

Why the Open Method of Coordination (OMC) is bad for you: a letter to the EU

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1. Introduction

The aim of the present “letter” is to provoke, rather than to prove. It is intended to further stimulate the – already well developed – scientific dialogue on the open method of coordination (OMC).¹ This explains why some of the arguments are overstretched.

This contribution, belated as it is entering into the debate, has the benefit of some hindsight. This hindsight is based on three factors (in chronological order): a) the fact that

¹ See, among many, the **books** (in relevance order) by J Zeitlin and P Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2005) P.I.E.-Peter Lang, Brussels e.a.; R. Dehousse (ed) *L'Europe sans Bruxelles? Une analyse de la Methode Ouverte de Coordination*, (2004) L'Harmattan, Paris; F. Snyder (ed), *The EU and Governance – L'UE et la Gouvernance* (2003) Bruylant, Bruxelles; G. de Burca & J. Scott, *Law and New Governance in the EU and the US*, (2006) Hart, Oxford/Portland; the **special issues** (1/2002) ELJ and (2/2004) JEPP dedicated to the OMC and other new methods of governance (individual articles from these issues are cited only to the extent that they have been specifically used); also the **articles in English** (in reverse chronological order): E. Szyszczak, “Experimental Governance: The Open Method of Coordination” (2006) ELJ 486-502; S. de la Rosa, “The OMC in the New Member States – The Perspectives for its Use as a Tool of Soft Law” (2005) ELJ 618-640; D. Trubek & L. Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the OMC” (2005) ELJ 343-364; K. Jacobsson, “Between Deliberation and Discipline: Soft Governance in EU Employment Policy” in U. Mörtz (ed.) *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (2004) Cheltenham, Edward Elgar; D. Ashiagbor, “Soft Harmonisation: The OMC in the EES” (2004) European Public Law 305-332; I Maher, “Law and the OMC: Towards a New Flexibility in European Policy-Making?” (2004) 2 *Journal for Comparative Government and European Policy* 2; D Hodson and I Maher, “Soft Law and Sanctions: Economic Policy Coordination and Reform of the Stability and Growth Pact” (2004) JEPP 798-813; A. Schaefer, “A New Effective Form of Governance? Comparing the OMC to Multilateral Surveillance by the IMF and the OECD” (2004) paper available by the Max Plank Institute at www.mpi-fg-koeln.mpg.de; G. de Burca “The Constitutional Challenge of New Governance in the EU” (2003) ELRev 814-839; G. de Burca & J. Zeitlin, “Constitutionalising the OMC, What Should the Convention Propose?” (31/2003) CEPS Policy Brief, at www.ceps.be; D. Wincott, Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon? (2003) Public Administration 533-553; S. Regent, “The OMC: A New Supranational Form of Governance?” (2003) ELJ 190-214; A. Sbragia, “The Dilemma of Governance with Government” Jean Monnet Working paper 3/02; R. Dehousse, “Misfits: EU law and the Transformation of European Governance”, Jean Monnet Working paper 2/02; C. de la Porte, Ph. Pochet & G. Room, “Social Benchmarking, Policy Making and New Governance in the EU”, JESP (2001) 291-307; G. Pagoulatos & M. Stasinopoulou, “Governance in EU Social Employment Policy: A Survey”, (2006) Report for the Study on Social Impact of Globalisation in the EU (SIMGLOBE) European Commission and CEPS (VC/2005/0228); see also the **articles in French**: Th. Georgopoulos, “La MOC européenne : en attendant Godot ?” (1/2005) McGill Institute for European Studies at http://www.iee.umontreal.ca/publicationsfr_fichiers/DIVERS/Georgopoulos-Texte.pdf; J. Goetschy, “L’apport de la méthode ouverte de coordination à l’intégration Européenne” in P. Magnette (ed) *La Grande Europe* (2004) Editions de l’ULB, Bruxelles; M. Blanquet, “Le système communautaire à l’épreuve de la ‘gouvernance européenne’ : Pour une ‘nouvelle gouvernance raisonnée’” in Mélanges en hommage à G. Isaac (2004) Presses de l’ Université de Toulouse, vol. 1, 239-269 ; M. Telo, “La gouvernance économique et sociale et la réforme des traités: la MOC” in Mélanges en hommage à J.V. Louis (2003) Editions de l’ULB, Bruxelles, vol. 1, 479-498 ; S. Cafaro, “La MOC, l’action communautaire et le rôle politique du Conseil Européen” in Mélanges en hommage à J.V. Louis (2003) Editions de l’ULB, Bruxelles, vol. 2, 203-221. A full list of bibliographic references is to be found at the Wisconsin/Madison EU Center’s of Excellence website at <http://eucenter.wisc.edu/OMC/open12.html> .

the author has participated himself as a member of a national delegation in one of the OMC-induced benchmarking exercises (only to see the final evaluation report getting lost in the Labyrinth of the national bureaucracy, despite the fact that it contained an overall favorable assessment); b) the extremely rich and knowledgeable academic input, offering a very promising theoretical background for the OMC; and c) some recent empirical research as to the efficiency of the OMC, the accounts of which are, to say the least, ambiguous.

This recent empirical research grounds the basic assumption of the present paper: that the OMC has only restricted, if not negligible, direct effects in the short term, while it may have some indirect effects in the medium-long term (2). On the basis of this assumption a series of arguments against the current “spread” of the OMC will be put forward (3). Some proposals on how to neutralize some of the shortfalls of the OMC will follow (4).

2. A first empirical assessment of the effectiveness of the OMC

Before assessing the effectiveness of the OMC, both in the short and in the medium/long term (2.2 and 2.3), a very brief presentation of the method has to be undertaken (2.1).

2.1. A (very) brief overview of the OMCs

While the term “Open Method of Coordination” only dates back to the 2000 Spring European Council held in Lisbon, the method itself has been around for much longer: a (strong) variant thereof, instituted by the Maastricht Treaty (1992), has underpinned the economic coordination which eventually led to and still drives the European Monetary Union (EMU), while the European Employment Strategy (EES) instituted by the Amsterdam Treaty (1997) is also based on this method. Nonetheless, the contribution of the Lisbon summit was of a threefold nature: a) it gave the method a name, b) it recognized that it may be used in fields for which there is no Treaty basis and c) it designated it as the core instrument for the achievement of the so-called Lisbon objectives, namely, the acceleration of the overall EU growth rate and the increase of employment, under conditions of social cohesion and of respect of the environment.

Although advertised as such (notably by the Lisbon European Council), this method is hardly new. First, it corresponds to practices followed by other regional or international *fora* of economic coordination, such as the OECD, the IMF, etc.² Second, it is based both on earlier “Processes” (such as the ones initiated in Luxembourg, Cardiff and Cologne) and on previous Commission initiatives, based on soft law, experience sharing, mutual learning, iterative evaluation of the policies pursued, etc.³ Third, and more fundamentally, it may be seen as a further transformation of the traditional “Community method”, furthering the 1985 “new approach”.⁴ Compared to the new approach,⁵ the OMC constitutes an even more flexible form of cooperation, based on commonly agreed indicators and/or benchmarks (not standards), which (like standards) allow for diversification and (again, like many standards) are not binding. This new “open” method is also quite dependent on the industry and on experts (for the choice and formulation of indicators and benchmarks), but is more political and more intergovernmental, in the sense that the last word is given by the Council and the member states.

The OMC may be analyzed as a multilevel process of governance, comprising at least four levels. First a) the European Council agrees on the general objectives to be achieved and offers general guidelines. Then, b) 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 by other independent bodies and agencies. Then follow c) the adoption of measures at the national or regional level (taking into consideration the local particularities) in view of the achievement of the set objectives and in pursuit of the indicators chosen. These are usually referred to as the “National Action Plans” or NAPs. The process is completed with d) mutual evaluation and peer-review between member states (occasionally coupled with a system of naming and shaming/faming), at the Council level.

² See Schaefer, above n. 1.

³ See Wincott, above n. 1 at 537.

⁴ See V. Hatzopoulos, “A (More) Social Europe: A Political Crossroad or a Legal One-way? Dialogues Between Luxembourg and Lisbon” (2005) CMLRev 1599-1635, 1630.

⁵ Based on minimal harmonization (often through standardization) and mutual recognition, see Council Resolution of the 7 May 1985 for a new approach concerning technical harmonisation and standardisation [1985] OJ C 136/1.

Since its official launch, in 2000, the OMC has been used or, at least, proposed as a means of coordination between EU member states in various fields. According to the most recent account, by E. Szyszczak,⁶ thirteen (!) different OMCs may be said to be in place. She proposes a four-tier classification as follows: a) Developed areas (with a legal basis within the Treaty): Broad Economic Policy Guidelines (BEPGs) and European Employment Strategy (EES); b) Adjunct areas: Modernisation of social protection, Social inclusion, Pensions, Healthcare; c) Nascent areas: Innovation and R&D, Education, Information Society, Environment, Immigration, Enterprise Policy; and d) Unacknowledged: tax. Each one of these OMCs differs from the others in several respects: duration of each cycle of coordination, kind of outcomes, degree of compliance pressure imposed upon the participating States, stakeholders involved, role of the participating institutions etc. These various OMCs have been classified from “strong” to “weak” by reference to three criteria: a) the degree of determinacy of the common guidelines, b) the possibility of sanctions and c) the degree of clarity regarding the roles of the various actors. Hence, it is accurate to state that “there seem to be as many types of OMCs as there are policy areas”.⁷ Therefore, the term OMCs, in the plural, more accurately depicts reality.

Also, there is a temporal dimension in all OMCs: they seem to be fluid and ever-evolving, both the European and the national components of the process being subject to change from a cycle to the next. The 2005 “streamlining” of the EES with the BEPGs is the most striking illustration of the overarching fluidity characterizing OMCs.⁸

⁶ Above n. 1, at 494.

⁷ S. Borràs & B. Greve in “Concluding Remarks: New Method or Just Cheap Talk?” (2004) JEPP 329-336, 330. See also J. Zeitlin, “The OMC in question” in Zeitlin & Pochet (eds), *The OMC in action*, above n. 1, 19-33, at 20-21.

⁸ Following the 2005 spring European Council the above procedure is being further rationalized, streamlined and brought closer to the institutionalized coordination procedures provided for in the EC Treaty. Thus, two three-year cycles (2005-2008-2011) are set for the attainment of the agreed objectives. Each of the two cycles is initiated by a) a Strategic Report submitted by the Commission to the spring European Council, which leads the latter Institution to the adoption of b) Policy Guidelines concerning the economic, social and environmental objectives to be pursued. Following this, the Council will adopt a set of c) Integrated Guidelines, consisting of c1) the Broad Economic Policy Guidelines (BEPGs) provided for in Article 99 EC and c2) the Employment Guidelines provided for in Article 128 EC. In this way these two, already existing, coordination instruments are combined in a more coherent way, with a clear precedence of the former over the latter.⁸ On the basis of these Integrated Guidelines member states shall draw up d) National Reform Programmes (NRPs) monitored by a national coordinator, while the Commission presents a e) Community Lisbon Programme, for the completion and the coordination of NRPs. Member states f)

2.2. Effectiveness in the short term: no visible immediate effects

In a paper published in the autumn of 2005,⁹ K. Featherstone convincingly explained why “soft” coordination at the EU level failed to subjugate, or else affect, “hard” politics in Greece. Hence, the proposed pension reform never took place, despite the fact that all the actors involved were in agreement as to the necessity (although not the terms) of such a reform. He observed that “the empowerment of the EU is limited in nature: it lacks precision; sufficient temporal discipline; and the costs of non-compliance are too low. Those features create a weak advantage in the face of the domestic impediments”.¹⁰ He further explained that “instead of restructuring a bargaining game on distributional issues, affecting core interests, the EU stimulus was probably more evident at the cognitive level [...] in terms of policy style”.¹¹ He concluded that the “Government’s ability to choose the social model is more constrained by entrenched privileges at home than market pressures from the EU”.¹²

Concomitantly, another London School of Economics originated paper, by M. Lodge, explored the impact of peer review and benchmarking, run under the auspices of the OECD, on regulatory innovation in participating states.¹³ He examined the “successful” case of Ireland and compared it with the less successful ones of Spain and the UK. The field in which innovation was pushed through by the OECD was, specifically, regulatory reform and the reduction of red tape. His findings do not leave room for excessive optimism. “[D]espite all the talk about the importance of international organizations acting as standard-setters, this study has found only limited evidence of such a process, whether by affecting change directly by prescription and recommendation or by voluntary compliance to international ‘best practice’. ‘Policy transfer’ and ‘diffusion’ played only a minor role in this area of government activity. Despite the benchmarking and ‘comparative experience collection’ functions of the OECD, detailed

report yearly to the Commission on the progress achieved, and the Commission in turn proceeds to g) a global assessment, i) submitted for review by the European Council every spring. On the basis of this assessment the latter Institution may decide to review the Integrated Guidelines.

⁹ K. Featherstone, “Soft co-ordination meets ‘hard’ politics: the EU and pension reform in Greece” (2005) JEPP 733-750.

¹⁰ Featherstone 734.

¹¹ *Id* 746-747.

¹² *Ibid* 747.

¹³ M. Lodge, “The importance of being modern: international benchmarking and national regulatory innovation” (2005) JEPP 649-667.

evaluation of other states' experiences was hardly evident.¹⁴ Finally, 'new governance' instruments that supposedly promote the use of 'learning' and 'peer-group review' were of limited value in promoting effective implementation of particular policy templates or even broad policy ideas".¹⁵ Further, he found that the reputed Irish "successful" experience in benefiting from the OECD method, was more about appearance than substance: "success" was based on the high availability of information, the active cooperation of officials during the reviewing process and the high level of endorsement that the final report received by the Irish authorities, rather than on actual reform pushed through.

2.3. Effectiveness in the medium – long term: indirectly affecting national policy processes

The above gloomy picture, however, has received a somehow positive overtone in a more recent study by Mrs. López-Santana.¹⁶ She looked into the EES and examined how the European guidelines have affected policymaking in three member states – Belgium, Sweden, and Spain. She acknowledged that "the effect of nonbinding instruments on domestic settings does not necessarily include changes in legal frameworks." She contended, however, that changes do occur in the *policy process framework*. Her argument is that "by acting as a framer of employment policy, the supranational level has restrained several dimensions of employment policy and labor market policies in the member states, mainly by: (a) defining (and reinforcing) what problems domestic policy-makers should attack to increase member state competitiveness, and to deal with internal and external challenges; (b) pointing out and/or reinforcing the idea that a policy line is good or bad and necessary; (c) restricting and limiting the policy options and courses of action that domestic policy-makers should develop; and (d) providing potential courses of action that allow policy-makers to 'draw

¹⁴ This is a problem also identified in the EU OMC, as some authors speak of a "beauty contest", see S. Borràs & K. Jacobsson, "The OMC and new governance patterns in the EU" (2004) JEPP 185-208 at 195.

¹⁵ Lodge, at 662.

¹⁶ M. López-Santana, "The Domestic Implications of European Soft Law: Framing and Transmitting Change in Employment Policy" (2006) JEPP 481-499; this paper is part of a much wider research conducted by the author and presented as her Ph.D. Thesis at the University of Michigan (unpublished, 2006): "Soft Europeanization? The Influence of Europe in Employment Policies, Processes and Institutional Configurations in EU Member States"

lessons’ and to ‘learn’ about ways to solve or diminish the problem in question”.¹⁷ Hence, change does not occur in any spectacular way, but rather is related to transformations “in early stages of the decision-making process by those who are responsible for managing policy on a daily basis”.¹⁸ The EU framing effect manifests itself as it “*expands* the courses of action available to policy-makers by providing information and opening new spaces for coordination, while simultaneously *restraining* their options by framing good and bad policy”.¹⁹ At the end of her study, however, she acknowledges that “changes in the early stages of the policy-making process cannot guarantee success outcomes”.²⁰

Therefore, the OMC does have some effect on policy procedure, this effect being contingent upon several diversifying factors, such as the institutional and the ideational fit/misfit of the Member State concerned by reference to the set objectives. It may also, with time and under propitious circumstances,²¹ lead to the transformation of newly induced policy objectives into some kind of norm. It is interesting to note that this empirical finding confirms the view expressed by the (European) “parents” of the theory of OMC, in one of the most influential articles in the field, who made clear that “what is coordinated may be less the policies themselves than the processes of cross-national benchmarking and organizational learning”.²²

These findings are fully corroborated by the empirical “national reports” on the effect of OMCs on employment and social inclusion policies in individual member states, compiled by Zeitlin and Pochet.²³ Hence in Sweden and Denmark “NAPs are not used as strategic tools for domestic policy making but are reports to the EU”. Further “EU recommendations are [not] decisive for policy change. Rather, they provide one argument

¹⁷ López-Santana, 482.

¹⁸ *Id* 486.

¹⁹ *Ibid* 494.

²⁰ *Ibid* 495.

²¹ Notably if the OMC recommendations are in line with the national reform programme already in place, see in this respect, except from López-Santana (above n. 16) and Lodge (above n. 13), C. De la Porte “Is the OMC Appropriate for Organising Activities at European Level in Sensitive Policy Areas?” (2002) ELJ 38-58 at 50.

²² C. de la Porte, Ph. Pochet (& Room) in « Social Benchmarking, Policy making and New Governance in the EU » (2001) JESP 291-307, 304. The theory also has two American parents, J. Zeitlin and D. Trubek, as it can easily be acknowledged by the bibliography in n. 1 above..

²³ J. Zeitlin & Ph. Pochet (eds) *The OMC in Action*, above n. 1.

among others”.²⁴ Similarly, in Germany, “the acceptance of the OMC processes by domestic actors as national policy instruments is limited since NAPs are regarded as mere reports to the European level rather than policy planning tools. [...] Consequently, the incorporation of the NAP processes into domestic policy-making procedures is fairly limited. Neither the EES nor the Social Inclusion process seem to have *direct* influence on policy developments in Germany”.²⁵ Interestingly enough, with time, the importance of European guidelines as a component of national policies diminished (!).²⁶ In the Netherlands “there was hardly any influence on the definition of problems of (un)employment and poverty, or the way these problems should be tackled”.²⁷ In Italy “the autonomous impact of the OMC has been relatively significant in the case of employment [where, however ‘endogenous dynamics of change were under way that worked in the same direction’] and relatively insignificant in that of social inclusion”.²⁸ Other member states, such as France, the UK and Ireland attract more positive remarks.²⁹

To this author’s knowledge, the above empirical studies represent the “state of the art” on the assessment of the efficiency of the OMCs. Assuming that they are correct, the following arguments may be put forward against the current blossoming of different OMCs in various EU policy areas. A further assumption, on which the following arguments rest, is that the interest of the EU is different from the sum of the individual member states’ interests.

²⁴ K. Jacobsson, “Trying to Reform the ‘Best Pupils in Class’? The OMC in Sweden and Denmark” in J. Zeitlin & Ph. Pochet, above n. 1. 107-136, at 130 and 132 respectively.

²⁵ M. Büchs & D. Friedrich, “Surface Integration, The NAPs for Employment and Social Inclusion in Germany” in Zeitlin & Pochet, above n.1, 249-285, at 278.

²⁶ *Idem* at 263.

²⁷ J. Visser, “The OMC as Selective Amplifier for National Strategies of Reform, What the Netherlands Want to Learn from Europe” in Zeitlin & Pochet above n. 1, 173-215 at 207.

²⁸ M. Ferrera & S. Sacchi, “The OMC and National Institutional Capabilities, The Italian Experience” in J. Zeitlin & Ph. Pochet, above n.1 137-172; the quotation comes from p. 166, while the excerpt within brackets from p. 155.

²⁹ A further illustration of the fact that the OMC is not apt to deliver the policy objectives attributed to it may lie on the failure of economic coordination. The prime example of a policy pursued through OMC, in its hardest version (since the Growth and Stability Pact provides for sanctions) failed to secure the desired results, is being constantly violated and its revision is now in the pipeline.

3. Why the OMCs are not good for the EU

3.1 Political reasons

3.1.1. EU's visibility/ credibility impaired

One of the principles introduced by the Commission's White Paper on Governance – and one that any political and/or administrative entity is naturally seeking – is that of “effectiveness”.³⁰ This, according to the Commission means that “policies must be effective and timely, delivering what is needed on the basis of clear objectives”.³¹ Four years later, in a much grimmer political context triggered by the defeat of the EU's Constitutional project, in its “Plan D” Communication,³² the Commission acknowledged the declining confidence of the European people in the EU. It observed that in order for this to be reversed “people need to feel that Europe provides an added value”.³³ In this regard, the Commission recently published a Communication identifying several fields in which recognizable results can be delivered.³⁴

In view of the above objective of effectiveness it is questionable for the Commission to invest in the various OMCs. As already noted, the OMCs entail no time constraints and have no enforcement mechanisms. Further, the empirical evidence confirms that outputs may be produced with a considerable time-differential, if at all. Since the OMC affects the *national* policy processes, change, if it occurs, is seen to be stemming from the member states themselves, not the EU. Therefore, it does not seem exaggerated to speak of “‘political appropriation at the national level’ of the outcomes of the OMC, combined with processes of scapegoating from the national to the EU level”.³⁵

³⁰ COM (2001) 428 final.

³¹ *Id* p. 10.

³² COM (2005) 494 final, The Commission's Contribution to the Period of Reflection and Beyond: Plan-D for Democracy, Dialogue and Debate.

³³ *Id* p. 2.

³⁴ Communication from the Commission, A Citizen's Agenda – Delivering Results for Europe, COM (2006) 211 final.

³⁵ S. Borràs & B. Greve above n. 7, at 332. The same risk is also highlighted by de la Porte, Pochet & Room, above n. 1 at 300 *in fine*.

The failure to implement the Lisbon agenda is a topical example.³⁶ It may be that the objectives of this agenda, contradictory as they are, may not be properly implemented at any time, by any method. What is certain, however, with the benefit of the hindsight of almost a decade of the application of a sanction-less OMC (since its introduction with the Treaty of Amsterdam), is that it is idealistic to set specific time-frames and try to keep them with OMCs as the sole means for the implementation of the relevant policies. This explains why the 2010 target, included in the initial formulation of the Lisbon strategy as a plausible timeframe for the realization of its objectives, has been dropped after the mid-term evaluation and the project has become an “open” one.

However, specific timeframes and highly symbolic moments do matter to the integration process of the EU. After George Orwell’s 1984 and the millennium bug’s 2000, most Europeans (of a certain age) do remember the internal market’s first birthday in (the end of) 1992 and, to a lesser extent EMU’s 1999. Similarly, the picture of the first post-accession European Council, meeting in the Athens agora, where democracy was born, does have a strong symbolic value. Of course, the internal market, the EMU and enlargement did not “end” on any specific date, but are ongoing processes, just like the Lisbon strategy. However, the lack of any specific target date in the Lisbon agenda negatively affects the visibility of the objective. Further, from a policy point of view, it makes an evaluation of the correctness of the choices made and of the effectiveness of the means used more difficult.³⁷

Therefore, the OMCs may already have had a role to play in the negative idea that many Europeans have of the EU. In this respect, it should be recalled that the 2005 spring European Council which acknowledged the mid-term failure of the Lisbon strategy and made the process an open one, was held only a couple of months before the two negative referenda in France and the Netherlands.³⁸ In fact the European Council had no choice

³⁶ For the Lisbon agenda see among many Wincott, above n. 1; for the (partial) failure thereof see “the Kok report” preparing for the mid-term evaluation of the strategy at http://ec.europa.eu/growthandjobs/pdf/kok_report_en.pdf, as well as the conclusions of the 2005 Spring European Council.

³⁷ Which is already difficult by itself, due to the lack of an adequate means to evaluate compliance with the set objectives and the extent to which such compliance (and not other factors) has indeed produced the desired outcomes. As this is a problem identified by almost all those who write on the OMC, the reference here is only indicative, S. Borràs & B. Greve above n. 7, at. 331 *in fine*.

³⁸ The spring European Council was held on the 22 and 23 of March, while the referenda at the end of May.

but to either make the strategy an *open* one, or to drop the *open* method of coordination as the means of its achievement – and it opted for the former.³⁹ In this respect it is interesting to note that the main reasons for the negative votes at the referenda are “fear of the harmful effect on jobs, the present economic and labour market situation, [and] the impression that the Constitution leant too much towards the liberal or not enough towards the social”,⁴⁰ all of which would be perceived differently if the Lisbon objectives were pursued successfully. Further, it should not be forgotten that the two European Councils which immediately followed the spring one were,⁴¹ after the *chaise vide* ones back in the late sixties, among the most dramatic ones in the history of European integration. These two Councils witnessed a Union which was “broken”, both literally and metaphorically, since member states were unable to reach agreement on the Financial Perspectives of the EU for the 2007-2013 period – an issue directly linked with the (non) implementation of the choices made in Lisbon and the diverging views about how to boost competitiveness. Then it is hardly surprising that, in the political arena, the most fervent supporters of the OMCs happen also to be quite unenthusiastic about European integration.

3.1.2. Reverse competence creep?

More importantly, OMCs may also damage the future legitimacy of the EU and its institutions. According to the functional nature of the integration process pursued, the impetus and legitimacy of EU action is to be founded in specific integration projects. The Internal Market, EMU and enlargement have fulfilled this function for the last 20 years. These were a basis for legitimizing action by the EU institutions. The White Paper on the completion of the Internal Market came complete with a list of fields in which the EU should legislate (on the basis of Qualified Majority Voting) for its objectives to be achieved.⁴² Similarly, the setting of the EMU required that the EU institutions monitor the economic performances of member states through the use of the convergence criteria and justified the creation of new institutions, such as the (short-lived) European Monetary

³⁹ The lack of political consensus and the thousands of pages of literature favourable to the OMC explain the outcome.

⁴⁰ See Commission’s Communication, The Period of Reflection and Plan D, COM (2006) 212 final, which refers to the post-referendum flash Eurobarometers 171 and 172, in France and The Netherlands, respectively.

⁴¹ Both held in Brussels, on 16-17 June and 16-16 December, respectively.

⁴² COM 85 (310) final.

Institute, the European System of Central Banks and the European Central Bank – the latter with independent decision making powers. In a different way, enlargement gave a strong boost to the Commission, making of it an important actor in the external relations of the EU, both in relation to accession and to third States. Therefore, the Commission (and through it the whole of the EU) was able to gain legitimacy in the regional and international arena by putting pressure on Serbia to cooperate with the International Tribunal for Yugoslavia and on Turkey to respect human rights and its obligations towards Cyprus. Even the establishment of loose intergovernmental cooperation in the second and third pillars of the Maastricht Treaty did confer some (ill-defined) new competences to the institutions, most of which (competences) were subsequently mainstreamed by the Amsterdam Treaty. Contrary to these past experiences, the Lisbon strategy⁴³ and, more importantly, the OMCs on which it is based, do not confer any new competences on the EU and its institutions, but specifically limit their reach on national policies in the fields concerned. It would be excessive to talk of a “repatriation of powers”⁴⁴ since the policies concerned (economic, social, inclusion, pensions) were never communautarized,⁴⁵ or not “enough”.⁴⁶ Nonetheless, the fact that Lisbon sets a political objective while investing on the OMC for its attainment means that any conferral of competences which would legitimize further integration is – for the first time – not taking place.

More importantly still, there is a risk that the OMC replaces the classic Community method in fields where the latter currently prevails. It is well documented that the EC has competence under Article 95 EC to deal with identified impediments to the Internal Market. Hence, as soon as the Commission (on its own motion, through complaints filed with it, or through notification procedures such as the one instituted by

⁴³ Here the term “Lisbon strategy” is used as a shortcut to the policies that the EU will have to develop in the economic and social fields, irrespective of whether they Lisbon or any other “strategy” will eventually be abandoned.

⁴⁴ See on the idea of “repatriation” but on different fields, D. Obradovic “Repatriation of Powers in the EC” (1997) *CMLRev* 59-88.

⁴⁵ A point put forward by many commentators in order to appease fears that the OMC may run against integration already achieved. See among many Szyszczak above n. 1, at 489-493.

⁴⁶ Such is the case of policies in the field of environment or R&D. Immigration and asylum are specific cases, fully integrated into the main policies of the first pillar since May 2004 (the end of the 5-year transitional period provided for in the Treaty of Amsterdam), but in these fields an OMC, although proposed by the Commission, may hardly be said to exist.

Directive 98/34),⁴⁷ or the Court (through preliminary rulings) identify impediments to the functioning of the Internal Market, then the EU may come in and legislate, in order to secure free movement. Hence, to take just a couple of examples, the judgment in *Choquet*,⁴⁸ where the Court recognized that Germany could require a French national regularly driving on German roads, to exchange his (French) driving license for a German one, prompted the Commission to put forward the first harmonization directive in this field.⁴⁹ Similarly,⁵⁰ the judgments of the Court in the early “migrant students” cases⁵¹ prompted member states to coordinate (and impose restraints to) free movement of students with Directive 93/96.⁵² This is the way in which spillover is expected to flow from the Internal Market.

Some recent (post OMC) developments, nonetheless, seem to question this pattern. The implications of the Court’s judgments in the healthcare cases have caused considerable excitement among authors and have made them conclude that some kind of regulation would be desirable.⁵³ However, eight years after the judgment in *Kohll*⁵⁴ and

⁴⁷ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204/37.

⁴⁸ Case 16/78 *Choquet* [1978] ECR 2293.

⁴⁹ Directive 80/1263/EEC on the introduction of a Community driving licence, OJ (1980) L 375/1 (repealed).

⁵⁰ The point presented here is also made by T. Hervey, “Social Solidarity” a buttress against internal market law?” in J. Shaw (ed) *Social Law and Policy in an Evolving EU* (2000) Hart, Oxford/Portland, 31-48, text accompanying notes 57-59.

⁵¹ Case 293/83 *Gravier* [1985] ECR 593; Case 152/82 *Forcheri* [1983] ECR 2323; Case 309/85 *Barra* [1988] ECR 355; Case 24/86 *Blaizot* [1988] ECR 379; Case 39/86 *Lair* [1988] ECR 3161 and case 197/86 *Brown* [1988] ECR 3205.

⁵² Originally enacted as Directive 90/366/EC, annulled in Case C-295/90 *Parliament v Council (student’s rights)* [1992] ECR I-4193; reenacted in substantially the same form, OJ (1993) L 317/59.

⁵³ See Hatzopoulos, “Killing national health and insurance systems but healing patients? The European market for health care services after the judgments of the ECJ in *Vanbraekel* and *Peerbooms*”, CML Rev. (2002), 683-729, and more recently “Health law and policy, the impact of the EU”, in De Burca (Ed.), *EU Law and the Welfare State: In Search of Solidarity*, (2005) EUI/OUP, Oxford, pp. 123-160. See also Davies, “Welfare as a service”, (2002) LIEI 27-40; Cabral, “The Internal Market and the right to cross-border medical care”, (2004) *ELRev*, 673-685, and van der Mei, “Cross-border access to health care within the EU: Some reflections on *Geraets-Smits* and *Peerbooms* and *Vanbraekel*”, (2002) ML, 289-215 and “Cross-border access to medical care: Non-hospital care and waiting lists”, (2004) LIEI, 57-67. More recently see Dawes, “Bonjour Herr Doctor: national healthcare systems, the Internal Market and cross-border medical care within the EU”, (2006) LIEI, 167-182. For a full account of the relationships between EU and Health Law see Hervey and McHale, *Health Law and the European Union*, CUP (Cambridge, 2004).

⁵⁴ *Kohll*, n. 60 above. For some comments of this case, see Mavridis in (1988) *RMUE*, 145-196; Van Raepenbusch in (1988) *CDE*, 683-697; and Huglo in (1988) *RTDE*, 584-589.

six years after *Smits & Peerbooms*⁵⁵ and *Vanbraekel*,⁵⁶ all legislative attempts in this field have failed.⁵⁷ Instead, cooperation in the field of healthcare is restricted to a highly informal OMC, coordinated by the Social Protection Committee and a further unrelated “informal coordination” process, under the auspices of the High Level Reflexion Group on Health Services and Medical Care,⁵⁸ which only held meetings for a year.⁵⁹ Hence, up until now, OMC has served as a substitute to the exercise of the necessary hard harmonization in the field of healthcare; or has it provided member states with an alibi for dragging their feet?

If OMCs are started in different policy areas as substitutes or waiting-rooms for “real” legislation, it is very likely that path dependence and institutional inertia will make them persist over time, thus making of them *de facto* substitutes for proper legislation, even in fields where legislation would be the best choice.⁶⁰

3.1.3. All the traditional EC Institutions suffer – the very premises of the EU are at stake

Many commentators have tried to explain how the institutional balance established by the Treaty (Article 7)⁶¹ is altered by the OMCs.⁶² Some view the Commission’s coordinating role as *de facto* extremely important,⁶³ while others see a

⁵⁵ Case C-157/99, *Smits & Peerbooms*, [2001] ECR I-5473.

⁵⁶ Case C-368/98, *Vanbraekel*, [2001] ECR I-5363.

⁵⁷ One must remember that, at the insistence of the Parliament, healthcare services were specifically excluded from the scope of the Services draft Directive (COM (2006) 160 of 4 April 2006), while a declaration of intent by the Commission to put forward a draft Directive specifically dealing with healthcare services, expressed in June 2006, has not materialized yet.

⁵⁸ See Szyszczak, above n. 1 at. 491-2.

⁵⁹ See T. Hervey, “The EU and the Governance of Health Care” in G. de Burca & J. Scott above n.1, 179-210, at 206.

⁶⁰ About path dependence see among many P. Pierson, “Increasing Returns, Path Dependence and the Study of Politics” (2000) *American Political Science Review* 251-267; see also H. Schwartz, “Down the Wrong Path: Path Dependence, Increasing Returns and Historical Institutionalism”, where further bibliographic references are to be found at <http://www.people.virginia.edu/~hms2f/Path.pdf>.

⁶¹ It should be noted that the concept of “institutional balance” is perceived by most authors as a dynamic one. See J.P. Jacqué “The principle of institutional balance” (2004) *CMLRev* 383-391 and S. Prechal “Institutional balance: a fragile principle with uncertain contents” in T. Heukels & M. Brus (eds) *The EU after Amsterdam* (1998) Kluwer, The Hague/Boston, 273-294.

⁶² See i.a. Blanquet, above n. 1. For an updated assessment of the general issue of the relative weight of each one of the main EU Institutions, based on empirical research, see R. Thomson & M. Hosli, “Who has the power in the EU? The Commission, Council and Parliament in Legislative Decision-making” (2005) *JCMS* 391-417.

⁶³ See e.g. De la Porte “Is the OMC Appropriate ...”, above n.21, at 50, who finds that “the Commission has emerged as a key actor”; De la Rosa, above n. 1 at 626 and 627 finds the Commission to be “omnipresent” and to occupy “a more dominant role”.

clear shift towards intergovernmentalism.⁶⁴ A third category of scholars refuses to reason on the supranational-intergovernmental divide and asserts that this is all new.⁶⁵ All, however, agree that the European Parliament (EP) and the European Court of Justice (ECJ) are completely left out of the procedure.

In this author's eyes, with the exception of the European Council which clearly gains in importance,⁶⁶ all other institutions (that is all *EC* institutions) suffer as a result of the OMCs. For the EP and the ECJ special developments follow below (3.1.7 and 3.3, respectively). For the Commission, it has already been explained that the OMCs endanger its political credibility, as it is the actor predominantly responsible for the design and (successful) implementation of Community policies (above 3.1.1). It also hampers its capacity as a policy originator and as the Union's main administrative agency (below 3.2). What is unexpected, though, is that the role of the Council is also being reduced. This is due to the fact that in the fields covered by OMCs the participation of the Council in the procedure is not based on its own structures and services, but essentially on the findings of special committees composed by *ad hoc* member states' officials. The findings of these committees do go to COREPER and the Ministers, but in fields in which agreement has been already reached at committee level, the Council is highly unlikely to intervene. Hence, the outcomes endorsed by the Council are the results of other, even more intergovernmental structures, which lack the continuity, common working language and methods and the fear of the long shadow of the future, which characterizes work in the Council.

This further begs the question of the Council's role in the process: the Ministers do have some indirect legitimacy from their being elected (or nominated by an elected president/prime minister) in their respective member states. On the contrary, government officials and consultant firms (who select the indicators and actually draft many of the reports on which Council recommendations are based) only have as much legitimacy as may stem from an imperfect principal-agent relationship. Moreover, in the EU context,

⁶⁴ Wincott, above n. 1.

⁶⁵ Georgopoulos above n. 1.

⁶⁶ See Cafaro, above n. 1.

national bureaucrats feel freed from the constraints of their national controls systems.⁶⁷ Furthermore, compromise texts drafted by national committees are not easily amendable by the Council proper. This is all the more annoying, because the “Council’s” Conclusions, Resolutions or Recommendations are the only pieces in the procedure which may qualify as “acts” having legal effects, thus being subject to the ECJ’s control.⁶⁸ Nonetheless, those are only formally attributable to the Council.

On a more macro level, it has been observed that the increased role that the OMC attributes to the European Council has symmetrically reduced the political weight of the Council in the overall institutional setting of the EU.⁶⁹ In a way, the OMC as “instituted” in Lisbon, adds a second head of competence in favour of the European Council. Next to the powers instituted by Article 4 EU, whereby the European Council is to provide the necessary impetus to the Union, the OMC attributes to the same body a second ground of powers: define general objectives and guidelines. While the EU and its institutions are the addressees of the former, member states directly are the addressees of the latter. Hence, not only does the European Council have a broader agenda, but also – and as a result – its meetings are increasingly formalized,⁷⁰ as they tend to be prepared by the Council, in a way similar to which COREPER is supposed to prepare the Council’s meetings. However, contrary to the Council, decisions in the European Council are only taken by unanimity, with the bigger States enjoying a clear bargaining advantage. Hence, all the political premises on which the EU has been successfully built (QMV, mutually agreed weight of States in the decision making process, negotiating against the fear of being outvoted, role of supranational bodies such as the Commission and EP) are put at stake.

3.1.4. The foundations of the EU legal order suffer: binding effects and supremacy

More importantly still, the legal premises of the EU are put into question. This argument need not be extensively developed here.⁷¹ It is beyond any doubt, however, that

⁶⁷ See also C. Harlow, “Deconstructing Government?” YEL (OUP, 2004) 57-89, 69. Harlow is taking about “normal” comitology, but the position is the same for officials sitting in OMCs committees.

⁶⁸ For which see below 3.3.

⁶⁹ See Cafaro above n.1.

⁷⁰ In Seville in 2002 for the first time ever specific rules have been adopted for the organization of the European Council’s meetings.

⁷¹ This argument may not extensively be developed here; see among many de Burca “The Constitutional Challenge of New Governance in the EU” above n. 1

were it not for the foundational judgments of the ECJ, where it established that the then EEC constituted a new legal order, the norms of which enjoy supremacy and direct effect, today's EU would be a fundamentally different political entity; if it had not completely disintegrate, like the EFTA. These two characteristics – direct effect and supremacy – ensured a unique mix of *effectiveness* of action, combined with the *protection* of individual's rights. It thus ensured a high degree of legitimacy for the actions of the EU.⁷² It may be that the legitimacy thus provided is appropriate for striking down barriers to trade and for establishing the Internal Market, but it does not allow for the adoption of policies of positive integration in areas where priorities may not be readily agreed. This, however, is not a reason for questioning the very foundations of what the EU is today. The OMC is precisely putting at stake the EU's main legal characteristics, in two ways.

First, it is supposed to create a series of non-binding norms, completely devoid of these two fundamental characteristics associated with the nature of the EU. These new norms do not affect the existing “acquis”, but shall result in an important proportion of the future “EU law” consisting of norms lacking these two characteristics.⁷³ Hence, to a large extent, politicians in the 21st century will be undoing what the ECJ did back in the early sixties, in order to set the foundations of a “new legal order”.

Second, it risks “emasculating” rules of “hard law”, thus putting into question the very supremacy of EU law. The example of the Growth and Stability Pact (GSP) is topical in this respect. The GSP consists of a European Council Resolution (a text of soft law),⁷⁴ and two (hard) Regulations 1466/97 and 1467/97.⁷⁵ It rests upon a system of periodic review of the Member State's performances which may lead to the issuance of Council Recommendations to non-complying States, topped with a system of sanctions, imposed through a political (i.e. non-judicial) process. The GSP is the archetypical example of the co-existence of hard and soft law, illustrating the “theory of hybridity”

⁷² At least in the functional sense put forward by P. Pescatore, “Les exigences de la démocratie et la légitimité de la CE” (1974) CDE 499-514, at 507-508.

⁷³ Although the most recent literature is suggesting that the development of new methods of governance will not simply co-exist with traditional ones, but “will increasingly demand a re-conceptualisation of our understanding of law and of the role of lawyers”; see G. de Burca & J. Scott, “Introduction: New Governance, Law and Constitutionalism” in G. de Burca & J. Scott (eds) *Law and New Governance in the EU and the US* (2006) Hart, Oxford/Portland, 1-12 at 9.

⁷⁴ OJ (1997) 236/1

⁷⁵ OJ (1997) L 209/1 and OJ (1997) L 209/6, respectively.

towards which EU law is supposedly moving, also under the impact of the OMCs.⁷⁶ It is also the most notorious example of where member states plainly ignored and unscrupulously violated (and still do) their previous common understanding, enshrined (among others) in Regulations, without giving any explanation or even bothering to modify them.

One can argue that member states simply changed their minds and decided to set aside a rule which was “imposed” upon them by the German hegemony on fiscal matters.⁷⁷ After all member states remain masters of their fiscal policies and decided to relax them in order to boost economic growth. Such an argument, plausible as it may seem, perfectly illustrates the major flaw in using OMCs with, or instead of, hard law. Contrary to other forms of soft law, the content of OMC outcomes is not determined by some Institution and then “inflicted” upon the member states. Instead, such content is freely set and regularly revised by the (supposedly) regulated parties themselves. Hence, OMC outcomes are self-referential in nature and their content is a constantly moving target. Therefore, their combination with hard law coming as a sanction, as is the case in the GSP, creates at least two problems. First, if member states fully master the content of the set objective (or soft rule), they may infinitely modify it each time they are about to breach it; hence hard law is obliterated. Second, given that the objective is freely set by member states themselves, the legitimacy of the Institution called upon to apply the hard law sanction will be highly controversial, unless a clear pre-commitment is being made.

The risks of such a pattern may be better illustrated by reference to other – more delicate – fields. It is true that up until now, despite the Commission’s proposal to that effect,⁷⁸ the OMC has not been used, in any hybrid way, in the field of immigration and

⁷⁶ The most vocal proponent of the theory of hybridity is D. Trubek. See, among the various articles which he has authored or co-authored on this topic: D. Trubek, P. Cortell & M. Nance, “Soft Law, Hard law and European Integration: Toward a Theory of Hybridity”, (2/05) Jean Monnet Working Paper, see also D. Trubek and L. Trubek, “Hard and Soft Law in the Construction of Social Europe: the Role of the OMC”, n. 1 above. See also C. Kilpatrick, “New EU Employment Governance and Constitutionalism” in G. de Burca & J. Scott, above n. 1, 121-151.

⁷⁷ For the « German hegemony » in this field see de la Porte, Pochet & Room above n. 1 at 294; also De la Porte “Is the OMC Appropriate ...” above n. 21, at 41.

⁷⁸ See communications COM 2001/387 final and COM 2001/710 final, on immigration and asylum policy, respectively.

asylum law.⁷⁹ If such were the case, however, who could guarantee that the, already very low common standards of protection offered to third country nationals by the relevant Directives,⁸⁰ would not be further watered-down by practices and norms introduced by the OMC, in the name of public security? This scenario would not only create risks for the human rights of the individuals involved, but would also raise questions regarding the legitimacy of the EU's action under the European Convention of Human Rights, the 1951 Geneva Convention on Refugees and other international texts of humanitarian law.

3.1.5. *Governance without government?*

It has already been stated that OMCs are more about process than outcome and that they do not lead to legally binding and enforceable norms. In this sense they do not constitute a means of government, but rather come within the wider concept of “governance”.⁸¹ The way in which governance and government relate to one another is the subject of a heated debate between scholars.

For some, the shift of focus from government to governance “is a theoretical counter-revolution against liberal democracy, a nostalgia for the bad old days of more and less enlightened absolutism” and an “attempt to re-brand liberal democracy as a system of enlightened paternalism”. Or, put in a different way “as the idea of *democracy* decays, the ideas of *governance* and *civil society* flourish”.⁸²

In the same vein others argue that recourse to the concept of governance is a way for the Commission to make up for its failure to bring to fruition essential reforms which would render the way it governs more efficient. Governance leads to “an inchoate post-modern world where there is ‘no longer a single sovereign authority’ and in which regulatory mechanisms do not need to be endowed with formal authority to function

⁷⁹ Although the creation of various committees, agencies and “horizontal” coordinating bodies in this field certainly secure some sort of “open” coordination between member states.

⁸⁰ Notably Directive 2003/86 on family reunification, OJ (2003) L 251/12 and the asylum procedures Directives 2005/85, OJ (2005) L 326/13, both brought in annulment proceedings before the ECJ.

⁸¹ One of the most influential contributions to the definition of the present-day concept of governance is the article by Rhodes, “The New Governance: Governing without Government” (1996) 44 *Political Studies* 652. It is interesting to note, however, that according to Ph. Allot “European Governance and the Re-branding of Democracy” (2002) *ELRev* 60-71, 65, the word “governance” in the English language appeared well before the word government in John Fortescue’s *The Governance of England*, written in the 1460s and first printed in 1714.

⁸² Ph. Allot, above, at 60 (bottom of page), 62 (bottom of page) and 60 (top of page) respectively.

effectively. The consequence is a ‘centreless society’ or ‘polycentric state’ characterized by multiple centers, in which the amorphous task of government is described in unaccustomed fashion as being ‘to enable socio-political interactions; to encourage many and various arrangements for coping with problems and to distribute services among the several actors’⁸³.

A less critical assessment of governance may have as its starting point Rhode’s metaphor, whereby the management of public affairs could entail more steering (governance) and less rowing (government);⁸⁴ provided, of course, that the boat is not altogether idle. In this respect, a clear differentiation in the way the concept of governance should be used at the national and at the European level should be introduced. Sbragia puts forward two ways in which the Commission is different from the national Governments, in a way that governance is affected.⁸⁵ First, as policy initiator, the Commission’s lack of democratic legitimacy means that it also lacks the political resources necessary to push through its legislative proposals: “administrative and legal rather than political resources are the major weapons in the Commission’s arsenal”. Second, as an executive, the Commission has to rely upon national Governments. The result of the above two differences is that “in national capitals, the term ‘governance’ may be thought as ‘government plus’ – government plus networks of experts, non-governmental groups, professional groups, business groups, labor unions, environmentalists, feminists etc. The legitimacy of this ‘government plus’ is essentially unquestioned. In Brussels, however, ‘governance’ is ‘government minus’”.

⁸³ C. Harlow, above n. 67 at 59. The quotations within the quotation are by R. Rhodes *Understanding Governance* (1997) Backingham, pp 6 and 51.

⁸⁴ R. Rhodes, “The New Governance: Governing without Government” (1996) *Political Studies* 652-667, 655. Rhodes himself is quite critical of governance as he states that it is about managing policy networks (at 658 *in fine*) and goes on to hold that such networks are a challenge to democratic accountability, to the extent that they “destroy political responsibility by shutting out the public; create privileged oligarchies; and are conservative in their impact, because, for example, the rules of the game and access favour established interests” (at 666).

⁸⁵ A. Sbragia, “The Dilemma of Governance With Government”, Jean Monnet/NYU Working Paper 3/02. See also F. Scharpf, “European Governance: Common Concerns vs. the Challenge of Diversity” (7/01) Jean Monnet Working Paper, who also highlights the fact that the Commission “lacks both, legitimacy and institutional capacity at the center and effective control over an efficient administrative infrastructure at regional and local levels” (end of para. 5 of his developments). For some early accounts of the relationships between government and governance see J. Roseneau & E.O. Czempiel (eds) *Governance without Government: order and change in world politics*, (1992) CUP, Cambridge & New York.

This, in turn, begs the intertwined questions of the efficiency and of the legitimacy of methods of governance such as the OMC at the EU level.

3.1.6. A new democratization: for which Demos?

The OMCs are said to provide a solution to the waning “technocratic legitimacy” of the EU,⁸⁶ as they are supposed to involve high participation, exchange of information, dialogue, and transparency. These “best intentions” however do not seem to materialize in practice.⁸⁷

First, the transparency side of the exercise is hampered by the technicality of the issues discussed, the use of elaborate indicators and, more importantly, the sheer number of national and follow up EU reports.⁸⁸ The fact that different OMC policy areas partly overlap (especially in the field of employment and inclusion),⁸⁹ while being the object of distinct procedures and similar-but-different indicators, only complicates things. Further, access to the documents of the OMCs is only regulated to the extent that the EU and (where applicable) national legislations offer access to their respective documents, subject to the authorship rule: every EU Institution may only give access to the documents which it has itself produced, not those of other institutions or bodies.⁹⁰ In the OMC practice, based on the constant exchange of documents between the various actors involved, the authorship rule raises an important barrier to access to the relevant documents.

Second, the participation issue may be termed in two questions: a) who wants to and b) who can participate?

⁸⁶ For the expression, but questioning whether this is actually so, see Borràs & Greve, above n. 7, 333.

⁸⁷ Talking about administrative governance in general, L. Azoulay, “The Court of Justice and the Administrative Governance” (2001) ELJ 425-441, at 436, observes that “the spirit of openness of the decision-making process is combined with rejection of all formal guarantees of information and participation”.

⁸⁸ The risk of highly technical processes excluding substantial participation had been already foreseen by De la Porte, Pochet & Room, above n. 1 at 299, and has indeed been empirically confirmed, in relation to the “Pension OMC”, by C. de la Porte & P. Nanz, above n. 1, at 283 speak of “expert deliberation”.

⁸⁹ See on this De la Rosa, above n.1 at 631.

⁹⁰ For the interpretation of the authorship rule see Case T- 83/96 *Van der Wal/Commission* [1998] ECR II-545 and Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463 and Case T-92/98 *Interporc/Commission (II)* [1999] ECR II-3521.

For the former question a brief reminder of the participation level of EU citizens in the top democratic moment of the EU, the direct election of the EP, may be a strong indication.⁹¹ A further indication may be the amount and nature of persons regularly involved in the consultations launched by the Commission, in the form of White or Green papers, Communications or merely electronic consultations. Yet another indication may be given by the identity (and professional occupation) of the vast majority of persons requiring access to the documents of the EU institutions.⁹² All these indicate that only big corporations, well-organized interest groups, trade-unions, NGOs and some journalists and scholars show an active interest to the decision-making process of the EU (at a time when it leads to the adoption of binding norms – interest is expected to dramatically fall if the only stake is the mere exchange of information and the formulation of non-binding recommendations).

This takes us to the second question, as to who can participate in the OMC processes. Here the subtle difference offered by the English language, in the use of the words “may” and “can”, is pertinent: everybody may, but few can. Participation does not only require access to the documents and physical presence, but also background knowledge of the issues discussed, documentary support, drafting of working documents, regular travels to Brussels etc. In this respect it is interesting to note that in the EES OMC, which is the oldest, more formalized and only OMC with a legal basis within the Treaty,⁹³ the trade-unions of only seven out of the 15 old member states (let alone the other, less directly involved, stakeholders) have been reported to have made a direct contribution to the NAPs.⁹⁴ On a different account it has been reported that in Italy (like

⁹¹ It is reminded that turnout in the 2004 elections was the lowest ever, with countries scoring as low as 17% (Slovakia), 20.87% (Poland), 26,83 (Estonia) 28,3% (Czech Republic and Slovenia) ... and below 45% in: Germany, France, The Netherlands, Austria, Portugal, Finland, Sweden, Latvia and Hungary; source http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/index.html.

⁹² According to Regulation EC 1049/2001, regarding public access to EP, Council and Commission documents, OJ (2001) 145/43, art. 17, all three Institutions are obliged to publish yearly reports of the application of the access rules; the European Ombudsman, for his part, monitors the responsiveness of the EU Institutions to demands for access to their documents.

⁹³ If BEPGS are not taken into account, since the possibility of sanctions provided for by the GSP makes them less open.

⁹⁴ De la Porte & Pochet, “The European Employment Strategy: Existing Research and Remaining Questions” (2004) JESP 71-78.

in Greece) the NAPs are elaborated as internal documents of the Ministry of Employment.⁹⁵

It is suggested that “participation” on the above terms does not enhance the legitimacy or the public acceptance of the EU’s policies. Further, as judicial control over OMC is not in the pipeline, if some individuals or interest groups feel excluded from the process, there is no way they can assert their rights.⁹⁶ Therefore, the statement that “under the guise of consultation, regulatory powers can be virtually delegated to private actors – such as the social partners in the field of social policy – and experts, responsible for negotiating the benchmarks to which member States agree to conform” may be forcefully depicting the reality of OMCs.⁹⁷

3.1.7. *And the Parliaments?*

If participatory democracy is not ensured through the OMCs, then should it not, at least, involve the parliaments at the EU and/or at the national level?

At the EU level, things are “clear”: the EP has no more competences than in the two intergovernmental pillars of the EU, since it may only be consulted – and this only in the EES.⁹⁸ At what stage of the procedure, to what effect, how long the EP will be allowed to reflect for, how its opinion shall be taken into account, whom should the EP committees contact in order to enquire further into the national reports, are all issues to which no clear answer exists. Nor could it exist, since every single OMC has its own singular characteristics which do not allow for generalizations. The fact that most of the “Council’s” documents involved in the procedure are in fact drafted by the Commission

⁹⁵ Ferrera & Sacchi above n. 28.

⁹⁶ For the issue of judicial control see below 3.3.2. For the Court controlling the representativeness of the bodies involved in the decision making process when the classic “Community method” is not followed see Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335.

⁹⁷ Harlow, above n. 67 at. 72. See, also C. de la Porte & P. Nanz, above n. 1 ; C. de la Porte & Ph. Pochet, “Participation in the OMC, The Cases of Employment and Social Inclusion” in Zeitlin & Pochet above n. 1 353-389 and, for a more positive account J. Zeitlin, “The OMC in Action, Theoretical Promise, Empirical Realities, Reform Strategy” in Zeitlin & Pochet, above n. 1, 447-503, at 460-470, who however, presents a somehow “embellished” vision from the one offered in the national “reports” on which he is building upon. All national reports for Sweden and Denmark (Chapter 3), Italy (Chapter 4), The Netherlands (Chapter 5), France (Chapter 6) and Germany (Chapter 7) highlight the lack of participation and of representativity as a major shortfall of the OMC practices. The reports on the UK (Chapter 8) and Ireland (Chapter 9) are somehow less pessimistic on this account.

⁹⁸ See among many J. Zeitlin, “The Open Method of Coordination in Question” in Zeitlin & Pochet (eds), *The Open Method of Coordination in Action* (2005) Peter Lang, 19-33, 21.

or by national bureaucrats, and are thus difficult for the Council to amend before their adoption, further complicates the way in which the Parliament's view could be taken onboard the procedure.

National parliaments, are not at all part of the process, but may, participate therein as stakeholders, to the extent that participation is practicable. However, it has been put forward that the OMCs often have deadlines which are too remote for politicians to show interest and that they are dominated by bureaucrats with whom politicians are not very easy to interact. The fact is that, to date, the input of national Parliaments in the various OMC processes has been very limited. A further, and more general argument, is that the multi-level political system of the EU stresses its "executive federalism" characteristics, thus shifting more powers to intergovernmental committees and working groups, at the expense of national parliaments.⁹⁹ The counter-argument goes that national Parliaments benefit from policy transfer triggered by the OMC, since they may learn and transpose solutions and best practices tested in other member states, producing, thus, better legislation in the domestic sphere.¹⁰⁰ This, however, remains at the wish level.

3.1.8. National executives strengthened and national self-interest promoted

There are at least two ways in which national executives are strengthened through the various OMCs; institutionally and sociologically. First, national officials and Ministers participating in the Council, i.e. representatives of the executive power, are made to create norms of general application. True, these are not binding and may hardly qualify even as being soft law.¹⁰¹ Hence, from the point of view of their regulatory intensity, the norms adopted only marginally modify the role of the executive. From the point of view of their regulatory scope and content, however, the norms adopted by the executive power under OMCs are different from the acts normally adopted by any executive: they operate basic societal choices and embody fundamental political

⁹⁹ For all the above arguments see T. Raunio, "Towards Tighter Scrutiny? National Legislatures in the EU Constitution" *The Federal Trust Online Paper* 16/04 and, of the same author, "Does OMC Really Benefit National Parliaments?" (2006) ELJ 130-131.

¹⁰⁰ F. Duina & M. Oliver, "National Parliaments in the EU: Are there any Benefits to Integration?" (2005) 11 ELJ 173-195.

¹⁰¹ Harlow, above n. 67 at 72, speaks of a "non-law-based approach", although Council recommendations may have some legal effects and, as such, be subject to the control of the ECJ, see already Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263; concerning a Commission Communication see Case C-57/95 *France v Commission (Pension Funds Communication)* [1997] ECR I-1627.

preferences, rather than securing the execution and implementation of choices already made. Second, from a sociological point of view, the OMC allows for the officials of Ministries other than the Foreign Affairs, Finance and lately the Interior, to gain all the psychological and material benefits of regularly going to “Brussels”.

There are also two reasons why member states’ self-interest is being served by the OMCs. First, member states with high standards (of social protection, activation policies, pensions etc) who would be unable to impose those standards in a political negotiation, are able to “upload” them as “best practices”. On the flip side, member states with low standards or in need of structural reform are able to pursue such policies, reap the beneficial effects for internal consumption in the domestic political arena, while blaming the EU for any unpopular measures.¹⁰²

3.2 Administrative reasons

It is clear from the above that the various OMCs do not serve the EU in any immediately identifiable way. They may be said to serve it in an indirect way, since they may benefit member states. Then, the question arises as to whether the Commission should bear the burden of running such processes. The argument here goes that the Commission’s strong involvement is not only unnecessary, but also inappropriate.

3.2.1. The Commission’s strong involvement in the OMCs is unnecessary

The Commission’s strong involvement in the OMCs is unnecessary, because other means and different *fora* already exist for member states to exchange information and to get to know each other’s practices. Such an exchange of knowledge, in fact, has long been taking place both inside and outside the EU.

3.2.1.1. Outside the EU, exchange of information between States has been organized in three ways: on a bilateral, a multilateral and in an industry-specific fashion.

Bilateral treaties and agreements setting the framework for the exchange of information in fields such as taxation, social security, education, border management,

¹⁰² See Boràs & Jacobsen above n. 14.

police operations, etc. are a common practice both between member states and between them and third states.¹⁰³

On a multilateral basis, it is submitted that almost all international Treaties which tend to the coordination of the signatories' policies do involve some exchange of information and, at times, also monitoring and periodical evaluation of their performances.¹⁰⁴ Cooperation and exchange of information is even more systematic at the regional level. The Council of Europe and, more importantly, the OECD, constitute important *fora* for the exchange of information concerning national practices, the development of common working methods and instruments (such as statistical tools, indicators, benchmarks and even common language) and the dissemination of best practices. In fact, the OECD has been working on these bases already for some decades.¹⁰⁵

Finally, many subject-specific international committees, commissions, federations etc, linked to specific industry sectors such as the COTIF for rail transport, the IATA for aviation, the various sport's federations etc, in which all member states participate, actively promote not only the exchange of information, but effective co-ordination and, at times, cooperation between their members.

3.2.1.2. *Within the EU framework* also, several means for the exchange of information and the promotion of knowledge-based integration are in place.

First, the COREPER is clearly a forum where national legal rules, administrative practices and experiences are shared. It is true that Member State's representatives in COREPER are not animated by the "sharing is caring" principle and that their aim is not merely to inform, but essentially to convince their peers. However, since most decisions

¹⁰³ For example France and Germany have, for many years now, been operating common University programs, as well as, customs and police controls .

¹⁰⁴ See for example the UN Convention of Human Rights and the periodical national reports by ECRE. For a detailed account of the systematic provision of information and (at cases) mutual evaluation of States participating in Human Rights instruments, see G. de Burca, "Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU" in O. de Schutter & S. Deakin (eds) *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005) Bruylant, Brussels, also available at the Madison/Wisconsin website, p. 19 et seq of the electronic version.

¹⁰⁵ See e.g. Lodge, above n. 13; see also Schaefer, "A New Effective Form of Governance? Comparing the OMC to Multilateral Surveillance by the IMF and the OECD", above n. 1.

are reached consensually and the possibility of walking out of the negotiations is rarely used, what is taking place in COREPER is closer to arguing, (i.e. building cognitively strong arguments, by reference to generally accepted values, in the pursuit of a generally accepted truth), than bargaining (i.e. putting forward unilateral positions and supporting them through the use of reprisals or the menace to walk out, if these are not accepted).¹⁰⁶ Hence, the exchange of information does occupy an important role in the way COREPER functions.

Second, the various committees which do the preparatory work for COREPER,¹⁰⁷ or supervise the Commission's executive powers in the sense of the "Comitology Decision"¹⁰⁸ or perform any other task, are typically composed of officials of the member states, occasionally backed up by national experts, both specialized in the field at issue.¹⁰⁹ Although the way these committees operate is notoriously opaque, it is logical to assume that specialized officials and experts, when they meet, do engage in some sort of information exchange.

Third, the last fifteen years have seen an unprecedented rise in the number of EU agencies.¹¹⁰ Some of them are specifically entrusted with the collection, exchange and dissemination of information at EU level. This is done either by the agencies acting alone (as is the case of e.g. the European Foundation for the Improvement of Living and

¹⁰⁶ For a fully-fledged development of the idea that the EU decision making is dominated by argument and not by bargain, see J. Neyer, "Explaining the unexpected: efficiency and effectiveness in European decision-making" (2004) JEPP 19-38.

¹⁰⁷ Eg the CATS (Comité Article Trente-six), in the third Pillar of the EU Treaty, or a myriad other non-institutionalized committees. For a list of all the operating committees within the EU see R. Jorrit, "Government and governance in the Area of Freedom, Security and Justice" (2005) Master's Paper at the College of Europe, Bruges (unpublished).

¹⁰⁸ Council Decision 99/468, OJ (1999) L184/23.

¹⁰⁹ For the role of committees as a means of policy sharing and exchange, contributing to the legitimacy of the action of the EU, see the highly influential article by Ch. Joerges & J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology" (1997) ELJ 273-299.

¹¹⁰ See in this respect, among many, E. Chiti, "The Emergence of a Community Administration: the Case of European Agencies" (2000) CMLRev 309-343; E. Vos, "Reforming the European Commission: What Role to Play for EU Agencies?" (2000) CMLRev 1113-1134; X. Yataganas, "Delegation of Regulatory Authority in the EU, The Relevance of the American Model of Independent Agencies" (03/01) Jean Monnet Paper; G. Majone, "Delegation of regulatory powers in a mixed polity" (2002) ELJ 319-339; P. Craig, "The constitutionalisation of Community administration" (2003) ELRev 840-864; M. Flinders, "Distributed public governance in the EU" (2004) JEPP 520-544 and D. Geradin & N. Petit, "The development of Agencies at EU and national levels: Conceptual analysis and proposals for reform" (2004) YEL, OUP, Oxford, 137-197; see also the Commission's Communication on the Operating framework for the European Regulatory Agencies, COM (2002) 718 final.

Working Conditions and the European Training Foundation), or as coordinators of national networks (as is the case of e.g. the European Environment Agency, the European Agency for Safety and Health at Work and the European Monitoring Center for Drugs and Drug addiction).¹¹¹ The other agencies, whose tasks go beyond the mere exchange of information, also pre-suppose extensive knowledge-sharing. Hence, the European Medicines Agency (EMA, formerly EMEA)¹¹², which plays a decisive role in the authorization of medicinal products (a task which is ultimately performed by the member states' authorities), before delivering an opinion is supposed to have a clear idea of the health patterns and medicinal market conditions pertaining to the different member States. Similarly, the European Railway Agency (ERA)¹¹³ needs a profound knowledge of the infrastructure, practices, working methods, security devices, etc. in use in every Member State. Why couldn't, say, a "European Social Exclusion Agency" grounded with a network of national experts, replace the bulk of heterogeneous national reports, their uncertain evaluation and all the complications and uncertainty which go with them?¹¹⁴

Fourth, parallel to the creation of independent agencies, the EU has also required the institution, at the national level, of sector-specific National Regulatory Agencies (NRAs).¹¹⁵ These are obliged to report regularly to the Commission (or to sector specific commissions which operate under the Commission). More importantly, some of these NRAs are set to operate in EU-wide networks, typically with the coordination and under the control of the Commission. Such is the case e.g. for the national competition authorities,¹¹⁶ as well as for the data protection authorities.¹¹⁷ Thirdly, some NRAs directly respond to an equivalent EU Agency; such is the case of the national Rail Safety

¹¹¹ Classifications borrowed by Vos, above, at 1120-1121.

¹¹² As rebranded by Regulation 726/2004, OJ 2004 L 136/1.

¹¹³ Created by Regulation (EC) 881/2004, OJ 2004 L 220/3.

¹¹⁴ It has been put forward that OMC, which involves the direct participation of national administrations may be preferable than other "external" means of information exchange and monitoring, since it directly touches upon the very administrative structures responsible for the implementation of the relevant policy and allows therefore "to stimulate policy reflection as part of concrete process of problem solving", see K. Armstrong "The OMC and fundamental rights: a critical appraisal" (2005) available at <http://eucenter.wisc.edu/OMC/Papers/Rights/armstrong.pdf>, at 6. However, even this author only gives relative weight to this argument and reaches a highly skeptical conclusion as to the need to the use of an OMC in the field of fundamental rights. On this latter issue see briefly below at 3.3.3. and 4.3.2.

¹¹⁵ For the parallel evolution of EU Agencies and NRAs see the brilliant presentation by Geradin & Petit, above n. 110.

¹¹⁶ See Council Regulation (EC) 1/2003, OJ (2003) L 1/1, recitals 15-16 and articles 11-12.

¹¹⁷ See Council Directive 95/46, OJ (1995) L 281/31, articles 28 and 29.

Authorities. Then, the uninterrupted information flow from the periphery to the center is secured and experts and stakeholders from the regional and national level may find their way to Brussels, according to their own national rules on participation.

Fifth, legal mechanisms compelling the member states to provide information about the measures and practices they follow in different fields of their activity have been in place, and have been proven quite efficient for over a decade now. Directive 98/34¹¹⁸ on the notification of all technical measures introduced by the member states in the field of free movement of goods, and later, information society services, is generally acclaimed to have considerably contributed to the smooth functioning of the internal market. A similar directive is currently being contemplated for measures in the field of immigration and asylum policy.¹¹⁹

Last but not least, whenever the Commission or some other Institution feels that information, comparative data or national case studies (which could then be used as best practices) are lacking, they may either find some funding in the already running EU actions and programmes, or create some new programme, which would pay for the commissioning of the necessary studies.

It becomes clear from the above that OMCs are neither original nor unique in that they entail exchange of information and knowledge sharing. Compared to the instances above, OMCs make for an exchange of information which is only periodical, opaque, unaccountable and legally insignificant.

3.2.2. The Commission's strong involvement in the OMCs is inappropriate

The above conclusion directly bears the question why should the Commission invest in carrying out such an exercise, instead of giving the EU the necessary steering leadership for which it has been created. The Commission has as many officials as the Prefecture of an average European city. It is well-known that the Council stubbornly refuses to increase the budget lines allocated to the Commission and that, under the ongoing Finnish Presidency, it even decided to reduce funding (and the Commission's

¹¹⁸ Directive 98/34/EC, OJ (1998) L 204/37, as subsequently modified by Directive 98/48/EC, OJ (1998) L 217/18.

¹¹⁹ COM (2005) 480 final.

staff) by 8,5 per cent.¹²⁰ Notwithstanding, the Commission's responsibilities and the challenges it faces greatly exceed those of most national administrations. According to the Treaty, the Commission has four main tasks. *First*, it has to work together with the national administrations (central or regional) of member states, in order to ensure the proper implementation of EU law (a Titanian task in itself, if one reasons on the basis of 25-27 member states). *Second*, if compliance is not ensured, its watch-dog function comes into play. *Third*, the Commission is responsible for running the negotiations necessary for all international agreements concluded by the EU: this includes new accessions, the ongoing Neighbourhood policy, WTO negotiations and much more. However, *fourth*, the most important task that the Commission has to accomplish is that of being an inspired and effective policy initiator, the soul of the EU, as it is the only Institution bestowed with the duty to promote the Community interest.

When the Commission is running short of resources the one function that it may not overlook is function three, above, since it is bound by a Council mandate, usually baring deadlines and well specified objectives. Then, the options open to the Commission are either to neglect its implementation-watchdog tasks, or to disregard and/or delegate to outside bodies and private companies the policy design task. Both options are sub-optimal.¹²¹

If the Commission is slow in executing EU measures, no other Institution has the competence, authority and resources to replace it; the efficiency of the EU will be further prejudiced. If, further, the Commission goes easy on its supervisory functions, then not only member states will breach EU law in impunity, but also the role of the ECJ will diminish, and with it the empire of the rule of law and, ultimately, the protection of individuals. This is not to mention the risk of trade wars staged between non-compliant and recalcitrant member states.

¹²⁰ See L. Kubosova, "Ministers Agree on Radical Cuts to EU Bureaucracy", EU Observer (online) 15/7/2006 at <http://euobserver.com/9/22097/?rk=1>.

¹²¹ In the same vein see D. Wincott, above n. 1, at 535 and 538, who observes that "the resulting reallocation of scarce resources within the Commission may become significant" and states that "any potential threat to the Commission is more in the reconfiguration of its role and the additional tasks it is given (without significant extra resources) than in the risk of it becoming redundant".

This, however, is the least bad alternative. Much worse for the project of European integration is the lack of political leadership. It is true that since its institution, the European Council has offered important guidance. The Commission, nonetheless, a) offers the preparatory and follow-up work, b) ensures continuity and c) puts flesh onto the European Council's vague political statements, which are often open to diametrically opposed interpretations. By ensuring these three functions, the Commission still performs an important steering role within the EU. If this is to be delegated either to specialized agencies or to private entities, at least two very important and distinct problems arise: a) coordination and efficiency of the action of the various instances and b) legitimacy of the same.

Under such circumstances it is to be questioned whether it is a good idea to keep the Commission occupied running an ever increasing number of ill-defined OMCs. In other words, it is not clear why the only supranational Institution of the EU should be “investing” its valuable resources into intra-national exchange of goodwill and (incremental) mutual learning, when such resources hardly suffice for the completion of tasks that the Commission, and the Commission alone, is able to perform. Or to borrow the expression by T. Beresford, it is not clear why the Commission should strive for “the European policy-making system [...] to become a ‘confederation of learning networks’”.¹²² It seems as if member states have given the Commission a bullet-less gun to keep itself occupied, in fields where it may not exercise its power to initiate legislation and where any enforcement is excluded. By the same token, the functions of the Commission which are most “feared” by member states are impaired.¹²³ Hence, the question arises whether a specialized agency or such other body, having proper (financial) resources, but operating under the auspices of the Commission, would not suffice to run the tedious and increasingly technical OMCs exercises.

¹²² T. Beresford, “EU Moves Towards the Creation of a Network Europe” *European Voice* (vol. 6, n. 24, 2000) at 21.

¹²³ See R. Dehousse “La méthode communautaire a-t-elle encore un avenir ?” in *Mélanges en hommage à J. V.Louis*, (2003) Editions de l’ULB, vol. 1, 95-107, at 105 who states: “on peut même penser que d’une façon générale, la Commission aurait intérêt à se décharger de la gestion au quotidien des politiques communautaires pour mieux se concentrer sur les fonctions *d’administration de mission* qui lui étaient dévolues à l’origine : impulsion politique, coordination et contrôle” (emphasis in the original).

3.3 Legal reasons

3.3.1. At the adoption level

It is unclear whether the outcomes of the various OMCs may qualify as law, soft law or non law. First, from a descriptive point of view, it is plain that outcomes differ in the various fields of the OMCs. Hence, the BEPGs in the field of economic policy are different from the EES guidelines (now the latter are streamlined into the former), which, in turn, are different from the outcomes in the Inclusion OMC. More importantly, from an analytical point of view, the distinction between hard, soft and no law at all is a blurred one. Francis Snyder, one of the main pioneers of soft law has convincingly demonstrated how soft law can be turned into hard law through litigation or regulation.¹²⁴ Jan Klabbers, on the other hand, a prominent critic of soft law, promptly states that “as soon as soft law is to be applied to any specific set of circumstances, it collapses into either hard law or no law at all”.¹²⁵ Or, to put it in another way (which partly explains the divide between political scientists and lawyers concerning their perception of soft law), soft law processes may be useful at the stage of *general policy formulation* but they become much less so at the stage of *specific rule application*.

Indeed, it is unclear whether soft law is desirable at all. Almost all political scientists and most lawyers acknowledge the advantages thereof.¹²⁶ However, the minority voices arguing against soft law are not devoid of pertinence: “the simplicity of the law, knowing only categories of legal or illegal, in force or not in force, binding or not binding, makes it possible to survive in this complex world. It is the simplifying rigor, the way in which it can translate complexity into something we can handle, which makes

¹²⁴ F. Snyder, “Soft law and Institutional practice in the EC”, in S. Martin (ed) *The Construction of Europe, Essays in Honour of Emile Noel* (1994) Kluwer, Dordrecht, 197-225.

¹²⁵ J. Klabbers, “The Undesirability of Soft Law” (1998) *Nordic Journal of International Law* 381-391, 392.

¹²⁶ See in particular Trubek, Cotrell & Nance, above n. 76, who identify at least seven ways in which soft law may be more advantageous a means of regulation than hard law: a) lower contracting costs, b) lower sovereignty costs, c) coping with diversity, d) flexibility, e) simplicity and speed, f) participation and i) incrementalism. See also L. Senden & S. Prechal, “Differentiation in and through Community soft law” in B. de Witte, D. Hanf & E. Vos (eds) *The Many Faces of Differentiation in EU Law* (2001) Intersentia, Antwerpen/Oxford/NY, 181-199. For a series of “para-legal” essays on soft law see U. Mörth (ed) *Soft Law in Governance and Regulation, An Interdisciplinary Analysis* (2004) Edward Elgar, Cheltenham/Northampton. For a strictly legal approach see L. Senden *Soft Law in EC Law* (2004) Hart, Oxford/Portland.

law such a useful tool. [...] if law loses its formalism, then what else will it become but a vehicle for administrative power?”¹²⁷ In this respect, it should not be forgotten that EU law, contrary to classic international law by reference to which most proponents of soft law tend to reason, produces effects which are not restricted to the signatory states, but extend to individuals to whom it confers subjective rights. Therefore, the question of justiciability does play an important role.

In this respect the outcomes of OMCs are highly problematic, since they evade, in principle, the Court’s control. At best, OMCs may result in Commission and/or Council guidelines and/or recommendations. Such acts may, under specific circumstances, be brought before the ECJ with annulment proceedings.¹²⁸ In all such atypical acts, the intent of the issuing Institution to create legal effects has been determinative for the Court’s extending its control. In the OMC framework, however, such intent is, by definition, absent. Moreover, even in the extremely exceptional circumstances where OMC “measures” could be found to be flirting with law, only the Institutions and member states (i.e. privileged applicants) could initiate annulment proceedings, as individuals would never be sufficiently directly and individually concerned in order to qualify under the terms of Article 230(4) EC.¹²⁹

3.3.2. *At the implementation level*

The lack of any justiciability at the adoption level is further worsened by the fact that OMC measures have to be implemented by member states in parallel, or, worse, in antagonism, with hard law, mainly EU directives. From a normative point of view the situation becomes even more complicated, as it may be argued that compliance with the objectives set by OMCs is a general obligation stemming from Article 10 of the EC Treaty. It may not be excluded therefore, that the OMC-based national measure comes as

¹²⁷ Klabbers, above at 387.

¹²⁸ See L. Senden above 361 et seq.; also, by the same author “Soft law and its implications for institutional balance in the EC” (2005) *Utrecht Law Review*, at www.utrechtlawreview.org ; and, by the same author “Soft Law, Self Regulation and Co-regulation in European Law” (2005) *Electronic Journal of Comparative Law*, at <http://www.ejcl.org/91/abs91-3.html> .

¹²⁹ For a complete account of the case law concerning the admissibility of annulment proceedings by individuals, see P. Craig & G. de Burca, *EU Law, Texts, Cases and Materials* (2003) OUP, 3d ed. 487 et seq.

a watering-down or, even, a complete reversal of another national measure which implements a binding directive.

This setting, far from being abstract or purely hypothetical, has almost materialized in *Mangold*.¹³⁰ In view of promoting flexible labour markets in accordance with the “Framework Agreement”¹³¹ reached by the Social Partners (yet another “new/old governance” instrument),¹³² the German legislation at issue provided that, by way of derogation to the general rule that fixed-term employment contracts should be objectively justified by reference to specific criteria, contracts concluded with employees over the age of 52 could *ipso jure* have a fixed duration. This rule, however, could be held – and indeed was found by the Court – to violate Directive 2000/78,¹³³ which specifically prohibits any discrimination in the working place based *i.a.* on age. Hence, this is a first example of two opposed sets of policy objectives, one more traditional relating to the protection of the fundamental social rights (non discrimination in employment) and one more “neo-liberal” aiming at the increased flexibility of labour markets. The former was being pursued by means of an “old fashioned” directive, while the latter was incorporated into a more “modern” regulatory instrument, that of a “Framework Agreement”. It may not be excluded that in the foreseeable future a similar situation will arise with some EES guideline or other OMC “soft” outcome on the one side of the equation. Then (in a factual situation like the one prevailing in *Mangold*), member states will be condemned in infringement proceedings and, even worse, will have their responsibility engaged in the sense of *Francoovich/ Brasserie du Pecheur*, for implementing into their legal order EU “voluntary norms” the legality of which could not possibly have been tested. More preoccupying still is the position of the individuals, who will be facing national measures altogether conceived and drafted with no legal guiding principles.

¹³⁰ Case C-144/04 *Mangold* [2005] nyr.

¹³¹ Framework Agreement put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

¹³² The expression and classification of the Framework Agreement as New/Old Governance (NOG) means is borrowed by J. Scott & D. Trubek, “Mind the Gap: Law and New Approaches to Governance in the EU” (2002) ELJ 1-18.

¹³³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ (2000) L 303/16

3.3.3. A confusing role for the ECJ

The above scenario becomes a lawyer's nightmare if we project it in the medium/long term. If the EES is exclusively pursued by means of OMC – and if OMC is indeed successful – in some years' time most of the Member State's regulation in the field of employment will be corresponding to “soft” guidelines and recommendations. Now imagine a situation like the one in *Mangold*, where two antagonistic values are pursued by means of two distinct OMC outcomes, say, guidelines. What will a future Mr. Mangold argue and in front of which jurisdiction, in order to protect his rights? Will the ECJ have jurisdiction to give preliminary rulings, and by reference to what kind of rules?¹³⁴

A beginning of an answer to the above question may be found in the Court's judgment in *Mangold*.¹³⁵ The particularity of this case was that, at the relevant time, the non-discrimination Directive 2000/78 had not yet entered into force. This, however, did not prevent the Court from asserting the existence of a general principle of community law ensuring non-discrimination in employment on the basis of age, inspired, i.a. from the very Directive. It is by reference to this general principle that the Court assessed and censured the contested German legislation. In this way the Court indirectly accepted that a directive a) may apply between individuals (horizontal effect), b) even if the transposition period of the directive which is supposed to implement it has not yet expired.¹³⁶ This “mysterious” (to say the least) judgment should be looked at alongside another “surprising” judgment of the Court in *Karner*.

*Karner*¹³⁷ concerned the Austrian legislation which prohibited that goods being sold as a result of an insolvency procedure be advertised as such. This prohibition was tested under both the rules on goods and on services, since it made the sale (Article 28)

¹³⁴ For a more general and well-focused account of the problems that the OMC may cause to the protection of fundamental rights see S. Smismans, “How to be Fundamental with Soft Procedures? The Open Method of Coordination and Fundamental Social Rights” at <http://eucenter.wisc.edu/OMC/Papers/Rights/smismans.pdf>.

¹³⁵ The idea developed in the following paragraphs was born upon proof-reading a draft article on this case, written by my teaching assistant in Bruges, Elise Muir (unpublished).

¹³⁶ For the ability of directives to produce indirect effects even before their transposition date see P. Craig & G. de Burca, above n. 129, at 211 et seq. This case, however, constitutes a clear departure from previous case law.

¹³⁷ Case C-71/02, *Karner*, [2004] ECR I-3025.

and advertising (Article 49) of goods from liquidations held in other member states more difficult. The Court held both provisions to be inapplicable, but nevertheless examined and gave judgment on the argument submitted by the parties that Article 10 ECHR, on freedom of expression, was violated. The Court did so after having recalled that “*where national legislation falls within the field of application of Community law* the Court, in a reference for a preliminary ruling, must give the national Court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures”.¹³⁸ What the Court failed to explain, nonetheless, is how the national measure *did* indeed *fall* within the field of application of community law. What is even more remarkable is that the Court finally upheld the contested measure, so one may wonder why it went to the pains of examining its compatibility with the ECHR at all.

Carpenter,¹³⁹ another “inexplicable” judgment must also be evoked at this point.¹⁴⁰ The Court held that Mr. Carpenter was a service provider in the sense of Article 49 EC, since numerous recipients of his (advertisement, etc.) services were established in other member states.¹⁴¹ However the Court did not find that the UK expulsion measure, against Mr. Carpenter’s wife, directly violated *his* right to provide cross-border services. What the Court did was to “invent” a right to the protection of family life as being embedded within the “free movement” directives, and also being protected by Article 8 of the ECHR. Then the Court found the UK measure to constitute a disproportionate restriction to this right (not to the free provision of services) and, hence held Article 49 EC to be violated (!).¹⁴²

The common denominator of these altogether problematic judgments is that the Court, instead of stating that no specific provision of EU law applied in the facts of the

¹³⁸ *Karner*, n. 135 above, para 49, emphasis added.

¹³⁹ Case C-60/00, *Carpenter*, [2002] ECR I-6279.

¹⁴⁰ For this case see the, mostly critical comments, by the editorial board of the CML Rev. (2003), 537-543, which in an effort to understate its objections characterizes the judgment as “remarkable”; Toner in (2003) *EJML*, 163-172, holds the reasoning of the Court to be “objectionable” “surprising and very striking”; Shuibhne, n. 100 above, 757 et seq., speaks of “a braking-point” to the Court’s jurisprudence.

¹⁴¹ For this aspect of the judgment see 2.1.1. above.

¹⁴² It is worth noting that in view of the ECtHRs own case law on Article 8 ECHR, in cases such as *Boujlifa v. France*, 25404/94 and *Bouchelkia v. France*, 23078/93, it is doubtful whether the Carpenters would have won their case, had it been judged by the Strasbourg Court.

cases under examination, reasoned by reference to (disputable) general principles, which aim at the protection of fundamental human and social rights. It may be that the Court will increasingly make reference to fundamental rights and general principles in order to make it up for the effects of "new governance" instruments, such as the OMCs, which only produce "soft" outcomes. Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticized.¹⁴³

4. Could the OMCs benefit the EU? Some suggestions

As observed by D. Wincott, the Lisbon strategy and its core method, the OMC, were devised at a time when the "knowledge-based" economy was in its hey-day and seemed able to inject dynamism into the European economy. Hence the "new" economy would facilitate the attainment of the set objectives, all the same ensuring a smooth running of the chosen method, the OMC. "Yet even before the collapse in the price of technology shares, when faced with entrenched and powerful opposition to the non-binding forms of policy co-ordination associated with the OMC were unlikely to be effective in this policy area".¹⁴⁴ After the dotcom bubble burst, it may be worth asking whether there is some sort of chivalrous futility in investing in a "knowledge-based" polity, like the one supposedly promoted by OMCs. It is true that Plato contemplated a system of governance based on knowledge, but so had he done with the world of ideas...

A completely negative analysis of the OMCs, however, would be misplaced, as it would be altogether dismissing an original means for further pursuing the project of European integration. It is also unlikely that the sheer number of EU scholars who see OMC as a promising complement or alternative to the Community method, have all gotten it wrong. Nonetheless, in view of all the above criticisms, based on the

¹⁴³ The above considerations may also explain the tendency of the Court to increasingly rely on precedents from the European Court of Human Rights, as illustrated in the recent Case C-540/03 *EP v Council, Family Reunification Directive* [2006] nyr, where the ECJ for the first time in the knowledge of the present author quotes extensive excerpts from the Strasbourg case law.

¹⁴⁴ D. Wincott, "Beyond Social Regulation? New Instruments and/or a New Agenda for Social Policy at Lisbon?", (2003) *Public Administration* 533-553, 540.

presumption that the empirical findings relayed at the beginning of the present article hold true, some rationalization and delimitation of the way the OMCs are instituted and operated seem commendable. In this respect the following suggestions may be put forward.

4.1. Demystify OMC and measure it by its efficiency

4.1.2. Clearly define the expectations

From the developments above it becomes clear that one of the main shortfalls of the various OMCs is their uncertain efficiency. Their “openness” does not allow for the achievement of specific pre-determined objectives, especially not within prescribed timeframes. Therefore, in order to avoid deceit and deception, OMCs should be completely avoided in policy areas where timing is important.

Further, recourse to some OMC should be directly proportional to the likeliness of its producing tangible outcomes. In this respect a three-tier classification could be of some use. It is true that within the OMC processes the distinction between legislative and executive functions is becoming blurred.¹⁴⁵ Notwithstanding, the main objective of an OMC may (should) beforehand be identified. Therefore, a first type of OMC could be used as a means for smoothing the implementation of EU hard law by the member states (executive OMC). Such would be the case e.g. of the proposed OMC in the field of immigration and asylum.¹⁴⁶ Such a well-framed OMC would have high chances of delivering its objectives. A second category of OMC could be used for attaining policy coordination in the absence of EU legislation, in fields where there is either a) strong leadership (as was the case with monetary policy dominated by the German priorities) or b) consensus as to the general objectives to be achieved.¹⁴⁷ This (strong coordination) OMC could also be effective. Much less effective would be the third kind of OMC, where policy coordination is pursued in the absence of any strong leadership or pre-established common values and in fields where a vast array of policy choices is available

¹⁴⁵ Szyszczak, above n. 1 at 495.

¹⁴⁶ Communications COM 2001/387 final and COM 2001/710 final, on immigration and asylum policy, respectively none of which have not been taken up by the Council. Although the use of OMC in fields where human rights are at stake is not exempt of any problems, see below 4.3.2.

¹⁴⁷ See De la Porte, above n. 21; also Scharpf, *The European Social Model...* above n. 85.

(loose coordination OMC). In this latter case recourse to some organized OMC should be the *ultimum refugium*.

A different test, as to the desirability of the institution of an OMC in any given policy field, has been put forward by K. Armstrong.¹⁴⁸ The argument goes that coordination is essentially desirable where unilateral policies of one Member State would produce externalities detrimental to other member states. The objective of coordination in such circumstances would be “to arrive at more or less similar results for States [as with the Community method] but without a transfer of legislative competence to the EU to achieve that result (either because legislative intervention would be inappropriate or because member states are reluctant to cede competence in the area). The problem with this sort of co-ordination is that it is continually begging the questions: why co-ordinate rather than legislate; why stimulate decentralised policymaking rather than centralise policymaking; why meddle in the margins rather than concede competence?”¹⁴⁹ On the other end of the spectrum, if an OMC is intended to have much “softer” outcomes, how do you justify common action under the principle of subsidiarity and, why bother anyway?

Exchange of information between the member states, and other forms of working together (such as the ones described above at 3.2.1.) could be taking place in order to enhance the definition of common solutions to complex problems. It does not seem sensible, however, to engage in a high-profile exercise involving the EU institutions, with a completely open-ended agenda. The EU cannot afford to be seen to be failing the objectives it sets for itself.

4.1.2 Evaluate it

Further, the OMCs should be self-evaluating. After two or three cycles of setting objectives and performing against them (every three years for the BPEGs and EES, every two years for the social inclusion OMC, etc.) the evaluation should not only concern the member states’ performances, but the process itself – although the two are inexorably and

¹⁴⁸ Armstrong, above n. 114, at 8 et seq.

¹⁴⁹ An answer to this question may be partly provided by C. Kilpatrick above n. 76 who explains that some policies, such as e.g. employment policy, are being essentially pursued by means of soft law even at the national level, so it would be illogical to “harden” them at the EU level.

intimately linked.¹⁵⁰ However, what should be evaluated is the level of convergence achieved between member states and only secondarily the improvement of the performances of individual states. If the evaluations are not positive, then the process should be either abandoned altogether or replaced by some sort of “old fashioned” proper coordination or harmonization.

4.1.3. Add a financial incentive

It is commonplace knowledge that the obligations ensuing from the OMC may not be enforced either by the Commission or by the Court. Moreover, the lack of invocability of the OMCs’ outcomes leaves individuals outside the picture. Member states may, nonetheless, in order to substantiate their commitment to the basic objectives pursued by the OMCs, empower the Commission (or the Council) to put up some financial incentives. These could materialize either in a reactive manner, through cutting down on (the various forms of) financial aid given to non-compliant member states, or, better, in a proactive fashion, through offering financial incentives, in the form of subsidies, aid, etc., in order to allow member states to set aside short-term negative consequences.¹⁵¹

4.2. Better organize it

4.2.1. Give it to an agency

The Commission is already overburdened and understaffed for coping with the tasks the Treaty explicitly confers on it. With time, the various OMCs tend (and ought)¹⁵² to perfect themselves and become more and more demanding, with specific timeframes, extensive deliverables, etc. What started as an occasional mediation between member states in specific and neighbouring policy fields is on its way to becoming an industry of continuous and increasingly formalized interaction with the other institutions, the different levels of Member State authorities, stakeholders and civil society, in an ever diversifying array of policies. To the extent that the OMCs are not to replace the classic Community method, the Commission cannot, as it presently stands, afford to run both agendas, or it will under-perform in both. Hence, either the Commission itself should be

¹⁵⁰ See also Ph. Pochet, “The OMC and the Construction of Social Europe” in Zeitlin & Pochet, *The OMC in Action*, above n. 1 at 56.

¹⁵¹ L. Tsoukalis, *What kind of Europe*, (2003) OUP, Oxford, at 97 seq. See also the Kok report.

¹⁵² See below 4.2.2.

reinforced with the personnel and the administrative structures necessary in order to run the new processes, or an independent agency should be created and given the responsibility for running the OMCs,¹⁵³

4.2.2. Streamline it – make it more transparent

The proliferation of OMC processes, having different (but similar) indicators, overlapping deadlines, unrelated actors and asymmetrical outcomes from one another is highly undesirable. Not only does it hamper the effectiveness of the processes, but it also constitutes an insurmountable impediment to transparency and participation thereto.

The EES is a good example of an effort to rationalize the use of the OMC. Hence, since the 2005 “streamlining”¹⁵⁴ the employment guidelines a) are integrated into the BEPGs (to which they are directly associated), b) are designed to cover a 3-year period (subject to yearly adjustments) and c) are subject to a clear timeframe with the different phases of their conception/evaluation/revision well scattered around the calendar year.¹⁵⁵ However, this is not true for all the other, less mature, OMCs. Further, the idea put forward by F. Scharpf, of issuing framework directives, which would provide the general legal background against which OMC could be developed should be given some further thought.¹⁵⁶

4.3. Protect EU citizens from its adverse effects

4.3.1. Open it up to the European Parliament

The risks of the various OMCs for democracy, representativeness and participation have been highlighted. All the empirical evidence available points to the findings that participation in the OMCs has been a) extremely restricted, b) highly uneven between member states and c) hardly representative of the stakeholders in each particular OMC.¹⁵⁷ All these findings have to do not only with the flaws of the OMC processes themselves, but also with the political traditions of participation prevailing in the

¹⁵³ The degree of independence of this agency from the Commission would be a delicate issue.

¹⁵⁴ For which see above n. 8.

¹⁵⁵ See Pochet, above n. 150 at 59.

¹⁵⁶ Scharpf, above n. 85.

¹⁵⁷ See above n. 97.

different member states.¹⁵⁸ Even if the first are gradually dealt with, the latter two are more difficult to transform. Hence, if the processes themselves do not formally involve some representative institution, at the European, national or regional level, then there is a serious risk of unequal democratic (and demographic) representation in the OMC outcomes. Which of the above three levels is the most appropriate for ensuring representativity without hampering effectiveness is a delicate question.

At first sight, the national level seems the most appropriate to ensure participation in the processes. The participation of the European Parliament in a process which is essentially left to the member states, both at the inception and at the execution level, does not seem to make much sense.¹⁵⁹ It is also clear that the systematic participation of regional authorities would risk making the whole exercise unworkable.

However national parliaments are typically dominated by national or local policy agendas and national electoral cycles, while they also feel increasingly threatened by the EU and its institutions. Therefore, one may wonder how 25, 27 or more national parliaments are going to cooperate effectively in a project which is only vaguely European. In other words, if the OMCs are to achieve any coordination at all, it may be counter-productive to involve national parliaments. Then, the active involvement of the European Parliament seems as the most plausible, although not self-evident, option.

From a slightly different view-point, if OMC instruments (BEPGs, NAPs etc) are to enhance participation and increase their legitimacy as means of policy formation, they need to contain substantial motivation of the choices operated.

4.3.2. *Fundamental rights*

The fact that the OMCs evade any judicial control at the EU level, while they may lead to binding outcomes at the national level, creates a real risk for individuals. The far-from-hypothetical *Mangold* example illustrates the kind of problems which may arise. Hence, to the extent that most of the OMCs' outcomes may not be subject to judicial control, it is submitted that the OMCs should be held away from any policy field which

¹⁵⁸ De la Porte & Nanz, above n. 1 at 278 et seq.

¹⁵⁹ See also the House of Lords Fourteenth Report (2003) – “The Future of Europe, Social Europe”, where the need for national Parliaments to be associated at the early stages of the OMC is underlined.

directly affects enforceable fundamental rights altogether. The position may be more tempered in relation to unenforceable social rights, although the distinction between the two is not always easy.¹⁶⁰ In this respect it should not be forgotten that, contrary to rights enshrined in some text of supra-legislative value, the outcomes of OMCs mirror the changes of the prevailing political winds¹⁶¹ – thus producing a lack of certainty which is intolerable in relation to fundamental rights.¹⁶² Further, if fundamental rights are supposed to protect the individuals against the arbitrary actions/inactions of the administration, then it would seem that monitoring by outside independent bodies, such as the Network of Independent Experts in Human Rights¹⁶³ or the proposed Human Rights Agency,¹⁶⁴ is more appropriate.

5. Conclusion

In an era where the EU increasingly touches upon delicate policy areas and consensus between member states is virtually impossible to achieve, diversity is seen as a virtue, or at least, as a necessary condition for the furtherance of European Integration. Depending on the viewpoint adopted, OMCs may be seen either as panacea, or as the second best way to push forward (or tame) the EU. What is beyond any doubt is that new methods of governance, among them the various OMCs, constitute responses to new realities and (tend to) offer solutions to new challenges. Thus, they may not be dismissed altogether just because they do not fit into pre-established concepts and categories. However, one should remain alert, in order to avoid being overwhelmed by the apparent “newness” of the processes, and try to ground these on generally accepted and valued principles, such as democracy and, in the wide sense, the rule of law. This “letter” is just a strong call to that effect.

¹⁶⁰ This is not the appropriate space to further elaborate on this issue. The reader should be aware, however, that a dialogue is already engaged on the relationship between OMCs and fundamental rights. Notably, O. de Schutter “The Implementation of Fundamental Rights through the Open Method of Coordination” and G. de Burca, both in O. de Schutter & S. Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (2005) Bruylant, Brussels argue in favour of the use of OMC as a means for the application of fundamental (social) rights. On the other hand, Armstrong, above n. 114 and Smismans, above n. 134 are much more skeptical.

¹⁶¹ The 2005 reshaping of the Lisbon agenda, whereby the EES got streamlined to the BEPGs, while the social inclusion OMC was left in a state of limbo, provides a forceful illustration of that.

¹⁶² Further for this argument see Armstrong above n. 114.

¹⁶³ Created by the DG JAI of the Commission, upon request of the European Parliament, in 2002

¹⁶⁴ COM (2004) 639 final.