

**Principle based collaborative governance:
what would it look like in Cohesion policy?**

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Introduction

This paper looks at governance as a process and focuses on different governance arrangements in two policy areas, where it focuses on competition policy and questions whether dynamics of the decision-making in this field can be of inspiration to Cohesion policy. Inspired by the case of services of general economic interest, the paper argues that there should be a greater informal role for regional and local authorities in the legislative phase as well, there is a need for more trust between the authorities and that the aims Cohesion policy is to achieve should be more clear and undoubted.

Cohesion policy is one of the major policy fields of the European Union with around 1/3 of the budget allocated for 'reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions'.³ It is characterized by multilevel governance, because of the involvement of different layers of government in the decision making and its implementation, which complicates its performance. This is also reflected in the recurring criticisms on Cohesion Policy: its inability to prove its effectiveness and value for money.⁴ As recent research on the accountability of Cohesion policy has shown, the multitude of different accountability relationships within this multilevel system is contributing to the complexity of this policy area, as can be seen in the Netherlands,⁵ thus hindering the implementation of Cohesion policy on national and regional level. This multilevel system leads to two specific characteristics of the implementation of Cohesion policy: a situation where responsibilities of actors are not clear, as well as the interpretation of rules and procedures. Both characteristics are linked to each other, because of a 'blurred situation' in responsibilities all actors consider they have a role in interpreting the regulations, which complicates the implementation.

In this paper, we specifically look at how actors collaborate within the context of public policy making and the implementation of those policies. Thus, we focus on the steering of regimes aimed at the definition and policy-making in relation to market failures and competitive markets, where we focus both on the actors and the setting of rules in those areas. Although competition policy is to be seen as a different policy field, it is providing interesting insights in how a situation of principle based collaborative governance in practice can work out, since it is an example of network governance, as an emerging and evolving form of governance where multiple actors on different (EU, national and regional) levels are involved in the implementation of policies.

The paper assesses the regulation of services of general economic interest, and reflects on what can be learned from the governance system in this policy area. Before turning to this policy area, we will first discuss some characteristics of Cohesion policy. We will then turn to the framework of principle based collaborative governance, which is to be used as an analytical perspective in the paper. After that, we will focus on the regulation of services of general economic interest and explain how principle based collaborative governance is effected in this policy area. Finally, in the last section, we will turn back to the situation of Cohesion policy and see what can be learned from the way services of general economic interest are managed in the EU and to what extent principle based collaborative governance is possible in Cohesion policy.

³ Consideration 1 of Regulation 1303/2013 (Common Provisions Regulation).

⁴ See for instance Bachtler, J., I. Begg, D. Charles and L. Polverari (2016). EU cohesion policy in practice: what does it achieve?, Rowman & Littlefield Publishers, Inc. and Polverari, L. and J. Bachtler (2014). "Balance of Competences Cohesion Review: Literature Review on EU Cohesion Policy."

⁵ Damen-Koedijk, M. J. (2016). EU Cohesion Policy & Accountability. Coverage, context, content and costs in the case of ERDF in the Netherlands, Universiteit Twente.

Cohesion policy and its blurred situation

Reflecting on both specific characteristics of the implementation of Cohesion policy, when it comes to the first, an unclear situation about the responsibilities of actors because of involvement of a multitude of actors, it is important to note that Cohesion policy is characterized by the principle of shared management⁶. This means in essence that formal responsibility for the implementation is shared between the Commission and the Member States. As different formal responsibilities may at times overlap or having unclear boundaries, Cohesion policy is prone to a situation where it is not clear who is responsible for what. Being aware of this 'blurred situation' in Cohesion policy,⁷ it is complicated to understand the working of the governance system, as well as in thinking about how to improve it.

When it comes to the second characteristic, the interpretation of rules and procedures, regional authorities, who are supposed to work on the basis of European, national and sometimes also regional legislation on Cohesion policy, feel themselves squeezed between the (perceived) responsibilities of all those different authorities. All are supposed to have a say on the implementation: the European Commission and the European Court of Auditors on European level, the responsible ministry on national level, as well as the audit authority and in some member states the National Court of Auditors.⁸ On the regional level, last but not least, a major role is set for managing authorities, responsible for the implementation of the policy in the regions. All are dealing with the interpretation of rules, whereby the rules themselves often leave room for interpretation: not least because situations within member states can be different, which makes it impossible to set clear rules for all situations in the European regulations.⁹

The accountability relations between all those actors lead to different tensions in the system, more specific to tendencies to just spend the available funds, specifically on national and regional level, as opposed to a tendency to efficient spending, which is more and more to be seen on European level.¹⁰ Although it would be too harsh to proclaim that authorities on the national and regional level *only* focus on spending the money, no matter what, at least an incentive to focus primarily on spending is present in the system, originating from the fact that it is considered politically unacceptable to have to inform the outside world of the inability to spend available European funds. On the European level there is an important focus on spending the money according to the rules and on appropriate projects, also because of the pressure for effective spending coming from the European Court of Auditors (ECA), which up until now has not been able to provide a positive declaration of assurance since its introduction in 1995. The ECA uses a level of materiality of 2%,¹¹ but Cohesion policy has not been below that threshold since the rates were published. Compared to the other policy areas, the error

⁶ Article 73 of Regulation 1303/2013.

⁷ Damen-Koedijk, M. (2015). "Blurred Lines: Cohesion Policy in the Netherlands." European Structural & Investment Funds Journal 3(2).

⁸ As in the case of the Netherlands the Algemene Rekenkamer, the two other countries in which the national Court of Auditors issues an Annual Declaration are Sweden and Denmark.

⁹ See for instance the example on p. 149 of Damen-Koedijk, M. J. (2016). EU Cohesion Policy & Accountability. Coverage, context, content and costs in the case of ERDF in the Netherlands, Universiteit Twente.

¹⁰ Ibid.

¹¹ As is explained by the European Court of Auditors '*Materiality is a concept that acknowledges that underlying transactions can rarely be absolutely free from all errors, and that a degree of tolerance in their accuracy is therefore acceptable. This concept is also recognised in the international auditing standards.*' '*In general the materiality threshold for DAS audits is set at 2% of total expenditure or of total revenue of the EU budget for the audit opinion at the level of the DAS.*' European Court of Auditors (2012). The DAS Methodology.

rate of Cohesion policy is very high and persistently has been above the materiality threshold, and for some years even above the 5% threshold.¹² This shows that from the European level, there is a lot of pressure to not only spend the funds, but also making sure they are spend effectively and on the best projects.

Although it is acknowledged on European level that improvements in the system are necessary, as gets clear from recent speeches by Commissioner Crețu for Regional Policy¹³ and the set-up of a High Level Working Group to initiate simplification for beneficiaries¹⁴, these policies or measures are primarily aiming at improvements in the post 2020 period and are not supposed to lead to a major change in the system in the near future. Since it is evident that major changes are necessary, but still lacking, even after all appeals for changes in the 2014-2020 period, this leads to the question what Cohesion policy can learn from other policy sectors, some of them also characterized by a multilevel structure. How can other practices be of inspiration to the often criticized policy area of Cohesion policy?

The framework of principle based collaborative governance

The concept of collaborative governance builds on separate definitions that in itself also have been given attention in academic literature. Before introducing the concept in practice, we will first start with elaborating what is meant by it in the context of this paper.

Amongst scholars, the concept of governance has different meanings,¹⁵ and is known for its ambiguity, making it a popular, although confusing term, with a threat 'to become relatively meaningless.'¹⁶ What these scholars agree on, however, is the fact that it refers to some kind of change in the meaning of government, referring to *new* processes of governing, *changed* conditions of ordered rule or *new* methods by which society is governed.¹⁷ Another definition is put forward by Lynn, Heinrich et al.,¹⁸ of governance as 'regimes of laws, rules judicial decisions, and administrative practices that constrain, prescribe, and enable the provision of publicly supported goods and services', with its basic focus on *what is needed* for (government) organizations to steer society.

¹² See for most recent data annex 5.1 on p. 157 of European Court of Auditors (2016). Annual report on the implementation of the budget. The report refers to heading 'Competitiveness for growth and jobs,' where Cohesion Policy falls into. In 2015, the most likely error rate has declined to 4,4%.

¹³ See for instance Crețu, C. (2017). Closing speech by Commissioner Crețu at the Cohesion Forum. and Crețu, C. (2016). Opening speech at the Ministerial meeting of the Visegrad Group Countries (Czech Republic, Hungary, Poland, Slovakia), Bulgaria, Croatia, Romania and Slovenia.

¹⁴ European Commission, C(2015) 4806 final, commission decision of 10.7.2015 setting up the High Level Group of Independent Experts on Monitoring Simplification for Beneficiaries of the European Structural and Investment Funds

¹⁵ See Levi-Faur, D. (2012). From "Big Government" to "Big Governance". The Oxford Handbook of Governance. D. Levi-Faur, Oxford University Press. p. 8 and 9 for an overview of four different meanings of governance.

¹⁶ Peters, G. B. Ibid. Governance as Political Theory.

¹⁷ Rhodes, R. A. W. Ibid. Waves of Governance., p. 33. See also Rhodes, R. A. W. (1996). "The new governance: governing without government." Political studies 44(4): 652-667.

¹⁸ Lynn, L. E. J., C. J. Heinrich and C. J. Hill (2001). Improving Governance: a new logic for empirical research. Washington D.C., Georgetown University Press.

Following Levi-Faur,¹⁹ governance has at least four meanings in the literature. As a structure, governance can be said to be focused on 'systems of rules'²⁰ or as a 'set of multi-level, non-hierarchical and regulatory institutions'.²¹ Second, as opposed to governance as a structure, which sees it as a stable or enduring set of institutions, governance as a process is seen as an ongoing process of steering, or enhancing the institutional capacity to steer and coordinate.²² The third meaning is governance as a mechanism, with a focus on institutionalization and naturalization of procedures of decision-making. Finally, the last meaning of governance, also called 'governancing', is about the design, creation, and adaptation of governance systems. It is about the decentralization of power and the creation of decentralized, informal and collaborative systems of governance.²³

However, in their definitions of public governance, some researchers also refer to an active role of non-state actors. This is also mentioned as 'new governance'.²⁴ This distinction between 'old governance', connecting it directly to actions of governments, and 'new governance' on the other hand, referring to policy networks and the connection between society and government, also connects with the literature on 'collaborative governance', focusing on the engagement of 'non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage programs or assets'.²⁵

Ansell²⁶ discusses four main elements that are relevant to collaborative governance, which we also use in this paper to classify what we see in both cases. The first issue concerns the question 'who collaborates?' We focus specifically on public actors, although there is also a role for some private and organized actors, not being citizens.²⁷ Secondly, an important question is who sponsors collaboration. In this paper, that is the role of public agencies, for which we will refer to public entities. In both cases concerned, we see an important role for those public entities, who define the exact boundaries of and balance between competition and the presence of market failures that require correction by means of private or public intervention. The third important issue

¹⁹ Levi-Faur, D. (2012). From "Big Government" to "Big Governance". The Oxford Handbook of Governance. D. Levi-Faur, Oxford University Press.

²⁰ Rosenau, J. N. (1995). "Governance in the twenty-first century." Global governance 1(1): 13-43.

²¹ Hix, S. (1998). "The study of the European Union II: the 'new governance' agenda and its rival." Journal of European public policy 5(1): 38-65.

²² Pierre, J. and G. B. Peters, Eds. (2000). Governance, Politics and the State, Kooiman, J. (2003). Governing as governance, Sage, Levi-Faur, D. (2012). From "Big Government" to "Big Governance". The Oxford Handbook of Governance. D. Levi-Faur, Oxford University Press.

²³ Levi-Faur, D. (2012). From "Big Government" to "Big Governance". The Oxford Handbook of Governance. D. Levi-Faur, Oxford University Press.

²⁴ Rhodes, R. A. W. (1996). "The new governance: governing without government." Political studies 44(4): 652-667, Kickert, W. J. (1997). "Public governance in The Netherlands: an alternative to Anglo-American 'managerialism'." Public administration 75(4): 731-752, Kjaer, A. M. (2004). Introduction: The Meanings of Governance. Governance, Polity Press.

²⁵ Ansell, C. and A. Gash (2008). "Collaborative Governance in Theory and Practice." Journal of Public Administration Research and Theory(18): 543-571.

²⁶ Ansell, C. (2012). Collaborative Governance. The Oxford Handbook of Governance. D. Levi-Faur, Oxford University Press.

²⁷ Although the collaboration with citizens forms a specific strand of literature, also mentioned as co-creation or co-production, see for instance Voorberg, W. H., V. J. Bekkers and L. G. Tummers (2015). "A systematic review of co-creation and co-production: Embarking on the social innovation journey." Public Management Review 17(9): 1333-1357.

relates to what collaboration means in effect, where Ansell states the definition above implies that participants must have a concrete decision-making role. Finally, the last issue refers to how collaboration is organized, where collaboration is 'a collective decision-making process that is formal, consensus-oriented and deliberative.' Since the second question is not specific for the cases in this paper and there is an overlap between the third and the fourth questions (in the way it refers to a formal and consensus oriented process that is deliberative and thus more than consultation), we will focus on the remainder of the paper on the first and fourth question as characteristics of collaborative governance.

We expand the definition of collaborative governance with the idea of 'principle based'. What is meant by that? As the wording expresses, by using this term, we consider authorities to work from a shared basis of principles, underlying the governance. This is the case when there is a clear direction following from rules and systems for actors working in practice. However, such a system of regulating via principles requires a high level of mutual understanding and trust between rule-makers and rule-takers.²⁸

We will now turn to examples from principle based collaborative governance in European Law connected to competition and services of general economic interests. After a general introduction, the governance of competition policy based on primary, secondary and tertiary law will be discussed, as well as on national law. Afterwards this discussion, we will connect this policy field with Cohesion policy to see what can be learned from the situation in competition policy.

Examples of principle based collaborative governance in European Law

Principle based collaborative governance is anything but new in European law. One area where this occurs frequently is in relation to economic law. This concept is used as an umbrella concept to cover an array of rules and policies that are all geared towards markets and their governance, with competition law as the most visible exponent. This area of law is well-known for its open concepts and multitude of actors, yet works remarkably well to deliver results both in terms of the underlying principles and the governance that is put in place. The section below will start with a short description of the rules in place at both the level of the Treaties and secondary law. It will then analyze the governance regimes in place on the basis of the specific set of rules that apply to the so-called services of general economic interest (hereafter SGEIs) in general and electricity markets in particular. In a nutshell, these services are to be administered by the Member States subject to control by the Commission and will provide significant leeway from the normal application of the competition rules. Moreover, SGEIs are essential for the provision of the core functions of the state, such as the reliable and universal supply of electricity. As such, we would expect this area of law to be contested and politicized. However, our review will show that the exact opposite is what has happened. We attribute this to the choice, both by the EU and national entities involved, for a principle based collaborative governance model that relies on expert institutions and structured dialogue between and with the regulated actors and regulators.

Competition and SGEIs in the Treaties and Secondary EU Law

Law is essentially about balancing. There are several dimensions to this, meaning that we could look at the interests involved or the actors engaged in the actual balancing. In terms of the interests involved, in a nutshell,

²⁸ Demortain, D. (2012). "Enabling global principle-based regulation: The case of risk analysis in the Codex Alimentarius." *Regulation & Governance* 6(2): 207-224.

the competition rules prohibit restrictions or distortions of competition unless these are objectively justified.²⁹ The governance of competition is mostly in the hands of administrative authorities, like the Commission and national competition authorities,³⁰ who define what exactly competition is and when a restrictive practice is objectively justified, subject to court review.³¹

In legal terms, these concepts remain undefined. Article 3(2) of the Treaty on European Union (TEU) mentions 'competitiveness' as one of the Union's objectives, without providing any clarification and actually mentioning it along many other goals. In the Treaty on the Functioning of the European Union (TFEU), the situation is just as uncertain. Article 3 TFEU lists the competition rules as one of the Union's exclusive competences and Article 14 TFEU allows the European Parliament and Council to adopt regulations governing the principles for the functioning of SGEIs 'without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services'. This is in line with the characterization of the European Treaties as framework agreements that confine themselves to providing for procedures rather than substantive rules.³² Further to the procedures in place, we note that this points to a competence in relation to SGEIs that is shared between the Member States and the European Union.³³ This means that the essential requirements and procedures may be defined at the Union level, notwithstanding the Member State competence in this field.

The fundamental problem in competition governance is that everyone shares an idea of the extremes that constitute restrictions of competition³⁴ as well as services of general economic interest,³⁵ but significant discussions occur when studying less extreme cases.³⁶ This begs the question how such extremes are identified and what this tells us about the outcome of competition governance in less extreme cases.

How this works in relation to SGEIs can be shown using two sagas in EU competition law. The first constitutes an extreme case, relating to the preferential treatment that Greek former state monopolist and public undertaking DEI benefitted from. In the EU, electricity market liberalization is currently subject to the Third

²⁹ An example of this is Article 101 TFEU, where the first paragraph contains a prohibition on agreements that restrict competition connected to the third paragraph that enables an exemption of such agreements. Article 106 and 107 TFEU contain a similar structure and for Article 102 TFEU this has been created by the Court.

³⁰ For certain, there is increased attention for private enforcement, but both in numerical terms and in terms of impact on policy, public enforcement is far more important, M. Kuijpers et al., 'Actions for Damages in the Netherlands, the United Kingdom, and Germany', 2015 *Journal of European Competition Law & Practice*, Vol. 6, No. 2, who identify most cases to be follow-on cases, i.e. following on from public enforcement.

³¹ For an overview and analysis of such review see F. Castillo de la Torre and E. Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, Edward Elgar 2017, notably pp. 265 *et seq.*

³² Vedder, H., & Amtenbrink, F., *The European Union Legal Order: An Introduction to its Nature and Scope*. In A. S. Hartkamp a.o. (Ed.), *The Influence of European Law on Dutch Private Law* (pp. 13-38). Kluwer Law International 2014.

³³ The protocol (No. 26) on services of general interest reaffirms this conclusion by reiterating the 'essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users'.

³⁴ Nobody will seriously discuss the presence of a restriction in a classic price fixing cartel between competitors.

³⁵ On a similar note, uninterrupted and high quality access to energy networks is unlikely to be discussed as a service of general economic interest.

³⁶ For example, the recent Google case, see press release IP/17/1784, is discussed actively both by proponents and opponents of the Commission's action against the internet mogul.

Package of liberalization measures.³⁷ This essentially means that statutory monopolies for the incumbents have to be removed and electricity networks must be separate from electricity production and supply to enable a level playing field enabling newcomers to compete with the incumbent. Electricity producers can do so by putting in bids on a wholesale market where generation capacity is sold. In view of the local circumstances, combusting lignite was the only profitable manner to generate electricity in Greece. This is where the case started. Some companies seeking to enter this market complained to the Commission about the difficulty of obtaining permits to mine for lignite. The Commission found that the Greek government only granted such permits to DEI, the former monopolist, thereby creating an uneven playing field to the effect that the dominant position for DEI remained unassailable in violation of the EU competition rules. In essence, the General Court required the Commission to show facts that went beyond the mere more advantageous position of DEI as a result of the actions of the Greek state.³⁸ No matter how understandable this may be from a strictly legal perspective, the facts in DEI represent an obvious distortion of competition in favor of the public undertaking. The ECJ overturned this judgment, finding that the creation of an uneven playing field did violate competition law because it reduced the effectiveness of the competition rules.³⁹ This answers one of the central and vexing questions in EU competition law,⁴⁰ in a manner that stresses the principle of effectiveness applied to a basic understanding of competition law. In terms of governance, however, this has been less of a success, with this result only being attained after a procedure that took well over a decade.⁴¹

The answer in DEI allows for two observations. The first observation is that the European institutions, whilst agreeing on the basic principles, often disagree on their exact interpretation and effects in a specific case. The actions of the Greek authorities in DEI were blatantly anticompetitive, yet the rules in place could be interpreted as not precluding such actions. The second observation is that a focus on effectiveness of the underlying principles for the competition rules – one of which is the level playing field – however, provide for a clear answer to the interpretation at issue that is overwhelmingly predictable.⁴² In view of the general preponderance of effectiveness-based reasoning in EU law,⁴³ a principle-based approach should have made this outcome easier to attain as far as finding an infringement is concerned.⁴⁴ In a nutshell, the ruling in DEI replaced the legal principle requiring causality between the actions of the state and the actions of the public undertaking with an appraisal of the effects on the level playing field, a principle that is sound and logical when

³⁷ For a fuller analysis and historical perspective see: H. Vedder, M. Roggenkamp, A. Ronne, & I. del Guayo, EU Energy Law. In M. Roggenkamp, C. Redgwell, A. Ronne, & I. del Guayo (Eds.), *Energy Law in Europe*, 2016 Oxford University Press.

³⁸ Case T-169/08 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission*, ECLI:EU:T:2012:448, paras. 92, 93.

³⁹ Case C-553/12P *Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)*, ECLI:EU:C:2014:2083, paras. 41 – 47 and notably 45.

⁴⁰ See the discussion at pp. 831 – 833 on the automatic abuse doctrine in J. Faull & A. Nikpay (eds.), *The EU Law of Competition*, Oxford University Press 2014.

⁴¹ The judgment dates from 2014 whereas the first complaint was filed in 2003.

⁴² We point out that the GC, see fn. 21 supra, did not refer to the effectiveness or duty to ensure the full effect at all.

⁴³ E.g. T. Tridimas, *The General Principles of EU Law*, Oxford University Press 2013.

⁴⁴ See in general on competition as an organizing principle: W. Sauter, *Coherence in EU Competition Law*, Oxford University Press 2016, p. 218.

seen in the light of the fact that Article 106 is part of the rules on competition.⁴⁵ For the justification, we will now turn to the second saga in competition governance, that of Article 106(2) and subsidization.

Article 106(2) TFEU provides an escape clause for SGEIs. In a nutshell, these are services that need to be provided under uniform and reasonable conditions on a universal basis. Classic examples are the universal postal service that requires mail to be delivered irrespective of the delivery address or the universal network service that allows all inhabitants to be connected on affordable terms to a reliable energy grid again without taking into account the actual costs for a specific connection.⁴⁶ Such universal services of SGEIs are invariably costly and will become more expensive as the quality or coverage increases. This means that affordability requires some form of subsidization, resulting in two options. Firstly, the state that issues such a SGEI could allow for cross-subsidization. This basically means that all users pay a uniform amount that allows the service provider to reap extra profits, connected, for example, to urban electricity connections, that it can use to cross-subsidize the loss-leading provision to others, say rural electricity connections. Such cross-subsidization requires a statutory monopoly that prevents cherry picking. Secondly, there may be straight forward subsidization of the loss leading activities.

Enabling cross subsidization is compatible with EU competition law, albeit subject to a competition principle.⁴⁷ This requires a definition of the SGEI to the smallest extent possible to ensure that the scope of services subject to cross-subsidization remains limited. By and large, this rule and the underlying principle have not resulted in many follow-on cases.⁴⁸ This may function as an indicator of the clarity of the rule, where for example, national regulators are able to check the compatibility of their national competition policies with this rule. On a similar note, the Dutch legislator did not encounter too many difficulties in checking compliance of the proposed regime for offshore wind energy with Article 106 TFEU.⁴⁹

With regard to subsidization we encounter the second saga, that of financing SGEIs by means of subsidies. Initially, such subsidization was classified as state aid within the meaning of Article 107, and thus prohibited unless notified to and approved by the Commission. This changed with the 2001 judgment in *Ferring*. This basically held that the compensation of costs for the provision of a SGEI did not entail state aid given that the ‘advantage’ required by Article 107 was absent.⁵⁰ This abrupt change, however sensible it may be, ignored important principles of competition law such as the need to maintain a level playing field. *Ferring*, for example, ignored the requirement of having a well-defined SGEI in order to prevent overly wide definitions that would

⁴⁵ Cf. M. Marquis, ‘The State of EU Action in EU Competition Law (Post *Greek Lignite*)’, in N. Philipsen, S.E. Weishaar and G.Xu (eds.) *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, Springer 2016, p. 67.

⁴⁶ By and large, rural connections are more expensive than those in urban surroundings because of the longer distances involved.

⁴⁷ Case C-320/91 *Criminal proceedings against Paul Corbeau*, ECLI:EU:C:1993:198, paras. 16 – 18.

⁴⁸ For an overview and analysis see: J. Faull & A. Nikpay (eds.), *The EU Law of Competition*, Oxford University Press 2014, pp. 857 – 862.

⁴⁹ Kamerstukken II 2014-15, 34 199, nr. 3, pp. 13-15.

⁵⁰ Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale*, ECLI:EU:C:2001:627, para. 27 and the opinion of A-G Tizzano in that case, paras. 56 - 63. 27

negate competition at the fringes of the SGEI.⁵¹ That was remedied with the refinement of *Ferring* in *Altmark*.⁵² As a result, the underlying competition principle was restored to the greatest extent possible in light of the Member State sovereignty in relation to SGEIs.⁵³ In terms of competition and SGEI governance, we now see a shift from governance between the Commission and the Member States to a more tripartite procedure that also involves the Court as an entity engaged in oversight that is aware of the two levels of governance involved. The SGEI governance is primarily organized at the national level, with national or regional and local governments setting standards for SGEIs. This interacts with the supra Member State level at which competition governance primarily takes shape. Still, the Treaty framework and these cases provide only for a coarse, general balancing framework, whereas the important interests involved in SGEIs require more legal certainty. This is provided by means of secondary and tertiary EU law in a further refined and more elaborately structured governance framework.

Competition and SGEIs in Secondary and Tertiary EU and National Law

The Third Energy Package was already mentioned above. This enables competition by requiring a separation of the energy networks from the generation and supply of energy, confining SGEIs essentially to the network activities.⁵⁴ Article 3, however more elaborate it may be compared to the Treaty rules on SGEIs and competition, still provides only the embryonic framework for electricity market governance. This is only sensible in view of the remarkable differences that anyone can imagine between the electricity sector in, say, Finland and that in Germany, France or Malta and the incredibly complicated technical nature of the matter concerned. Even the straightforward idea, related to SGEI's, that renewable energy and energy efficiency should be encouraged, triggers so many highly specialized questions that cannot possibly be answered by the Union legislature in a one size fits all manner.⁵⁵

This is where National Regulatory Authorities (NRAs) and ACER come into play. Every Member State should have an NRA that regulates the operators of the networks. In doing so the NRAs will draft generally applicable rules and decisions that will strike a refined balance between the competition principle and SGEI involved. A practical example of this are the network codes that contain the precise rules on preventing and reactions to network failures.⁵⁶

⁵¹ A point eloquently and convincingly put forward by Ph. Nicolaïdes, 'Compensation for Public Service Obligations: The Floodgates of State Aid?', 2003 *European Competition Law Review*, pp. 561 – 573.

⁵² For a fuller analysis see: H.H.B. Vedder & J.M. Holwerda, 'The European Courts' Jurisprudence after *Altmark*: Evolution or Devolution?' In E. Szyszczak, & J. W. van de Gronden (Eds.), *Financing Services of General Economic Interest*, 2013 Springer.

⁵³ H.H.B. Vedder, 'The constitutionality of competition: European internal market law and the fine line between markets, public interests, and self-regulation in a changing constitutional setting', in F. Amtenbrink, & P. A. J. van den Berg (Eds.), *The Constitutional Integrity of the European Union*, 2010 T.M.C. Asser Press.

⁵⁴ For electricity, there is a parallel directive for gas, the relevant legal framework is laid down in Directive 2009/72, OJ 2009 L 211/55, notably Article 3.

⁵⁵ Consider, for example, the need to maintain voltage levels and quality in the light of the intermittent nature of renewable energy, see Article 16 of the Renewable Energy Sources Directive 2009/28, OJ 2009 L 140/16, that envisages priority or guaranteed access of such green electricity to the grid 'subject to requirements relating to the maintenance of the reliability and safety of the grid'.

⁵⁶ E.g. the 'Code besluit Netcode', available at <https://www.acm.nl/nl/publicaties/publicatie/14381/Netcode-Elektriciteit/>.

In terms of governance, various networks in place are highly interesting in the context of this discussion. At the national level, a network exists between the various actors involved, such as for the network operators. These are, when they propose changes to the network codes, required to consult organizations of network users, creating a structured exchange of views between the networks of actors involved.⁵⁷

This networked governance is to a large extent regulated at the European level, where both the network operators and the NRAs have formed networks for collaborative governance.⁵⁸ The electricity network operators have created a forum for the exchange of ideas and the drafting of, *inter alia*, codes on the safe operation of networks, called ENTSO-E.⁵⁹ The volume of and level of detail in these codes evidences the great success of these networks and the governance that they enable. Apart from these regulatory outcomes, ENTSO-E also has a successful stress test to look back to, when the 2015 solar eclipse in connection with weekday consumption and significant installed PV capacity required intensive cross-border cooperation between the national network operators.⁶⁰ NRAs are working together in a similar network, The Council of European Energy Regulators (CEER),⁶¹ now supplemented by the Agency for the Cooperation of Energy Regulators (ACER).⁶²

Both networks are engaged in a regular discussion in which the basic principles are laid out in the form of the competition principle on the one hand and the principles of affordability and sustainability on the other.⁶³ This involves elements of consultation, but equally elements of collaboration in decision-making.⁶⁴ For the consultation we refer to Article 7(3) of the ACER Regulation that envisages cooperation between the NRAs and stipulates that ACER shall take due account of the outcome of such cooperation when formulating its opinions, recommendations and decisions. On the collaborative side of the spectrum we find Article 14 that provides for decisions to be taken by a board of regulators that consists of, *inter alia*, representatives of the NRAs. When we cast the net slightly wider, the cooperation between the SGEI beneficiaries, the network operators, and the national as well as EU regulators, we see a comparable form of collaborative governance, the substance of which centers around balancing SGEIs with the competition paradigm. A practical example would be the adoption of the network code on demand connection. This quite technical topic is closely connected to the role played by (small) electricity consumers in facilitating energy transition whilst ensuring a stable and reliable grid,

⁵⁷ This is outlined at <https://www.acm.nl/nl/onderwerpen/energie/de-energiemarkt/codes-energie/wijziging-van-codes-energie/>.

⁵⁸ See S. Lavrijssen & L. Hancher, *European Regulators in the Network Sectors: Revolution or Evolution?* (June 2008). TILEC Discussion Paper No. 2008-024. Available at SSRN: <https://ssrn.com/abstract=1162164> or <http://dx.doi.org/10.2139/ssrn.1162164>.

⁵⁹ ENTSO-E stands for European Network of Transmission System Operators, information can be accessed at entsoe.eu.

⁶⁰ https://www.entsoe.eu/Documents/Publications/ENTSO-E%20general%20publications/entsoe_spe_pp_solar_eclipse_2015_web.pdf

⁶¹ Information can be found at ceer.eu

⁶² Set up by Regulation 713/2009, OJ 2009 L 211/1, hereafter the ACER Regulation.

⁶³ A specific balance between these principles can be seen in the ACER white paper on renewables in the wholesale market, available at: http://www.acer.europa.eu/Official_documents/Position_Papers/Position%20papers/WP%20ACER%2001%2017.pdf

⁶⁴ E.g. recital 10 of the preamble to the ACER Regulation that refers to 'an integrated framework within which national regulatory authorities are able to participate and cooperate'.

the core of the SGEI.⁶⁵ This network code was proposed by ENTSO-E on the basis of ACER's Framework Guidelines, but only after a positive recommendation by ACER⁶⁶ was the Commission able to adopt it as a binding regulation.⁶⁷ Apart from the specific elaboration of SGEI thinking in the energy sector, we can see a similar phenomenon in the field of competition and SGEI governance, with the Commission setting general, principle-based standards in a deliberative framework that involves Member State central governments, as well as regional governments and interest groups.⁶⁸

Principle based collaborative governance in Cohesion policy?

Based on these examples of the governance system within competition policy in relation to SGEI's, it is possible to state that is a good example of principle based collaborative governance. Looking at governance as a process, focusing on the steering of regimes aimed at the provision of publicly supported goods and services, in this case of services of general economic interest in general and electricity markets in particular, we can qualify this situation as collaborative governance, based on the questions of Ansell,⁶⁹ where we focus on the first and fourth question (as mentioned earlier). First, when looking at who collaborates, we see a situation where there is an important role for both public and private actors and where expert institutions, such as NRA's and ACER are recognized as key players in the governance system. Secondly, referring to the fourth question mentioned by Ansell with a focus on the process as formal, consensus-oriented and deliberative, what we see is that public institutions from European level not only leave room for those other actors to take their role, thus sponsoring collaboration, but also enable, incentivize and require such collaboration in, for example, the adoption of draft network codes. When it comes to the principle based situation, the examples given also show that where there are discussions on the interpretation of rules and principles, the judicial system in place (in the end) defines these principles. Summarized: although there is multitude of actors involved in the governance system of these examples from competition policy, and a contested and politicized situation could be expected, in practice there is enough room for actors to fill in the open concepts in this policy area. Such a situation is comparable to the situation of Cohesion policy: with its multilevel character involving a multitude of actors on European, national and regional level, and a lot of open concepts in the regulations to be applied, this policy area confirms the suggested contested and politicized situation. Thus, this leads to the question as to what can be learned from these cases to make Cohesion policy more effective in delivering results in terms of underlying principles and the governance in place.

First of all, when looking at the question on who collaborates we see it is important to acknowledge the role of expert institutions in governing the policy field. This means that on all levels there is recognition for the knowledge and experience of actors involved. When it comes to Cohesion policy, we can see there has been a

⁶⁵ A short description is available at: <https://www.entsoe.eu/major-projects/network-code-development/demand-connection/Pages/default.aspx>.

⁶⁶ ACER Recommendation 02/2013, available at:

http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2002-2013.pdf. See notably the first and second recital of the preamble for an outline of the process.

⁶⁷ Commission Regulation 2016/1388, OJ 2016 L 223/10.

⁶⁸ The results of the consultation on the drafts of the most recent legislative package, for example, can be accessed at http://ec.europa.eu/competition/consultations/2011_sgei/index_en.html. The SGEI Decision 2012/21 envisages two yearly reports from the Member States that enable Commission supervision as well as fine-tuning of the rules.

⁶⁹ Ansell, C. (2012). Collaborative Governance. *The Oxford Handbook of Governance*. D. Levi-Faur, Oxford University Press.

shift to include regional and local authorities more and more in the drafting of the regulations and to give feedback on issues that arise when implementing the policy. An example is the engagement of managing authorities in the preparations for the negotiations for the 2014-2020 regulatory package in 2012 and 2013 in the Netherlands, where the ministry of Economic Affairs (EZ) explicitly informed the managing authorities on the suggested changes in the regulations for the Structural funds, and the hearings that were organized by the Dutch Permanent Representation, in cooperation with the Committee of the Regions (CoR) in January and March 2016 in Brussels, where regional and local authorities were able to share their experiences and bottlenecks with each other and officials from CoR and the European Commission. A good example is also the set up of the High Level Group of on Simplification,⁷⁰ which expresses the fact that critical views on and suggestions for change of the existing regulations are welcomed on EU level.

Regarding the question on the governance system to be formal, consensus-oriented and deliberative, we see also some change in recent years in Cohesion policy towards a more collaborative system, although it would still be not appropriate to talk about a principle based collaborative governance system.

On the one hand, there is formally no room for regions and local authorities in the setting of rules and the decisions to be taken regarding the open concepts in the regulations. From the Dutch practice of the implementation of Cohesion policy, there are various examples where national, but more often regional authorities decide on how to interpret these open concepts, and other authorities, being on a national or European level, overrule these decisions. Whereas there should always be room for higher authorities on national or European level to overrule interpretations that are not correct, the basic perspective should be that where the regulations are not entirely clear, there is and was meant to be scope and thus an opportunity for interpretation. So a formal role for other authorities in the explanation of the legislation is primarily still lacking, as well as a deliberative role.

Whether the current system in Cohesion policy is consensus-oriented is also questionable. To some extent it is, for instance when regional or local authorities are unsure about a certain explanation and ask the EC for clarity, in most cases the explanation will still be vague. On the one hand it could be argued the EC is not taking its role to clarify the rules set on EU level. Another perspective would be that the EC is (more or less explicitly) leaving room for other authorities to justify (different) choices that have been made about the explanation of legislation, taking the perspective that as long as it's not explicitly forbidden it should be allowed.

And that is where the principle based part of the concept kicks in. As explained in the situation of competition policy, there is quite a clear basic idea of what restriction of competition means. Although there are cases brought to court, there seems to be a shared basis of the concept in practice: in general it is known that when economic actors are not treated in an equal way, there is potential disruption of the competition principle. On the same basis, it could be questioned whether there is a common ground at actors on Cohesion policy: are there clear principles, for instance on what the policy aims at? In competition policy that seems to be quite clear as a principle, although legally not very pronounced. For Cohesion policy: there is an ongoing discussion on the aims of the policy: from a historical point of view it has always been to diminish economic imbalances between the member states, but in current times (with economic flourishing countries also receiving support) it has changed to being an instrument of the EU2020 goals. Since its aim is ambiguous and varying according to the context it is placed in, that is hampering implementation and cooperation.

⁷⁰ See footnote 14.

So what can be learned from this comparison? First of all, in a multilevel policy area as Cohesion policy is, a recognized role for regional and local levels is essential. Although this is formally done by a consulting obligation of the CoR in cases of new regulation, the informal role needs to be expanded, as already is visible to increase. Although it is difficult to implement a formal role for regional and local authorities, as opposed to the national level which has a formal role in the Council of Ministers, their informal role should further increase. Since the policy is by definition implemented on a regional and local scale, these actors have the best reflections on the obstacles and problems in the field. This knowledge and experience should find its way to the legislative phase as well, to prevent implementation problems.

Secondly, for a policy to be successful and effective, it is essential that it is clear what the results are that the policy is aiming at. With the current situation with tangled goals and aims of the policy, it seems to be impossible to be regarded as successful. With the debate starting on the post 2020 period in the fall of 2017, it is essential that the end result of the refined policy is clear and open about its goals and pursued results.

Finally, and perhaps the most important issue, is that there is a need for trust. Where in the situation of competition policy, as illustrated, it is clear that authorities on energy regulation are entrusted with their capabilities to assess what is needed in regulating the policy, in Cohesion policy actors tumble fiercely over each other: the European Commission, the European Court of Auditors, the audit authority, the national ministry and managing authorities all assume they know best how the regulations should be explained, and take their responsibility in that. However, in a situation of multilevel governance par excellence, it should be normal also on regional or local level to have some room for maneuver and, as long as the basic principles of the policy are respected and the rules are followed as much as possible, in cases of confusion on how to interpret those rules, European or national authorities should respect the discretionary powers of regional and local authorities. Where an explicit choice has been made to leave the regulations with open concepts, proscription of a correct implementation afterwards by one of the parties is unwelcomed.