1992).

¹⁴³ In Kadelbach’s characterization, this “set of rules and principles governs the execution of European law by institutions of the Union and, as far as that law takes direct effect, by the Member States” (Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in: CHRISTIAN JOERGES & RENAUD DEHOUSSE (eds.), *GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET* 167 (2002))

¹⁴⁴ JÜRGEN SCHWARZE (ed.), *ADMINISTRATIVE LAW UNDER EUROPEAN INFLUENCE. ON THE COVERGENCE OF THE ADMINISTRATIVE LAWS OF THE EU MEMBER STATES* 17 (1996) Nehl argues that these rules have been “tailored to the specific requirements of sectorial policy implementation. They are barely coordinated with one another, suffer from serious gaps –in particular as regards individual protection- and, at least partly, are not up to the new challenges to

There is, on the other hand, administrative law under European influence. The phenomenon of “Europeanization” of national administrative systems refers to the transformation of the administrative law that is applicable to purely national aspects of European policies or to entirely national policies, as a result of their exposure to EU administrative law and the legal traditions of other Member States. The implementation of EC/EU law rests on the Member States –what is known as *indirect administration*. In principle, each MS applies its own administrative law system and is not allowed, in application of the principle of equality, to apply rules or standards different than those applicable to comparable domestic situations.¹⁴⁵ Member States that, “in principle, enjoy constitutional and procedural autonomy. Depending on how far EC law interferes with national procedural autonomy by setting common criteria for its implementation, a complex interaction between supranational and national rules ... is established; this, moreover, may be coupled with a sectorial (sic) shifting degree of interplay between Community and national organs.”¹⁴⁶ Yet, scholars have detected instances of adaptation or ‘Europeanization’ that “comes about as the result of an interaction between the national and the European systems.”¹⁴⁷

Other analysts take issue with a clear-cut division between direct and indirect administration. Sabino Cassese, for example, places a strong analytical emphasis in organizational arrangements that involve both domestic and EU administrative entities in

which a modern economic and technocratic bureaucracy is increasingly being exposed.” (HANS PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* 3 (1999)) For in-depth study, with careful case-law analysis, of these principles, see: HANS PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* (1999); SUSANA GALERA RODRIGO, *LA APLICACIÓN ADMINISTRATIVA DEL DERECHO COMUNITARIO. ADMINISTRACIÓN MIXTA: TERCERA VÍA DE APLICACIÓN* 149-156 (1998) For an earlier, seminal, analysis, see: JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* (1992). For a brief overview, see: Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in: CHRISTIAN JOERGES & RENAUD DEHOUSSE (eds.), *GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET* 181-192 (2002) See, also, Sabino Cassese, *European administrative proceedings*, 68 (1) *Law & Contemp. Probs.* 21 (2004)

¹⁴⁵ Joined cases 205-215/82, *Deutsche Milchkontor GmbH et al. v. Germany*, (1983), ECR 2633

¹⁴⁶ HANS PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* 3 (1999)

¹⁴⁷ Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in: CHRISTIAN JOERGES & RENAUD DEHOUSSE (eds.), *GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET* 167 (2002) The Commission, supported by the ECJ, has exercised a certain pressure on national administrations to conform to its understanding of what procedures or guarantees are appropriate, sometimes leading to a lower standard of procedural protection of the individual (such as is the case of a narrow interpretation of ‘stakeholder’) than that which would apply in a similar process if conducted entirely at the discretion of domestic administrators. Again, a detailed analysis of this body of law falls beyond the scope of this paper. For in-depth analysis, see: ALBERTO J. GIL IBÁÑEZ, *THE ADMINISTRATIVE SUPERVISION AND ENFORCEMENT OF EC LAW: POWERS, PROCEDURES AND LIMITS* (1999). For a brief overview, see: Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in: CHRISTIAN JOERGES & RENAUD DEHOUSSE (eds.), *GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET* 167 (2002)[add: Bignami 2004, Mario Chiti 2004, Gil-Ibáñez 2004, Schwarze 2004]

varying degrees of collaboration for the implementation and enforcement of EU legislation.¹⁴⁸ These arrangements, that he calls ‘common systems’, reflect the collective character of EU government, and are seen as tools for the reconciliation of “conflicting but interconnected interests”, as well as for the mutual control of the two levels of administration.¹⁴⁹ They vary across policy areas –depending on whether the original competence is supranational, concurrent, or national- and are characterized by the intervention of multiple actors from the domestic and EU levels, the casting of individual actors in different roles along the process, the development of both vertical and horizontal (among MSs) linkages as the specific procedure unfolds, and a Commission that takes a various roles -final decision-maker, stirring and coordinating- role along the process.¹⁵⁰

As could be expected, the likelihood and normative desirability of a common body of administrative law that would unify the administrative law of each MSs, European administrative law, and Europeanized administrative law, as well as the related question of its formal codification has been explored by some scholars.¹⁵¹ This process – of ‘convergence’ remote as it is- is seen as normatively desirable for the integration process, and it would operate as a platform for benchmarking of best practices.¹⁵²

I would like to close this section with a mention of Mario Chiti’s stance on European administration, one that explicitly points in the direction of the traits of multilevel network governance analyzed earlier in this piece. In Chiti’s view, an evolution is taking place in the direction of the

¹⁴⁸ Sabino Cassese, *European administrative proceedings*, 68 (1) *Law & Contemp. Probs.* 21 (2004). [add Edoardo Chiti 2004, Franchini 2004, Cananea 2004]

¹⁴⁹ Sabino Cassese, *European administrative proceedings*, 68 (1) *Law & Contemp. Probs.* 21, at 22 (2004)

¹⁵⁰ See: Sabino Cassese, *European administrative proceedings*, 68 (1) *Law & Contemp. Probs.* 21, espec. 24-25 (2004)

¹⁵¹ Schwarze considers that “an approximation of the national administrative law systems in their own sphere of competence and responsibility, and whether, therefore a ‘ius commune Europaeum’ in the field of administrative law is emerging.” (JÜRGEN SCHWARZE (ed.), *ADMINISTRATIVE LAW UNDER EUROPEAN INFLUENCE. ON THE CONVERGENCE OF THE ADMINISTRATIVE LAWS OF THE EU MEMBER STATES* 15 (1996)) See, also: Stefan Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in: CHRISTIAN JOERGES & RENAUD DEHOUSSE (eds.), *GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET* 167, 168 (2002)

¹⁵² The EU has thus served to ‘inspire’ domestic legal orders to “make use in their own sphere of solutions jointly developed at Community level. Principles originally established only for cases involving Community elements are thus increasingly applied in purely domestic situation with no links to EC law. In this way European law not only brings about the permeability of the domestic legal orders, it also stimulates them to improve their own solutions. It even puts pressure on the Member States by creating standards of comparison, i.e. common legal principles which again where derived from many European legal systems on the basis of comparative law.” JÜRGEN SCHWARZE (ed.), *ADMINISTRATIVE LAW UNDER EUROPEAN INFLUENCE. ON THE COVERAGE OF THE ADMINISTRATIVE LAWS OF THE EU MEMBER STATES* 836 (1996)

“rise of a *multi-level* public administration in which the original Community scheme of the indirect, autonomous execution of Community policies by national administrations is being replaced by an administrative model of integration based on the criteria of flexibility and differentiation. By now, the model of polycentric public administration is standard in national systems, and is gradually coming so in Europe’s supranational system of governance. Europe’s legal order contains a variety of principles capable of disciplining the new multi-level public administration that may be said to substitute and ‘administrative law of integration.’”¹⁵³

Echoes of multi-level governance begin to reach deep into formerly traditional administrative law analysis.

2.4. Governance as administration. In defense of interwoven but differentiated administrative law systems in the EU space

A dialectical process of influence amongst all levels seems to be the reality of administrative law in the EU space. This creates, at the very least, enhanced visibility –a *broader experiential universe*- that allows for the comparison and transplantation of norms and ideas in multiple ways. With regard to adjudication, EU administrative law is manufactured by drawing bits and pieces from the traditions of the Member States. The EC courts have created this normative corpus through extensive borrowing of domestic doctrines, picking and choosing from various Member States. Such an operation entails selection, adaptation, ‘distortion’, ‘misinterpretation’, re-appropriation, reformulation reinvention, creation of new meanings. It is, thus, a multi-, supra- and a-national system of rules, one that does not correspond to any one given system in particular, but that bears deep traces of many. When this body of law bounces back to the Member States, another similar process of transformation takes place, with the additional dynamics provided by its confrontation with a legal system that may or may not have been the original source of inspiration for the EU with respect to that specific practice, but where, in any case, the law has in the meantime evolved and adapted to that specific interpretative context. These dynamics of cross-fertilization take place simultaneously and feed on each other; it is only for analytical reasons that one may venture to separate them into autonomous

¹⁵³ Mario P. Chiti, *Forms of European Administrative Action* 68 (1) *Law & Contemp. Probs.* 37, at 37-38 (2004).

occurrences. Behind the advocacy of a common, uniform, European administrative law I cannot help but see a certain pan-Europeanist ideology and a Cartesian logic that longs for comprehensiveness, internal coherence, and clear hierarchies; the codification of such system of rules would be a first step in the unification of administrative and constitutional law into a common body of public law principles sanctioned by a European Constitution.

At the same time, there has always been a rich doctrinal exchange amongst continental European countries. Domestic administrative law in continental Europe – notwithstanding the differing degree of ‘importance’ attached to administrative law within the body of public law in each country- has been the result of extensive exchange, transplanting, and importation, both in terms of the content of rules and their doctrinal backing, within an overall predominance of the French system. Scholarship in the discipline often profits from contributions from foreign scholars, without an explicit conscience that this might be an exercise in comparative legal analysis. I would go as far as to argue that such resource to concepts from other legal systems and ‘foreign’ legal scholarship is not understood as motivated by a common genealogy or a similarity of legal cultures, but as an inherent and unquestioned component of one’s own theoretical armory.¹⁵⁴

A similar comment can be made with regard to rulemaking. In a study of comitology, Wessels argues that committees are not only signs, but also the main driving force behind a progressive merging –Europeanization- of public resources operated by national governments, national bureaucracies, and other public and private actors.¹⁵⁵ In this process, responsibilities are ‘diffused’ -thus challenging traditional mechanisms of

¹⁵⁴ For example, the Spanish system has extensively borrowed from the French, as well as –to a lesser degree-, from the German (in particular to those portions of administrative law that are most proximate to constitutional law, where Spain has adopted many Kelsenian principles) and the Italian. Scholarship from these countries is generally not regarded as truly ‘foreign’; in the explanation of legal notions, it is perfectly common to see continuous references to foreign scholarship as authoritative interpretations of domestic rules, practice that extends to law school textbooks. (See, for all: EDUARDO GARCÍA DE ENTERRÍA & TOMÁS RAMÓN FERNÁNDEZ, CURSO DE DERECHO ADMINISTRATIVO (9th ed., 1999))

¹⁵⁵ “Institutional growth and procedural differentiation offer access to decision cycles in policy fields which grow both in number and scope. Committees provide evidence of a growing Europeanization of national administrations.” (Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 *Journal of European Public Policy* 209, at 216 (1998))

accountability-, and transparency diminished.¹⁵⁶ Sovereignties, argues Wessels, are pooled; the state is transformed by an apparatus –comitology- that fosters ‘joint management’ of the whole policy cycle and at “all relevant levels of the member states’ administration including national, regional, and local levels.”¹⁵⁷ Yet, crucially, this ‘partnership’ is “the product of increasing competition for access and influence in the EU policy cycle. The push to and pull from Brussels are part of a battle for power in the multi-level system which does not lead to an ultimate victory of any one level or group of actors; the dynamics of this competition lead to greater participation by many national actors.”¹⁵⁸ National bureaucracies are changed in the process; domestic officials “have to convince colleagues with different political and administrative cultures as well as different interests. These challenges spill back into the national system. This process evolves incrementally and creeps into the political and administrative normality at the national level without causing dramatic structural changes there.”¹⁵⁹

These infinite and minute practices of cross-fertilization unveil an *expanded experiential universe* where each agency is immersed in a multi-level system of variable geometry, where a local in one place may affect the regional in a different place, and so on. The result of such processes may not –should not- be a ‘uniform’ system, if by this term one means internal sameness in the letter of the law, homogeneity, and unvarying implementation of rules. What these processes do reveal is a universe of interlinked bureaucracies and legal practices, one of various instances of interwoven public spheres.

¹⁵⁶ Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 Journal of European Public Policy 209, at 216 (1998)

¹⁵⁷ Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 Journal of European Public Policy 209, at 217 (1998)

¹⁵⁸ Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 Journal of European Public Policy 209, at 217 (1998)

¹⁵⁹ Wolfgang Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 5:2 Journal of European Public Policy 209, at 228 (1998)

The process of legal interpenetration just characterized would be part of what Jacques Ziller describes as the continuing process of consolidation of ‘European public law’, a “complex process in which the legal systems of EU member states, of the EU itself and ECHR law contribute to shaping and transforming the body of public law of each other. It concentrates on how European and national legal systems get progressively anchored to one another, both vertically and horizontally. This is a specifically European process in the broader framework of globalisation, which goes far beyond the growing cross-fertilisation of legal systems due to developing exchanges.” Description of EUI Department of Law Project “Consolidating European Public Law”, directed by professor Ziller (<http://www.iue.it/OnlineProjects/LAW/conseulaw/english/description.htm>) (accessed 15 July 2005)

This space of interwoven bureaucracies and legal practices reaches far beyond the picture drawn by multi-level governance as previously described. Not only it embodies significant horizontal and cross-level dimensions that link bureaucracies from corner to corner in the European space at various functional and territorial levels -even in areas seemingly un-related to EU policies-, but it is also deeply marked by the recurrent inserting of the particular into the universal and the local into the regional, and vice-versa that takes places as the resolution of common problems unfolds in systems and sub-systems that are, crucially, highly institutionalized, deeply marked by law in content and operation, and operated by individuals and entities that are deeply embedded in regulatory cultures that exhibit variable degrees of inertia and permeability.

What all of this suggests is that what is presented in the EU as a multi-level system of governance appears more like a *multi-level system of administration*, a legal realm indeed complex and innovative, but *administrative in core and legal substance*. The interactions described above, and the relationships that spring from them, are profoundly shaped by administrative law broadly understood, that is, by the administrative legal procedures and regulatory cultures of the public actors involved. To a large extent, political struggles find their way to the state through agencies, in a dynamics that can be characterized as the coexistence of both nested and interconnected legal arenas. In this universe, policy arenas and political communities are defined and redefined by a continuous interplay of identity and differentiation. This cosmos can only be captured through a level of analysis that descends to the particulars of the formulation and implementation of specific policies, even to occurrences that are, in appearance, minute or highly localized.

In sum, looking at the European space through the lenses of administrative law reveals a map characterized by a greatly variable geometry. Through regulatory restrictions, subsidies, promotional activities or pilot projects, the Union links multiple combinations of individuals, interest groups, public and private organizations, and government agencies of all functional and territorial levels. The interactions and relationships thus established do not correspond to a pyramidal distribution of power, but to the supra-, infra-, trans-, and meta-national –and multiple combinations of these elements- dynamics of contemporary politics in the European space. What lies behind

these dynamics is nothing less than the continuous and dialectical process of formulation, contestation and transformation of political struggles.

IV. A DEMOCRATIC TWIST ON ADMINISTRATION

1. ‘PARTNERSHIP ADMINISTRATION’: POLICYMAKING AS (DELIBERATIVE) PROBLEM-SOLVING.

1.1. Partnership administration and interest representation

This part analyzes the works of some legal scholars who have put forward normative proposals for addressing the complexities of contemporary administration with an overt emphasis on the democracy/legitimacy side. As we have seen, the EU is crowded by novel regulatory techniques deployed to address what are perceived as common problems in legal and political environments where diversity and uncertainty are structural components. Behind these developments, there are discourses that seek to promote, explain, or criticize them.¹⁶⁰ This part explores some of these contributions. For the purposes of this part, I will recall the notion of partnership governance, except that I will now name it ‘partnership administration’. Partnership administration is a mode of governing by which public and private actors assemble in policy networks where relationships within are characterized by (variable degrees) of cooperation, trust, and equality. In such system, politics is conceived as joint problem-solving. It is, therefore, openly participatory and a high premium is placed on those techniques that foster the pooling of knowledge, expertise-building, and innovation.

¹⁶⁰ Borrowing from Iris Young, I take the notion of paradigm to mean the “configuration of elements and practices which define an inquiry: metaphysical presuppositions, unquestioned terminology, characteristic questions, lines of reasoning, specific theories and their traditional scope and mode of application” IRIS YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 16 (1990) Paradigms both conform and are molded by individual input, epistemic communities, disciplinary demarcations, and the course of specific debates. They allow scholars to comprehend and build upon each other, while simultaneously acting as disciplinarians of the course of investigation and critique. A specific vocabulary often lies at the core of paradigms -an issue entirely different from that of they in/commensurability-; exposing, rejecting, or re-appropriating such vocabularies is part of a critical stance.

A frequent starting point in the analysis of partnership administration is dissatisfaction with traditional command-and-control regulatory administration and, by extension, the interest representation theory that is identified as supporting it. This general mode of command-and-control regulatory intervention is perceived, notwithstanding the particularities of the specific legal system under scrutiny, as a prevailing approach in highly industrialized states, as well as in the EU. Yet, a theory of interest representation refers to the nature of the administrative process and the role and relationships amongst the actors involved in it. It does not prescribe the tools that should be deployed for the fulfillment of regulatory goals; it stipulates only certain conditions of entry and participation in the decisionmaking procedure, not the type of measure to be adopted. Nevertheless, authors preoccupied with command-and-control regulatory approaches see them as the product of a very specific, adversarial, conception of the relationships of between agencies and the groups that interact with them. Thus, the primary problem seems to reside more in the characterization of the role of the actors involved in decisionmaking processes than on the particularities of any given regulatory tool. It is in this sense that interest representation theories have become a target of critique. Interest representation has commonly been used to explain and determine the role of agencies, citizens and groups in the formulation of public policies. This take on regulation has been argued with particular care in the context of the US legal system, notwithstanding forceful critiques.¹⁶¹ As Richard Stewart put it in his seminal article with reference to the US legal system, the main purpose of administrative law is the control of administrative discretion, which, in turn, is “inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.”¹⁶²

¹⁶¹ See, for all: Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975). For an early, comprehensive critique of the interest representation model and its predecessors in the US legal system, see: Gerald Frug, *The ideology of bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984). For an analysis of theories of regulation and their unsatisfactory applicability to US administrative law, see: Steven Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1 (1998)

¹⁶² Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, at 1683 (1975) Through the decades of the 1960’s and 1970’s, US courts “transformed the basic purpose of administrative law –from one of limiting governmental power to protect private interests (as defined by the common law) to one of representing relevant interests, by providing a system in which all of the various interests with a stake in agency policy have the right to participate and secure judicial review of the balance struck by the agency” (STEPHEN BREYER, RICHARD STEWART, CASS SUNSTEIN & MATTHEW SPITZER, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 27 (4th ed., 1998)).

Indeed, the language of administrative law is that of *interests – stakes*-. Actors are assimilated to issues; individuals are relevant only as *stakeholders* and groups are generally equated to interest groups. The term ‘stakeholder’ is revealing, a word so malleable that becomes virtually meaningless, except for the fact that it serves to offer a clear impression of the *absence of the human*. Reference to the entity of the subject is reduced to ‘she who holds a stake’, a notion with substantial implications: nothing beyond the stake is relevant for the purpose of administrative law; the individual enters the realm of administrative operations only insofar as she holds a stake; once ‘inside’ the administrative state, the individual is just an instrument of her stake; the stake does not contribute to conform the identity (political, psychological, cultural) of the individual, it is simply ‘held’ by her as some kind of external attachment.

Growing dissatisfaction with the descriptive power and normative content of interest representation has led a number of scholars to spell out new approaches that would account for emerging practices in various regulatory settings and further promote legal reform. The replacement of ‘adversarial’ for ‘collaborative’ relationships between agencies and other actors in regulatory processes is well received in EU studies under the name of the principle of ‘partnership’. As we have seen in previous section, the EU is seen by many today as paradigmatic of a broad trend whereby ‘traditional’ regulatory states appear to be shifting from the usual recourse to command-and-control mechanisms to “less authoritative, less interventionist, more participatory regulatory forms.”¹⁶³ On occasion, sweeping correlations are made between the notion of ‘government’ as authoritative, non-democratic, command-and-control intervention through hard law, and ‘governance’, which would be non-hierarchical, legitimate problem-solving through soft law instruments.¹⁶⁴ The partnership principle has been seen by many as a “tangible

¹⁶³ Christoph Knill & Andrea Lenschow, *Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation*, EIoP Vol. 7 (2003) No.1, p. 1.

¹⁶⁴ “In recent years, there has been widening academic interest in global and European governance. There has been a focus on opportunities for new types of legitimate authority, particularly on institutionalized forms of power that are recognized by those who are regulated by them. Authority is found not only on systems of government –the traditional system of command and control- but also in governance. Traditional authority is characterized by the domination of hierarchy and monopoly for rule setters, which in most cases are state and public actors. Governance rests upon multiple authorities that are not necessarily public and sharing. In systems of government the law is hard; in systems of governance the law is soft. The crucial difference between these two types of legal norms is that soft law lacks the possibility for legal sanctions. Thus soft law is not considered to be legally binding”. (ULRIKA MÖRTH, (ED.), *SOFT LAW IN GOVERNANCE AND REGULATION. AN INTERDISCIPLINARY ANALYSIS* 1 (2004)

expression of a trend that was seen as transforming European Union policies into a system of multi-level governance”, often by glossing over the continued confrontational nature of the relationships among the actors involved.¹⁶⁵ The world of joint-ventures with stakeholders in a world of policy networks denotes symbiotic relationships between the government and the people; a new turn in the old, many time deconstructed -but still pervasive- distinction between the public and the private spheres. Under the idea of partnership, policy actors from different government levels and the private sphere are brought together to ‘collaborate closely and continuously.’¹⁶⁶ The principle of ‘partnership’ serves, indicates Michael Bauer, to organize actor interaction by “interlock[ing] layers of government and organized social interests across multiple arenas in order to prepare and implement supranational policies”.¹⁶⁷

1.2. Collaborative governance, democratic experimentalism and deliberative polyarchy

One of the earliest systematic formulations of this turn in administrative law thinking is Jody Freeman’s 1997 “collaborative governance”, conceived as an explicit alternative to interest representation in the US legal system.¹⁶⁸ The seemingly insurmountable problems of ‘ossification’,¹⁶⁹ (what Stewart has recently labeled ‘administrative fatigue’)¹⁷⁰ and the eternal legitimacy crisis that affects administrative agencies make this theory no longer descriptively and normatively adequate. The interest representation model, argues Freeman, is based on the no-longer acceptable premises

¹⁶⁵ Michael W. Bauer, *The EU ‘partnership principle’: still a sustainable governance device across multiple administrative arenas?* 80(4) Public Administration 769, at 770 (2002)

¹⁶⁶ Liesbet Hooghe, *Reconciling EU-wide Policy and National diversity*, in: LIESBET HOOGHE (ed.), COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTI-LEVEL GOVERNANCE 2 (1996)

¹⁶⁷ Michael W. Bauer, *The EU ‘partnership principle’: still a sustainable governance device across multiple administrative arenas?* 80(4) Public Administration 769, at 770 (2002)

¹⁶⁸ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997);

¹⁶⁹ See, Thomas O. McGarity, *Some thoughts on ‘deossifying’ the rulemaking process*, 41 Duke L.J. 1385 (1992). For McGarity, “ossification” means more than mere delays or overly extensive administrative records; it is the result of deeper more structural problems. Informal (notice-and-comment) rulemaking has been the victim of its own success. Ossification is the result of a fundamental absence of consistency in what the different branches of power expect from agencies, a heightened institutional competition to control agencies, the pervasive nature of scientific uncertainty (that makes risk management and policy choices unfeasible), an unprecedented public distrust of the executive branch, and the predominance of cynical skepticism about administrative exercise of discretion.

¹⁷⁰ Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437, at 446 (2003)

that: discretion must be contained, regulations have the nature of bargains among interest groups, the process of decisionmaking is –due to the conflictive nature of interactions amongst interest groups- inherently adversarial, stakeholders are understood as ‘outsiders’ in relation to administrative agencies, and that the role of agencies is merely neutral and reactive.¹⁷¹

As an alternative, Freeman proposes a model of ‘collaborative governance’ based on the understanding of agency decisionmaking as ‘problem-solving’. Collaborative governance is a multi-stakeholder process where not only bargaining is facilitated and information sharing is required, but where also a truly deliberative process emerges, participation by all interested parties and at all stages of the process is encouraged as an independent democratic value, the characterization of the problems at hand are continuously redefined and the solutions are always considered provisional, where all parties are understood as interdependent and accountable to each other, the role of administrative agencies is reduced to that of mere facilitator of a very open-ended and inherently provisional rulemaking process, and where the conditions are created for the promotion of innovative solutions to regulatory problems. The conception of agency decisionmaking as ‘problem-solving’ would seemingly reduce the adversarial nature of current procedures and allow for a continuous questioning and redefinition of regulatory goals and solutions. A natural consequence of this scheme would be the emergence of friendly and productive relationships amongst stakeholders and a willingness to exchange information and ideas that, in turn, would make regulatory processes faster, less costly, and more effective. Freeman’s proposal appears to claim that collaborative governance is not only more participatory, but also allows the participants for a sense of ‘owning’ the process, being able to shape it and transform it as needed, with the assurance of their voices being heard. The centrality of the debate over control of agency discretion would finally be overcome, replaced by a dialectical and creative process where all participants are politically transformed. The end result would seemingly be enhanced –more deliberative and participatory- democracy.¹⁷² This entails, argues Freeman, an

¹⁷¹ See: Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 18-21 (1997)

¹⁷² See: Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 8-33 (1997)

overcoming of the public-private divide that she sees entrenched in the interest representation model, especially in what regards accountability:

“The purpose of collaboration is not to displace or ‘privatize’ agency functions on the theory that privatization would be more efficient or because agencies are viewed as unaccountable. In fact, the word ‘privatization’ is misleading in this context. A collaborative regime challenges existing assumptions of what constitutes public or private roles in governance, because most collaborative arrangements will often involve sharing responsibilities and mutual accountability that crosses the public-private divide.”¹⁷³

Shortly thereafter, a monumental piece by Dorf and Sabel proposed a new and more comprehensive view of these themes under the brand of ‘democratic experimentalism’.¹⁷⁴ This article studied a plethora of administrative programs and initiatives, and set them against a conceptual framework of philosophical pragmatism, as well as a variety of popular innovations in the private sector, such as benchmarking, concurrent engineering, and ‘learning by monitoring’. The driving force of the study was Dorf and Sabel’s conviction in the inadequacy of traditional administrative and constitutional law to deal with the volatility that characterizes economic conditions today and the extreme complexity of large societies. What was needed was a “new model of institutionalized deliberation that responds to the conditions of modern life.”¹⁷⁵

¹⁷³ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, at 30 (1997). In later works, Freeman has taken this notion further and proposed a complete disposal of the distinction between the public and the private, an altogether elimination of the notions of governance and governing: “Given the reality of public/private interdependence, I propose an *alternative conception of administration as a set of negotiated relationships*. Specifically, public and private actors negotiate over policy making, implementation, and enforcement. This evokes a decentralized image of decisionmaking, one that depends on combinations of public and private actors linked by implicit or explicit arrangements. One might describe this conception by using the term ‘shared governance’, but ‘governance’ implies hierarchy of control in which there is one thing –or a set of things- to be governed, and a center of control that does the governing. In my conception, however, there are only problems to confront and decisions to make. There is nothing to govern.” (Jody Freeman, *The private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, at 547-548 (2000). (emphasis added) Also, see: Jody Freeman, *Private Parties, Public Functions, and the New Administrative Law.*, 52 Admin. L. Rev. 813 (2000).

¹⁷⁴ Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998)

¹⁷⁵ Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, at 283 (1998) Philosophical pragmatism provided the authors with a suitable conception of thought and action; pragmatism “takes the pervasiveness of unintended consequences, understood most generally as the impossibility of defining first principles that survive the effort to realize them, as a constitutive feature of thought and action, and not as an unfortunate incident.” Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, at 285 (1998) Philosophical pragmatism conceives thought and action as problem solving and its conceptual core is the reciprocal determination of means and ends; in collective choice processes, the objectives initially presumed are transformed in the light of the experience of their pursuit, and this transformation, in turn, serves to redefine what would count as a mean.

The resulting proposal of democratic experimentalism rejects the configuration of administrative agencies as centralized, hierarchically, and vertically integrated, and advocates instead a notion of ‘working groups’ with blurred boundaries and open-ended membership, a decisive transcendence of the public/private divide, a regulatory philosophy of ‘networking’ and information sharing. Their envisioned administrative world is a gigantic system of information pooling, where all parties involved have incentives to share information, and where citizens have access to information about how better or worse a similar problem is solved in a different jurisdiction. This absolute openness and fluidity of ideas is envisioned as an incentive for agencies to compete for the best solution and would seemingly render a much less hierarchical, much more collaborative, and significantly more democratic administrative universe.

In the end, democratic experimentalism ‘privatizes’ political institutions by “exposing them to the novel ‘market’ of compelling, competitive benchmarking comparisons with the performance of like entities”, yet, argue Dorf and Sabel, it also

“re-politicizes political institutions by introducing a novel form of deliberation based on the diversity of practical activity, not the dispassionate homogeneity of those insulated from everyday experience. This form of deliberation ... neither depends on consensus nor results in uniformity of view. Rather, it produces workable cooperation by continuously exploring different understandings of means and ends.”¹⁷⁶

Sabel and Cohen have written a series of pieces that take a somewhat different turn –and a much closer focus on the developments taking place in the EU, under the labels ‘directly-deliberative polyarchy’, ‘deliberative-polyarchy’ and, most recently, ‘global administrative law’.¹⁷⁷ In their 1997 essay, Cohen and Sabel proposed the notion of ‘directly-deliberative polyarchy’ as a tentative, embryonic, approach to tackle the democracy deficit in the EU.¹⁷⁸ This essay, more a set of questions intended to open a

¹⁷⁶ Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, at 313-314 (1998)

¹⁷⁷ Joshua Cohen and Charles Sabel, *Directly-Deliberative Polyarchy*, 3 ELJ No. 4, 313 (1997); Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998); Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345- 375 (2003); Joshua Cohen and Charles F. Sabel, *Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance* (manuscript, April 2005, on file with authors)

¹⁷⁸ Joshua Cohen and Charles Sabel, *Directly-Deliberative Polyarchy*, 3 ELJ No. 4, 313 (1997)

novel venue for debate than a specific institutional reform proposal, formulates the notion of directly-deliberative polyarchy as a system where

“collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions. But in deciding, those citizens must examine their own choices in the light of relevant deliberations and experiences of others facing similar problems in comparable jurisdictions or subdivisions of government. Ideally, then, directly-deliberative polyarchy combines the advantages of local learning and self-knowledge with the advantages and discipline of wider social learning and heightened political accountability that result when the outcomes of many current experiments are pooled to permit public scrutiny of the effectiveness of strategies and leaders.”¹⁷⁹

It was a matter of time before the EU would become a fertile realization of these ideas. In a 2003 article, Cohen and Sabel re-examine their deliberative polyarchy framework in the light of recent developments in the debate concerning the nature and ‘democratic vocation’ of the EU as a polity, within the framework of a regulatory setting that they see producing “new forms of rule-making issuing in open-ended rules”, as would be the case of comitology or the (OMC).¹⁸⁰ Their characterization of the EU as a “deliberative polyarchy” is as follows:

“Consider now a world in which sovereignty – legitimate political authorship- is neither unitary nor personified, and politics is about addressing practical problems and not simply about principles, much less performance or identity. In this world, a *public* is simply an open group of actors, nominally private or public, which constitutes itself as such in coming to address a common problem, and reconstitutes itself as efforts at problem solving redefine the task at hand. The polity is the public formed of these publics: this encompassing public is not limited to a list of functional tasks (police powers) enumerated in advance, but understands its role as empowering members to address such issues as need their combined attention.”¹⁸¹ (emphasis added)

The defining feature of deliberative polyarchy, then, would be its ability to “transform diversity and difference from an obstacle to cooperative investigation of

¹⁷⁹ Joshua Cohen and Charles Sabel, *Directly-Deliberative Polyarchy*, 3 ELJ No. 4, 313, at 313-314 (1997)

¹⁸⁰ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 346 (2003)

¹⁸¹ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 362 (2003)

possibilities into a means for accelerating and widening such inquiry.”¹⁸² In this world of deliberative polyarchy, ‘solidarity’ –the civic bond- is understood as the “mutual capacitating by equals”.¹⁸³ This civic bond is ‘moral’ because individuals recognize each other as equal moral agents, and is ‘practical’; because the reason for their being together is no other than the recognition that “each is better able to learn what he or she needs to master problems through collaboration with the others whose experiences, orientations, and even most general goals differ from his or her own- a recognition that both express and reinforce a sense of human commonality that extends beyond existing solidarities.”¹⁸⁴ Cohen and Sabel argue that this mode of attachment, this civic bond, is fostered by the pervasively uncertain nature of the current world, a world where “cultural homogeneity, intellectual closure of the demos and occupational group” obstruct the finding of solutions to common problems.¹⁸⁵ In other words: difference has to be preserved within and without.

Thus, we are faced with a political realm that is mainly administrative, but where the meaning of the regulatory state is fundamentally reconceived: rulemaking is “open – the creation of frameworks within which actors are encouraged to experiment with local solutions, on the condition that they pool what they learn with others.”¹⁸⁶ The “new architecture” of the European Union is a budding materialization of this vision, a system where lower level actors have the autonomy to experiment with regulatory solutions, insofar as they furnish higher-level actors with such information, in a “periodic pooling of results” that serves to unveil the flaws of local solutions, elaborate standards on how to

¹⁸² Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 368 (2003)

¹⁸³ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 363 (2003)

¹⁸⁴ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 363 (2003)

¹⁸⁵ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 363 (2003)

¹⁸⁶ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 363 (2003)

compare such local solutions, expose “poor performers to criticism from within and without, and making of good (temporary) models for emulation.”¹⁸⁷

Furthermore, Cohen and Sabel argue that this framework reduces the elitist – technocratic- nature of the processes of rulemaking:

“Through the use of comparisons of performance and the formulation of various responses to the problems such comparisons reveal, deliberative polyarchy potentially transforms the professions: it reduces their technocratic pretence, and reveals the dependence of expert judgment on assessments of ends as well as means. By making tacit knowledge of problem-solving explicit – or explicable- in a way that disrupts the traditional hierarchy of skill within each, it may open the boundaries that separate it from the others and the larger public.”¹⁸⁸

The next step in the Sabel-Cohen saga is a response and elaboration of the proposal of a new field, global administrative law, put forward by Kingsbury, Kirsch and Stewart (‘KKS’).¹⁸⁹ As already indicated, KKS propose to replace the vocabulary of governance with that of administration. The reason for this, argue the authors, is that structuring global regulation with the familiar vocabulary of administrative regulation “exposes its character and extent more clearly” and allows to

“recast many standard concerns about the legitimacy of international institutions in a more specific and focused way. It provides useful critical distance on general –and often overly broad- claims about democratic deficits in these institutions, and shifts attention to the equivalents in the global context of the several accountability mechanisms for administrative decisionmaking, including administrative law, that in domestic systems operate alongside, although not independently from, classical democratic procedures such as elections and parliamentary control.”¹⁹⁰

¹⁸⁷ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 366 (2003)

¹⁸⁸ Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in: JONATHAN ZEITLIN & DAVID M. TRUBEK (eds.), *GOVERNING WORK AND WELFARE IN A NEW ECONOMY. EUROPEAN AND AMERICAN EXPERIENCES* 345, at 369 (2003)

¹⁸⁹ Benedict Kingsbury, Nico Krisch, Richard Stewart, *The emergence of Global Administrative Law* (IILJ Working Paper 2004/1 (Global Administrative Law Series)(www.iilj.org)) [update 68 (3) *Law & Contemp. Probs.* 2005]

¹⁹⁰ Benedict Kingsbury, Nico Krisch, Richard Stewart, *The emergence of Global Administrative Law* 6 (IILJ Working Paper 2004/1 (Global Administrative Law Series)(www.iilj.org)), p. 14 [update 68 (3) *Law & Contemp. Probs.* 2005]

In a response to the KKS article, Cohen and Sabel write a “sober contemplation of a fantastic possibility”¹⁹¹ They address a fundamental question that exudes throughout this –my- paper; that of what kind of accountable administration is possible when the traditional command-and-control system through binding rules won’t work. Their answer is to replace the rational of principal-agent accountability with that of peer review

“in which decision-makers learn from and correct each other even as they set goals and performance standards for the organization. Peer review becomes in turn dynamic accountability –accountability that anticipates the transformation of rules in use- and dynamic accountability becomes the key to ‘anomalous’ administrative law: the kind of administrative law there must be... when administration is not built on ‘core command-and-control.’”¹⁹²

Now, where can one find a model for this? Cohen and Sabel’s answer is, of course, the OMC. Yet, as I have suggested in my examination of the OMC, and will more precisely examine in the next section –devoted to the analysis of the OMC in the field of higher education-, the OMC stands at a great distance from offering such panacea for the achievement of a more efficient and democratic administration.

Despite the value of these contributions, many questions remain. Do these proposals successfully deal with the essential problem of political conflict? Is it possible or desirable to eliminate the adversarial nature of administrative relationships? Do they leave any space for political activism that is not ‘normalized’ and ‘institutionalized’ by the type of overreaching agencies they seem to advocate? Do they subscribe to a meta-theoretical notion of the common good? Are they successful in substituting the public at large for interest groups? More fundamentally, do these proposals render a substantive notion of the public?

2. ELITE-DRIVEN TECHNOCRATIC ADMINISTRATION: THE OPEN METHOD OF COORDINATION IN THE EU POLICY ON HIGHER EDUCATION:

¹⁹¹ Joshua Cohen and Charles F. Sabel, *Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance* (manuscript, April 2005, on file with authors)

¹⁹² Joshua Cohen and Charles F. Sabel, *Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance* (manuscript, April 2005, on file with authors)

The application of the Open Method of Coordination to the field of higher education is a fascinating case study that exemplifies in a particularly fitting manner not only some pervasive dilemmas incited by governance/administration, but also a political baggage that lies at the heart of the integration process. The fragile balance between convergence and the preservation of difference, the acute political sensitivity of the subject, or the extraordinary complexity of actors, legal frameworks and regulatory cultures that have to be brought together, are just some thorns to be smoothed out simply to get started, to begin imagining the possibility of that new experiential universe that would be the European Higher Education Area. And then, still, the long journey of policy design lies ahead.

[A study and forecast of the new policy on higher education goes here:

Operated through the OMC, the goal is to establish a “European Higher Education Area” integrated with a “European Research Area” by 2010. Preceded by the Bologna Magna Charta Universitatum (1998) and the Sorbonne Declaration of 1998, it was officially launched with the Bologna Declaration of 1999 and substantially reinforced by the Bergen European Council (2005) (thus known as the “Bologna-Bergen process”).

The process is an extension and fundamental revision of the EU’s Socrates/Erasmus programs. Its main goals are to adopt an across-the-board system of comparable degrees, a reconfiguration of university studies in all participant countries into the model of two cycles (undergraduate and graduate); the adoption of a converged system of credits that allows transferability and accumulation; a full commitment to student and faculty mobility (including the possibility of obtaining a degree through studies in various universities); the implementation of quality standards through benchmarking and evaluation mechanisms; and the promotion of the ‘European dimensions’ in higher education.

The main participants are States (their respective Ministers of Education as gathered in the Council), and includes most European countries, also non-EU members. The Council meets every two years; the ground work in-between Councils reserves an influential role for the Commission, as well as the ad hoc BFUG (Bologna Follow up Group). Other actors are: the Council of Europe (an organization completely separate from the EU), the European University Association, the European Association of Institutions in Higher Education, ESIB (National Unions of Students in Europe), UNESCO-CEPS, ENQA (European Network of Quality Assurance in Higher Education), as well as other newcomers, such as UNICE (Union of Industrial and Employer’s Confederations of Europe), EI (Education International Pan-European structure).

As an OMC, it was no binding nature... in theory. In practice it is highly technical, overloaded with standard-setting, reporting and review procedures, benchmarking, and extensive domestic legal reform to accommodate what is, for some countries, a fundamental restructuring of their educational systems. Turf battles are abundant, especially with regard to the role played by universities, which are mostly public in Europe and have the status of independent administrative entities with organizational autonomy, rulemaking power, and control over their budget. In addition, the principle of academic freedom raises deep questions as to who is to decide the structure and contents of academic curricula.

I intend to briefly describe this process-in-the-making (the target is 2010) and then use it to reassess all questions raised through the paper: strength of the 'new governance' paradigm, principles of 'partnership' and 'flexibility', the potential of a retro-renewed administrative law approach, etc.

My main argument will have the following components:

- The substantive goals to be achieved have been agreed by the ministers of education under the umbrella of the Union; there is no trace of the oft-proclaimed bottom-up approach that seemingly characterizes the new governance paradigm
- The process is highly structured and institutionalized; there is little flexibility or chance for re-considering the general course of affairs on this immense machinery is set in motion
- It is an extremely traditional system of administrative policymaking, backed by a high degree of binding rules at the domestic level
- While the process is quite transparent, this is only in terms of the availability of documentation, which implies little with regard to participation and accountability
- While the political stakes are extremely high, the actors allowed in the process are restricted to government entities and traditional social partners. As this policy will fundamentally transform the educational system of the Union –and beyond-, one can imagine that almost everybody is not only a stakeholder in the administrative sense, but a citizen with a political interest that needs to be addressed
- The system of peer review does not necessarily lead to better accountability or enhanced learning, although it does seem to be working in this particular case
- As to the deliberative arena (as understood by Cohen and Sabel) propitiated by the system, it is simply impossible to determine whether true deliberation takes place (as opposed to bargaining)
- Finally, there is one factor that I do find very positive. This would be the obligation that the system imposes on the actors to confront the views of others and explain themselves. While this agrees in broad terms with Cohen and Sabel, I intend to push this arguments further through a notion of the public extracted from the works of Frug, Young, Weiler, and others.]

3. DEMOCRATIC ADMINISTRATION IN THE EU

[FINAL PART; here is where I propose an alternative ... to be written soon!]