

New Modes of Governance, the Open Method of Co-ordination and Other Fashionable Red Herring

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ABSTRACT *Many academic analysts have greeted EU efforts to promote 'new modes of governance' including the Open Method of Co-ordination (OMC) with enthusiasm. Most of the literature on EU governance suggests that the introduction of new modes of governance is desirable and that the OMC and other new modes of governance are likely to play a greater role in EU governance in the future. We challenge this view of the OMC and other 'new' modes of governance. The current significance and likely future impact of such modes of governance has been greatly exaggerated. The OMC and new modes of governance more generally are red herring that distract attention from the more important and pervasive increase in the formality and judicialisation of EU policy making. While we agree that the idealised model of the OMC might be desirable in many respects, we question the conceptual underpinnings of this hopeful vision and find that the actual practice of the OMC to date has little to recommend it. Finally, we reject claims that the OMC and other new modes of governance promise to enhance the legitimacy of EU policy making. Instead, they threaten to do precisely the opposite.*

KEY WORDS: European Union, governance, open method of coordination, regulation

Introduction

In recent years, Commission officials have trumpeted initiatives promising to introduce 'new modes of governance' into the EU's policy-making repertoire. The *primus inter pares* in the EU's new armoury of governance is the Open Method of Co-ordination (OMC). Other 'new' modes of governance include framework directives, soft law, co-regulation, self-regulation, voluntary agreements and economic instruments. The Commission's initiatives concerning these new modes of governance have attracted considerable scholarly attention.¹ Most academic analysts have greeted these initiatives with enthusiasm. Normatively, they feel that the introduction of new modes of governance is desirable, and their positive analysis suggests that the OMC and other new modes of governance have already had policy consequences and are likely to play a greater role in EU governance in the future

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(Borrás & Jacobsson, 2004; Jacobsson, 2004; Radaelli, 2003; Scott & Trubek, 2001; Trubek & Mosher, 2003; Zeitlin & Pochet, 2005).

We challenge this view of the OMC and other 'new' modes of governance on both counts. The current significance and likely future impact of such modes of governance has been greatly exaggerated. The limited introduction of such flexible, informal, non-binding measures does not herald the transformation of EU governance. Quite to the contrary, the OMC and new modes of governance more generally are red herrings that distract attention from the more important and pervasive increase in the formality and judicialisation of EU policy making. We agree that the idealised model of the OMC – with its benchmarking, peer pressure and emulation of 'best practices' – might be desirable in many respects. However, we question the conceptual underpinnings of this hopeful vision, and we find that the actual practice of the OMC to date has little to recommend it. Finally, we reject claims that the OMC and other new modes of governance promise to enhance the legitimacy of EU policy making. Instead, they threaten to do precisely the opposite.

The remainder of this paper is divided into four sections. First, we note the shortcomings of the OMC in two areas – the European Employment Strategy (EES) and the Social Inclusion Programme – where it has been most highly developed and where, therefore, one might expect it to have yielded the most significant results. We argue that the failure of the OMC in these and other areas is rooted in serious flaws in its very conceptual foundations. Second, we move beyond the OMC to examine the limited impact of 'new modes of governance' more generally. We analyse why formal, judicialised approaches to governance remain so prevalent in the EU, despite all the fanfare surrounding informal, flexible, new modes of governance. Third, we explore why policy makers have placed so much emphasis on the OMC and other methods of 'informal governance', despite their failings and limited significance. Finally, we turn to normative considerations and suggest that the OMC and informal new modes of governance are far from a panacea for the democratic deficit in EU policy making. While these new modes of governance may address some failings of the traditional Community method of policy making, they are unlikely to improve – and may instead undermine – the transparency and accountability of EU policy making. A focus on enhancing the openness, transparency and accountability of the traditional Community method is likely to contribute more to the legitimacy of EU governance than an increased reliance on the OMC or other fashionable 'new modes' of governance.

The OMC in Practice: Failure by design?

Recent scholarly work on the European Union has emphasised the growing importance of 'new modes of governance', sometimes referred to as 'network governance' (Kohler-Koch & Eising, 1999), 'new governance architecture' (Radaelli, 2003), or simply 'new governance' (Scott & Trubek, 2002). Authors in this field refer to governance, as opposed to government, as they claim that authoritative allocation increasingly takes place without or outside government. Central to these new processes of governance is the purported absence of central authority and hierarchy. As Kohler-Koch and Eising put it, 'In essence, "governance" is about the structured ways and means in which the divergent preferences of interdependent actors are

translated into policy choices “to allocate values”, so that the plurality of interests is transformed into co-ordinated action and the compliance of actors is achieved’ (p. 5). More generally, Scott and Trubek (2001) highlight a number of characteristics of new modes of governance that distinguish them from traditional governance, including a greater degree of deliberation among and power sharing with stakeholders, co-ordinating multiple levels of government while permitting diversity, and increased reliance on informal, flexible guidelines. These characterisations of new governance raise two questions when we turn to assessing the OMC. First, can the OMC mould the plurality of interests in the European Union into co-ordinated action and policy choices? And second, if member states can agree on a plan for coordinated action, can the compliance of member states be achieved? To date, the OMC has achieved limited results on both fronts. In this section, we provide an explanation of this failure and support our theoretical analysis with evidence from the limited results of the two most developed examples OMC processes: the European Employment Strategy and the Social Inclusion process.

Although some argue that OMC processes have produced genuine impacts at both EU and member state level, there seems to be a growing consensus in the literature that the empirical results thus far remain rather limited (Zeitlin, 2005a, p. 483). In 2004, the High Level Group on the Lisbon strategy concluded that, ‘The open method of coordination has fallen far short of expectations’ (2004, p. 42). Contributors to a recent comprehensive evaluation of the OMC in an edited volume by Jonathan Zeitlin and Philippe Pochet come to similar conclusions. The impact of the OMC on domestic policy-making procedures in Germany is described as ‘fairly limited’ (Büchs & Friedrich, 2005, p. 278). With the authors concluding that, ‘Neither the European Employment Strategy, nor the Social Inclusion process seem to have any influence on domestic policy developments in Germany’ (p. 278). In the Netherlands, the OMC remains a rather bureaucratic experience, and its potential as a reflexive learning strategy is neither appreciated nor realised (Visser, 2005).² Along the same lines, Kenneth Armstrong (2005, p. 308) argues that the OMC is just a reporting process in the UK, rather than a real agenda-setting plan. For Italy, the impact of the plan is found to be highly contingent on domestic policy priorities (Ferrera & Sacchi, 2005). Hence, the OMC is used in areas where it is in harmony with domestic policy priorities (employment), but practically ignored in areas where it conflicts with these priorities (social inclusion).

The literature provides various explanations for the limited results produced by the OMC. Some argue that the OMC processes need to be reformed, others argue that the process takes time to develop, noting that the EES has only been going on since 1997, and the social inclusion process only since 2000 (Ferrera & Sacchi, 2005). However, most of these explanations share a degree of optimism about the OMC’s theoretical potential and focus on factors that impede the OMC from achieving its potential. Surprisingly, only a few studies challenge the theoretical potential of the OMC (Hodson, 2004). Below we examine the theoretical underpinnings of the OMC and identify flaws in its theoretical foundations that can explain the limited empirical results.

The literature suggests several ways in which the OMC affects domestic policy change (for an overview see Trubek & Trubek, 2005). Two theoretical bases underlie most claims regarding the impacts of the OMC; first, a rational choice institutionalist

perspective, and second a perspective based on a mixture of constructivist theory and learning. Though most analyses of the OMC do not explicitly associate themselves with an underlying theoretical framework, nevertheless their analyses tend to be rooted in these two frameworks. While some authors rely primarily on one or the other of these perspectives, many authors writing about the OMC apply these two theoretical frameworks in tandem. Below we review the hypotheses that derive from these theoretical frameworks and assess their *a priori*, theoretical plausibility.

Rational Choice

A rational choice approach interprets the OMC as an instrument of the member states, created to monitor and enforce compliance with the ambitious target set by the European Council at Lisbon in 2000 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' (European Council, 2000, p. 2). This expectation is clearly present in policy circles; the High Level Group writes that 'the central elements of the open method of coordination – peer pressure and benchmarking – are clear incentives for the member states to deliver on their commitments' (2004, p. 42). Like other rational choice explanations for the origin of institutions, this perspective views the OMC in functionalist terms as an instrument designed to serve the rational self-interest of its creators (Keohane, 1984; see also Pollack, 1996). Following such logic, the OMC was designed to overcome basic collective action problems confronting Member State governments, such as monitoring compliance and identifying transgressors, which might otherwise prevent co-operation. However, unlike the traditional Community method, which relies on law and European courts to address such collective action problems, the OMC is based on soft governance in the form of peer pressure and benchmarking. By monitoring the progress made by countries through commonly agreed indicators and publishing them in Joint Reports, the Commission can name and shame or 'fame' countries based on their performance. Such theories predict that by praising countries that have performed well, and by castigating those that have not, the Commission can effectively steer Member States in their commonly agreed direction. It is argued that in the absence of law and courts, the OMC can ensure compliance through soft instruments. Soft law may be harder than we think (Trubek & Trubek, 2005).

For the OMC's naming and shaming to be effective, three conditions must be fulfilled. First, the Commission must be able to detect transgressions on the part of Member States. Second, for the threat of shaming to be credible, the Commission and/or other Member States must have the incentive and discretion to react to transgressions by shaming infringing Member States. Third, Member States must be sensitive to the Commission's shaming. Hence, the Commission should have an authority that cannot easily be discredited by the Member States (Hodson, 2004). We find that none of these conditions is fulfilled for the OMC.

To begin with, the Commission's monitoring abilities are limited. In order to detect Member State violations of 'soft' OMC commitments, the Commission is largely dependent on reports and statistics provided by national governments. In many areas of traditional hard-law regulation, EU directives and regulations create specific rights and obligations, the violation of which may be observable by private

actors. As a result, private litigants can bring cases before national or European courts, and individuals can bring complaints to the European Commission alerting it of Member State violations of Community law. However, the sorts of aggregate target established under the OMC are not conducive to individual monitoring. The European Employment Strategy has set itself general and long-term targets, such as that the EU should have 70% overall employment by 2010 (Council of the European Union, 2005). The Social Inclusion programme refrains from using quantitative targets (although there are quantitative benchmarks), and commits itself 'to develop, for the benefit of people at risk of exclusion, services and accompanying measures which will allow them effective access to education, justice and other public and private services, such as culture, sport and leisure' (Council of the European Union, 2002, p. 11). It is impossible to determine in 2005 whether an individual member state is 'on track' to achieve such general and undefined targets.

The Commission's heavy reliance on data provided by Member State governments is also problematic. Member States realise that any 'incriminating' information that they provide to the Commission may be used to shame them; naturally, they will be reluctant to share such information and, where reporting is required, they will have incentives to distort information. In the case of Social Inclusion, for example, the Netherlands kept using its own indicators in its National Action Plan instead of the commonly agreed indicators (Council of the European Union, 2003; Visser, 2005). Though the Commission's staff has grown rapidly since the mid-1980s, it remains far too small to monitor the implementation of most policies effectively (Garrett & Weingast, 1993, pp. 197–198). The Commission has sought to overcome this problem by establishing civil society networks around the OMC processes to assist it in monitoring, such as the European Anti-Poverty Network in the case of Social Inclusion. Also, The European Foundation for the Improvement of Living and Working Conditions, founded in 1975, gathers some data on unemployment and social exclusion.³ While such networks and agencies certainly increase the flow of information to the Commission, they by no means eliminate the 'monitoring deficit'.

Besides monitoring deficiencies, both the incentive and the discretion of the Commission to shame are limited, making it unlikely that the Commission will actually shame laggard Member States. The Commission's main instrument to shame is a Joint Report. These reports are published annually for the OMC process in Employment, and bi-annually for the OMC process in Social Inclusion. In addition, in the case of Employment, the Commission can issue country-specific recommendations. Joint Reports have to be adopted by the Council, with a qualified majority in the case of Employment and unanimity for Social Inclusion. Recommendations also require a qualified majority. So the baseline for a Joint Report and a Recommendation is a broad majority of Member States agreeing substantially and strategically with the Commission's shaming. This means that a majority of countries will need to vote against an individual country, or, in the case of Social Inclusion, that the Member State concerned will have to agree with being shamed. Most governments, unfortunately, are not so virtuous as to be capable of genuine self-criticism. Moreover, Member States have no incentive to vote against each other. First, to do so could harm bi-lateral relationships. Second, Member States will fear that tit-for-tat strategies may be used against them when they are subsequently in a position to be shamed. Precisely these disincentives explain why in

the last 48 years, Member States have on only a handful of occasions used their right (under Treaty Article 227, ex 170) to take other Member States to the ECJ. Member States collectively only have an incentive to shame infringing Member State(s) if the behaviour of the infringing Member State(s) imposes considerable negative externalities on other Member States, for example, if the excessive budget deficit of one Member State created pressure for interest rate increases for all, or if trans-boundary pollution from one Member State imposes costs on its neighbours. In the case of the policy areas where the OMC is applied, however, such negative externalities are marginal or non-existent. For instance, Germany's high unemployment rate has a much stronger impact on Germany than it has on any other Member State, while Britain's high levels of poverty among single mothers are primarily a British concern. Given the strong domestic incentives to reform such areas, there is little or no value added from international pressures. Shaming is superfluous.

To put it another way, the Commission's discretion in the OMC is the antithesis of the ECJ's discretion in the traditional Community method of enforcement. In the traditional Community method, when the ECJ detects a violation of the law, it can readily make a judgment that shames a Member State, unless it fears that a majority of (in the case of legislation) or all (in the case of Treaty interpretations) Member States will oppose its decision and act together to overturn it. Under the OMC, by contrast, the Commission can only shame a Member State if it can assure that either a majority or unanimity will support its shaming.

In addition to having limited discretion, the Commission also has little incentive to shame countries. As the Commission is dependent on Member States to pursue its ambitions for further integration in this field, it must make sure that the first steps of integration in this direction are not too painful. Further integration aside, even within the OMC the Commission is dependent on Member States to keep committing themselves to ambitious targets. If the domestic repercussions of failing to meet agreed targets are exacerbated by the Commission's shaming, Member States are unlikely to agree to concrete and ambitious targets. This dependence on Member States for future co-operation discourages the Commission from actually shaming. Moreover, the Commission would lose face if Member States discredited its shaming efforts by defying, ignoring or evading its decisions.⁴ The Commission will therefore only pursue an effort to shame if it is confident that its action would be consequential.

This brings up the second condition, which is the authority of the Commission's shaming. Unlike the ECJ under the Community method, the Commission under the OMC cannot shield itself behind the authority of law. Instead, the Commission has to base its reports on general texts of presidency conclusions and rather open targets. Because the obligations are not precisely drawn, there is always the possibility for a counter-claim from a defensive Member State. The power of such counter-claims was most apparent around violations of the Stability and Growth Pact. Member State governments denied their excessive deficits by challenging the definitions of budget deficit and by excluding certain posts from the calculations.

Learning and Constructivist Theories

Learning and constructivist theories stress the impact of the OMC as a new forum for actor interaction. These theories take neither policy goals nor policy instruments

as exogenous; instead, they focus on how institutions shape the identities and preferences of actors (Adler, 2002; and also Checkel, 1998). Norms may determine what kind of practices are “socially acceptable” for actors with particular identities in a given social context, thereby exerting as much influence over actors’ behaviour as formal rules (Katzenstein, 1996). Where rationalist approaches focus on formal institutional structures and incentives, constructivism takes a broader view of institutions, encompassing formal institutions, informal norms, shared systems of meaning, discourse, knowledge and routinised practices. Constructivist approaches have been applied to several domains of European politics. For example, in their analysis of comitology, Joerges and Neyer (1997) argue that the working of this inter-administrative partnership relies much more on the constructivist notions of persuasion, argument and discursive processes than on the rationalist notions of command, control and strategic interaction. In a similar vein, Lewis (2000) argues that socialisation and the density of normative environments affect bargaining outcomes by constructing interests and identities in the Committee of Permanent Representatives (COREPER).

Through a constructivist lens, the impact of the OMC can be both at the level of policy goals and at the level of policy instruments. Learning on the level of goals is a deeper, more fundamental form as it alters the values, norms and preferences underlying policy objectives. Such theories argue that the OMC links civil servants and civil society actors from all Member States with the Commission and Council staff in a multi-level, public–private trans-national network through which new ideas diffuse resulting in common policy positions (Jacobsson, 2003).

Learning on the level of policy instruments is a thinner, functional form, as it upgrades policy makers’ knowledge of which policies work and which do not. This latter form falls in the category of bounded rationality theories, which assume that actors cannot have full knowledge about all possible policy instruments and their causal linkages to policy outcomes (for a recent review of this literature, see Jones, 2003). By bringing to the surface best and worst practices, policy makers involved in the OMC can learn from each other’s successes and failures. Moreover, as the OMC introduces comparable indicators and benchmarks, good practices are brought to the surface and poor performers are encouraged to re-think their strategies (Jacobsson, 2003).

Undeniably, the OMC is a forum of information exchange, and therefore those involved will learn from each other. Before one can assess the impact this has on domestic policy change, two questions need to be answered. First, of the whole policy-making community, who is involved in the OMC, and, second, what part of their ‘total learning’ can be ascribed to the OMC? OMC networks do not extend deep into national bureaucracies. Only a small fraction of any Member States’ policy makers actually participates in the OMC. Often these people are dedicated fully to the bureaucratic obligations of the OMC, with the result that they are often isolated and do not participate in the general domestic policy-making process. The ministry of social affairs in the Netherlands has one full-time employee assigned to the National Action Plan, who is responsible for collecting information and writing the report. Similarly, Büchs and Friedrich (2005) found that the majority of actors in Germany perceived the task of producing the National Action Plan for the OMC as an additional reporting obligation, on top of the many they already face, and

therefore regard them as time-consuming and even superfluous. More generally, Schäfer concludes that the surveillance procedures, 'can be quite detached from national policy-making' (2006, p. 85).

Just how much learning takes place through the OMC? For Member State social policy makers, the OMC is just one source of learning amongst many. The OECD has long brought together policy makers from EU countries (as well as other advanced industrial countries) to exchange views and best practices on issues of social policy (Schäfer, 2006, p. 85). More generally, policy thinktanks, academic journals, other international organisations and international newspapers like the *Financial Times* and the *Economist* all provide policy makers with information about successful and failed policies of their European counter-parts. In many highly technical policy areas, such as the field of food safety discussed by Joerges & Neyer (1997), EU networks may provide rather unique fora for the exchange of ideas and best practices. However, in the areas of social policy that are the focus of the OMC, information is hardly in short supply. The creation of yet another forum is therefore unlikely to have significant policy consequences. Given the rather limited participation in the OMC by national policy makers and given the wide supply of other sources of learning, the OMC is likely to play only a marginal role in overall policy learning.

Why Formality and Judicialisation Persist

The tendency to produce detailed, inflexible regulations is deeply rooted in the EU's political system. Many policy makers may sincerely wish to pursue informal, flexible 'new' modes of governance, such as the OMC. However, the EU does not provide an institutional environment conducive to the use of such policy instruments. The underlying structure of EU institutions generates incentives for policy makers that make it unlikely that experiments with new modes of governance will ever amount to more than just that – experiments. Policy makers in peripheral areas, such as social policy, where the EU has no legal basis for issuing binding regulation, may continue to rely on the OMC and other similar instruments. Indeed, they have little choice but to do so. But in core areas of EU competence, such new modes of governance will remain of little significance. They will be over-shadowed by the persistent tendency of the EU to rely on judicial enforcement of strict legal norms. Indeed, as Kelemen & Sibbitt (2004; Kelemen, 2006) have argued, in many policy areas the EU is actually encouraging a shift toward a policy style of 'adversarial legalism' (Kagan, 2001), characterised by an emphasis on detailed rules, substantial transparency requirements, adversarial procedures for resolving disputes, costly legal contestation involving many lawyers and frequent judicial intervention in administrative affairs. Thus, for those who would understand the primary impact of Europeanisation on patterns of governance across the Member States, soft law, the OMC and new approaches to governance are red herrings that distract us from the growing judicialisation of regulatory processes.

In essence, a predilection for relying on adversarial legalism as a mode of governance is programmed into the very institutional foundations of the European Union. Political authority in the EU is highly fragmented. In Tsebelis' terms, it is a polity replete with veto players (2002). Authority is divided vertically between the

EU and Member State governments and horizontally at the EU level between the Council, the Parliament, the Commission and the ECJ. As in other polities, the fragmentation of power between law makers in the EU encourages them to issue strict goals and procedural requirements and to rely on a judicialised approach to enforcement (Franchino, 2004; Kelemen, 2004b; McNollgast, 1987). Member States favour this approach because they fear becoming the 'sucker' that implements costly EU policies while others shirk. Therefore, they regularly support strict EU laws that can be readily monitored and enforced by the Commission, the ECJ and national courts. The European Parliament recognises that Member State administrations will have incentives to shirk on their EU commitments, and therefore demands binding legislation that will encourage the Commission or private parties to take enforcement actions against laggard states. All players in the EU's legislative process recognise the difficulty of adopting or amending EU legislation and anticipate the difficulty in exercising political control of other Member States' bureaucracies after an EU law is adopted. Therefore, they try to programme controls into the EU laws they draft and invite the ECJ and national courts to play a central role in the implementation process. Finally, judicialisation has enduring appeal for EU policy makers because it is cheap and self-enforcing. The EU's limited budget prevents it from adopting significant distributive policies and the small size of its bureaucracy prevents it from establishing large-scale programmes implemented by bureaucrats (Majone, 1993). Working within the confines of this 'weak state', EU policy makers who wish to affect outcomes 'on the ground' within Member States have an incentive to create rights for private parties and to enlist national courts to apply them.

In addition to the impact of all the enduring features of the EU polity discussed above, increasing critiques of the EU's democratic deficit and public distrust of 'faceless Eurocrats' will encourage further judicialisation. Already, critiques of the democratic deficit have led to calls for increasing transparency and public participation in the EU's regulatory processes (Bignami, 2003; Harlow, 1999; Shapiro, 2001, pp. 94–113). Because citizens distrust Eurocrats and the EU policy-making process in general, they want to control the discretion of the former and increase the transparency of the latter. As we discuss below, some advocates of the OMC and other 'new' modes of governance suggest that these approaches are very well suited to addressing 'democratic deficit' concerns, because they can stimulate the broad participation of stakeholders in governance. We greet such arguments with considerable scepticism. With their lack of legal certainty and the relegation to the sidelines of the European Parliament, the OMC and other informal modes of governance are more likely to exacerbate the democratic deficit than to ameliorate it.

Why Informal Governance Sells

Given their questionable effectiveness and limited significance (both discussed above) and the concerns they raise regarding democratic accountability (addressed below), why have policy makers placed so much emphasis on the OMC and other forms of new, 'informal' modes of governance? Policy makers have done so for both rhetorical and strategic reasons.

In terms of rhetorical appeal, the Commission's professed commitment to the OMC and more flexible informal governance as part of a broader, ongoing public relations campaign aimed at dispelling the widely held view of the EU as an incorrigible producer of red tape and absurd regulations. Quite simply, traditional EU regulation following the 'Community Method' has a bad reputation. Rightly or wrongly, there is a longstanding and widespread perception that the EU regulation is particularly rigid and burdensome. At least since Delors' drive to re-vitalise the Single Market with a 'new approach' to regulation, EU leaders have been promising to better accommodate distinct national approaches by making EU regulation more flexible. Since the early 1990s, various Council and Commission guidelines have been issued and inter-institutional agreements between the Council and European Parliament have been proclaimed, all with the stated aim of simplifying and improving the quality of EU legislation. In 1996, the Santer Commission launched its regulatory simplification initiative promising that the EU would 'do less in order to do it better' (Communication from the Commission, 1996). In 2002, as part of the implementation of the Lisbon Strategy, the Prodi Commission issued an action plan on better regulation (Communication from the Commission, 2002). In March 2005, the Barroso Commission took the drive for better regulation to new heights by launching a 'better regulation' initiative aimed to improve the regulatory climate for business, in particular for small and medium-sized enterprises, by simplifying EU regulation and assuring that new and existing legislative proposals can withstand a regulatory impact assessment that takes into account the Lisbon Strategy's objectives (Communication from the Commission, 2005).

The repeated emphasis of EU policy makers on new modes of governance, better regulation, soft law and the OMC must all be seen in the same light – as parts of a widespread effort to improve the EU's reputation as a regulator. While proclamations of commitment to new approaches may be entirely sincere and while the EU's 'tool-kit' of policy instruments has surely expanded, on the whole EU regulation remains highly formal, detailed and prescriptive – and in some respects is growing more so.

Aside from its rhetorical value, the OMC also serves an important strategic purpose for policy makers who would like to see the EU play a greater role in the social policy arena. Advocates of a strong EU role in social policy find themselves hamstrung by the EU's lack of competence to regulate in this area. While they might wish to impose binding EU law in this field via the traditional community method, opponents of a powerful EU role in social policy will not permit this. Opponents of a powerful 'social Europe' have, however, been willing to allow the operation of the OMC in this field, as they see the OMC as a rather innocuous exercise that entails no binding commitments. Advocates of EU social policy hope that the OMC – even where it fails to produce concrete effects in the short run – may prepare the ground for more codified, legally binding initiatives in the long run. Turning briefly to another policy area, EU foreign and security policy, we find a clear illustration of this dynamic. The EU's (then the European Economic Community; EEC) first foray into foreign policy co-operation was the European Political Co-operation (EPC) programme launched in 1970. Long before the EU formally committed itself to a Common Foreign and Security Policy (CFSP) in the Maastricht Treaty or developed the actual capacity to undertake joint missions as part of its European Security and

Defence Policy (ESDP), the EPC set about developing networks for information exchange and consensus building among Member State foreign policy makers at all levels. Describing the operation of the EPC, Michael E. Smith (1996) observes that 'EPC rested on informal practices and rules not formally codified by treaty' and that, 'it was generally a decentralised, flexible . . . , non-enforceable policy domain'. He suggests further that, 'As habits and procedures of political cooperation became institutionalised into a coherent body of European values and norms, they even caused member states – large and small – to change their attitudes and preferences in certain situations, despite the absence of any real compliance or enforcement mechanisms besides peer pressure'. As a result of such socialisation, Smith and others (Glarbo, 1999; Hill, 1997) claim, a 'co-ordination reflex' developed whereby when a foreign policy situation arose, foreign policy officials automatically turned to their counter-parts in the EU network to exchange views and attempt to build co-ordinate policies, before fixing national positions.⁵ The development of this co-ordination reflex, in what at the time was a weak, peripheral area of EU policy making, laid the foundation for today's Common Foreign and Security Policy. As co-ordination and normative consensus increased, the range of areas in which Member States co-ordinated foreign policy expanded and the strength of their common instruments increased dramatically (from simple diplomatic declarations to actual joint actions). Substitute OMC for EPC in the above account and you have a strategic programme for the development of EU social policy. For advocates of European social policy focusing on the *long durée*, the immediate effectiveness of the OMC is secondary. The OMC will be a success simply if it contributes to the development of a 'co-ordination reflex' that helps move social policy from the periphery of EU policy making to the core and sets the stage for more ambitious initiatives in the future.

Conclusion: Informality and Illegitimacy

Contrary to the hopes and expectations of their strongest advocates, the OMC and other flexible, informal 'new' modes of governance are unlikely to enhance the legitimacy of EU governance. Rather, they are likely to do precisely the opposite. It is no coincidence that the European Council has celebrated the OMC as 'an important tool to improve transparency and democratic participation' (Council of the European Union, 2000, cited in Zeitlin, 2005, p. 29), while the European Parliament (2003) and European Court of Justice⁶ have been much less sanguine. In a recent report on the OMC, the European Parliament was rather scathing. It is worth quoting the report at length:

As things stand, the OMC is, in many cases, a process conducted between and on behalf of elites, the outcome of intergovernmental negotiation and consultation. The European Parliament and the ECJ are the traditional guardians of democratic debate in Europe. Parliament is either excluded as a formal or informal partner from all the various manifestations of the OMC, or marginalised as in the case of the employment strategy. Parliament must force its way into these closed processes in order to exercise democratic control. . . . It is only in this way that the OMC can retain its legitimacy and its effectiveness

as a means of achieving important objectives by a 'soft' (as opposed to 'hard law') approach. (2003, p. 13)

The Parliament and the ECJ have expressed similar reservations concerning the democratic and judicial accountability of other new modes of governance, such as the use of voluntary agreements in the field of environmental protection (Kelemen, 2004a, p. 215). In many cases, the OMC, and many other new modes of governance, permit 'end runs' around the increasingly stringent transparency and accountability requirements of the 'traditional' Community method of law making, in which the Parliament and ECJ are central.

Scharpf's (1999) distinction between input and output legitimacy provides a useful starting point for assessing the OMC's legitimacy. Input legitimacy relies on the logic of participation and consensus: Political choices are legitimate if they reflect the will and preferences of the Community, which has been expressed and heard in the decision-making process. Output legitimacy is about effectiveness and is achieved by delivering efficient policy outcomes. The OMC scores poorly on both counts. Taking the case of the EES, the longest standing and most developed application of the OMC, input legitimacy is sorely lacking. A series of studies of the EES demonstrates that participation by 'stakeholders' has been weak, parliamentary involvement has been nearly non-existent, the transparency of the process is middling at best and that the accountability of the process is highly problematic (Goetschy, 2004; Smismans, 2004). In terms of output legitimacy, in the preceding sections we have explained that, due to its flawed conceptual foundations, the OMC is an ineffective tool for delivering policy results. Therefore, wherever the OMC is relied on as the primary policy instrument, policy makers risk creating a mis-match between expectations and delivery. By relying on the OMC as a central policy instrument with which to pursue high profile initiatives such as the Lisbon Strategy's drive to become, 'the most competitive knowledge based economy in the world' by 2010, the EU runs a great risk of undermining its output legitimacy.

What will happen if the OMC and other 'new modes of governance' continue to fail to live up to the hopes and expectations of their strongest advocates? If the OMC and other new modes of governance were restricted to policy areas where the EU would otherwise have no competence or engage in purely inter-governmental decision making, then their 'legitimacy deficit' would not be highly problematic. If they simply proved to be failed experiments in governance in peripheral areas of EU policy making that quietly wither away, then little harm would have been done. However, the OMC is already being relied upon, and failing to deliver, in high profile policy areas such as the Lisbon Strategy. Also, with the ongoing enthusiasm of some policy makers in the Council and the Commission, supported by a chorus of academic advocates of new governance, the danger is that the OMC may spread to a greater number of policy areas and under-cut progress made on enhancing the legitimacy of the traditional Community method in those areas. As Zeitlin notes, 'OMC-type processes and approaches have also been proposed by the Commission and other European bodies as mechanisms for monitoring and supplementing existing EU legislative instruments and authority in fields such as immigration and asylum, environmental protection, disability, occupational health and safety, and even fundamental rights' (2005a, p. 20). The drive to enhance transparency and

participation in the traditional Community method of policy making has made significant progress in recent years (Bignami, 2003; Kelemen, 2006; Shapiro, 2001). As an abundant literature on the ‘institutionalisation’ of the EU demonstrates, legitimate forms of democratic participation at the EU level, from lobbying, to litigating, to demonstrating, are on the increase (see, for instance, Imig & Tarrow, 2001; Sandholtz & Stone Sweet, 1998; Stone Sweet *et al.*, 2001). Of course, a substantial democracy and legitimacy deficit remains, but this has more to do with shortcomings of the electoral dimension of EU politics than with policy-making procedures (Hix & Follesdal, 2006). Comparing the significant increases in participation, transparency and accountability in the traditional Community method with the shortcomings of the OMC in these areas, one must ask whether – in terms of its impact on legitimacy – new governance offers a cure worse than any old governance disease.

Notes

- ¹ In addition to the many contributions to the literature cited here, the pan-European academic network on New Modes of Governance, itself funded by the European Union, has brought together dozens of leading academics to conduct research on new modes of governance including the OMC (see the network’s website at <http://www.eu-newgov.org/>).
- ² For social inclusion see Idema (2004). For the European Employment Strategy see Zijl *et al.* (2002).
- ³ On the role of EU agencies more generally, see Kelemen (2002, 2005).
- ⁴ A similar argument is developed for the ECJ in Kelemen (2001).
- ⁵ We leave aside here the question of whether their account is correct. Intra-EU schisms such as those over the outbreak of war in Yugoslavia in 1991 or the US-led war in Iraq certainly call into question the power of any ‘co-ordination reflex’.
- ⁶ See Scott and Trubek (2002) for a review of relevant ECJ case law.

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