2 An Open Method of Coordination (OMC) for European Criminal Law?

Ivan Sammut

2.1 Introduction

The European Union may be perceived as a multi-level governance system in which a European private law can be established both by harmonization and by the OMC. In areas where EU law has been less intrusive traditionally, such as European criminal law one can argue for the use of an open method of coordination (OMC). The term 'governance' is very versatile. It is used in connection with several contemporary social sciences, especially economics and political science. It originates from the needs 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'. Referring to the exercise of power overall, the term 'governance', in both corporate and state contexts, embraces action by executive bodies, assemblies (e.g., national parliaments) and judicial bodies (e.g., national courts and tribunals). The term 'governance' corresponds to the so-called post-modern form of economic and political organizations. According to the political scientist Roderick Rhodes, the concept of governance is currently used in contemporary social sciences with at least six different meanings: the minimal State, corporate governance, new public management, good governance, social-cybernetic systems and self-organized networks.[1] The European Commission established its own concept of governance in the White Paper on Governance,[2] in which the term 'European governance' refers to the rules, processes and behaviour that affect how powers are exercised at the European level, particularly as regards openness, participation, accountability, effectiveness and coherence. These five 'principles of good governance' reinforce those of subsidiarity and proportionality.

1 R. Rhodes, 'The New Governance: Governing without Government' (1996), 44 *Political Studies* 652.
2 COM (2001) 428 final.

Table 2.1 The further Europeanization of criminal law requires a multi-level mode of governance confirming the traditional supranational community method mode of governance with intragovernmental innovative methods such as OMC/soft-law

Mode of Governance	Method	Tools
Traditional supranational mode	The community method – the Commission has the exclusive right to propose legislation while the Council and EP decide together	Harmonization UnificationCodification/ Consolidation
Proposed intergovernmental mode	Innovative methods such as OMC, soft-law, formalized networks/institutions	Cooperation Standardization/ Unification

2.2 GOVERNANCE

The EU must draft new governance techniques that prove effective, efficient and most importantly, democratically accountable in the context of multi-level regulation and considerable diversity in national legal systems. The traditional methods used by nation-states in fixing those settlements of fundamental values in private law through the enactment of codes and respect for the evolution of judicial precedents must be adapted and even wholly revised to be relevant to the multi-governance structure of the EU. The governance system of a multi-level pluralistic EU requires new methods for the construction of this union of shared fundamental values which would respect cultural diversity and the innovative modes of governance mentioned above.

While the Treaty of Amsterdam provided for the increased momentum in the development of private law in the European field, one must not lose sight of the fact that we are now in the age of globalization. The action of strong political and economic forces, the ease of travel, the development of communication technologies and the advent of the Internet are contributing to the convergence of national societies in a shift from territorial to functional differentiation at the world level.[3] The field of law, particularly private law, is also becoming 'globalized'. The diverse sectors of the new 'world society' are developing their own legal frameworks, thereby displacing the importance of state-produced law and legal centralism.

Parallel to the process of globalization, another significant phenomenon, which erodes the importance of national boundaries and the conception of the state as the centre of the

3 G. Teubner, 'Global Bukwina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law without a State*, Dartmouth, 1997, p. 3 *et seq.*

legal order, is taking place in certain geographical areas.[4] It is the process of regional integration, with a maximum exponent in the EU. This is witnessing the gradual transformation of European sovereign states into new political entities without historical precedents, breaking the traditional dualism of states and international organizations. There is a considerable transfer of sovereignty from the state to the EU level so that the EU can no longer be characterized as an instrument for implementing the will of the Member States. Indeed the Member States play a central role in the decision-making process at the European level, but they do so in a constitutional-legal context which they do not fully control. EU law is gradually developing into an autonomous, distinct and independent supranational legal order, possessing primacy over the law of the Member States, the provisions of which are directly applicable to the nationals of the Member States.

2.3 THE OMC METHOD

There are several innovative modes of governance which can be tested to examine how they can influence the development of European criminal law and take it to new dimensions. However, one of the most important ones is OMC. The reason for choosing the OMC as the main mode to test the hypothesis is due to it being the most flexible and policy-oriented mode that provides very concrete mechanisms to address the balance between the need to respect diversity among Member States, and the unity and meaning of common EU action. The OMC is a collection of mechanisms previously developed under the broad 'soft-law' tradition in the EU, such as collective recommendations, review, monitoring and benchmarking. Sometimes it is contended that the OMC offers nothing new when compared with soft-law.[5] However, this work intends to prove that the matter is otherwise and innovative modes of governance such as the OMC are a very valid mode in which to examine the future potential of European criminal law especially in bringing the different European legal families together.[6]

Today the OMC is eminently a legitimizing discourse. It provides the EU's policy-makers with a common vocabulary and a legitimizing project – to make Europe the most competitive and knowledgeable society in the world. As a legitimizing discourse, open coordination enables policy-makers to deal with the new tasks in policy areas that are either politically sensitive or in any case not amenable to the classic community method. The result is that practices that up to a few years ago would simply have been labelled as 'soft-law', new policy instruments, and benchmarking are now presented as

4 T. Wilhelmsson, 'Jack-in-the-Box Theory of European Community Law', in Erikson and Hurri (eds.), *Dialectic of Law and Reality*, 1999, p. 437 *et seq.*, at p. 447.

5 S. Borrás and K. Jacobsson, 'The Open Method of Co-ordination and New Governance Patterns in the EU' (2 April 2004) 11 *Journal of European Public Policy* 185-208.

6 *See* P. F. Kjaer, *Between Governing and Governance*, Hart Publishing, Oxford, 2010, p. 104.

'applications', if not 'prototypes' of 'the' method.[7] The reality is that the method varies markedly across policy areas. This work focuses on how the open method can influence the challenges presented to European criminal law and examines whether developments in private law can go beyond what may appear to be achievable in the foreseeable future.

Naturally, as attested earlier in the introduction to this chapter, European criminal law is so complex that any analysis involving only one mode of governance would be incomplete. The OMC is certainly one of the most important innovative modes of governance for the reasons already outlined, but a successful analysis would be incomplete without the examination of other innovative modes of governance. The innovative modes of governance contribute to the redefinition of some important institutional choices concerning European criminal law and allow for the overcoming of the binary allocation scheme of legislative competence between the EU and the Member States. Innovative modes of governance provide new coordination mechanisms across the Member States and between them and the EU to improve the process of implementation and reduce inadequacies.[8]

The OMC has developed over time so that its precise procedures have been delineated gradually. The notion of an OMC first materialized in the conclusions of the Lisbon Summit in March 2000.[9] Such a method was already envisaged in the procedures for coordinating national economic policy under the Economic Monetary Union (EMU) established under the Maastricht Treaty, and in the employment chapter of the Amsterdam Treaty. In Lisbon, the Portuguese Presidency successfully gave a name to this new method, while linking it to the new agenda for socio-economic development which was the fruit of a political compromise aligning the visions of both the right-wing and left-wing parties. The main procedures of this method are common guidelines to be translated into national policy, combined with periodic monitoring, evaluation and peer review organized as mutual learning processes and accompanied by indicators and benchmarks as a means of comparing best practices.[10]

The OMC may be analysed as a multi-level process of governance, comprising at least four levels. First, the European Council agrees on the general objectives to be achieved and offers general guidelines. Then the Council of Ministers selects quantitative and/or qualitative indicators for the evaluation of national practices. These indicators are selected upon a proposal by the Commission or other independent bodies and agencies. This is followed by the adoption of measures at the national or regional level, given the

7 S. Borrás and K. Jacobsson, *op. cit.* at p. 187.

8 F. Cafaggi and H. Muir-Watt (eds.), *Making European Private Law - Governance Design*, Edward Elgar: Cheltenham and Northampton 2008, *op. cit.* at p. 289.

9 V. Hatzopoulos, 'Why the Open Method of Coordination is Bad for You: A Letter to the EU' (May 2007) 13(3) *European Law Journal* 309-342 at p. 311.

10 *Ibid.*, p. 312.

achievement of the set objectives in pursuit of the indicators chosen.[11] These were usually referred to as the 'National Action Plans' or NAPs. The process is completed with mutual evaluation and peer review between the Member States, at the Council level. Since its official launch in 2000, it has been proposed as a new way of governance in several different fields such as immigration, environment and innovation, research and development, among others.

Proposals to apply the OMC to European criminal law can be made in the context of addressing problems arising from the lack of competence, but even more important to accommodate the goal of harmonization with that of preserving legal diversity, in its institutional and cultural forms.[12] It is important to underline that those proposals were aimed at enforcing the weakest modes of the European chain: monitoring the process of implementation of European criminal law and governing the differences at the Member State level, not only those in existing laws amenable to harmonization, but also and perhaps more importantly, those stemming from the use of directives harmonizing different fields.[13] This brings the discussion to the point where one can analyse how the OMC has contributed or could contribute to the development of European criminal law.

While the term OMC was formally launched in Lisbon in 2000 as a mode of governance, it had existed earlier, though it was not formally recognized as such. Certainly, one can examine any role the OMC may have played in the development of European criminal law through analysing both the formal and informal attempts. However, given the fact that the OMC may be more useful when a clear legal base is absent, it is worth examining it as a mode of governance in comparison with the more traditional soft-law approach. Given the nature of European criminal law and, in particular, the significance of private law-making by an individual or collective actors, it is clear that major adjustments should be made to the current OMC methodologies, especially with regard to the relatively weak involvement of private actors.[14] Soft-law can include recommendations and opinions as they have no binding force as well as a variety of other instruments which may include resolutions and declarations, action programmes and plans, decisions of the representatives of the Member States meeting in Council and guidelines issued by the institutions as to how they exercise their powers and inter-institutional arrangements.[15] Professor Chalmers explains that these measures all come under the generic 'soft-law'.[16] Referring to Professor Snyder, he explains that

11 E. Szyszczak, 'Experimental Governance: The Open Method of Coordination' (2006) 12(4) *European Law Journal* 486, at p. 494.

12 F. Cafaggi, 'The Making of European Private Law: Governance Design', in F. Cafaggi and H. Muir-Watt (eds.), *Making European Private Law – Governance Design, op. cit.* at p. 344.

13 *Ibid.*, p. 344.

14 *See Ibid.*, p. 344.

15 D. Chalmers et al., *European Union Law – Text and Materials*, Cambridge University Press, Cambridge, 2006, p. 137.

16 *Ibid.*, p. 137.

these are rules of conduct, which in principle have no legally binding force but which nevertheless may have practical effects.[17] Table 2.2 highlights the differences between the OMC and traditional soft-law and can also serve as a critique for the OMC as a methodology to be used in the development of European criminal law.

Table 2.2 Differences between the OMC and traditional soft-law

The Open Method of Coordination	Traditional Soft-law
Intergovernmental approach: the Council and the Commission have dominant roles	Supranational approach: the Commission and the CJEU have dominant roles
Political monitoring at the highest level	Administrative monitoring
Clear procedures and interactive process	Weak and *ad hoc* procedures
Systematic linking across policy areas	No explicit linking of policy areas
Interlinking EU and national public action	No explicit linking of EU/national levels
Seeks the participation of social factors	Does not explicitly seek participation
Aims at enhancing learning processes	No explicit goal of enhancing learning is stated

One can identify at least seven different points that mark the distinction between the two. Firstly, the essentially intergovernmental-oriented approach oriented to the OMC differs from the previous supranational-oriented approach to soft-law in the EU. The Council and the Commission both play an important role in the innovative mode of governance while the CJEU has played a decisive role in including soft-law as a source of a non-binding but decisive form of regulation in the *acquis*. In contrast, this Court has no role to play in the OMC. The CJEU will play a role when it is hard-law. This idea is reinforced by the second difference: the OMC involves a high level of political participation.[18] While good legislation involves a bottom-up approach in its formulation, hard legislation is always enacted top-down at the end. The OMC can thus reconcile these two approaches.

Thirdly, the clear procedural mechanism and the high-level political participation entail more mutual commitments and peer pressure mechanisms than the *ad hoc* and weak procedures of previous soft-law mechanisms. Fourthly, while soft-law has previously been used mostly *ad hoc* within the confines of particular policy areas, the OMC has the goal of strategically bridging policy areas and orientating policies towards a common goal. The OMC seeks to strategically bridge policy areas in a double horizontal way, by linking national policies with each other, and by linking functionally different policies at the EU level. Finally, similar to the practices of the OECD, the innovative

17 F. Snyder, 'The Effectiveness of European Community Law: Institution, Processes, Tools and Techniques' (1993) 56 *MLR* 19, 32.

18 S. Borrás and K. Jacobbson, *op. cit.* at p. 189.

method of governance is designed to support learning as it builds on and encourages mutual cooperation and the exchange of knowledge and experiences.[19]

The OMC enables common objectives to be agreed on while leaving the choice of means to the individual Member States or other entities responsible for the achievement of policy goals. The OMC has contributed to the elaborate monitoring methods, benchmarking and adjustments, all of which are required in the area of European criminal law.[20] Some criticisms have been directed towards its openness to private actors and its top-down nature while other critics have addressed effectiveness, especially about the sanctioning system. Deeper critiques concern its compatibility with the rule of law.[21] However, in spite of its advantages and disadvantages with regard to its viability to contribute towards the development of European criminal law, neither the OMC and the innovative modes of governance nor the traditional community method may be used without resort to the tools that can be used for the Europeanization of private law.

European criminal law operates in the frame of a complex multi-level system whose structure is quite complex. It should not be described by juxtaposing uniform market values at the EU level and differentiated cultural and moral values at the Member State level. From this perspective, governance would be perceived only as an institutional response to cultural differences, associated with national identities to make them compatible with the creation of the Internal Market. One of the other issues to be examined in this context is the improvement in legislative design. Legislation needs better design and coordination. With respect to law-making, improvements can be made to achieve better coordination among different Commission directorates at the stage of legislative initiatives as well as linguistic improvements in translations of legislative documents.[22]

2.4 CONCLUSION – A NEW MODE OF GOVERNANCE FOR EUROPEAN CRIMINAL LAW

It may be argued that the EU suffers from a political and democratic deficit. Its system of governance appears to be best suited to the task of managing a single market, an economic community guided by the narrow objectives of efficiency and free markets. Numerous issues at the European level are, in reality, political questions that demand democratic decision-making procedures. The context of this debate is that there is a

19 *Ibid.*, p. 189.

20 *See* W. Van Gerven, 'Bridging Private Laws Closer, Bridging (Private) Laws Closer to Each Other at the European Level', in F. Cafaggi (ed.), *The Institutional Framework of European Private Law*, OUP, Oxford, 2006, p. 63.

21 *See* W. Scheuerman, 'Democratic Experimentalism or Capitalist Synchronisation? Critical Reflections on Directly-deliberative Poliarchy' 17 *Canadian Journal of Law and Jurisprudence* 101-128.

22 F. Cafaggi, *op. cit.* at p. 333.

technocratic 'yes' to increase the powers of Europe confronted by a popular 'no vote' as happened in the first Irish referendum on the Lisbon Treaty. While the development of European criminal law is not directly a central issue in the constitutional process of reforming the EU Treaties, and it is not necessarily linked with the constitutional development of the EU, it will somehow also be influenced by it. One important reason for this is that the development of European criminal law has gone beyond the limits traditionally attributed to the Internal Market.

Some political scientists such as Moravesik look on the one hand at intergovernmentalism and on the other hand at neo-functionalism as the two main competing schools of thought that help to explain European integration.[23] However, it can be argued that a significant challenge comes from a new school of thought that portrays the EU as a 'multi-level system of governance'.[24] This theory highlights the erosion of the nation-state but denies the transformation to a new European super-state. The concept of governance is flexible enough to capture the *sui generis* characteristics of an emerging European polity and leave open the question of exactly where the European system lies on the scale between the traditional nation-state and the looser forms of international cooperation. In parallel, the theory also helps with the conceptualization of 'integration' as a contingent political process and is, therefore, better equipped than functionalism in dealing with the interests and strategies that engage and are pursued by both institutional and governmental actors on one side and by private actors such as academics on the other side. This holds for both the national and supranational levels.

Thus the 'multi-level system of governance' is a good theory to understand the development of European criminal law. First, the multi-level approach appears to be compatible with certain specific features of the present situation of European private law, which includes the conservation of the core elements of the national system together with the imposition by the EU of several private law instruments designed for Internal Market building. One could also mention the openness of the European legal system to international cooperation in its regulatory activities as well as in its efforts to facilitate private law relations. Secondly, this approach also has the advantage of being able to conceptualize 'governance' as independent from and beyond the formalized nation-states and Union structures. This is compatible with the erosion of the powers of the nation-state on the one hand and the growth of regulatory powers at a European level on the other hand. Thirdly, this analytical framework also allows the interdependence of legal integration and disintegration to be articulated and characterized as a dual and simultaneous development. This allows for the building up

23 *See* Moravesik, 'Preferences and Power in the European Community: A Liberal Inter-governmentalist Approach' (1993) 31 *JCMS* 473-524.

24 *See* Marks, Hooghe and Blank, 'European Integration Since 1980s State Centric Versus Multi-level Governance' (1996) 34 *JCMS* 343-378.

of a framework for economic and social regulation, which is very beneficial for the Internal Market and likewise cuts the ties between national markets and their traditional institutional environments.[25]

An important analytical feature of multi-level governance portrays the EU as a non-state and a non-hierarchal system. One can perhaps use the term 'deliberative supranationalism'.[26] This term does not only accept the open-mindedness or contingency of the integration process but is itself based on two intuitions. The first is that it builds upon legal theories which ground the laws' validity on the institutions of the traditional constitutional state. The second takes the notion of 'deliberation' further, no longer grounding supranationalism in formal international law or technocratic traditions, but in the establishment of external and tampering deliberative processes between states as institutional actors and societies.

An important factor which would influence the extent to which the European criminal law could develop is the conceptualization that supranational constitutionalism is an alternative to the model of the constitutional nation-state. This has to respect that state's constitutional legitimacy but at the same time clarify and sanction the commitments arising from its interdependence with equally democratically legitimized states. Supremacy requires the identification of rules and principles, ensuring the coexistence of different constituencies and the compatibility of the objectives of these constituencies with the common concerns that they may share. European private law, as in the rest of EU law, has to lay down a legal framework which structures political deliberation about these issues.

However, while the extent of the nation-state element's readiness to give way to European supranationalism is far from clear, it is well known that there is an ongoing transformation of the 'Community of Constitutional States' into a real and visible 'European Union'.[27] This *de facto* process is legalized by European law and constrained by the Treaty rules. Thus constitutional development is highly relevant to private law. Therefore one might ask where this relevance is leading to.

To answer this question, one must state what the Community and now the Union has done and continues to do to the national legal systems. It inserts new individual freedoms into them and thus strengthens the realm of private autonomy. It imposes new duties upon traders and assigns inalienable minimum rights to the consumers. So it establishes transnational regulatory frameworks to which national institutions of private law must adapt themselves. These interventions in the national system not only determine the social space allocated to the market but also set the limits and restrict techniques which might be used to identify and correct market failures. European interventions are

25 C. Joerges et al. (ed.), *Integrating Scientific Expertise into Legal Decision-making* (1997) pp. 295-323. at p. 299.

26 C. Joerges et al. (ed.), *op. cit.* pp. 300-319.

27 C. Joerges, *op. cit.* at p. 303.

concerned with those asymmetries in private relationships which legal systems have traditionally affirmed or sought to cure. Therefore, when seen in the perspective of deliberative theories of liberal democracy, the constitutional dimension of issues, such as the delineation of the realm of private autonomy and the protection of basic and inalienable rights, is simply irrefutable.[28]

The constitutional dimension partly overlaps with the institutional dimension, although the two are far from coextensive.[29] The institutional dimension of European criminal law is built around the different roles of European and national institutions. This includes the mode of cooperation and, to a more limited extent, competition between the legislators, courts and regulators. It brings the governance perspective to the centre stage. It broadens the perspective on competence, often focused on the alternative between existence and inexistence, by concentrating on the different modes through which the creation of the 'private law infrastructure' of a common market can be established. Special attention has to be given to the notion of private autonomy as a substantive principle of European private law. The role of private autonomy may vary from one system to another, and recurring arguments in favour of harmonization have been related to the differences concerning mandatory rules in the Member States and the problems they may cause for the creation of the integrated European market. The same reason could be applied to international private law rules.[30] Such circumstances could weaken the rationale for unification and limit harmonization to mandatory rules only.

A final note about the institutional dimension of European criminal law concerns the issue of language. The choice of one language to create new common rules and its subsequent translation into 20 or more languages does not address the comparative issue that has caused so many problems for the transposition of directives. Multilingualism is not a solution in itself. An adequate institutional framework for European criminal law needs to be supported by a comparative analysis engaging not only an evaluation of the effects associated with the use of multilingualism to pursue harmonization and preserve differentiation, but also an evaluation of the impact of harmonized rules in national and regional legal systems that maintain their own legal and everyday vocabularies.[31]

---

28 *See Ibid.*, pp. 304-305.

29 P.F. Kjaer, *op. cit.* at p. 15.

30 H. Muir Watt, 'The Challenge of Market Integration for European Conflicts Theory', in A. Hartkamp et al. (eds.), *Towards European Civil Code*, Kluwer, The Hague, 3rd ed., 2004, p. 191.

31 F. Cafaggi, 'Introduction', in F. Cafaggi (ed.), *The Institutional Framework of European Private Law*, OUP, Oxford, 2006, p. 21.